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Erasmus University Rotterdam
Making Minds Matter

Frontrunners vs Free Riders? Mapping the Institutional Implementation of Human Rights Due Diligence in France and the Netherlands

SILVIA CIACCHI* & CAITLIN W. CERQUA**

Abstract

This paper analyses the institutionalisation process of human rights due diligence ("HRDD"), from its origins as an international soft law doctrine into national hard law. The paper offers a comparative overview of the implementation process of HRDD in France and the Netherlands, with the aim to understand how and why institutional change took different forms in the two jurisdictions. The analysis applies the theoretical framework of historical institutionalism in order to understand the nuances of institutional change and assess whether this is a tale of frontrunners and free riders.

Keywords

HRDD, soft law, hard law, institutional change, historical institutionalism, France, Netherlands, comparative analysis, European Union, UNGPs

Introduction

The international soft law frameworks for corporate social responsibility (CSR) and business and human rights (BHR) have flourished and grown in authority over the past twenty years. The United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD) have been instrumental in supporting this evolution, most prominently in the development and promotion of the UN Guiding Principles on Business and Human Rights (hereinafter 'UNGPs', 'the Principles')[1] and the OECD Guidelines for Multinational Enterprises (hereinafter 'OECD

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[1] United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect Respect and Remedy" Framework* (2011).

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Guidelines'),[2] respectively. The institutional change and doctrinal development in the field of BHR are particularly interesting because of the unique characteristics of this emerging field of law. This is especially true for one of the most prominent doctrinal innovations to come out of this soft law framework: human rights due diligence (HRDD).[3] Despite being a relatively new 'institution', HRDD has undergone a significant evolution in the past decade, expressed in an ongoing process of crystallisation of what was previously a soft law-based norm, into the fabric of several national legal systems. When looking at the process of implementation of HRDD by the European Union Member States, different approaches can be observed. France and the Netherlands, in particular, exhibit starkly opposing implementation processes. While France took a decisive and leading approach by developing the first mandatory HRDD (mHRDD) law – the *Loi de Vigilance* – in 2016, the Netherlands initially followed a largely soft-law-based approach, based on a network of non-binding multi-stakeholder governance initiatives and only moved towards the development of a mHRDD law in 2019. What are the reasons and implications of these two opposite approaches? Is this a tale of frontrunners and free riders?

1. Research Framework

1.1. Research Question and Sub-Questions

The paper investigates the overarching question of *what determined the differences in the implementation process of HRDD in France versus the Netherlands*. The research seeks to map this dynamic process and extrapolate the driving factors behind it.

The analysis is articulated in a series of sub-questions. Firstly, the research examines *the roots and historical development of HRDD as an institution.* Going back to the creation of the concept of HRDD in the international soft law space, the paper draws a timeline of the increase in relevance and authoritativeness of this doctrine, and what eventually led to the "critical juncture" in which the institutional change of HRDD from soft law to hard law was set in motion.[4] In this way, the research asks *how the institution of HRDD changed over time* and it identifies *the critical juncture* in this respect. The paper carries out a comparative overview of the French and Dutch

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[2] The latest version of the Guidelines was published in 2023, however, this paper primarily references the 2011 version. See OECD, *OECD Guidelines for Multinational Enterprises, 2023 Edition* (2023) and OECD, *OECD Guidelines for Multinational Enterprises, 2011 Edition* (2011).

[3] In its pure form, due diligence refers to the gathering of material information for risk assessment purposes. The first time the term was used in hard law was with the United States Securities Act of 1933. Since then, it has found several applications in other fields of law.

[4] The concept of "critical juncture", as well as the other key notions of historical institutionalism are briefly defined in the section detailing the theoretical and methodological framework. A deeper elaboration of these topics is then set forth in the section detailing the mapping of the institutional change.

jurisdictions throughout key points in time and seeks to assess *what were the different (socio-political) conditions in France and the Netherlands at the critical juncture moment.* By understanding the parallels and differences in socio-political realities of the two countries at the time, the paper ponders on *how the above conditions informed the choices made by France and the Netherlands at the critical juncture moment.* Looking at how the legal frameworks developed following the critical juncture moment can shed light on *in what way the abovementioned choices established path dependence in the two jurisdictions.* Finally, having built a theoretical framework aimed at explaining the institutional implementation of HRDD in France and the Netherlands, the paper relies on its findings to assess *the foreseeable future developments regarding the entrenchment of HRDD in the European Union.*

1.2. Theoretical and Methodological Framework

This paper employs an interdisciplinary approach to the study of institutional change and doctrinal innovation in the field of HRDD legislation in Europe. Institutions are defined by sociologist John Meyer as entities with 'a network of rules creating public classifications of persons and knowledge'.[5] The process by which a certain phenomenon becomes 'institutionalized' can therefore be envisaged as the passage through which a loose concept becomes endowed with "a rule like status in social thought and action".[6]

Institutionalism is a branch of theory that studies and highlights the role played by rules and structures in the interactions of individuals, whether these be sociological, economic or political. 'Old' institutionalism, as it has now come to be known, focused primarily on formal institutions, such as those in government.[7] By contrast, *new* institutionalism studies these same interactions, but without the constraint that 'institutions' be formally organized, as such.[8] This new framework is also decidedly plural in nature, of its most popular threads are rational choice institutionalism, sociological institutionalism and historical institutionalism.[9] The latter of these forms the theoretical basis of the present work.

Historical institutionalism distinguishes itself from the other new institutionalist theories primarily by way of its frame of analysis, which considers how institutions

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[5] John W. Meyer, *The Effects of Education as an Institution* 83 AJS 55, 55 (1977).

[6] John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony* 83 AJS 340, 341 (1977).

[7] A. L. Stinchcombe, *On the Virtues of Old Institutionalism* 23 Annu. Rev. Sociol. 2, 5 (1997).

[8] M. Fiorina, *Rational Choice and the New(?) Institutionalism* 28 Polity 107, 108 (1995).

[9] Rational choice institutionalism, as the name suggests, applies rational choice theory to understand the decision-making processes of institutional actors. It sees institutions as the boundaries within which rational individuals seek to maximize their utility. Sociological institutionalism focuses on how institutions influence the behaviour, identity and belief of individuals. In this sense, it is primarily used to analyse informal institutions. For an overview of the three institutionalisms see: Mark, Bevir, ed. *Encyclopedia of Political Theory*, p. 699-702 (Sage Publications 2010).

exist over time.[10] The fundamental tenets to be identified in a historical institutionalist analysis are: path dependency and critical juncture.[11]

This paper considers the institution of HRDD as the primary unit of analysis. HRDD is a series of expectations of behaviour on corporations regarding the implementation of risk assessment practices and systems for mitigation and prevention of possible negative human rights impacts derived from or connected to their business activities. It is intended as a series of procedural steps that – if correctly implemented – would enable a corporation to integrate human rights awareness and risk mitigation into the fabric of their business operations and foster intrinsic changes in corporate practices. In this respect, the paper focuses on how HRDD changed – and is changing – from a soft law-based norm into hard law in the legal frameworks of France and the Netherlands. Thus, the institutional change object of this analysis is the institutionalisation and implementation of HRDD in both jurisdictions. Key institutional actors and their contributions to the dynamics of institutional change play an important role in this analysis. In particular, the paper considers the role of civil society actors, especially NGOs, international organisations like the UN and OECD, the national governments of France and the Netherlands, and European Union institutions.

The sources utilized in the research are documentary in nature, ranging from legal instruments to official government communications, journal articles, academic books and accredited media sources.

2. Mapping Institutional Change: The Case of HRDD

2.1. A Historical Institutionalist Perspective of Institutional Change

Since old institutionalist analysis was primarily focused on how and why institutions persist through time and how they affect the behaviour of individuals, new institutionalism was often criticized for failing to capture and explain institutional change.[12] However, more recent applications of historical institutionalism have provided notions and language that can be used to explain not only why institutions endure, but also why and how they might change. According to historical institutionalist theory, institutions generally undergo long periods of stability, alternated by moments

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[10] Peter A. Hall, *Politics as a Process Structured in Space and Time* in *The Oxford Handbook of Historical Institutionalism*, 31 (Oxford 2016), Paul Pierson, *The Path to European Integration: A Historical Institutionalist Analysis* 29 Comparative Political Studies 123, 126 (1996).

[11] Ellen M. Immergut, *Historical-Institutionalism in Political Science and the Problem of Change* in *Understanding Change: Models, Methodologies and Metaphors,* 242 (Springer 2006).

[12] James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change* in *Explaning Institutional Change: Ambiguity, Agency, and Power,* 2 (Cambridge University Press 2009), Peter A. Hall, *Historical Institutionalism in Rationalist and Sociological Perspective* in *Explaining Institutional Change: Ambiguity, Agency, and Power*, 205-206 (Cambridge University Press 2009).

of disruption.[13] These moments are referred to as 'critical junctures' – an event which essentially creates a 'fork' in a given timeline. The exogenous nature of critical junctures are essential to the understanding of path dependency, indeed, as posited by Thelen and Steinmo, 'institutions explain everything until they explain nothing'.[14] Critical junctures occur in the presence of special conditions that enable institutional change.[15] These are divided into 'permissive conditions' and 'productive conditions'.[16] Both must subsist at the same time in order for a critical juncture to open, and for institutional change to occur. Permissive conditions are those that affect the institutional context to a degree to which the probability of institutional change is heightened.[17] They also mark the duration of the critical juncture – which may vary in length, possibly even lasting several years.[18] Examples of permissive conditions are periods of crisis, economic shocks, social movements, political agitation etc. When these conditions subsist, there is an opportunity for change. The outcome of the change is determined by the productive conditions. In the presence of the same permissive conditions, different productive conditions can lead to divergent institutional outcomes.[19] Examples of productive conditions could be pre-existing legal frameworks, cultural or historical factors, socio-political arrangements etc.

There are several permissive conditions that can be identified in the current analysis: the build-up in the authoritativeness of the international soft law framework of CSR, constant efforts of non-governmental actors to build awareness about the field of business and human rights, and certain key events that brought the topic of human rights violations by corporations to the forefront of public discourse. These conditions, in turn, enabled certain jurisdictions, like France and the Netherlands, to initiate institutional change. Particular attention is put on how increased acceptance and support of HRDD by key institutional actors may have contributed to reaching a tipping point for the institutionalisation of HRDD.

The following subsections describe the origins of HRDD as an institution in the international space and demonstrate how the aforementioned processes (permissive conditions) may have contributed to the opening of a critical juncture in the Dutch and French environments. In Section 3 the paper undergoes a comparative analysis of the two countries in an effort to identify the productive conditions that influenced

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[13] This is referred to as the dual mode or dualist conception of institutional development, G Capoccia & R. D. Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism* 59 World Politics 341, 341 (2007), Other modalities of institutional change also exist in the literature. For example, see Mahoney & Thelen (2009).

[14] Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics* in *Structuring Politics: Historical Institutionalism in Comparative Analysis*, 15 (Cambridge University Press 1992).

[15] Capoccia & Kelemen (2007), at 343.

[16] Hillel David Soifer, *The Causal Logic of Critical Junctures* 45 Comparative Political Studies 1572, 1572 (2012).

[17] Soifer (2012), at 1574.

[18] Capoccia & Kelemen (2007), at 350.

[19] Soifer (2012), at 1575.

the differences in the implementation processes and led to the different legislative outcomes.

2.2. Origins of HRDD: An International Soft Law-Based Institution

HRDD first originated in the context of international law. Although due diligence has been an established concept in the business world for a long time, its application to human rights – especially business and human rights – was first introduced in the early 2000s with the United Nations' Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (hereinafter 'Draft Norms').[20] The 2003 Draft Norms were intended to become the first hard law-based instrument on BHR, introducing binding obligations for companies to respect international human rights law. The negotiations on this instrument never came to fruition and as a result, the Norms never entered into force.[21] Despite this failure, the concept of HRDD survived and became a central aspect of the UN Guiding Principles on Business and Human Rights, which remains today one of the most influential pieces of soft law in the field of BHR. The UNGP project has its origins in 2005, when Special Representative John Ruggie was appointed a mandate to produce a normative instrument on BHR.[22] The mandate was completed in 2008, with the publication of the Protect, Respect and Remedy Framework (hereinafter 'the Framework'), and then was renewed for three more years, culminating with the UNGPs in 2011.[23] John Ruggie intentionally undertook a 'soft governance', multi-stakeholder dialogue-based approach, and favoured the creation of a soft law instrument,[24] in light of the failure of the hard law-based Draft Norms.[25] The UNGPs and HRDD were able to gain considerable authoritativeness and strength in the international law sphere, starting with a unanimous endorsement of the Principles by the Human Rights Council in July 2011.[26] Since then, the UNGPs have become more and more prominent, together with other international soft law instruments such as the OECD Guidelines and the International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (hereinafter

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[20] *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2003) E/CN.4/Sub.2/2003/12, UN. Subcommission on the Promotion and Protection of Human Rights. Working Group on the Working Methods and Activities of Transnational Corporations.

[21] John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* in *Research Handbook on Human Rights and Business,* 70-71 (Elgar 2020).

[22] Ruggie (2020), at 74.

[23] Ruggie (2020), at 74-79.

[24] Soft law is a non-binding obligation with normative character.

[25] Ruggie refers to this as an exercise of "polycentric governance" in Ruggie (2020), at 74-79.

[26] Human Rights Council, Seventeenth session, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/RES/17/4 (6 July 2011).

'ILO Declaration'),[27] receiving widespread support from policymakers, civil society organisations and practitioners alike.

The fact that HRDD first manifested in soft law forms has interesting implications. At the international level, soft law-based legislation is not uncommon, especially on more contentious and controversial topics.[28] Once adopted, international soft law can be seen as a political agreement signalling the will and expectation of future hard law developments.[29] This means that although international soft law instruments do not generate any legally enforceable obligation, the adoption and endorsement of soft law in authoritative institutional settings can contribute to establishing the presumption that a matter should be subject to certain rules. An authoritative soft law framework provides guidance to legislators, as it provides a template and a set of principles to adopt in future legislative projects. Further, it provides targeted actors with guidance on behaviour, that can contribute to the creation of expectations and benchmarks for best practices and encourage the crystallisation of social norms. The normative attribute of soft law and its effects in promoting hard law developments through time can be a driver for institutional change. Considering that agreeing on and endorsing a soft law instrument signal political support for a set of norms, and can indicate legislative intent in a given area, the presence of strong soft law can be considered a permissive condition for institutional innovation.

Some of the key dates in the timeline of HRDD are 2003, with the failure of the Draft Norms, 2005 and 2008, with the institution and first completion of Ruggie's mandate, and 2011 with the endorsement of the UNGPs. Although it is difficult to pinpoint the exact moment of a critical juncture opening, all these dates point to moments of an incremental process of strengthening and consolidation of HRDD as an international soft-law-based norm.

2.3. Exploring the Critical Juncture

The story of the institutionalisation of HRDD in national legal regimes is essentially one of multistakeholderism. Like many other sectors, this form of governance has become more prominent with the shifts in relative importance and capacity of national (and transnational governments), corporations, civil society and other private actors.[30]

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[27] For the latest version of the ILO Declaration see: ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2022 Edition* (2022).

[28] Lawmaking at the international level occurs by consensus. Literature has pointed out that the transaction costs of barraging and coordination that States have to incur to produce international law can determine whether the negotiation process results in soft or hard law. E.g. see: Andrew Guzman & Alan O'Neil Sykes, *Economics of International Law* in *The Oxford Handbook of Law and Economics* (Oxford Academic, 2017).

[29] Meyer describes the normative character of soft law as "the expectation that a non-binding rule will be incorporated into a binding agreement" either under international or domestic law in Timothy Meyer, *Soft Law As Delegation* 32 Fordham International Law Journal 888, 890-891 (2008).

[30] Huib Huyse & Boris Verbrugge, *Belgium and the Sustainable Supply Chain Agenda: Leader or Laggard?* 20 HIVA Research Institute for Work and Society (KU Leuven 2018), Peter Utting, *Introduction* in *Business Regulation and Non-State Actors*, 3 (Routledge 2011).

The below sections detail the interactions between these different entities giving rise to the permissive conditions necessary for the trigger of the critical juncture.

2.3.1. Support from International Institutional Actors

The years 2008 and 2011 marked two moments of success of the UNGP project, with the renewal and fulfilment of Ruggie's mandate and public institutional support for the Framework and the Principles. In June 2011 HRDD officially became an institution in the international soft law landscape. As mentioned, the UNGPs were unanimously endorsed by the UN Human Rights Council, a geographically representative and authoritative body.[31] Shortly thereafter, the OECD Guidelines for Multinational Enterprises adopted the notion of HRDD, utilising very similar language to that of the Principles.[32] The support of an established institutional actor like the OECD, as well as the alignment of the Principles with the OECD Guidelines – a pre-existing authoritative soft-law instrument for corporate governance – provided an important contribution to the consolidation of the HRDD.[33] Indeed, whilst the UNGPs can be credited with the first introduction of HRDD in the soft law space, the OECD Guidelines are often cited and referred to, as they provide relatively more in-depth operational guidance. Similarly, the ILO Declaration provides what can be understood as a practical guidance to enterprises on incorporating sustainable workplace practices.[34] In 2011 the European Commission published a communication laying out "A renewed EU strategy 2011-14 for Corporate Social Responsibility", which set out plans for the implementation of the UNGPs.[35] A 2012 review of that strategy by the European Parliament supported HRDD, with specific reference to the OECD Guidelines.[36]

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[31] The Human Rights Council is formed by 47 elected members that serve 3-years staggered terms. The nationality of the elected members is chosen in order to provide proportional geographic representation according to the UN regional grouping system. In the terms overlapping with 2008 and 2011, the composition of the Human Right Council included members form France (2009-2011 term) and the Netherlands (2008-2010). See: UN General Assembly – Elections & Appointments, (2008). <https://web.archive.org/web/20081114214133/https:/www.un.org/ga/62/elections/hrc_elections.shtml>., UN General Assembly 61st Session – Human Rights Council Election, (2019), https://web.archive.org/web/20190110031542/http:/www.un.org/ga/61/elect/hrc/.

[32] The addition happened in 2011. Indeed, the 2011 version of the OECD guidelines introduced a whole chapter on human rights. See: OECD, *OECD Guidelines for Multinational Enterprises 2011 Edition* (2011).

[33] Notably, France and the Netherlands are founding members of the OECD.

[34] HRDD was introduced in the 2017 edition of the ILO Declaration. See International Labour Organisation, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) 2017 Edition* (2017).

[35] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed Strategy 2011-14 for Corporate Social Responsibility,* https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF (25 Oct. 2011).

[36] European Parliament, *European Parliament resolution of 13 December 2012 on the review of the EU's human rights strategy (2012/2062(INI)),* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012IP0504&qid=1697044201288 (13 Dec 2012).

It appears that June 2011 marked the start of a transition period, in which key institutional actors started taking concrete steps toward the institutionalisation of HRDD. For purposes of this analysis, the wave of institutional endorsement of the Principles and HRDD starting from 2011 onwards can be seen as a build-up of permissive conditions, signalling the opening of a critical juncture moment.

2.3.2. The Socio-political Shock of Rana Plaza

The early 2010s were characterized by an increase in public awareness of business and human rights issues, paired with an increased demand for more decisive governmental intervention in this respect. In 2010, a fire at Hennes & Mauritz (H&M) supplier Garib & Garib in Dhaka, Bangladesh resulted in 21 fatalities and 50 injuries due to insufficient safety protocols and equipment.[37] In 2012, a similar incident claimed 112 lives. The Tazreen factory produced garments for names such as Wal-Mart, C&A, KiK and El Corte Inglès.[38]

The above stories make up only a small portion of the many human rights violations that occurred in the first part of the 2010s. Indeed, according to a report issued by risk analysis firm Maplecroft in 2013, human rights abuses had increased by 70% since 2008.[39]

Public tensions on the topic of business and human rights reached a tipping point in 2013 following the tragic collapse of the Rana Plaza building in Bangladesh, taking the lives of more than 1000 and injuring many more.[40] The facility hosted several garment factories providing manufacturing services for prominent European brands and retailers. The structural collapse, the deadliest accident of its kind in modern history, was found to have been caused by systematic negligence.[41] The incident illuminated the dangers of the systematic exploitation by large multinational corporations of workers in weak human rights protection regimes. The public uproar following this event was particularly strong in the European Union.[42] Prominent European brand

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[37] Business & Human Rights Resource Centre, *Bangladesh: Fire at Garib & Garib Clothing Factory Kills 21, Injures over 50,* https://www.business-humanrights.org/en/latest-news/bangladesh-fire-at-garib-garib-clothing-factory-kills-21-injures-50-article-includes-comments-by-buyer-hm/ (28 Feb. 2010).

[38] Human Rights Watch, *Bangladesh: After Fire, Companies Evade Compensation: Two Years On, Tazreen Catastrophe Victims Still Lack Assistance,* https://www.hrw.org/news/2014/11/23/bangladesh-after-fire-companies-evade-compensation (23 Nov. 2014).

[39] Relief Web, *World: Human Rights Risk Index 2014,* https://reliefweb.int/map/world/world-human-rights-risk-index-2014 (4 Dec 2013).

[40] NPR, *The Tragic Number That Got Us All Talking About Our Clothing,* https://www.npr.org/sections/money/2013/12/26/257364509/year-in-numbers-the-tragic-number-that-got-us-all-talking-about-our-clothing (26 Dec. 2013).

[41] The Guardian, *Bangladesh Factory Collapse Blamed on Swampy Ground and Heavy Machinery,* https://www.theguardian.com/world/2013/may/23/bangladesh-factory-collapse-rana-plaza (23 May 2013), BBC News, *Rana Plaza Collapse: Sohel Rana Jailed for Corruption* https://www.bbc.com/news/world-asia-41082448 (29 Aug. 2017).

[42] P Spiegel & J Wilson, *E.U. Considers Trade Limits on Bangladesh,* https://www.ft.com/content/7f6d9cb0-b24d-11e2-8540-00144feabdc0 (1 May 2013), European Commission, *Joint Statement by HR/VP Catherine Ashton and EU Trade Commissioner Karel De Gucht following the recent building*

names suffered a significant reputational backlash in the wake of their involvement with the Rana Plaza factories. Several EU jurisdictions felt a political shock. As argued in this paper, April 2013 became a tipping point after which several jurisdictions took decisive action and underwent a process of institutional change. Out of all the EU Member States, the socio-political shock was especially prominent in France, because of the involvement of many French companies in the tragedy.[43]

Civil society has long been recognized for their role in policymaking. Fundamentally distinct from governmental actors, yet 'explicitly seek[ing] to shape' the outcomes of governments, civil society can encompass a wide range of actors, such as non-profit organisations, non-governmental organisations, charities, trade associations and even academic institutions.[44] The literature documents well the role played by civil society actors particularly in improving representation of minority groups and the interests of other countries who lack administrative capacity to bargain equally with others.[45] Though human rights had been a prominent talking point in French civil society organisations for some time, as will be explored in the following section, the Rana Plaza incident evoked a particularly strong response from several key NGOs in France. In fact, the importance of the civil society actors in France in bringing these legal developments to the fore cannot be overstated. Indeed, the draft due diligence law presented to the French Parliament in 2013 was the product of 'a small, peripheral group of young, female activists, together with lawyers and left-wing deputies'.[46] This reaction not only aided in fuelling the public outcry on the ground, but also played a key role in shaping the government's response. In the Netherlands, the roles of governmental officials and civil society organisations in the reaction to Rana Plaza played out differently. As explored in the later section outlining the Dutch institutionalisation timeline, the Dutch model of HRDD implementation took form of a multistakeholder collaboration between NGOs, governmental actors and practitioners. In this sense, Dutch civil society actors were actively included in an institutionalized process of collective bargaining and decision making, overseen and supported by the government.[47] As argued below, this is consistent with Dutch culture and policymaking tradition.

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collapse in Bangladesh, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_395 (30 April 2013).

[43] The Rana Plaza Arrangement, *The Rana Plaza Donors Trust Fund,* https://ranaplaza-arrangement.org/trustfund/, M Krehl, *Dix ans après le drame du Rana Plaza, l'industrie de la mode a-t-elle change?* https://www.lefigaro.fr/industrie-mode/dix-ans-apres-le-drame-du-rana-plaza-l-industrie-de-la-mode-a-t-elle-change-20230423#:~:text=Benetton%2C%20C%26A%2C%20Camaïeu%2C%20H%26M,Plaza%2C%20le%2024%20avril%202013 (23 April 2023).

[44] World Economic Forum, *Who and What is 'Civil Society'?* https://www.weforum.org/agenda/2018/04/what-is-civil-society/ (23 April 2018), World Bank, *Civil Society*, https://www.worldbank.org/en/about/partners/civil-society (18 Sep. 2022).

[45] Keck and Sikkink (1998), Princen and Finger (1994), Scholte (2004), Arts (1998), Betzold (2010).

[46] A. Evans, *Overcoming the Global Despondency Trap: Strengthening Corporate Accountability in Supply Chains* 27 Review of International Political Economy 658, 662 (2020).

[47] For a further insight on the Dutch governments' response to the Rana Plaza scandal, see Rijksoverheid, *10 Jaar na Ramp Rana Plaza: Stappen in de Goede Richting, Maar Inzet Blijft Nodig,* https://

The incremental increase in public awareness, interest and political relevance of the topic of business and human rights, together with increased efforts from civil society to push for governmental action in this respect, were instrumental drivers for the institutionalisation of HRDD, especially in France. In this sense, these factors can also be assimilated to permissive conditions. Considering this socio-political context, together with the abovementioned developments in the international soft law space, the period between 2011 and 2013 can be identified as a critical juncture in the process of institutionalisation of HRDD and how it changed from international soft law into national doctrine and hard law. As EU Member States and OECD countries, France and the Netherlands were at the centre of the institutional discussion about HRDD as a soft law tool. Both countries were also affected by the socio-political shock born out of the Rana Plaza incident.

Having laid out what may amount to some of the key permissive conditions for institutional change, the following section provides a comparative overview of HRDD institutionalisation in France and the Netherlands, seeking to narrow down what productive conditions may have been present in each jurisdiction, and how they may have influenced the divergent institutional outcomes that can be observed.

3. Institutional Development in France and the Netherlands: A Comparative Overview

The jurisdictions of France and the Netherlands display starkly distinct approaches to the hard law institutionalisation of HRDD, as explored briefly in the introduction to this paper. While the permissive preconditions that enabled these institutional changes are almost identical for both EU Member States, their divergent productive preconditions resulted in very different outcomes at the legislative level. This section will explore in deeper detail these productive conditions in order to analyse the way in which the choices made by each Member State at the critical juncture established their path dependency.

3.1. The French Example

The French model of HRDD, namely *La Loi de Vigilance* ("the *Loi*"), attracts much academic attention due to its rapid adoption in 2017 following the Rana Plaza incident just four years prior. However, concrete efforts towards the development of HRDD measures in France date back much further.

Even if this law was not created with the idea of being the frontrunner, or innovator in the legal doctrine of HRDD, it became a relevant talking point towards the latter part of the law's development. As a contextualizing point, it is important to note France's position in the EU economy, and their self-assigned role as part of the EU's

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www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/het-werk-van-bz-in-de-praktijk/weblogs/2023/10-jaar-na-ramp-rana-plaza (24 April 2023).

leaders which, in the *Loi*'s time of darkness, acted as a source of motivation to ensure that the pursuit continued.[48] For one, France is the seventh largest economy in the world.[49] In the EU, France, together with Germany, makes up more than half of the EU's GDP.[50]

In 1995, French NGOs came together to collaborate on the *Éthique sur Étiquette* whistleblowing campaign, which aims to expose human rights abuses in the work environments of several companies, especially in the textile industry.[51] Even in the absence of a legal framework to tie French brands to exploitation in their supply chains, the collective nonetheless succeeded in drawing much public attention to the topic, and as a result, was able to broker a number of deals between certain brands and unions in the countries that they operated in.[52] By the early 2000s, several associations in France were working on the issue of corporate social responsibility throughout various other sectors. Indeed, writing in 2008, French CSR scholar Delalieux claimed that corporate social responsibility had been undergoing a certain 'craze', and this already for several years.[53]

During his campaign in 2012, former President François Hollande affirmed his commitment to holding companies responsible for their impacts on the environment and human well-being, seemingly availing himself to the adoption of a law of this kind during his term.[54] Three prominent NGOs, namely Amnesty International, CCFD Terre Solidaire and Sherpa, each having separately conducted work in this domain, formed a partnership with the objective of proposing this law.[55] However, following the French government's formation in 2012 and newly applied pressure from the corporate sphere, elected representatives began to distance themselves from the

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[48] C Bright, *Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Duty of Vigilance Law the Way Forward?* 1 Max Weber Programme Working Papers 1, 10 (2020).

[49] A. O'Neill, *Countries with the Largest Gross Domestic Product (GDP) 2022*, https://www.statista.com/statistics/268173/countries-with-the-largest-gross-domestic-product-gdp/ (29 Aug. 2023).

[50] Eurostat, *Which Member States Have the Largest Share of EU's GDP?,* https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180511-1 (11 May 2018).

[51] Collectif Éthique sur l'Étiquette, *Qui Sommes-Nous?,* https://ethique-sur-etiquette.org/Qui-sommes-nous-11.

[52] Collectif Éthique sur l'Étiquette, *Des Entreprises Poussées à Agir,* https://ethique-sur-etiquette.org/Des-entreprises-poussees-a-agir, G Delalieux, *Influence des ONG dans la construction des praqtiques de RSE et développement durable: Une étude de cas* 4 Mondes en Développement 45, 47 (2008).

[53] Delalieux, *Influence des ONG,* 45.

[54] Assemblée Nationale, *Rapport fait au nom de la Commission des Lois Constitutionnelles, de la Législation et de l'Administration Générale de la République sur la Proposition de Loi (nº 1519) de Mmes Denielle Auroi, Barabara Pompili et M. François de Rugy et plusieurs de leurs collègues, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre,* https://www.assemblee-nationale.fr/14/rapports/r2504.asp (21 Jan 2015).

[55] G. Delalieux, *La loi sur le devoir de vigilance des sociétés multinationales : parcours d'une loi improbable* 3 Droit et Société 649, 652 (2020), Droits de l'Homme, *Programme 5e Forum Mondiale,* 10, http://guinee44.org/wp-content/uploads/2013/05/130517_programme_5e_fmdh_fr_web.pdf (22-25 May 2013).

project.[56] It has been pointed out in the literature that although Hollande presented himself as left-leaning during campaigns and other public messaging opportunities, his policies rarely fell into this category.[57] Indeed, the *Loi* appeared to be incompatible with the proposition of other laws, namely *La Loi Travail El Khomri* and the *Crédit d'impôt pour la compétitivité et l'emploi,* all of which confirmed Hollande's government's true liberal nature.[58] Nevertheless, work on developing a proposal continued amongst the three NGOs and the few elected representatives who supported them.[59]

As mentioned earlier, the disaster of Rana Plaza in 2013 had considerably increased the reach of NGOs messaging on the ground throughout the EU.[60] This was especially true in France, where corporate social responsibility 'certification' by private companies had already become commonplace, especially by corporate entities known for their financial auditing expertise.[61] This type of outsourcing to auditing firms contributed to the creation of an image of French companies in the early 2000s as socially responsible.[62] After the incident, it became clearer to the public that government action was required, and indeed, as a result of the incident and its gravity, government action became *possible*. As opposed to many other developed nations, France remains an economy with essentially *dirigiste* tendencies – state intervention is encouraged, rather than eschewed.[63] However, as regards enterprises and their externalities, the Fifth Republic in particular had become increasingly hands-off, leading to a type of 'institutional inertia'.[64] The disaster of Rana Plaza was thus, as identified earlier, a critical moment in the timeline and a fork in the road.

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[56] Delalieux, *Parcours d'une loi improbable*, 652

[57] N. Parsons, *Left Parties and Trade Unions in France* 13 French Politics, 63, 65 (2015).

[58] Delalieux, *Parcours d'une loi improbable,* 652, the former of these laws sought to liberalize the relations between workers and their employers, notably by reducing certain benefits and protections of employers, the latter of these laws established a tax credit for companies who employ salaried workers.

[59] Notably Danielle Auroi, Philippe Noguès and Dominique Potier.

[60] G Delalieux, *Devoir de vigilance* 3 Revue Projet 78, 79 (2016), C Alet, *Les multinationales coincent sur leur devoir de vigilance*, https://www.alternatives-economiques.fr/multinationales-coincent-devoir-de-vigilance/00050989 (1 Dec 2016).

[61] Delalieux, *Devoir de vigilance,* 80, C. Gaudy, C. Godowski & J. Maurice, *L'audit RSE à la croisée des chemins* 5 Revue Française de Gestion 59, 60 (2022), C. Gillet-Monjarret & G. Rivière-Giordano, *La verification sociale : une revue de la littérature* 2 Comptabilité Contrôle Audit 11, 15-17 (2017).

[62] M. Blasco & M. Zølner, *Corporate Social Responsibility in Mexico and France: Exploring the Roles of Normative Institutions* 49 Business and Society 216, 233 (2008), KPMG, *KPMG International Survey of Corporate Responsibility Reporting 2005,* 10, http://www.theiafm.org/publications/243_International_Survey_Corporate_Responsibility_2005.pdf (2005), KPMG, *The KPMG Survey of Corporate Responsibility Reporting 2013,* 23, https://assets.kpmg.com/content/dam/kpmg/pdf/2013/12/corporate-responsibility-reporting-survey-2013.pdf (2013).

[63] B Clift, *French Responses to the Global Economic Crisis: The Political Economy of "Post-Dirigisme" and New State Activism,* in *The Consequences of the Global Financial Crisis*, 213 (Oxford 2012), Blasco & Zølner (2008), at 239.

[64] Delalieux, *Parcours d'une loi improbable,* 661.

The text that was eventually presented to the French National Assembly in November 2013 was very much the product of civil society efforts. The partnership of NGOs mentioned above were not only instrumental in putting the issue on the agenda of the French government (and subsequently insisting that it remain there), but also in the formulation of the law itself.[65]

Despite this initial rapid mobilisation, the text was nevertheless held up "in the drawers of the National Assembly" for nearly two years.[66] This was due to the initial rejection of the text by the 'Commission of Laws' of the Parliament, who subsequently named a member of the Socialist Party as the Rapporteur for the file, counting on their past ease of negotiation in order to water down the text to their liking, notably through the removal of the reversed burden of proof.[67] Indeed, the first proposal would have placed the burden of proof on the companies accused of the harm; the final version of the text imposes this duty of discharge on the claimant.[68] The new version of the text developed prior to its next presentation in Parliament in 2015 was also much more fleshed out than its predecessor, and included the important 'Vigilance Plan': a report put together by enterprises (and published publicly) detailing the measures taken (or to be taken) in order to identify and prevent human rights and environmental harms in their immediate operations, as well as those in their supply chains.[69]

In 2015, the reformulated text underwent a near-death experience. After having received 32 of 33 possible votes in the Parliament after its second reading, the text passed to the Senate, who changed (or deleted entirely) all but one of the *Loi*'s articles.[70] According to Delalieux, this state of affairs suited the executive all too well, who saw the majority right-leaning Senate as a perfect scapegoat for tanking the law.[71] Other forces were also at play. The French Association of Large Companies (Afep), bringing together and representing over 100 of France's most economically prominent enterprises, has been recognized as one of the major lobbying efforts against the *Loi*.

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[65] For an extensive overview of civil society participation in the development of the French due diligence law, see Delalieux (2016).

[66] Alet (2016).

[67] Delalieux, *Parcours d'une loi improbable,* 654-655, Commission des lois constitutionnelles, de la legislation et de l'administration générale de la République, *Compte rendu nº37,* https://www.assemblee-nationale.fr/14/cr-cloi/14-15/c1415037.asp (21 Jan 2015).

[68] A. Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?* 22 Human Rights Review 109, 122, Assemblée Nationale, *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, https://www.assemblee-nationale.fr/14/propositions/pion1519.asp (6 Nov. 2013).

[69] Assemblée Nationale, *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, Art 1.I., https://www.assemblee-nationale.fr/14/propositions/pion2578.asp (11 Feb. 2015).

[70] Sénat, *Compte Rendu Intégral des Débats: Séance du 13 octobre 2016,* https://www.senat.fr/seances/s201610/s20161013/st20161013000.html (13 Oct. 2016), Assemblée Nationale, *Compte rendu intégral: séance du mercredi 23 mars 2016,* https://www.assemblee-nationale.fr/14/cri/2015-2016/20160158.asp (23 March 2016).

[71] Delalieux, *Parcours d'une loi improbable,* 655

Indeed, the President of the association called the draft law, 'a bad answer to a good question'.[72] The Afep, whose mission includes advocacy for a legislative environment that is favourable for companies' growth, has opposed many similar laws emanating from the French and European law-making space.[73] These and other instances of corporate politicking greatly abetted in creating hurdles at the executive level. Several actors within the government were sympathetic to Afep's case, in particular, current President Emmanuel Macron, who occupied the position of Minister of Economy at the time – a considerably important Ministry during Hollande's term.[74] A (short) letter addressed to Macron by the President Afep demonstrates this relationship:[75]

Cher Emmanuel.	Dear Emmanuel,
Ce texte est juste déraisonnable.	This text is just unreasonable.
Amitiés.	Best regards.

In 2016, however, new ambitions saw Macron's priorities shift away from the current government, and towards campaigning for his own. The Minister for Economy resigned, leaving the post to one Michel Sapin, previously the Minister for Labour.[76] Sapin, socialist and pro-workers' rights, immediately started the push towards repositioning the law for constitutional validation, alongside both NGO- and union representatives.[77] It is notable that Sapin participated in the discussions of both the Parliamentary and Senatorial second readings, publicly confirming his support for this "ambitious" law, prior to his appointment, the Minister for Economy had never been present at the presentations nor readings for the *Loi* in either legislative body.[78]

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[72] N Raulin, *Pierre Pringuet: 'Cette loi va pénaliser les multinationales françaises',* https://www.liberation.fr/france/2016/03/22/pierre-pringuet-cette-loi-va-penaliser-les-multinationales-francaises_1441329/ (22 March 2016).

[73] AFEP*, ESA Call for Evidence on Greenwashing: AFEP Position Paper,* https://afep.com/wp-content/uploads/2023/01/2023-CfE-on-greenwashing_Afep-final.pdf (Jan 2023), AFEP, *Position de l'AFEP et du MEDEF sur le règlement prohibant les produits issus du travail force sur le marché unique et à l'export*, https://afep.com/wp-content/uploads/2023/02/2023-02-01-Position-Afep-Medef-Rgmt-Travail-Force.pdf (Feb. 2023).

[74] Delalieux, *Parcours d'une loi improbable,* 655

[75] Delalieux, *Devoir de vigilance,* 81, Evans (2020), at 662, F Roux, *Devoir de vigilance: récit du lobbying autour de la loi*, https://www.contexte.com/article/pouvoirs/loi-sur-le-devoir-de-vigilance-retour-sur-le-lobbying-autour-du-texte_27997.html (1 April 2015).

[76] Le Monde, *Emmanuel Macron démissionne pour 'entamer une nouvelle étape de son combat',* https://www.lemonde.fr/politique/article/2016/08/30/apres-la-demission-de-macron-sapin-nomme-ministre-de-l-economie-et-des-finances_4990065_823448.html (30 Aug 2016).

[77] Delalieux, *Parcours d'une loi improbable,* 655,

[78] Sénat, *Compte Rendu Intégral des Débats: Séance du 18 novembre 2015,* https://www.senat.fr/seances/s201511/s20151118/st20151118000.html (18 Nov. 2015), Sénat, *Compte Rendu Intégral des Débats: Séance du 13 octobre 2016,* https://www.senat.fr/seances/s201610/s20161013/s20161013001.html#orat1 (13 Oct. 2016), Assemblée Nationale, *Compte rendu intégral: première séance du lundi 30 mars 2015,* https://www.assemblee-nationale.fr/14/cri/2014-2015/20150193.asp (30 March 2015), Assemblée Nationale, *Compte rendu intégral: séance du mercredi 23 mars 2016,* https://www.assemblee-nationale.fr/14/cri/2015-2016/20160158.asp. (23 March 2016).

In order for the law to finally be passed in 2017, several substantial adjustments had to be made to the text. One such example is the removal of Article 1.III, which prescribes a fine to be paid by a company for non-compliance with the obligation to set up a vigilance plan.[79] The Constitutional Council abolished this part of the text for non-conformity with the French Constitution.[80] Following these and the other changes brought to the law over the years of its development, the final version of the text has been labelled 'short and vague' – it comprises only four short articles, no practical guidelines, and importantly, no implementing decree.[81] One notable example of the lack of clarity in the text is the way in which the claimant is defined as 'any person with standing'[82] Cases brought before the court in line with the *Loi* have also been few and far between, and notably: without egress. Two cases brought against TotalEnergies by a group of NGOs, for example, were judged inadmissible due to procedural issues in the claimant's cases.[83]

Nevertheless, the core innovation of the law, the 'Vigilance Plan', has been lauded as a particularly important development in mHRDD, and something to carry forward in other legal developments.[84] The fact that these vigilance plans are to be drawn up in consultation with stakeholders is noted as a particularly powerful provision, at least in theory.[85] While not termed a 'vigilance plan' as such, the obligations imposed on companies under the EU's CSDDD has similar phrasing to elements to be included in the French Vigilance Plan.[86] When it comes to practical implementation, companies' vigilance plans, judged as being very poorly executed in the first year of the law's implementation in France, have subsequently improved following annual

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[79] Assemblée Nationale, *Proposition de loi* 2015, *Légifrance,* LOI nº 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Art 1, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/.

[80] Conseil Constitutionnel, *Décision nº 2017-750 DC du 23 mars 2017*, https://www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm (23 March 2017).

[81] P. Barraud de Lagerie, E. Béthoux, A. Mias & E. Penalva Icher, *La mise en œuvre du devoir de vigilance: une managérialisation de la loi?* 106 Droit et Société 699, 701 (2020), The French legal system comprises various different legal instruments, one of which is the *décret d'application*, which serves to clarify certain practical aspects of a promulgated law. The *Loi de Vigilance* envisages a *décret d'application*, specifically with regard to the vigilance plan to be put together by companies. However, no such *décret* has yet been published.

[82] LOI Art 2, E Savourey & S Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption* 6 Business and Human Rights Journal 141 149 (2021).

[83] Tribunal Judiciare de Paris, *Ordonnance du Juge de la Mise en État rendu le 06 Juillet 2023,* https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2023/07/22203403.pdf (6 Jul. 2023), A. Beaujon, *Affaires TotalEnergies: "la loi devoir de vigilance est trop floue"*, https://www.challenges.fr/green-economie/affaires-totalenergies-la-loi-devoir-de-vigilance-est-trop-floue_861423 (11 Jul. 2023)

[84] C. Clerc, *The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains* 1 European Economic, Employment and Social Policy 1,1 (2021).

[85] Clerc (2021), at 3.

[86] European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, Arts 5-7.

feedback from the NGOs involved in the law's development.[87] The law was also historical in the sense that it not only imposed reporting requirements on companies, as many previous CSR policies had done, but actually created a duty of care against which companies could be held accountable.[88]

The contents of the law are sparse, limited, and in dear need of clarification, however, as posited by Delalieux, they 'conceal a major innovation' in doctrine.[89] Indeed, despite its shortcomings, the 'early' adoption of the *Loi* has secured France's position as political frontrunners in this policy space, with many other countries looking to the hexagon for guidance on the drafting of their own laws. While their influence is not cited expressly, the European legislative procedure has also mentioned the French law in several preparatory texts, as well as the Proposal of the CSDDD itself.[90]

3.2. The Dutch Example

The Netherlands has a long tradition of CSR and public interest on business and human rights. CSR was first introduced as a concern of Dutch lawmakers in 1999, with a parliamentary dossier on the topic.[91] When looking at the timeline of the Dutch regulator's policy initiatives, statements and commitments on CSR since then, it appears that several of the milestones in this regard correlate to the key dates for the institutionalisation of HRDD in the international space, as laid out in a previous section. Starting around 2008 the Dutch CSR policy began to be increasingly focused on the international dimension of corporate sustainability concerns increased.[92] In 2011 the guiding policy on CSR was renamed to "international corporate social responsibility" (ICSR),[93] a name that endures to this day. The same year the government committed to the renewed 2011 version of the OECD Guidelines now including HRDD.[94] In 2013 the Netherlands undertook a series of new commitments, restating and strengthening the international dimension of their CSR policy and aligning themselves with the language and framework of the OECD Guidelines and the UNGPs

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[87] Savourey & Brabant (2021) 148, Le Radar du devoir de vigilance, *Notre méthodologie*, https://plan-vigilance.org/methodologie/.

[88] Clerc (2021), at 3, LOI Art 1.I

[89] Delalieux, *Parcours d'une loi improbable,* 656.

[90] European Commision, *Commission Staff Working Document: Follow-up to the second opinion of the Regulatory Scrutiny Board*, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2022:0039:FIN:EN:PDF (23 Feb. 2022), Europea Parliament, *Briefing Requested by the DROI subcommittee,* https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603505/EXPO_BRI(2020)603505_EN.pdf (June 2020), European Commission, *Proposal for a Directive*.

[91] See: Parliamentary Dossier 26485 at <zoek.officielebekendmakingen.nl/dossier/26485>.

[92] This aspect appeared in the policy document titled 'Inspiring, innovating and integrating' and remained in place between 2008 and 2011. See: Policy and Operations Evaluation Department (IOB), IOB Evaluation no. 433, *Mind The Governance Gap, Map the Chain, Evaluation of the Dutch Government's Policy on International Responsible Business Conduct (2012-2018)* 34 (2019).

[93] KST 26.485-106 (2011). *Maatschappelijk verantwoord ondernemen*. 27 April 2011, IOB (2019), p. 35.

[94] OECD (2011).

alike.[95] Public outrage regarding the Rana Plaza collapse can credibly be seen as driving factor behind these initiatives. For example, the announcement the policy document titled "Corporate Social Responsibility pays off" was published by the Dutch Minister for Foreign Trade and Development in June 2013, little over a month after the Rana Plaza incident. In the same announcement, it was also communicated that the government had commissioned a Sector Risk Assessment (SRA) aimed at evaluating the human rights and environmental risks in global value chains linked to the Dutch industry.[96] The SRA was centred around the notion of HRDD and heavily influenced by the UNGP Framework and OECD Guidelines. The assessment, finalized in 2014, concluded by highlighting a list of 13 high risk sectors.[97] It was on this basis that, that same year, the Dutch government launched the International Responsible Business Conduct Covenants ("IRBC covenants", "IRBC agreements") in 2014.[98] The IBRC Covenants policy is formed by a network of sectoral multi-stakeholder agreements between businesses, trade associations, government, unions or NGOs and the Dutch government. They are soft law-based instruments and constitute voluntary statements of intent to implement and respect certain practices and standards of behaviour, such as HRDD and responsible global value chain management. The OECD Guidelines and the UNGPs are primary references for the Dutch IBRC policy and are directly mentioned in several of the agreements.[99] Although the covenant policy was launched in 2014, the policy has been slowly rolling out, with different sector agreements concluding every few years.[100] As of 2023 there are 11 operational agreements.[101]

The IBRC agreements have been criticized and their effectiveness has been brought under question. Studies and evaluations of the covenant's performance have shown mixed results.[102] Although they can be said to have had some positive effects, there is still no concrete evidence of tangible and widespread improvement of HRDD

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[95] The "a World to Gain" agenda, the "Corporate social responsibility pays off" policy document and the 2013 launch of the Dutch National Action Plan on Business and Human Rights, are a few examples. See IOB (2019), p. 36-39.

[96] KPMG, *CSR Sector Risk Assessment, Considerations for Dialogue* (September 2014).

[97] KPMG (2014), p. 18.

[98] For more information on the IRBC Covenants see the government website: International RBC | SER | Agreements on international Responsible Business Conduct, *International RBC Agreements* <https://www.imvoconvenanten.nl/en>.

[99] For an overview of the relationship between the OECD Guidelines and the UNGPs, as well as the core labour standards of the International Labour Organization (ILO), see the webpage: International RBC | SER | Agreements on international Responsible Business Conduct, *OECD Guidelines* <https://www.imvoconvenanten.nl/en/why/oecd-guidelines>. See also European Commission, *Study on Due Diligence Requirements Through the Supply Chain, Final Report*, 171 (January 2020).

[100] See: KIT Royal Tropical Institute, *Evaluation of the Dutch RBC Agreements 2014-2020, Are Voluntary Multi-Stakeholder Approaches to Responsible Business Conduct Effective?* 25 (July 2020).

[101] The agreements cover the following sectors: banking, coal, floriculture, food products, forestry, garments & textiles, gold, insurance, metals, pension funds, trustone. See KIT Royal Tropical Institute (2020), p. 25.

[102] See: IOB (2019) and KIT Royal Tropical Institute (2020).

practices in the high-risk sectors.[103] Firstly, only a small number of agreements have been in place for sufficient time to see any results. In the garments and textiles and the banking sector, there are tentative signs of positive outcomes, especially with respect to companies establishing the first steps of due diligence (i.e. implementing HRDD policies and undergoing risk assessment).[104] Beyond that, the policy yielded little to no concrete results, other than moderately increasing awareness around HRDD. Perhaps in part because of the slow progression of the policy, discussions started in the Netherlands on whether more decisive regulatory action was needed. In the Dutch example, the institutional change of HRDD from international soft law into national hard law underwent an intermediate stage, in the form of a comprehensive national soft law framework. As argued in the section below, this is consistent with the productive conditions that were present in the Dutch legal system at the time.

What went on to become the Dutch Child Labour Due Diligence Act ("CLDD act"),[105] was first spearheaded by a Dutch Labour Party MP.[106] A controversial piece of legislation, the Act was eventually adopted by the House of Representatives in 2017. Following two years of heated debate and opposition, the Act was also passed in the Senate, by slim majority.[107] The adoption of the 2019 CLDD Act marked a new milestone in the process of institutionalisation of HRDD in the Netherlands. However, as explained below, the process never quite came to fruition as the CLDD Act never actually entered into force in the Dutch legal system. The Act is a mHRDD law, which imposes on companies an obligation to undergo due diligence with the aim of preventing the exploitation of child labour in their value chains. Both the CLDD Act and *Loi de Vigilance* are clearly influenced by the UNGPs and the OECD Guidelines. However, they differ in several ways.[108] Two of the most immediately noticeable departures are the material scope of the law and the enforcement mechanisms. First, the CLDD Act has a much narrower scope than the *Loi*, as it only covers child labour and not human rights in the broader sense.[109] Secondly, the CLDD Act foresees a public enforcement regime which includes the possibility of criminal sanctions under certain circumstances.[110] This is a unique feature of the Dutch law that also

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[103] For example, only 1.6% of companies in the 13 high-risk sectors have joined a Covenant. KIT Royal Tropical Institute (2020), p. 51, 62.

[104] KIT Royal Tropical Institute (2020), p. 70.

[105] *Wet zorgplicht kinderarbeid* of 7 February 2017 as adopted by the Senate on May.

[106] For more information see the web page: Mvoplatform, *Update: Frequently Asked Questions about the New Dutch Child Labour Due Diligence Law* <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> (3 June 2019).

[107] Liesbeth Enneking, *Putting the Dutch Child Labour Due Diligence Act into Perspective* 12 Erasmus Law Review 20, 20-21 (2019).

[108] For an overview see Enneking (2019), p. 30-34.

[109] MP Roelof van Laar, who had first introduced the CLDD Act to the House of Representatives, had worked closely with civil society organisations focused on the fight against child labour, like "Stop Child Labour" and UNICEF. See Mvoplatform, *Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law* <https://media.business-humanrights.org/media/documents/files/documents/FAQChild_Labour_Due_Diligence_Law.pdf>.

[110] *Wet zorgplicht kinderarbeit*, Art 7.

distinguishes it from the other national mHRDD laws that have been implemented in the past six years.

In some ways, it could be argued that although the Netherlands was slower in introducing a mHRDD law, having a broader industry coverage through the soft law agreements then enabled the Dutch lawmaker to introduce a more sectoral and seemingly stronger law with the CLDD Act. However, this argument falls flat when considering that the CLDD Act, which was set to take effect in 2022, is still not in force, and there are serious doubts as to whether it will ever come into effect. A major factor in this regard is the European Union initiative on Sustainable Corporate Governance, which eventually led to the proposed Corporate Sustainability Due Diligence Directive.[111] In 2020 the Dutch government released their updated IRBC plan, highlighting the need to take more effective action in light of the shortcomings of the Covenant policy. This 2020 document refers to the European Union legislative process on the CSDDD proposal, emphasising that an EU general due diligence obligation would be preferred to the CLDD Act. In this way, the government signalled that they would shift their focus towards the EU law-making process and delay the child labour law entering into force.[112] Then, in parallel to the EU-level negotiation process, the Dutch Minister for Foreign Trade and Development Cooperation, Tom de Bruijn, announced that they would undergo the creation of a new national mHRDD law with general scope, akin to the layout of *Loi de Vigilance* and the European Union's plans.[113] The new draft bill on Responsible and Sustainable International Business Conduct (*Wet verantwoord en duurzaam internationaal ondernemen*) is at the time of writing in an advanced stage.[114] This leaves the CLDD Act in an interesting limbo, as the Dutch political system is now focused on the development of a generalized mHRDD law in conformity with the EU standard.

The timeline and modality of the institutionalisation of HRDD in the Netherlands can provide some insight into what productive conditions were at play in the Dutch legal framework at the critical juncture moment, and how these conditions informed path dependency in this context. Culture, the history and features of a legal and political system, and the socio-political context at the time of a critical juncture, can all amount to productive conditions that shape the outcomes of institutional change. The following section provides commentary on how these conditions manifested in the Netherlands and how they compare to the French example.

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[111] European Commission, *Proposal for a Directive* (2022).

[112] AVT/BZ201009-002, *From Giving Information to Imposing Obligations, A New Impulse for Responsible Business Conduct,* 20 (2020).

[113] Mvoplatform, *New Dutch Government is Preparing for Due Diligence Legislation in the Netherlands and the EU,* https://www.mvoplatform.nl/en/new-dutch-government-is-preparing-for-due-diligence-legislation-in-the-netherlands-and-the-eu/ (7 March 2022).

[114] An unofficial translation of the draft bill is available here: <https://www.mvoplatform.nl/en/wp-content/uploads/sites/6/2021/03/Bill-for-Responsible-and-Sustainable-International-Business-Conduct-unofficial-translation-MVO-Platform.pdf>.

3.3. Frontrunners and Free Riders? Productive Conditions and the Nuances of Institutional Change

At first glance, the French and Dutch path to HRDD institutionalisation looks like a tale of frontrunners and free riders. Although there is some truth to this framing, there are nuances that emerge when viewing this case through the lens of historical institutionalism.

The frontrunner versus free rider dichotomy comes into play when looking at a high-level overview of the institutionalisation process in the two countries, as well as the rest of the EU. The French legal system took decisive action, and – it could be argued – a risky choice by championing the first mHRDD law of its kind in Europe. As highlighted in the section detailing the French development of the *Loi*, the mediocrity of its implementation must, in a certain way, be considered against the novelty of the law as a whole and the risks associated with this kind of action. Indeed, these risks include not only an exit by major companies domiciled in France towards more indulgent jurisdictions, but also legal isolation from other EU countries who choose not to follow them. Other countries who did not move towards HRDD implementation – or took a different approach like the Dutch soft law strategy – could be framed as having decided to 'free ride' on the risk took by the French jurisdiction, opting to wait and see the outcomes, drawbacks and merits of mHRDD laws. Furthermore, considering the unfolding of events and from a birds' eye view, it may appear that France was successful in its gamble, possibly even securing a "first mover advantage" with respect to its neighbouring jurisdictions who were slower to institutionalize. Indeed, the European Union as a whole is now gradually adapting to a (albeit modified) French blueprint of a generalized, horizontal mHRDD law.

The timeline of events that brought about the *Loi de Vigilance*, as discussed above, was not straight-forward in nature. The same observation can be made of the intentions of the institutional actors involved in this procedure, although the objectives of the various civil society actors appear constant over time, those of the government (a *sine qua non* for this type of institutional change) shift according to the environment and, importantly, composition of officials. As pointed out by Evans, the civil society actors working to bring about mHRDD in France 'got lucky with the coincidental appointment of a sympathetic Minister'.[115] Indeed, following the change of Minister of Economy in 2015, the *Loi* saw more progress in six months than it had over the prior four years.[116] Still, the efforts of French civil society, and the enabling environment that surrounds civil society participation in France, are important factors in the (albeit limited) success of the *Loi*. Indeed, as noted in the section above, the law that passed its final reading in the Parliament in 2017, was very different in substance from its original 2013 and even revised 2015 predecessors. The impact of the disinterest of government officials to carry this law, as well as the corporate lobbying that

[115] Evans (2020), at 659.

[116] Delalieux, *Parcours d'une loi improbable,* 655.

undoubtedly underpinned if not further encouraged this disinterest, resulted in an altogether less ambitious law that has proven difficult to invoke in the courts.

What had initially been set in stone as a soft law mechanism was brought sharply under refocus following the disaster of Rana Plaza, and with the pressure of civil society and the actions of a small number of elected officials, new courses were chartered by the French legislator, in essence establishing a new path dependency for Europe. Despite the fact that it might not have been a priority, or even a secondary objective, for French civil society or elected officials to be frontrunners in this policy domain, the enabling environment on both an international and national level, and the decisive actions of a select number of actors paved the way for other national governments, and eventually, the European Union, to begin considering more concrete action.

In a similar vein to what happened in France, 2013 marked a tipping point by which the Dutch legislator took more decisive action towards the institutionalization of HRDD. However, the outcomes of institutional change in the Netherlands took a completely different form than the French counterpart. The fact that the integration of HRDD in the Dutch legal system happened through soft law is characteristically in line with Dutch legal and political culture. The Netherlands comes from a long tradition of consensus-based regulatory intervention, and a multistakeholder dialogue approach. This is also reflected in the conformation of the Dutch political system which lends itself to larger coalition governments and a strong culture of political compromise. Indeed, consensus-based decision-making is so ingrained in the fabric of the Dutch sociopolitical system that it is formalized in what is referred to as 'the polder model' (*poldermodel* in Dutch).[117] In some ways, it is true that by failing to progress with a national mHRDD law at the same time as France did – or even shortly thereafter – the Netherlands could be seen as having opted to "free ride" on the French risk-taking approach. However, whether such intentionalism can be ascribed to Dutch lawmakers is doubtful. The institutionalisation path undertook by the Dutch legal system is better explained by looking at the productive conditions. In this regard, the polder model culture, a tradition of soft law regulation and the fact that the Rana Plaza shock was perhaps felt less strongly in the Netherlands when compared to the French experience, can explain the choice for the IBRC Covenant policy.

The fact that the Netherlands first went with a soft law-based policy is consistent with established path dependence in the legal system. It also likely contributed to reinforce path dependence going forward, hindering the move towards the development of a binding mHRDD law. Indeed, the Dutch government has been criticized for their reliance on consensus-based decision making as a way to 'put-off' more decisive action.[118] As a result, the CLDD Act is now in legislative limbo and the Dutch

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[117] For more on the *poldermodel* see: Jaap Woldendorp & Hans Keman, *The Polder Model Reviewed: Dutch Corporatism 1965–2000* 28 Economic and Industrial Democracy 317 (2007), http://journals.sagepub.com/doi/10.1177/0143831X07079351.

[118] Liesbeth Enneking, *Van beleid naar gepaste zorgvuldigheid in mondiale waardeketens*, NTBR 2022/43, afl. 10 365 (2022).

legislators are re-focusing on the development of a general mHRDD obligation. In this sense, the Dutch legal system seems to be conforming to the path first established by the French legal system, and then consolidated by the choices made by the European Union institutions.

In the wake of the institutional convergence towards the 'French model' it is unclear whether the IRBC covenant policy can be labelled a failure, or whether it can still play an important supportive role as one part of the 'smart mix' of voluntary and mandatory policy instruments.

4. Concluding Remarks: Forecasts for Doctrinal Development in Europe

Mandatory human rights due diligence has come into a certain level of maturity.

Rothstein posited that 'understanding the implications of institutional change is probably one of the most challenging problems for political science'.[119] This paper embarked on a narrative journey of the development of mandatory human rights due diligence in order to show the beginnings of its implications. Indeed, no longer confined to the flexible, yet simultaneously limited categorization of soft law, big shifts in the doctrinal understanding of this domain have resulted in what we identify in this paper as the beginning stages of deeper institutional change. Beginning our analysis in the early 2000s, we take a shorter approach to historical institutionalist evaluation, preferring to focus on key pertinent points in the timeline. Like many other authors, we identify the critical juncture as the Rana Plaza disaster, at which point the soft approach to human rights due diligence came sharply under focus, encouraging policymakers to rethink the way in which the law regulates companies' interactions with society – a subject that civil society actors had already been mobilizing around for some time. These elements are more present in some jurisdictions than others; France's political and civil society environment is noticeably more open to the kind of discourse that resulted in their due diligence law, than the Netherlands, as was demonstrated. For these jurisdictions where changes of this kind in hard law may be more difficult to establish for various reasons, lawmakers may choose to take an observer's approach – monitoring not only the political developments of the 'frontrunner' nation, but the implications of the resulting law. The choice to delay one's own policy development may have certain advantages, as observed in the case of the Netherlands in this paper, such as the ability to follow a unified European approach under the Corporate Sustainability Due Diligence Directive, currently undergoing the legislative procedure in the European institutions.

As a primary contribution, this paper demonstrates the value of the historical institutionalist perspective as a theoretical lens for observing doctrinal change. In this respect, future research expanding on the timeline would be incredibly fruitful for mapping past and projected institutional change. Furthermore, we have discussed the

[119] Bo Rothstein, *Political Institutions: An Overview* in *A New Handbook of Political Science*, 154 (Oxford Academic 1996).

interplay of frontrunners and free-riders in the specific context of mandatory human rights due diligence. Many what-ifs exist in this research environment, especially when considering the new European law and its 'stopping' effect on many Member States' own legislative initiatives, one of whom was the Netherlands. The objective of this paper is not to ruminate on these non-events. Rather, it attempts to illuminate the importance of the various factors, pre-existing and intervening, that make up the way in which different environments give rise to and guide actors in the accomplishment of institutional change. Possible further research in this domain boasts a fruitful future. Other avenues for future work also include a closer look at the way in which the jurisdictions with enacted or draft laws have been influenced by other legal frameworks, such as France or Germany – not only in the substance of their texts, but in the institutional arrangements set up to support their development.