

A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich

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This paper discusses the present 'legal consciousness' literature and seeks to identify two different conceptions of legal consciousness. Most of this literature originated in the United States, but there has also been a growing interest in issues of legal consciousness in Europe. The use of the term 'legal consciousness' in these European discussions is, however, remarkably different from its use in the United States literature. It is argued that the most commonly used 'American' conception of legal consciousness reflects important ideas of Roscoe Pound and asks: how do people experience (official) law? By contrast, a European conception of legal consciousness, which was first introduced by the Austrian legal theorist Eugen Ehrlich, focuses on: what do people experience as 'law'? After both perspectives are applied in a case-study of a run-down neighbourhood in the Netherlands, it is concluded that future studies of legal consciousness may benefit from an integration of the two conceptions.

INTRODUCTION

The study of 'legal consciousness' is rapidly becoming one of the most popular and most important subjects in socio-legal research. In recent years a growing number of books, articles, and international conferences has been focusing on 'individuals' experiences with law and legal norms, decisions about legal compliance, and ... the subtle ways in which law affects the

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everyday lives of individuals'.¹ With strong roots in several existing research traditions, these studies represent 'a promising contemporary approach to empirical research on law in society'.² Most of the present literature originated in the United States. At the same time, however, there has also been a growing interest in issues of legal consciousness in many European countries, not only in academic circles, but also in social and political debates. During the past two decades, the legal consciousness of ordinary citizens has frequently been the subject of everyday conversations about law, government, and politics, often in relation to the legal ideal of the *Rechtsstaat*. The use of the term 'legal consciousness' in these discussions is remarkably different from its use in the American literature.

In Germany, the historic reunification of east and west in 1989 brought fewer socio-economic improvements than many former citizens of East Germany had hoped for. This is also reflected in their attitude towards law. In 1991 German artist and civil rights activist Bärbel Bohley expressed the feelings of many of her fellow 'Ossies' when she exclaimed: 'We were hoping for justice, only to end up with the Rechtsstaat!'³ In 1994 a local politician, in an article entitled *Rechtsstaat West und Rechtsgefühl Ost*, expressed a similar concern for the fact that Germany was still a long way from a 'common legal consciousness' (*ein gemeinsamen Rechtsbewusstsein und Rechtsgefühl*).⁴ This is also reflected in statistical data. Elisabeth Noelle-Neumann argues that Germany is characterized by a 'split legal consciousness'.⁵ In her survey, 68 per cent of all Germans agree that in their country there is no consensus about what defines law and justice. When asked, for example, what first comes to mind when they think of human rights, people in the west list the freedom of speech (32 per cent), equality (18 per cent), and the right to life (15 per cent) as the most important, whereas people in the east prefer the right to labour (35 per cent), freedom of speech (19 per cent), and the right to proper housing (17 per cent).⁶

When in Belgium Marc Dutroux was arrested and charged with the kidnap and murder of four young girls, the public reacted with shock and outrage. These feelings became even stronger when in October 1996, Judge Jean-Marc Connerrotte, who led the investigation against Dutroux, was sacked. Soon after Dutroux's arrest, it became apparent that the police and

1 L.B. Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' (2000) 34 *Law & Society Rev* 1055, at 1059.

2 R. Cotterrell, *The Sociology of Law: An Introduction* (2nd edn., 1992) at 148.

3 Cited in S. Heitmann, 'Rechtsstaat und Rechtsbewusstsein' (1995) 31 *Recht und Politik* 123, at 129 [my translation].

4 S. Heitmann, 'Rechtsstaat West und Rechtsgefühl Ost' (1994) 47 *Neue Juristische Wochenschrift* 2131, at 2132.

5 E. Noelle-Neumann, 'Rechtsbewusstsein im wiedervereinigten Deutschland' (1995) 16 *Zeitschrift für Rechtssoziologie* 121, at 125.

6 *id.*, p. 126.

officials had shown gross incompetence in the investigation leading to his arrest. By contrast, Judge Connerrotte was seen by many as the only man who had made considerable progress in this case. Thanks to his efforts, two young girls had been rescued from Dutroux's gang. Following their dramatic rescue, Connerrotte had attended a fund-raising dinner for the families of missing children (a 'spaghetti night'). On 14 October, 1996, the Belgian High Court ruled that this could be considered a conflict of interest and Connerrotte should therefore be taken off the case and replaced by another judge. This 'spaghetti ruling' instantly led to public anger and protest. On 20 October, 1996, 300,000 Belgians participated in a 'White March' through the streets of Brussels, the largest protest march in Belgian history.⁷ Paradoxically, whereas the court claimed that Connerrotte should be taken off the case to safeguard the impartiality of the judiciary, many Belgians lost their confidence in the legal system because of this very decision.⁸ Many claimed that the spaghetti ruling went against the 'legal sentiment' of the Belgian population. Based on a content analysis of five major newspapers, Walgrave and Manssens state that most papers framed their articles in terms of a deep divide between the official world of the Belgian legal system and that of the ordinary citizen. In many cases this was explicitly linked to different opinions about the *Rechtsstaat*.⁹ In a similar analysis of letters to the editor, Tanghe concludes that this case has made explicit a strong tension between what people imagine and expect from the law and the views of many professional lawyers, who simply ignore the 'legal consciousness' of ordinary citizens.¹⁰

Similar cases can be found in other European countries. In this paper, I will argue that the present (North-American) legal consciousness literature focuses on people's experiences with 'official' law. By contrast, the references to legal consciousness in Europe cannot be fully understood in these terms. The use of the term in these examples is more similar to the way in which Eugen Ehrlich interpreted legal consciousness; to describe *die Rechtsauffassung der Leute* (people's own idea of law and right). My main argument will be that both interpretations are not mere semantic differences, caused by the translation of the same term in different languages, but that they in fact refer to two alternative conceptions of legal consciousness. In his critical review of the present legal consciousness literature, David Engel concluded that 'the assumptions and approaches brought to these studies can best be understood in terms of the decades of law and society research on

7 S. Walgrave, 'De zaak-Dutroux en de witte beweging' (2000) 41 *Tijdschrift voor de sociale sector* 26.

8 M. Hooghe, 'De "witte mobilisatie" in België als *moral crusade*' (1998) 45 *Sociologische Gids* 289; M. Elchardus and W. Smits, *Anatomie en oorzaken van het wantrouwen* (2002).

9 S. Walgrave and J. Manssens, 'De Witte Mars als product van de media' (1998) 45 *Sociologische Gids* 340, at 357.

10 F. Tanghe, *Het spaghetti-arrest. Recht en democratie* (1997) at 33.

which they build'.¹¹ Taking up this suggestion, I will trace these different ideas about legal consciousness back to two authors who made an important contribution to the development of modern sociology of law: Roscoe Pound and Eugen Ehrlich.¹² Following Klaus Ziegert, who considers Pound in terms of the 'legacy of American Legal Realism' and who refers to the work of Ehrlich as a 'European sociological theory of law',¹³ I will differentiate between an 'American' and a 'European' conception of legal consciousness. Both conceptions will be applied in a case study, each using a different empirical model of the *Rechtsstaat*.

I will first examine the present legal consciousness literature and discuss three characteristics of an 'American' conception of legal consciousness. This perspective – in which law is considered an independent variable – will then be applied in a case study of the redevelopment of a run-down neighbourhood in the Netherlands. Based on a discussion of the conceptual differences between 'law in action' and 'living law', I will argue that aside from the most commonly used 'American' perspective, there is also a 'European' conception of legal consciousness. This alternative perspective – in which law is considered a dependent variable – will then be applied in the case study as well. Finally, it will be argued that future studies of legal consciousness may benefit from an integration of the two conceptions.

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'.¹⁴ Yet, under this general heading various researchers have applied the term in many different ways, some of which are closely related to the study of legal culture.¹⁵ Engel makes a useful

11 D. Engel, 'How Does Law Matter in the Constitution of Legal Consciousness?' in *How Does Law Matter?*, eds. B. Garth and A. Sarat (1998) 109, at 139.

12 See, also, M. Hertogh, *De levende rechtsstaat. Een ander perspectief op recht en openbaar bestuur* (2002).

13 K. Ziegert, 'Introduction to the Transaction Edition' in E. Ehrlich, *Fundamental Principles of the Sociology of Law* (reprint, 2002) xix, xxxix.

14 D. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Rev.* 575, at 592.

15 Engel argues that the current interest in legal consciousness has deep roots in the law and society research of the 1970s and 1980s on legal culture. See Engel, *op. cit.*, n. 11, p. 126. Similarly, Cotterrell has recently identified six different fields of research explicitly relating law and culture. In his view, contemporary legal consciousness studies are closely related to the literature that considers *law as a cultural projection*. The other five categories focus on: law's dependence on culture, law's recognition of culture, law's domination of culture, law as an object of cultural competition, and law's stewardship of culture. See R. Cotterrell, 'Law in Culture' (2004) 17 *Ratio Juris* 1, at 5.

distinction between two alternative meanings of the term. Legal consciousness can refer both to: a) aptitude, competence or awareness of the law; and to b) perceptions or images of law.¹⁶

1. Awareness and images of law

Most empirical studies in the first category date back to the 1970s.¹⁷ 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. KOL studies are often indistinguishable in aim and philosophy from studies of the acceptance, impact or effectiveness of laws. Some KOL researchers also argue that their work can be used to predict criminal behaviour. ‘Strong’ legal consciousness is considered the cause of adherence to law while ‘weak’ legal consciousness is considered the cause of crime and evil.¹⁸ 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). ‘To understand law is to understand the processes of interaction associated with the idea of “law”.’¹⁹ 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’.²⁰ Unlike the early KOL studies, the fieldwork involved in these more recent examples is often detailed descriptive ethnography. Typically, they use observations of courts, lawyers’ offices or welfare agencies to reveal individuals’ subjective experience of courts, their ways of thinking about rights, and the understandings shaped by their contacts with lawyers, court officials or other state agencies.²¹

16 Engel, *op. cit.*, n. 11, p. 119.

17 See, for example, A. Podgorecki et al., *Knowledge and Opinion about Law* (1973); A. Sarat, ‘Studying American Legal Culture: An Assessment of Survey Evidence’ (1977) 11 *Law and Society Rev.* 427, and the references cited therein.

18 B. Kutchinsky, ‘The Legal Consciousness: A Survey of Research on Knowledge and Opinion about Law’ in Podgorecki et al., *id.*, p. 101.

19 Cotterrell, *op. cit.*, n. 2, p. 146.

20 Engel, *op. cit.*, n. 11, p. 119.

21 Cotterrell, *op. cit.*, n. 2, p. 148.

2. Three contemporary studies

To illustrate this contemporary approach, I selected three fairly recent and reasonably representative works by widely read law and society scholars. The three works are: Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*;²² Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life*;²³ and Laura Beth Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment'.²⁴ The conclusions with regard to these three works may also be applied to other recent legal consciousness studies.²⁵

Merry 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. Initially, the people in her study feel that some of their personal problems – which involve their families, neighbourhoods or friendships – should be dealt with by a court. However, court clerks and other legal officials consider these issues 'problems out of place'; not 'real legal problems' but 'garbage cases', 'junk cases', and so forth. These cases are seen as difficult, troublesome, and often frivolous. As a result:

[t]he court endeavors to provide justice by delegating the problem, considering it in moral or therapeutic terms, while plaintiffs struggle to assert the legal elements of the situation.²⁶

In their book, Ewick and Silbey develop an empirically based theory of legal consciousness. In 430 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

22 S.E. Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (1990).

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

24 Nielsen, *op. cit.*, n. 1.

25 Other legal consciousness studies include A. Sarat, '“The Law Is All Over”: Power, Resistance, and the Legal Consciousness of the Welfare Poor' (1990) 2 *Yale J. of Law and the Humanities* 343; B. Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (1993); M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994). See, also, M. García-Villegas, 'Symbolic Power without Symbolic Violence? Critical Comments on Legal Consciousness Studies in USA' (2003) 53 *Droit et Société* 137, and the references cited therein.

26 Merry, *op. cit.*, n. 22, p. ix.

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.

Nielsen 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 analysed variation across race and gender groups in attitudes about how offensive public speech should be dealt with by law. Respondents generally oppose the legal regulation of offensive public speech, but they employ different 'discourses' to explain why. 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.

AN 'AMERICAN' CONCEPTION OF LEGAL CONSCIOUSNESS

These studies by Merry, Ewick and Silbey, and Nielsen are three representative examples of, what I will refer to as, an 'American' conception of legal consciousness. The primary focus of this conception is: *How do people experience (official) law?* It can be summarized by the following three²⁷ characteristics.²⁸

First, all three studies discussed here describe as their central theme the 'persistent contradiction between the ideal and the actual in the law'.²⁹ According to Merry:

[l]aw as it blends into life in communities, in families, and in neighborhoods is not the mythic law of Perry Mason, or of the black-robed justices of the Supreme Court ...³⁰

In her view:

[t]his is a society which celebrates individualism and equal access to the due process of the law. Yet there are some problems which seem less worthy of this equal access and less appropriate for legal intervention.³¹

27 García-Villegas suggests three additional premises of American legal consciousness studies: first, a defence of empirical research without this implying the adoption of positivist postulates; second, a progressive political position in favour of weak or marginalized social actors; and finally, a perspective that is more open to exploring the relationship between law and social change from a constructivist perspective. See García-Villegas, *op. cit.*, n. 25, p. 139.

28 Note that these characteristics can also be recognized in studies outside the United States, whose authors are inspired by the American literature. See, for instance, D. Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) 22 *J. of Law and Society* 506.

29 Ewick and Silbey, *op. cit.*, n. 23, p. xiii.

30 *id.*

31 Merry, *op. cit.*, n. 22, p. 182.

Using a similar approach, Nielsen studies 'the ideal of free speech' as a 'celebrated canon of American constitutional democracy' and she analyses the question whether ordinary citizens are aware of the First Amendment and how this affects their attitudes towards the regulation of offensive public speech.³²

Second, all three studies share a similar use of the term 'law'. Rottleuthner's general observation, that most socio-legal research is focused on 'official' law and formal legal institutions,³³ turns out to be particularly true for contemporary studies of legal consciousness.³⁴ Merry, for instance, on the first page of her book equals 'law' with 'the legal system',³⁵ and her main argument is that through the use of 'law' working-class Americans grow increasingly dependent on 'institutions of the state'.³⁶ Moreover, Merry analyses the legal consciousness of her respondents in terms of specific provisions of official law, in particular, property ownership and contract.³⁷ Similarly, Ewick and Silbey choose to use the term 'law' in relation to formal institutions and their actors only. To describe the social attitudes towards official law, they use the term 'legality'.³⁸ Consequently, to them the material forms of 'law' include such things as: 'court houses; parking meters; ... and the signs that warn us against trespassing, loitering, right turns, or smoking'.³⁹ Moreover, their interview questions included 'standardized indexes to measure knowledge of law, experience and familiarity with courts and legal institutions, [and] perceptions of legal authorities and legal procedures ...'.⁴⁰ Much in the same way, Nielsen equals people's attitudes towards 'law' with their attitudes towards 'legal regulation' and the First Amendment. In her view, the study of legal consciousness focuses on how ordinary citizens think about 'legal institutions and legal rules'.⁴¹

Finally, 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. Nielsen argues, for instance, that these studies should 'hold constant legal doctrine ... to better understand variations in legal consciousness'.⁴² In her own study, this allowed her to explore variation in legal consciousness according to race, gender, and class. This research strategy is used by others as well. Regardless of whether ordinary

32 Nielsen, *op. cit.*, n. 1, p. 1059.

33 H. Rottleuthner, 'Volksgesit, gesundes Volksempfinden und Demoskopie' (1987) *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 20, at 22.

34 See, also, Engel, *op. cit.*, n. 11, p. 140.

35 Merry, *op. cit.*, n. 22, p. 1.

36 *id.*, p. 182.

37 *id.*, p. 62.

38 Ewick and Silbey, *op. cit.*, n. 23, p. 23.

39 *id.*, p. 16.

40 *id.*, p. 253.

41 Nielsen, *op. cit.*, n. 1, p. 1058.

42 *id.*, p. 1086.

citizens are before, with, or against the law, in all cases ‘law’ equals ‘official law’.

1. *Law in action*

Many studies of law and society – on a variety of subjects – take as their point of departure the ‘law in action’, the famous concept which was first introduced by Roscoe Pound. The richness of Pound’s ideas warrants an extended analysis that goes well beyond the limited scope of this paper.⁴³ Central to Pound’s view on law and society is the way he distinguishes ‘the rules that purport to govern the relations of men’ (law in books) and ‘those that actually govern them’ (law in action).⁴⁴ According to Pound, courts should not make their decisions solely on the basis of the common law system of fundamental rules and principles, but they should also accommodate those principles and values in society that are otherwise overlooked. To Pound, the law is not an autonomous system of formal rules, but an important tool for ‘social control’. Judges and other lawyers should act as ‘social engineers’ and apply the law to prevent or to address social conflict. To be the most effective, the official law needs to be constantly updated and amended to legal reality to bridge the ‘gap’ between the law in books and the law in action.⁴⁵ ‘In a conflict between the law in books and the national will there can be but one result. Let us not become legal monks . . . For the word remains, but man changes.’⁴⁶

This perspective has proven very successful: ‘Pound’s concerns have become today’s orthodoxies.’⁴⁷ This is also reflected in the present legal consciousness literature. Although most contemporary legal consciousness studies reject traditional ‘gap studies’ as part of an instrumentalist view of law and insist on the indeterminate character of law instead,⁴⁸ the ‘American’ conception of legal consciousness – as applied by Merry, Ewick and Silbey, Nielsen, and others – still echoes important elements of Roscoe Pound’s view of law and society. First, Pound’s emphasis on the gap between the ‘law in books’ and the ‘law in action’ is very similar to the concern of many modern studies with the discrepancy between the ideal and the actual in the law. In fact, in a recent collection of legal

43 For a more elaborate introduction to his work, see R. Pound, *Jurisprudence* (1959). See, also, D. Wigdor, *Roscoe Pound, Philosopher of Law* (1974).

44 R. Pound, ‘Law in Books and Law in Action’ (1910) 44 *Am. Law Rev.* 12, at 15.

45 As Tamanaha rightly points out, there are two distinct versions of the gap problem. The first version is the gap between the written law and the practices of lawyers and judges. The second version is the gap between the legal rules and what people in the community actually do. See B. Tamanaha, *A General Jurisprudence of Law and Society* (2001) at 131.

46 Pound, *op. cit.*, n. 44, p. 36.

47 D. Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157, at 158.

48 García-Villegas, *op. cit.*, n. 25, p. 141.

consciousness studies it was argued that this type of research may be characterized as ‘a new version of the “gap study”’.⁴⁹ Second, ‘[f]or Pound there is only one criterion of valid law. This is equated with the rules laid down by the authorities in a politically constituted society’.⁵⁰ Most contemporary studies on legal consciousness share this view. Finally, Pound, too, treats the law as an independent variable. The main difference between the ‘law in books’ and the ‘law in action’ is the difference between the ‘books’ and the ‘action’; in both cases what is meant by ‘law’ is given.

These elements strongly suggest that an ‘American’ conception of legal consciousness is primarily focused on the ‘(official) law in action’.⁵¹ The application of this conception in an empirical case study will enable us to analyse the consequences of this particular perspective in greater detail. To this end, the ‘American’ conception of legal consciousness can be translated into an empirical model of the *Rechtsstaat*.

2. *The ‘Rechtsstaat in action’*

When we apply Pound’s central distinction between the ‘law in books’ and the ‘law in action’ to the *Rechtsstaat*, the ‘*Rechtsstaat* in Books’ refers to the ‘official’ definition of the *Rechtsstaat* in legal doctrine. The ‘*Rechtsstaat* in Action’ then looks at the degree to which these legal principles are implemented in practice. Whereas the ‘*Rechtsstaat* in Books’ can be studied by reading law books and studying court decisions, the ‘*Rechtsstaat* in Action’ requires empirical research. Similar to Pound’s general theory of law and society, this type of empirical study focuses on the gap between the ‘*Rechtsstaat* in Books’ and the ‘*Rechtsstaat* in Action’ and on possible ways to bridge this gap. Consequently, the first research question of our case study is: *How do people experience (important elements of) the ‘official’ Rechtsstaat?*

LAW AS AN INDEPENDENT VARIABLE

This case study considers the attitudes of local government officials towards the legal ideal of the *Rechtsstaat*.⁵² All officials were actively involved in

49 A.-M. Marshall and S. Barclay, ‘In Their Own Words: How Ordinary People Construct the Legal World (Symposium Introduction)’ (2003) 28 *Law & Social Inquiry* 617, at 622.

50 Nelken, *op. cit.*, n. 47, p. 160.

51 This is also reflected in the term ‘legal consciousness in action’: Marshall and Barclay, *op. cit.*, n. 49, p. 622. ‘[T]he law in action consists of meaning-making activities of ordinary people trying to navigate the opportunities and challenges of everyday life.’

52 See, also, M. Hertogh, ‘The Living *Rechtsstaat*: A Bottom-Up Approach to Legal Ideals and Social Reality’ in *The Importance of Ideals. Debating their Relevance in Law, Morality, and Politics*, eds. W. van der Burg and S. Taekema (2004) 75.

the redevelopment of the 'Indonesian quarter'; a run-down neighbourhood in the town of Zwolle in the Netherlands. I draw here on open-ended in-depth interviews with local politicians, officials from the local housing association, local police officers, and with the people who live in this neighbourhood. The case study is based on a secondary analysis of the empirical material of a six-month evaluation study in 1999, which was originally aimed at studying the public sense of security in this area, supplemented with material from local and national newspapers and with an informal interview with the researcher.⁵³ All interview fragments and other quotations given below were translated from Dutch into English.

Following its interpretation in legal doctrine, the ideal of the *Rechtsstaat* is usually understood to include the legal values of legality, equality, fundamental human rights, the separation of powers, and the right to an independent court.⁵⁴ Treating law as an independent variable, this 'official' interpretation of the *Rechtsstaat* will be held constant and our case study will focus on the public attitudes and reactions to two of its principles in particular: legality and equality.

1. Background

The 'Indonesian quarter' is a small and predominantly blue-collar neighbourhood in Zwolle, a provincial town in the eastern Netherlands. Its name does not refer to the ethnic background of its inhabitants, but to the fact that the streets in this area are named after towns and islands in Indonesia (the former Dutch colony of the East Indies). Many consider this area, which is wedged between a busy motor way and a small industrial area, the seedy part of town. There are about 350 houses in this area, most of which are part of social housing projects that provide accommodation for some 1,000 inhabitants. Unemployment figures in this area are extremely high. Many people depend on social security for their income and many of them have serious financial problems. Most children leave school early and social life in this community is very limited. The crime rate is the highest in Zwolle.

In the spring of 1994, after a series of smaller incidents, the Indonesian quarter was the scene of severe street violence. After a fight, a black family that had only just moved to *Javastraat* were forced to leave their home by

53 The case study is my reconstruction of events, primarily based on the material which was first published in J. Hes, *Recht doen aan de buurt* (2001). The original study focused on matters of public security only, but did not analyse the empirical data in terms of legal consciousness or the *Rechtsstaat*.

54 On the relation between the *Rechtsstaat* and the 'Rule of Law' and the history of the two concepts, see R. Grote, 'Rule of Law, Rechtsstaat and "Etat de droit"' in *Constitutionalism, Universalism and Democracy: A Comparative Analysis*, ed. C. Starck (1999) 269.

other people in the neighbourhood. A curfew and police in riot gear were necessary to restore public order. In the aftermath of these events, many people left their houses and moved to other parts of town. In response to these developments, the mayor and other members of the municipal government decided it was time for a change. They approached three men who had previously worked in the neighbourhood – Joop (a social worker concerned primarily with homeless young people), Wessel (a local policeman), and Freddie (an official from the local housing association) – and asked them to set up the so-called ‘Neighbourhood Intervention Team Zwolle’ (NITZ) to help restore the sense of community and security. To this end, the local government (backed by the municipal council) transferred some of its authority to the NITZ team, especially with regard to the allocation of low-rent houses. The work of the NITZ team has recently been evaluated. The overall conclusion is that their approach is controversial but successful.⁵⁵ The Indonesian quarter is no longer considered a ‘no-go area’, more people are involved in voluntary community work, less damage is done to the local houses, and the crime rate has dropped considerably.

2. *Legality*

According to Dutch law, the principle of legality requires that every administrative act that affects the rights and freedoms of an individual has a statutory basis.⁵⁶ For the members of the NITZ team and some of their colleagues, however, this principle does not play an important role in their day-to-day decision making. Most decisions concerning the internal organization of the NITZ team are, for instance, largely informal and are in no way based on official rules and regulations. As a result, those who are not closely connected to the team often have a hard time figuring out the responsibilities of each individual team member. The way in which public officials in the Indonesian quarter play down the importance of legality is also illustrated by the attitude of the local police towards privacy. During her fieldwork, the researcher had noticed that the police discussed and exchanged private information about tenants without much restraint. When she confronted them with some of the provisions of Dutch privacy law, their typical reaction was as follows:

Privacy? That’s something I infringe on every day ... Privacy cannot be handled by legislation, but should be considered in each individual case instead.⁵⁷

Perhaps the most telling example of the way in which the members of the NITZ team think about legality is reflected in their most controversial

55 Hes, *op. cit.*, n. 53, p. 121.

56 See, for example, A.J.C. de Moor-van Vugt and B.W.N. de Waard, ‘Administrative Law’ in *Introduction to Dutch Law*, eds. J. Chorus et al. (3rd rev. edn., 1999) 331.

57 Hes, *op. cit.*, n. 53, p. 40.

scheme in the Indonesian quarter: the allocation of low-rent houses. Their approach consisted of neglecting the general rules and regulations of official housing policy and replacing them by their own rules. About these and other examples, the evaluation study concludes: 'To defend the good cause, official rules are often put aside.'⁵⁸ Moreover, '[t]he fact that something "works" is considered far more important than whether it is legally permissible.'⁵⁹ Although the way in which the NITZ team decides on the allocation of local houses goes against official (national) rules and regulations, the then mayor of Zwolle, Mr J. Fransen, openly defended this approach. In an interview with a national newspaper he claimed:

Sometimes it is better to put the formal rules aside, provided that you have a clear concept and your policy is supported by the municipal council.⁶⁰

In their efforts to restore public order and security in the Indonesian quarter, the NITZ team is sponsored by an organization called the 'Stichting Maatschappij, Veiligheid en Politie' (the Society, Security and Police Foundation).⁶¹ With regard to the role of the police, the managing director of this organization argues as follows:

Murder, theft and violence – these are all things the police can never tolerate; in these cases strong police action is called for. In other cases, however, it might be beneficial to bend the rules somewhat or to be flexible in the implementation of the rules.⁶²

Whereas the legal ideal of the *Rechtsstaat* puts great emphasis on the 'rule of law, not of men', the members of the NITZ team and other public officials seem to have changed this principle into a 'rule of men, not of law'.

3. Equality

The principle of equality is anchored both in the Dutch Constitution and in statutory law. Article 1 of the Constitution guarantees equal treatment of all persons in the Netherlands in equal circumstances. In addition, the Equal Treatment Act seeks to ban discrimination on the grounds of religion, belief, political opinion, race, sex, hetero- or homosexual orientation, or marital status.

58 *id.*, p. 119.

59 *id.*, p. 107.

60 J. Groen, 'Zet soms regels opzij in achterstandswijk. Politici pleiten voor onorthodoxe aanpak gemeentebesturen na succes in voormalige Zwolse crisiswijk' *de Volkskrant*, 26 January 2001, 1.

61 The Dutch Society, Security and Police Foundation was founded in 1986 as an independent (private) organization contributing to the debate on policing and on safety and security issues in society. It publishes opinions, recommendations, discussion papers and textbooks, organizes conferences and symposia, and commissions experimental projects.

62 J. Groen, 'Beetje soepel met de regels' *de Volkskrant*, 26 January 2001, 9.

In 1994, police in riot gear were sent to the Indonesian quarter after local citizens had forced a black family to leave their newly rented house in *Javastraat*. To prevent similar incidents in the future, the NITZ team decided to develop a completely new, and highly controversial, policy. Before 1994, the distribution of low-rent houses in Zwolle (and in most other Dutch towns) was subject to a detailed housing policy. This policy gave all citizens in Zwolle in equal circumstances equal opportunities to rent a house. All future tenants were awarded a number of ‘housing credits’ for the number of family members and the time they had been listed on a waiting list. On the basis of these credits, town officials decided who was eligible for a house in Zwolle (including the Indonesian quarter). After the events in 1994, however, the municipal government transferred most of its authority with regard to the allocation of houses to the NITZ team. They effectively chose to put the official system aside, and decided to control the allocation of low-rent houses in the Indonesian quarter themselves. Consequently, town officials no longer decided on who was eligible for which house on the basis of someone’s housing credits, but from then on the members of the NITZ team themselves decided who they thought would be the most suitable for a particular house.⁶³ Team member Freddie explains:

We [the members of the NITZ team] conducted several interviews, and we considered whether a newcomer would fit into the neighbourhood and the neighbourhood would suit him.⁶⁴

In effect, this meant that tenants from ethnic minorities were excluded from social housing in the Indonesian quarter, because people in this neighbourhood felt that they did not fit in. This raised great controversy among many people in other parts of Zwolle, who not only objected to the discrimination against foreigners but also complained that those who happened to live in the Indonesian quarter did not have to comply with the general housing policy and were thus given preferential treatment.

4. Discussion

Looking through the lense of an ‘American’ conception of legal consciousness (with its focus on ‘law in action’), this case study provides us with some important clues about the attitude of local government officials towards the legal ideal of the *Rechtsstaat*. Two major elements of the *Rechtsstaat* – legality and equality – do not seem to play a significant role in the day-to-day decision making of the NITZ team and other public officials. Rules and regulations are put aside in favour of more informal solutions and the allocation of houses favours some tenants in the Indonesian quarter over others.

63 This policy lasted for two years. In 1996, the old system of ‘housing credits’ was reinstated again.

64 Groen, op. cit., n. 62, p. 9.

Yet, this perspective also leaves a number of important questions unanswered. We used a definition of the *Rechtsstaat* which can be derived from the Dutch Constitution, statutory law, and from writings in constitutional and administrative law. Next, we compared this 'official' definition of legality and equality with the attitudes and opinions of local government officials. But how do people in the Indonesian quarter themselves feel about this legal interpretation? What do they consider important principles? What is *their* ideal of the *Rechtsstaat*? Thus far, we have been unable to answer these questions. This is an important shortcoming of an 'American' conception of legal consciousness. It allows us to register people's reactions to a *given* definition of the law and the *Rechtsstaat*, but it falls short in analysing people's *own* definitions of these concepts.

This is also reflected in the three studies that were discussed in the previous section. In Merry's study of the legal consciousness of working-class Americans, people keep coming back to the courts despite the fact that they are often deeply disappointed about the way the legal system treated them. Merry argues: 'I believe they return [to the courts, MH] because there is nowhere else to go for "justice", however that is conceived ...'⁶⁵ In her own study, she is unable to identify how the people she interviewed conceive the idea of justice. Ewick and Silbey, in their discussion of those people who are 'Against the law', make a similar argument. '[P]eople undertake ... violations of conventional and legal norms with a strong sense of justice and right.'⁶⁶ Rita Michaels, one of their respondents, is said to act against strong 'local group norms'⁶⁷ and the way Jamie Leeson, another respondent, speaks about the law is closely related to his 'personal code of justice'.⁶⁸ Likewise, on the final page of their book they refer to the fact that many drivers on the expressway from Logan Airport to the tunnel into Boston do not simply observe traffic rules but often demonstrate 'their own sense of fairness or courtesy'.⁶⁹ In none of these cases, however, they are able to identify the substance of these notions. Finally, Nielsen in her study concludes that respondents generally oppose the legal regulation of offensive public speech, but use four different paradigms to explain why. 'Each pattern represents a well-thought-out rationale for disfavoring the legal regulation of speech.'⁷⁰ In her analysis, she focuses on how these paradigms affect people's ideas about legal regulation and how their ideas vary by social group (in particular, race and gender), but she does not explicitly address the question what her respondents themselves define as 'law' and what they feel this law should look like.

65 Merry, *op. cit.*, n. 22, p. 170.

66 Ewick and Silbey, *op. cit.*, n. 23, p. 49.

67 *id.*, p. 61.

68 *id.*, p. 180.

69 *id.*, p. 250.

70 Nielsen, *op. cit.*, n. 1, p. 1072.

To answer these and similar questions, we need to find out whether ‘law’ can also be analysed as a dependent variable.

A ‘EUROPEAN’ CONCEPTION OF LEGAL CONSCIOUSNESS

In his review of the current literature, Engel has argued that ‘studies of legal consciousness have sometimes forgotten important lessons from the past’.⁷¹ 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.⁷²

Engel therefore calls for a view on legal consciousness ‘from below’.⁷³ As it turns out, the basis for such a view might be found in the European tradition of the sociology of law.

1. *Living law*

At about the same time that (in the United States) Roscoe Pound published his article ‘Law in Books and Law in Action’ (1910), in Europe Eugen Ehrlich first introduced his notion of ‘living law’ (1911).⁷⁴ Two years later, he published his major book on the principles of the sociology of law.⁷⁵ Ehrlich was Professor of Roman Law at Czernowitz in the remote province of Bukowina, on the eastern border of the Austro-Hungarian empire. Pound (1870–1964) and Ehrlich (1862–1922) were near contemporaries and both men have a lot in common.⁷⁶ Moreover, Pound played an important role in the introduction of Ehrlich’s ideas to a wider audience. He invited Ehrlich to

71 Engel, op. cit., n. 11, p. 139.

72 id., p. 140.

73 id., p. 141.

74 E. Ehrlich, ‘Die Erforschung des lebenden Rechts’ (1911) 35 *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* 129, also published in *Eugen Ehrlich. Recht und Leben. Gesammelte Schriften zur Rechtsstatsachenforschung und zur Freirechtslehre*, ed. M. Rehbinder (1967) 11.

75 E. Ehrlich, *Grundlegung der Soziologie des Rechts* (1913).

76 On the many similarities between the personal histories of Pound and Ehrlich and the significance of the ‘frontier’ towns they both grew up in, see A. Likhovski, ‘Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence’ (2003) 4 *Theoretical Inquiries in Law (Online Edition)* at <<http://www.bepress.com/til/default/vol4/iss2/art7>>.

publish in the *Harvard Law Review*,⁷⁷ and he wrote the introduction to the English translation of Ehrlich's book.⁷⁸ Finally, whereas Pound had a long and distinguished career in American law schools (including his Deanship at Harvard) and his ideas are still very influential today, Ehrlich left behind no similar inheritance. 'Many, if not most, sociologists of law today would be hard pressed if asked how their work was related to Ehrlich's foundation of the sociology of law.'⁷⁹ It is, therefore, perfectly understandable that some commentators argue that Pound's 'law in action' and Ehrlich's 'living law' are nearly identical. Ziegert claims, for instance, that:

[the] famous distinction of 'law in books' versus 'law in action' is very much Ehrlich's pair of opposites 'Rechtssatz' (legal proposition) versus 'Rechtsleben' (legal life) ...⁸⁰

At closer inspection, however, this turns out to be a 'false equation'.⁸¹

2. A false equation⁸²

To Ehrlich, court rulings and state legislation are 'norms for decision' that tell judges and government officials how to perform their tasks. Society as a whole is considered a collection of social associations:

a plurality of human beings who, in relations with one another, recognize certain rules of conduct as binding, and generally at least, regulate their conduct according to them.⁸³

Ehrlich calls these rules 'living law'. 'The living law is the law which dominates life itself even though it has not been posited in legal propositions.'⁸⁴ To Ehrlich, the need for 'norms for decision' arises only in cases of dispute and conflict, whereas 'living law' prevails under normal circumstances.

The most significant difference between Pound's and Ehrlich's views on law and society is their central focus on two different objects. Whereas Pound focused on the behaviour of legislators, judges, jurists, and other legal officials, Ehrlich was oriented towards the behaviour of people in social associations (inside *and* outside legal institutions).⁸⁵ The 'law in books'

77 E. Ehrlich, 'The Sociology of Law' (1922) 36 *Harvard Law Rev.* 130. See, also, R. Pound, 'An Appreciation of Eugen Ehrlich' (1922) 36 *Harvard Law Rev.* 129.

78 E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936).

79 Ziegert, *op. cit.*, n. 13, p. xix.

80 K.A. Ziegert, 'The Sociology behind Eugen Ehrlich's Sociology of Law' (1979) 7 *International J. of the Sociology of Law* 225, at 233.

81 Nelken, *op. cit.*, n. 47, p. 158.

82 David Nelken was the first to articulate some of the important differences between the 'law in action' and the 'living law'. See *id.*, p. 165. This section is largely based on his analysis of both concepts.

83 Ehrlich, *op. cit.*, n. 78, p. 39.

84 *id.*, p. 493.

85 See, also, B. Tamanaha, 'An Analytical Map of Social Scientific Approaches to the Concept of Law' (1995) 15 *Ox. J. of Legal Studies* 501, at 517.

refers solely to (official) rules and norms. In this way, it can be distinguished from the 'law in action'; the implementation of these rules and norms in practice. 'Norms for decision', on the other hand, include not only rules and norms but also the actual patterns of decision by legislative and judicial bodies. Conversely, 'living law' is not identical to 'law in action' because it refers essentially to obligatory norms rather than action. Ehrlich's 'norms for decision' therefore encompass most of what Pound meant by both the 'law in books' and the 'law in action'. But Ehrlich's notion of 'living law' has no parallel in Pound's distinction.

3. *Legal consciousness*

Considering these important differences between 'law in action' and 'living law', the notion of 'living law' gives rise to an alternative perspective on the study of legal consciousness. In 1912, one year prior to the publication of his book on the sociology of law, Ehrlich strongly criticized Savigny and other representatives of the Historical School for not entirely following their own ideas. He argued as follows:

It is about time that the supporters of the Historical School, who in the past century repeatedly have argued that the law develops in the popular legal consciousness (*Rechtswusstsein des Volkes*) finally take this statement more seriously; and start studying this legal consciousness ...⁸⁶

In the same article, Ehrlich presented a unique research project aimed at studying the 'living law' of the peoples of the Bukowina, where Armenians, Germans, Gypsies, 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*).⁸⁷ His methodological approach can be described as follows:

Ehrlich did not take the Austrian civil law book as the basis for his questions (i.e. by submitting legal rules and asking whether they were known or not, a method 'modern' sociology of law very often does not hesitate to use) but on the contrary very sociologically makes the household and how it organizes its social relations by norms the research-unit of his studies ...⁸⁸

To Ehrlich, the law is a notion (*Gedankengebilde*) that lives in people's heads⁸⁹ and which can be identified 'on the basis of people's attitudes'.⁹⁰ Legal consciousness in this sense essentially refers to people's own ideas

86 E. Ehrlich, 'Das lebende Recht der Völker der Bukowina' (1912) 1 *Recht und Wirtschaft* 273, also published in Reh binder, op. cit., n. 74, p. 43, at p. 48 [my translation].

87 id., p. 44.

88 Ziegert, op. cit., n. 80, p. 238.

89 Reh binder, op. cit., n. 74, p. 103.

90 Nelken, op. cit., n. 47, p. 163.

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’?* (see Figure 1).

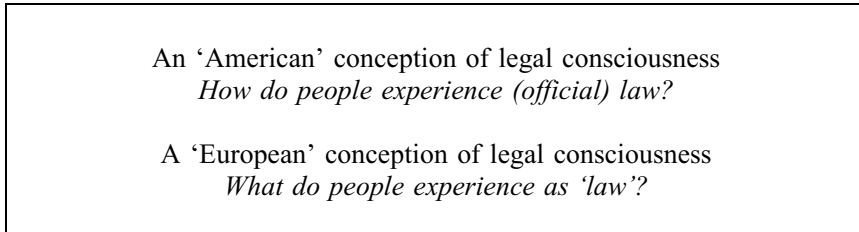


Figure 1. Legal Consciousness and Legal Experience

Although Ehrlich first articulated this approach, this particular perspective can also be recognized in many other European legal consciousness studies. In, for example, the relevant German literature, including the work of the Danish-German sociologist Theodor Geiger,⁹¹ ‘legal consciousness’ (*Rechtsbewusstsein*) is usually considered a synonym for ‘people’s sense of law and right’ (*Rechtsgefühl*).⁹² This is also true for much of the literature on legal consciousness in the Netherlands.⁹³ Similarly, the Polish-Russian jurist Leon Petrazycki considered legal consciousness in relation to ‘intuitive law’, to ‘those legal experiences which contain no references to outside authorities’.⁹⁴ This interpretation has also influenced many contemporary Polish researchers.⁹⁵ Moreover, Ehrlich’s conception of legal consciousness seems to fit comfortably with the use of the term in the two European debates that were cited in the introduction, on the reunification of Germany and the Dutroux case in Belgium.

91 See T. Geiger, *Vorstudien zu einer Soziologie des Rechts* (4th edn., 1987), which was originally published in Kopenhagen in 1947 (ch. VIII: ‘Einige Bemerkungen zum Thema Rechtsbewusstsein’).

92 See, for example, E. Riezler, *Das Rechtsgefühl* (3rd edn., 1969); M. Rehbinder, ‘Rechtskenntnis, Rechtsbewusstsein und Rechtsethos als Probleme der Rechtspolitik’ in *Zur Effectivität des Rechts*, eds. M. Rehbinder and Helmut Schelksy (1972) 25; E.-J. Lampe (ed.), *Das sogenannte Rechtsgefühl* (1985).

93 See, for example, H. Krabbe, *De moderne staatsidee* (1915); R. Kranenburg, *Algemene staatsleer* (2nd edn., 1949); J.J. Boasson, *Het rechtsbewustzijn* (1919); W.J. Witteveen, ‘Wat doet de rechter als hij recht vindt: de formule van het rechtsbewustzijn’ (1983) 9 *Recht en kritiek* 192.

94 L. Petrazycki, *Law and Morality* (1955) at 6. For a discussion of the many similarities between Petrazycki and the work of Eugen Ehrlich, see R. Banakar, ‘Sociological Jurisprudence’ in *An Introduction to Law and Social Theory*, eds. R. Banakar and M. Travers (2002) 33.

95 See Banakar, id., pp. 41, 42.

4. The 'living Rechtsstaat'

A 'European' conception of legal consciousness (with its emphasis on 'living law') may also be translated into an empirical model of the *Rechtsstaat* (see Figure 2). The model of the 'Living *Rechtsstaat*' then refers to all social norms and values that dominate life itself, even though they have not been posited in 'official' law (or the 'official' definition of the *Rechtsstaat*). The central focus of this model is not the level of *social support* for legal propositions, but the *social definition* of the *Rechtsstaat*. What do members of a given community themselves consider important, regardless of what legal doctrine and official law have to say about this? There is probably not just one, but a collection of many different understandings of the *Rechtsstaat*.⁹⁶

	An 'American' Conception	A 'European' Conception
Inspiration	Pound	Ehrlich
Law	independent variable	dependent variable
Focus	(official) law in action	living law
<i>Rechtsstaat</i>	' <i>Rechtsstaat</i> in Action'	'Living <i>Rechtsstaat</i> '

Figure 2. Two Conceptions of Legal Consciousness

When applied to an empirical study of the *Rechtsstaat*, the 'European' conception of legal consciousness takes as its primary research question: *What do people experience as (important elements of) the Rechtsstaat?* To analyse this perspective in greater detail, we will now venture a second visit to the Indonesian quarter.

LAW AS A DEPENDENT VARIABLE

Cotterrell has argued that, in conceptualizing 'law', a social science of law must seek 'not to close off inquiry, before it begins, by conclusively specifying the nature of the object of study in a definition'.⁹⁷ Therefore, rather than working with a sharp *definition* of law, sociology of law should rely on '*working models* or open conceptions of law which are adequate to

96 This is, of course, very similar to the central argument in much of the literature on legal pluralism. For a recent discussion of this literature, see A. Griffiths, 'Legal Pluralism' in Banakar and Travers, op. cit., n. 94, p. 289.

97 Cotterrell, op. cit., n. 2, p. 38.

guide inquiry and are constructed solely for that purpose'.⁹⁸ Likewise, an empirical study 'from below' – in which the legal ideal of the *Rechtsstaat* is considered a dependent variable – should not start with a sharp definition but with a working model of the *Rechtsstaat*. In our case study of the Indonesian quarter, we will ask: what do local government officials working in this neighbourhood consider important social values with regard to the most desirable relation between the law (*Recht*) and the state (*Staat*)? In our working model, these values are considered important fragments of their own ideal of the *Rechtsstaat*.

The evaluation study of the NITZ team attributes much of the team's success to what is referred to as the 'personalistic value orientation' of its members.⁹⁹ This orientation is characterized by a strong emphasis on the special circumstances of each individual citizen. This is reflected in two values that will be referred to as responsiveness and material equality.

1. Responsiveness

Whereas in the 'official' definition of the *Rechtsstaat* the legitimacy of administrative action is its statutory basis (legality), public officials in the Indonesian quarter themselves feel that their legitimacy should instead be based on their close cooperation with the neighbourhood and its citizens (regardless of the legal status thereof). The NITZ team is not oriented towards fitting their individual decisions into a system of general rules, but towards individual citizens and their unique circumstances.¹⁰⁰

Prior to the start of the NITZ team, people in the Indonesian quarter felt a deep sense of mistrust towards the town authorities. They felt abandoned by the authorities, who refused to listen to their complaints and did not even bother to send a police car when they reported a break-in. After the 1994 incident, this was one of the first things that Joop, Wessel, and Freddie were keen to change. From that moment on, most of their actions were inspired by the central value of responsiveness. Or, as Freddie put it, 'Not a single stone from the pavement should be removed without consulting the local people first.'¹⁰¹ Public officials in Zwolle consider this one of the 'cultural pillars' of their organization. In a brochure for future employees, the town council summarizes what they see as typical for the 'Zwolle perspective':

Town government should be at the heart of society, outward-looking and cooperative. Policy is not made from behind a desk; public officials know what's going on in Zwolle and their work is directed at the needs of the client. There is a very close cooperation with all partners in the city.

98 *id.*

99 *Hes, op. cit.*, n. 53, p. 96.

100 *id.*, p. 95.

101 *Groen, op. cit.*, n. 62, p. 9.

Town officials and politicians pay regular visits to all quarters of Zwolle. During such visits, either on foot or by bicycle, officials take note of problems in the Indonesian quarter that require further attention, and all members of the community are encouraged to walk or cycle with them. One official summarizes their attitude as follows:

Our golden rule is: listen to what the residents say. Our second rule: do not shy away from creative solutions.¹⁰²

This is also reflected in the interviews with local police officers. According to one policeman:

The rules are made by the residents themselves; it is our job to help them enforce these rules.¹⁰³

His position is illustrated by the following events. For a long time, many people in the Indonesian quarter had complained about heavy traffic from the nearby motorway that used the small streets in their neighbourhood to avoid traffic jams. At one point, several inhabitants of the *Sumatrastraat* decided to block their street with a concrete pole and a wire fence. Only two days after this incident, members of the community met with town officials. As a result of this meeting, the *Sumatrastraat* was formally closed by way of a removable fence, which allows only a limited number of cars to pass. Moreover, local inhabitants were made responsible for this fence. This solution goes against official traffic rules, and people in other parts of Zwolle objected to what they considered a bonus for anti-social behaviour.

2. *Material equality*

The ‘personalistic value orientation’ of the NITZ team is also reflected in their attitude towards equality. In the Indonesian quarter, public officials feel less inspired by the idea of ‘general justice’ that focuses on official rules and general norms (*Normgerechtigkeit*) and they adhere more to the idea of ‘individual justice’ that emphasizes individual solutions for specific problems (*Einzelfallgerechtigkeit*). In their opinion, one should not focus on treating all people equally, but consider ways that may help restore the equal position of individuals instead. It is, in other words, not the intent but the result of their actions that should promote equality. In some cases, this may require favouring some citizens over others.

This attitude is most clearly expressed in the way the NITZ team – and the local housing association in particular – used so-called ‘special contracts’ for the allocation of houses.¹⁰⁴ In these contracts, each tenant is treated differently and each has to fulfil different requirements to be eligible for a

102 id.

103 Hes, op. cit., n. 53, p. 43.

104 id., p. 61.

house. In one of these contracts, Mrs A., who had been refused a house before, was offered a house under the specific condition that she would *not* allow her two sons to move in with her. Moreover, she was obliged to arrange for other members of her family to take care of her. Both sons of Mrs A., who locally held a somewhat notorious reputation, were offered a house as well. Before the 1994 incident, they used to live in a caravan. In their contracts, the men were explicitly prohibited from drinking more than one litre of beer a day. In his defence of these and other remarkable contracts, the managing director of the local housing association claimed:

You may argue, equal cases should be treated equally. But that simply doesn't hold for the Indonesian quarter. Here, there are no equal cases ...¹⁰⁵

With regard to these and other examples, the evaluation study concludes: 'Justice is done by recognizing the importance of individual differences and by treating the neighbourhood favourably.'¹⁰⁶ Whereas the legal definition of the *Rechtsstaat* adheres to a concept of 'formal equality', the members of the NITZ team and others acted upon the value of 'material equality'.¹⁰⁷

3. Discussion

Following a 'European' conception of legal consciousness (with its emphasis on 'living law'), the 'Living *Rechtsstaat*' model allows us to analyse life in the Indonesian quarter 'from below'. This provides us with a completely different image of this neighbourhood. Unlike the previous rather grim picture, which focused on 'official' law and which led to the conclusion that officials do not follow the legal principles of legality and equality, this alternative perspective suggests that local government officials are motivated by two different values instead: responsiveness and material equality. To most officials involved in the redevelopment of the Indonesian quarter, these values represent two important fragments of their own ideal of the *Rechtsstaat*. Both values do not constitute some degree of more or less *Rechtsstaat*, but a different type of *Rechtsstaat* altogether.

In this way, Ehrlich's concept of 'living law' has proven very helpful in formulating an alternative perspective on legal consciousness, yet the use of his work is not without problems. Ever since Ehrlich first published his ideas on an empirically based concept of law which was broader than the state law, he was faced with strong criticism and sometimes even outright hostility from many lawyers and legal theorists.¹⁰⁸ Kelsen argued, for instance, that Ehrlich had simply confused normative and descriptive analysis and his

105 *id.*, p. 61.

106 *id.*, p. 117.

107 *id.*, p. 106.

108 Banakar, *op. cit.*, n. 94, p. 33.

notion of law was wrong¹⁰⁹ whereas others have accused Ehrlich of practising ‘megalomaniac jurisprudence’,¹¹⁰ seeking to encompass everything with little discrimination. Using his ideas in studies of legal consciousness may well provoke similar reactions. Yet, Ehrlich’s failure to make a clear distinction between law and other social norms seems especially problematic in normative jurisprudence but does not necessarily undermine the usefulness of the concept of ‘living law’ in descriptive studies.¹¹¹ The previous section has provided a first illustration of what these studies may look like. More empirical and conceptual research is needed to develop this approach further.

CONCLUSION: REDISCOVERING EUGEN EHRLICH

The increasing significance of issues of legal consciousness is not only present in the predominantly American socio-legal literature, but in Europe as well. In this paper, it has been argued that aside from the most commonly used ‘American’ conception of legal consciousness, which echoes the work of Roscoe Pound and which focuses on the ‘(official) law in action’, there is also an important alternative perspective. This ‘European’ conception of legal consciousness was first introduced by Eugen Ehrlich and looks at people’s own ideas and expectations of law.

Over the years, the study of legal consciousness has undergone several changes. Early studies in the 1970s had a strong positivistic character and used statistical surveys to measure people’s knowledge and opinion about law. By contrast, more recent studies use detailed observations to analyse the constitutive character of law. These studies offer a much more detailed and contextualized image of the law in people’s everyday lives. Yet, both types of study are still limited to ‘official’ law. Therefore, an important step forward in the development of legal consciousness studies may be to try and integrate the ‘American’ and ‘European’ conceptions of legal consciousness. In a way, both views are two sides of the same coin. How people think about ‘official’ law is closely related to what they themselves experience as law. Likewise, people’s own sense of law and justice cannot be seen in complete isolation from their attitude towards ‘official’ law.

The development of such an integrated perspective might benefit from a ‘rediscovery’ of the work by Eugen Ehrlich. In 1912, when Ehrlich first introduced his ideas on legal consciousness, the great ethnic and cultural diversity in the Bukowina was still quite exotic. At present, however, almost

109 See for a recent reprint of their debate, H. Kelsen and E. Ehrlich, *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/17)* (2003).

110 See Cotterrell, *op. cit.*, n. 2, p. 40.

111 See Nelken, *op. cit.*, n. 47, p. 161.

one century later, in many countries multiculturalism and legal pluralism are no longer the exception but the general rule. In this ‘global Bukowina’,¹¹² the study of legal consciousness increasingly calls for an approach that not only focuses on the (diminishing) social significance of ‘official’ law, but also takes seriously people’s own ideas of law and justice.

112 G. Teubner, ‘“Global Bukowina”: Legal Pluralism in the World Society’ in *Global Law Without a State*, ed. G. Teubner (1997) 3.