ARTICLES

System failure in the digital welfare state

Exploring parliamentary and judicial control in the Dutch childcare benefits scandal*

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1 Introduction

In recent years, there have been multiple government scandals in the context of the 'digital welfare state'[1] across several countries. The Dutch childcare benefits scandal is an especially dramatic example. For several years, the Dutch Tax Authority applied an anti-fraud policy based on a risk-detection algorithm that wrongly treated an estimated number of 26,000 benefit recipients as deliberate frauds. Many parents were driven into financial and emotional destitution by the Tax Authority's zero-tolerance approach based on forced repayments and rigid sanctioning.[2]

While exceptionally reprehensible, the childcare benefits scandal is no stand-alone case. There is a growing consciousness of its striking similarities to cases from other countries, indicating a cluster of similar 'policy failures'[3] rather than unique incidents. The childcare benefits scandal has, for example, been compared to cases of unlawful and disproportionately damaging social security enforcement from Norway (the Nav scandal), the USA (the MiDAS scandal) and Australia (the Robodebt scandal).[4] These scandals together demonstrate the dangers of harsh enforcement with limited possibilities to consider unfairness and disproportionality in individual cases. Another important takeaway is that in these cases, policy failure has (to a varying degree) coincided with failure at a higher level: the rule of law system, or *Rechtsstaat*. For these different cases, a shared conclusion is that the

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1 The phrase 'digital welfare state' refers to the widespread deployment of digital technologies in domains such as social protection, healthcare and education, including the automation of service delivery and the prediction, surveillance, detection and punishment of fraud. Jørgensen 2023; Alston 2019.

2 Parlementaire Ondervragingscommissie Kinderopvangtoeslag (Parliamentary Inquiry Committee on Childcare Benefits) 2020.

3 As policies may fail for various reasons, definitions of policy failure have a broad scope, as reflected, for example, in McConnell's (2016, p. 671) definition: "A policy fails, even if it is successful in some minimal respects, if it does not fundamentally achieve the goals that proponents set out to achieve, and opposition is great and/or support is virtually non-existent."

4 See, respectively, Venice Commission 2021; Ranchordás 2022; Simonse et al. 2022.

executive government was insufficiently counteracted by the other branches of government, exposing a weakened capacity of parliament and judiciary in fulfilling their roles as scrutinizers of the executive government.[5] These scandals have thereby refocused attention towards control mechanisms in the rule of law system, highlighting the importance of parliamentary and judicial control as mechanisms to prevent, or at least counteract, the 'repressive' tendencies of social security administration.[6]

The fact that these similar cases have appeared across welfare states around the same time suggests that a general risk of policy failure has emerged in the domain of social security enforcement. This is no surprise in light of recent research. There has been growing attention for the risks of the increasingly conditional, punitive and repressive nature of social security law and policy that emerged from the early 1990s onwards.[7] There is also increasing attention for the risks posed to benefit recipients in the digital welfare state.[8] More specifically, the digitalization of decision-making in the domain of social security benefits has been observed to risk a 'dehumanization of government' and further stigmatization of welfare recipients.[9]

However, the importance of parliamentary and judicial control and the problematic nature of deficits in these control mechanisms has so far received little attention in research on the digital welfare state. And while there is some general knowledge on the relationship between checks and balances and policy failure,[10] there is no readily applicable framework to analyse parliamentary and judicial control in policy failures, which seems to be a consequence of the persistent divide between the legal (constitutional) and public policy literature (further discussed in Section 3.1). To prevent fiascos like the childcare benefits scandal from reoccurring in the future and to durably safeguard the well-being of social security recipients, we must first of all realize a comprehensive understanding of the interwovenness of policy failure and 'rule of law system failure' as manifested in the (digitalized) enforcement of social security in recent years.

This contribution forms a first step towards such a comprehensive understanding. It draws on insights from the legal and public policy literature to explore the role of (deficits in) parliamentary and judicial control in large-scale policy failures in the digital welfare state. Combining a theoretical study with an empirical analysis of the childcare benefits scandal, it answers the following question: how did deficits in parliamentary and judicial control contribute to the emergence and extended duration of the Dutch childcare benefits scandal? The article is structured as follows. The first section (Section 2) delivers a comparative overview of recent social security scandals. This is followed by a theoretical discussion (Section 3) of the relationship between 'checks on government' and policy failure and a discussion

5 Venice Commission 2021; Graver 2019; Ranchordás 2022; Carney 2019; Brenninkmeijer 2021; Brinkman & Vonk 2022.

6 On the importance of parliaments and judiciaries to scrutinize and counteract the excesses of repressive welfare states, see Vonk 2014.

7 Vonk 2014; Watts & Fitzpatrick 2018; Kiely & Swirak 2022.

8 Alston 2019; Jørgensen 2023; Larasati, Yuda & Syafa'at 2022; Henman 2022.

9 Ranchordás 2022.

10 See, for example, Dunleavy 1995; Bovens & 't Hart 2016; Jennings, Lodge & Ryan 2018.

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of parliamentary and judicial control from two perspectives: safeguarding rule of law and enhancing government performance. This theoretical examination delivers an empirical methodology (discussed in Section 4) that is used to analyse deficits in parliamentary and judicial control in the Dutch childcare benefits scandal, differentiating between ex-ante control (parliamentary control in the legislative process) and ex-post control (parliamentary scrutiny and judicial review) (Section 5). The final section (Section 6) states the conclusions and provides recommendations for future research.

2 Context: The Childcare Benefits Scandal and Similar Enforcement Fiascos

In recent years, there have been several government scandals revolving around the social security enforcement, i.e., the overall process of fraud prevention, surveillance, chargebacks and sanctioning in the domain of social security benefits.[11] The Dutch childcare benefits scandal stands out as one of the most dramatic cases. Between 2012 and 2018, the Dutch Tax Authority wrongly labelled an estimated 26,000 recipients of childcare benefits as deliberate frauds. Benefit recipients were unlawfully subjected to a ruthless enforcement policy in the form of repayments (tens of thousands of euros in many cases) and fines of up to 100% of the amount of fraud detected.[12] Moreover, the decision-making algorithm applied by the Tax Authority disproportionately targeted ethnic minorities with a second nationality.[13] Following a parliamentary investigation into these developments, the government cabinet (Rutte-III) resigned on 15 January 2021.[14] As mentioned in the introduction, the Dutch childcare benefits scandal has been compared to multiple cases from other countries. In its opinion on the childcare benefits scandal, The European Commission for Democracy through Law (Venice Commission) emphasized that the scandal is not a unique incident. Next to mentioning an affair from Ireland,[15] the Commission observed similarities between the childcare benefits scandal and the Norwegian NAV scandal (or EEA scandal),[16] in which the Norwegian Labour and Welfare Administration (NAV) unlawfully rejected benefit applications for many years (at least from 2012 to 2019), wrongly demanded recipients to stay in Norway and issued unlawful chargebacks based on national law that was in violation of European regulation on the coordination of social security systems. This resulted in at least 2,400 wrongfully demanded repayments and 80 wrongful fraud convictions, in some cases causing people to

11 Klosse & Vonk (2022, p. 362) refer to this overarching process of activities in social security enforcement as the 'chain of enforcement' (*handhavingsketen*).
12 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.
13 Adviescommissie Uitvoering Toeslagen (Commissie Donner) 2020.
14 Rijksoverheid 2021.
15 The Venice Commission (2021) observed that the prolonged failure to change the detrimental course of action in the childcare benefits cases was similar to developments in the Irish 'Long Stay Care Affair'. Elderly care residents were unlawfully charged for nearly three decades, despite numerous signals and growing doubts around the legal underpinning of the charges, owing to an 'overreliance on the law' with regard to its capacity to address all individuals' situations.
16 Venice Commission 2021.

serve unconditional prison terms they should not have been sentenced to.[17] Weaknesses in parliamentary and judicial control allowed for this prolonged administrative failure, characterized by legal scholars as systemic rule of law weaknesses[18] or even 'rule of law failure'.[19] Another comparison to the childcare benefits scandal has been made by Ranchordás, who explained its similarities to the 'MiDAS scandal' from Michigan (USA). An automated system was used to ensure the eligibility of recipients of unemployment benefits and thereby reduce social expenditures. This 'weapon against fraud' had multiple structural errors, resulting in 34,000 false accusations of unemployment fraud that were nonetheless collected rigorously. Forced repayments (some as high as $187,000) caused financial distress and personal tragedies such as evictions, divorces and homelessness. The MiDAS scandal has come to be viewed as a problematic combination of a strong focus on fraud prevention and a weakened scrutiny and accountability of government.[20] Yet another case that has been related to the childcare benefits scandal[21] is the Australian Robodebt scandal. This concerned an automated system that was introduced in 2015 to increase recoveries of social security overpayments. Historical records of welfare payouts were data-matched to past income tax returns to identify discrepancies. Individuals were 'flagged' by a simple algorithm, and debts were raised automatically (hence the name 'Robodebt').[22] Owing to structural errors in the calculation method, approximately 470,000 social security recipients were confronted with wrongful debt collections, in many cases causing extreme financial hardship.[23] Despite early warning signals, the scheme persisted until 2020, and Robodebt has since been characterized as a major policy failure[24] as well as a 'failure of rule of law protections'.[25]

The similarities between the foregoing cases discussed deserve a more extensive comparative analysis, which goes beyond the goal and scope of this article. However, it can deliver a preliminary qualification of these cases as a specific cluster of policy failures. Across welfare states, social security recipients were disproportionately and unlawfully damaged by welfare bureaucracies in pursuit of a rigid approach to fraud prevention, chargebacks and sanctioning. This constitutes major policy failure owing to a combination of substantial social damages and a violation of certain 'higher principles', both ethical and related to the rule of law.[26] In line with Whiteford's qualification of the Robodebt scandal,[27] the cases can more specifically be labelled as 'policy fiascos', a concept that refers to major policy failures with social damages and serious political repercussions, combined with a degree of

17 Norges offentlige utredninger (Norway's Public Reports) 2020.
18 Einarsen 2019; Ikdahl 2020.
19 Graver 2019.
20 Ranchordás 2022.
21 Simonse et al. 2022.
22 Whiteford 2021.
23 Royal Commission into the Robodebt Scheme 2023; Whiteford 2021.
24 Whiteford 2021.
25 Carney 2018, 2019; see also Maxwell 2021.
26 For an explanation of the different evaluative criteria that are used as indicators for policy failure, see McConnell 2016.
27 Whiteford 2021.

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blameworthiness, foreseeability and avoidability.[28] This study develops a further specification of this concept: 'social security enforcement fiascos', or enforcement fiascos in short. This term is used to collectively refer to similar cases of substantial policy failure in the form of unlawful and disproportionately damaging outcomes in the (digitalized) enforcement of social security.

The remainder of this article explores a specific similarity in the causal background of multiple enforcement fiascos: the fact that weaknesses in parliamentary and judicial control have partially determined their emergence and extended duration.[29] The following sections work towards an understanding of the linkages between these control mechanisms and policy failure, which delivers the 'building blocks' for the empirical analysis of the childcare benefits scandal.

3 Theory

3.1 Checks on Government and Policy Failure

Ultimately, this contribution aims to increase our knowledge of the role of parliamentary and judicial control in large-scale policy failures in social security enforcement. To achieve this, attention must first be directed to a more general question: what is the relationship between the overarching concepts of checks on government and policy failure? Answered in short, there is the general assumption that weaknesses in the system of checks on government increase the likelihood and magnitude of policy failure. This resonates with Peters' research on the linkages between different levels of failure in the public sector (state, governance and policy failure). Peters emphasized that "the best designers will be incapable of producing effective policies if the fundamental factors within their governance arrangements are not conducive to success," and that researchers must carefully consider 'systemic level influences' (besides policy design and implementation issues) when analysing policy failure.[30] Other studies have more explicitly pointed to malfunctioning checks and balances as a cause of failure. Notably, Bovens and 't Hart draw the following general conclusion in their revision of the policy fiasco concept:

> The biggest fiascos are not caused by division, ceaseless debate, all too powerful checks and balances and institutional paralysis, but by the closing up of policy-making processes: concentrating authority in too few hands; constraining the scope and duration of deliberation; and shutting down diversity and dissent.[31]

Likewise, others have emphasized the danger of 'over-strong'[32] and 'unchecked' executive governments, which makes both policy formulation and implementation

28 Bovens & 't Hart 1998, p. 15; See also Bovens & 't Hart 2016.
29 Venice Commission 2021; Graver 2019; Ranchordás 2022; Carney 2019; Brenninkmeijer 2021; Brinkman & Vonk 2022.
30 Peters 2015, p. 273.
31 Bovens & 't Hart 2016, p. 663.
32 Dunleavy 2018.

vulnerable to large mistakes.[33] Specific constitutional and political systems that are characterized by weak checks on government have been deemed especially prone to large-scale policy failures. For instance, the United Kingdom has been observed to be "unusual in the extent to which it suffers from acute policy disasters and policy fiascos" largely owing to a lack of checks in the political system.[34] In a recent study, McConnell and Tormey, for example, evaluate to what extent the 'Brexit policy fiasco' should be attributed to the structural lack of checks and balances in the Westminster model of government.[35]

Summarizing the foregoing, the public policy literature clearly shows that deficits in the system of checks and government may strongly determine the likelihood and magnitude of policy failure. However, there are two gaps in the literature because of which it is still difficult to systematically analyse parliamentary and judicial control in cases of policy failure. First, the overwhelming majority of studies that bring together checks on government and policy failure focus solely on the relationship between the executive and the legislative branch, excluding judicial control.[36] Second, the existing literature lacks a clear overview of issues that may obstruct effective parliamentary and judicial control, and there is no readily applicable empirical framework to identify such 'control deficits' in policy failures. These gaps in the literature seem to be related to a more general issue: a divide between two isolated academic disciplines and literature streams, namely the legal literature and the public policy literature. The legal literature contains much information on the role of parliamentary and judicial 'checks' in the rule of law system[37] but provides little insight into how they influence government performance (and, more specifically, policy failure). Conversely, the public policy literature contains much information on the various causes of policy failure,[38] but the relevance of system-level checks and balances is often only discussed in abstract terms without specific attention directed to the dynamics of parliamentary and judicial control. It goes beyond the scope of this article to fully bridge this apparent divide between literature streams.[39] However, it does integrate both literature streams by reflecting on parliamentary and judicial control from the perspective of both the rule of law and public policy (policy success and failure). Before turning to an empirical framework that combines both of these perspectives, the following section provides a basic conceptualization of parliamentary and judicial control.

33 Fagan 2023, p. 5. Interestingly, Fagan shows that, on the other hand, an overabundance of counteracting pressure from veto players (e.g. courts and parliaments) can increase the likelihood of 'policy disaster'.

34 Dunleavy 2018, p. 219; see also Dunleavy 1995; King & Crewe 2014.

35 McConnell & Tormey 2020.

36 A notable exception is Fagan's (2023) study on the relationship between political institutions and policy failure, which considers checks and balances based on a broad interpretation of 'veto players', including both formal institutions (e.g. bicameral legislatures, strong courts, presidents and fractionalized party systems) and informal institutions (media and interest groups).

37 See, for example, Heringa 2019; Sellers 2014.

38 See, for example, McConnell 2016.

39 This relates to the observation that over the years, public policy research appears to have isolated itself from (macro-level) questions related to the institutional organization of the *Rechtsstaat*. See, for example, Roberts 2020 and Ringeling 2017, p. 198.

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3.2 Conceptualizing Parliamentary and Judicial Control

Any discussion of parliamentary and judicial control must begin with an explanation of the rule of law system (*Rechtsstaat*).[40] The subjection of government action to control from parliament and judiciary is a core criterion of any constitutional system based on the rule of law. Under the framework of this rule of law system, parliamentary and judicial control can be viewed as instruments that serve to ensure that the executive government is constrained and 'checked', with the aim of preventing abuses of power and safeguarding rule of law principles.[41] The capacity of states to realize these checks on government forms an important indicator of 'rule of law-performance', as, for example, reflected in the World Justice Project's Rule of Law-index.[42] Parliamentary and judicial control go 'hand in hand' as the traditional control mechanisms in the rule of law system[43] and are therefore defined in a similar way. This study defines parliamentary control as the process by which parliament monitors and exerts influence over decisions and actions of the executive government (by constraining, sanctioning or redressing).[44] Likewise, judicial control is understood as the process by which the judiciary scrutinizes government decisions and actions and imposes legal restraints on the exercise of power.[45]

The functioning of parliamentary and judicial control can be clarified in a straightforward way by taking the moment that public authority (competence) is created as a point of reference. Accordingly, we can distinguish between control exercised before (ex-ante) and after (ex-post) the executive government has become active in the exercise of a specific activity, coming down to a distinction between parliamentary control in the legislative process, parliamentary scrutiny and judicial review.[46] The exercise of parliamentary control in the legislative process is referred to with terms like a priori control[47] and ex-ante legislative oversight,[48] meaning control exercised before the government has become engaged in a specific activity. Parliament exercises this control as 'co-legislator' alongside the executive government, whereby it can influence lawmaking with three main powers: the

40 While the labels rule of law and Rechtsstaat have some specific differences, they are underpinned by the same core criteria: that public authority is derived from law and that the exercise of authority is constrained by legal norms, with the underlying essence of protecting citizens from unjustifiable and illegitimate exercises of power. See, for example, Zouridis 2021; Heringa 2019; Sellers 2014.

41 Van Ommeren 2003. Some bring these principles down to a few core values such as legality, equality by law and legal certainty (Zouridis 2021; Molander, Grimen & Eriksen 2012), while others include additional values like accuracy, legitimacy, transparency and accountability (Schuck 2014, p. 299).

42 Among other indicators, The Rule of Law-index measures whether "legislative bodies have the ability in practice to exercise effective checks on and oversight of the government" and whether "the judiciary has the independence and the ability in practice to exercise effective checks on the government." World Justice Project 2022, p. 16; Dougherty, Gryskiewicz & Ponce 2018.

43 Venice Commission 2021 p. 10.

44 Drawing on Holzhacker 2005, in Karlas 2011. See also Sejersted 2000.

45 Spanou 2020; Peters 2001.

46 Similarly, Harlow & Rawlings (2009, p. 40) refer to legislation as prospective control (controlling administrative activity by prescribing its bounds) and to judicial review as retrospective control (keeping the administration to its pre-set bounds).

47 Sejersted 2000, p. 485.

48 Pelizzo & Stapenhurst 2004, p. 13.

right of initiative (to propose a law or specific provisions), the right of amendment (to propose and make changes) and the right of veto (to override).[49] Parliamentary control after the creation of public authority is referred to as parliamentary scrutiny, referring to the competences and activities of parliament in the domain of monitoring and controlling ('checking') the executive apart from lawmaking.[50] This parliamentary scrutiny can be realized through various instruments, such as oral and written questions, committee hearings and debates and parliamentary inquiries. In many political systems (including the Netherlands), parliamentary scrutiny is importantly assisted and facilitated by institutions such as ombudsmen and auditors.[51]

Finally, the judiciary exercises control over arbitrary government action by 'offsetting' unjust laws and decisions from the other branches through judicial review.[52] While the exact functioning of judicial review differs greatly across constitutional systems,[53] a general distinction can be drawn between judicial review of the legislative branch (i.e. judicial review of administrative decisions) and judicial review of the executive branch (judicial review of legislation).[54] Judicial review of legislation involves an assessment of the compatibility of 'common' legal norms with 'higher' norms,[55] such as constitutional provisions (constitutional review) or international treaties.[56] Judicial review of administrative decisions generally concerns a single administrative decision regarding the legal entitlements of an individual, such as a chargeback or penalty for misuse of social security benefits, generally with little wider impact on decision-making practices.[57] While some further reference to judicial review of legislation will be made, the remainder of this article focuses predominantly on judicial review of administrative decisions. Within this focus, attention is also directed to the preceding phase of administrative reconsideration (appeals procedure), as this is necessary to fully understand the functioning of judicial review as the tailpiece of the broader process of administrative adjudication.[58]

3.3 Two Perspectives on Parliamentary and Judicial Control

A further understanding of parliamentary and judicial control can be achieved by reflecting on their underlying values, or objectives. For the purpose of this study they can be analysed from two distinct perspectives, each with its own central

49 Heringa 2019.
50 Heringa 2019, p. 191. Others refer to this domain of control with terms such as parliamentary oversight (Venice Commission 2010), *a posteriori* scrutiny (Sejersted 2000) or post-legislative scrutiny (De Vrieze & Norton 2020).
51 Heringa 2019; Pelizzo & Stapenhurst 2004.
52 Ng 2007; Elliott 2001; Woehrling 2006.
53 Sunkin 2004.
54 Koopmans 2010; Van der Schyff 2010.
55 Van der Schyff 2010, p. 5.
56 Heringa 2019, p. 237. Heringa defines constitutional review as "the power of judges to check whether laws which are made by the central parliament comply with the constitution", Heringa 2019, p. 35.
57 Except in case of "high-level constitutional or policy challenges", Thomas & Tomlinson 2021, pp. 2-3.
58 Asimow 2015.

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objective and evaluative criteria.[59] First, parliamentary and judicial control serve to protect citizens by curtailing abuses of power and safeguarding rule of law principles. Second, these control mechanisms have the capacity to increase government performance by providing policy feedback and incentives. This contribution refers to the first as a 'rule of law perspective' and the second as a 'public policy perspective'.

The rule of law perspective has already been discussed numerous times, as it is the classical perspective on parliamentary and judicial control. From this perspective, ex-ante parliamentary control serves a dual objective: constraining executive discretion and ensuring that government action will adhere to rule of law principles.[60] The formulation of legislative texts and explanatory memoranda regulates the discretion left to decision makers and determines the adherence to rule of law principles, for example through the inclusion of specific standards ('metanorms') to ensure due process and fair procedure.[61] Ex-post parliamentary scrutiny is also implied to contribute to the rule of law. This concerns monitoring specific developments in policy implementation (for example, by following up on signals of illegalities in administrative practice) as well as checking and redressing systemic failures in legislation.[62] Finally, and perhaps most importantly, judicial review serves as a 'grievance-handling mechanism' to provide legal protection to individuals who are confronted with illegitimate or disproportional exercises of power, while it also controls and steers government action through interpretations of the law (e.g. by explaining and operationalizing general principles of good government).[63]

Viewed from a public policy perspective, the focus is shifted to the influence of parliamentary and judicial control on government performance. A first remark to be made is that these control mechanisms have a generally positive impact on government performance. Checks on government form an important precondition for good governance and favourable policy outcomes,[64] while this depends on the ability of the 'legal-political environment' to strike the right balance between granting discretion and exercising control.[65] This added value of parliamentary and judicial control essentially comes down to two interrelated logics. An effective

59 This typology is inspired by Bovens, Schillemans & 't Hart's (2008, p. 233) study on mechanisms of control and accountability, in which they distinguish between a democratic perspective (legitimation of power through the "democratic chain of delegation") a constitutional perspective (preventing abuses of power), and a learning perspective (increasing government effectiveness).

60 This dual objective is also referred to as the 'duality' of the rule of law; see Cormacain 2017.

61 Zouridis, 2021. The protection of these principles is of special importance in social security law, as legal standards to ensure transparency, access to justice and equality by law are crucial to uphold a 'stable machinery' for supervising claims and allocating benefits. Vonk & Katrougalos 2010, p. 89.

62 See, for example, Sejersted 2000, p. 492.

63 Harlow & Rawlings 2009, pp. 669-670.

64 See, for example, Wu, Ramesh & Howlett 2015.

65 Wu, Ramesh & Howlett 2018, p. 186. A similar conclusion arises from Bovens' (2010, pp. 957, 960) research on accountability mechanisms. Inappropriate government action may remain unaddressed because of accountability deficits ("loopholes in the web of control mechanisms"), while accountability overloads (excessive scrutiny and intervention) may overburden the administration and cause defensive routines.

system of parliamentary and judicial control facilitates 'policy success',[66] while it also contributes to the prevention, discovery and correction of policy failures. In the legislative process, parliaments play an important role in ensuring that legislative proposals are critically assessed before their implementation, which is needed to prevent errors in the domain of both legal drafting (e.g. inconsistencies between acts, ambiguity or badly interconnected definitions) and policy appraisal (e.g. lacking empirical feasibility or harmful effects).[67] Ex-post parliamentary scrutiny serves to enhance the quality of government by continually analysing the effectiveness and efficiency of government (with regard to both processes and outcomes), keeping decision makers attentive to errors and providing incentives to reconsider bad laws and policies and develop additional regulation where necessary.[68] And while the fact remains that courts do not have a constitutional responsibility to support the quality of government, there has been growing attention to the 'policy impact' of judicial review.[69] Judicial review – and, more broadly, the entire system of administrative adjudication – is understood not only as a grievance-handling mechanism but also as a means to modify bureaucratic behaviour and contribute to good governance.[70] Similarly, it has been said that courts serve a role as both 'problem-solver' (redressing grievances) and 'system-fixer' (monitoring the quality of decisions and looking for system improvements).[71]

Following the logic discussed above, there have also been studies that identify deficits in control of government as contributory factors to policy failure. For example, in their large-n study of 'government blunders', Jennings, Lodge and Ryan evaluate the causal importance of lacking meticulousness in legislative design and deliberation (e.g. in the form of 'fast-tracking' legislative proposals), while they also point to weakened parliamentary checks as a cause of failure.[72] In a similar vein, Mousmouti explains that policy failure may arise owing to a variety of problems in legislative design (including poor drafting and wrong instrument choice), while she also emphasizes that 'post legislative scrutiny' is the prime solution to such legislative failures ("identifying the error is the first step to an effective solution").[73] Empirical (case) studies illustrate these linkages between parliamentary control and policy failure, for example showing that parliament may "pave a path to policy failure" by allowing flawed policy to pass through its

66 As defined by McConnell (2010, p. 351): "A policy is successful if it achieves the goals that proponents set out to achieve and attracts no criticism of any significance and/or support is virtually universal."

67 Mousmouti 2019. More generally, it has been argued that the quality of public administration depends, first of all, on the quality of legislation, see Damen et al. 2013.

68 See, for example, Damen et al. 2013; Bovens, Schillemans & 't Hart 2008.

69 As phrased by Hertogh & Halliday (2004, p. 277): "In many countries judicial review has become immensely popular as a treatment for the pains of modern governance. A heightened expectation about the practical significance of judicial review to administrative practice precedes or accompanies the use of judicial review as a remedy." See also Hertogh 2021.

70 Harlow & Rawlings 2009; Cane 2004; Damen et al. 2013.

71 Hertogh 2001.

72 Jennings, Lodge & Ryan 2018.

73 Mousmouti 2019, p. 137.

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chambers[74] or that an utter lack of parliamentary attention can contribute to a prolonged duration of policy failure.[75]

While there has been growing attention to the positive policy impact of judicial review, its relationship with policy failure remains fuzzy. As discussed before, this is mainly so because most studies that bring together checks on government and policy failure focus solely on the relationship between the executive and the legislative branch. However, there is the general logic that judicial review carries the capacity "to reduce or correct systematic failures in legislative and executive decision making".[76] Consequently, errors in judicial review may contribute to a prolonged duration of policy failure, as these may cause failures in government to remain uncorrected. Generally speaking, following the previously shared typology, judicial review may play a role in the extended duration of policy failure due to deficits in both its problem-solving capacity (redressing individual grievances) and its system-fixing capacity (monitoring government processes).[77]

4 Methodology: Analysing Parliamentary and Judicial Control Deficits

All in all, the theoretical study in Section 3 essentially comes down to two typologies. First, a distinction is made between ex-ante (parliamentary control in the legislative process) and ex-post control (parliamentary scrutiny and judicial review). Second, a distinction is drawn between a rule of law perspective and a public policy perspective on these control mechanisms, each with its own core objective. Combined together, these typologies deliver a comprehensive framework of the functioning of parliamentary and judicial control of government. This framework is summarized in Table 1.

74 McCarthy-Cotter 2019.
75 Vince 2015.
76 Fox & Stephenson 2011, p. 397.
77 Hertogh 2001.

Table 1 Two perspectives on parliamentary and judicial control of government

	Parliamentary Control		**Judicial Control**
	Legislative process	Parliamentary scrutiny	Judicial review
Rule of law perspective *Core objective:* constraining executive power and safeguarding rule of law	Constraining administrative discretion, safeguarding rule of law principles in legislative design	Confronting illegalities (e.g. rule of law-violations) in administrative practices, addressing systemic failures in legislation	Redressing individual grievances, resolving legal inconsistencies and conflicts
Public policy perspective *Core objective:* enhancing government performance through feedback and incentives	Policy appraisal (ex-ante): critically examining empirical feasibility, addressing potential harmful effects	Policy evaluation (ex-post): addressing ineffectiveness and harmful effects	Monitoring the quality of legislation and administrative decisions, delivering feedback for systemic improvements

This framework can be used to identify and analyse deficits in the functioning of parliamentary and judicial control. As the positive effects of parliamentary and judicial control can be viewed from the perspective of both the rule of law and government performance, the negative consequences of deficits in these control mechanisms can also be considered from these two perspectives. Following this, the framework summarized in Table 1 is more or less directly translated into an empirical strategy to identify 'control deficits' in the Dutch childcare benefits scandal.

The empirical analysis (Section 5) has two stages. The first is a descriptive summary of the key developments in the childcare benefits scandal. The second section explores how deficits in parliamentary and judicial control have shaped the outcome of the scandal. This analysis is structured based on the typology of ex-ante parliamentary control and (ex-post) parliamentary scrutiny and judicial review, and it considers the functioning of these control mechanisms from both the rule of law and the public policy perspective. This is done by way of a document analysis (or, 'textual analysis')[78] of a broad range of documents. These include legislation (the *Algemene wet inkomensafhankelijke regelingen* and the *Wet kinderopvang*), explanatory memoranda and texts of debates (mainly related to the same laws) as well as reports and inquiries, among which the final report of the Parliamentary Inquiry Committee on Childcare Benefits is especially important.[79] Finally, because there has been considerable academic attention to the childcare benefits scandal, the analysis draws on prior academic studies, predominantly legal analyses from constitutional and administrative law scholars.

Of course, this analysis comes with its limitations. First, developments within the administrative level (core executive and government agencies) remain largely out

78 Epstein & Martin 2014, p. 81.

79 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.

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of scope owing to the focus on parliamentary and judicial control.[80] Second, it is a broad exploration that does not aspire to fully explain the reasons why parliamentary and judicial control deficits arose in the childcare benefits scandal. While the analysis delivers some preliminary insights into the causes of the childcare benefits scandal and similar system failures, additional research is needed to uncover this fundamental causal background (as reflected on in the final conclusions).

5 Parliamentary and Judicial Control in the Childcare Benefits Scandal

5.1 Summary of Developments

In 2004, the Childcare Act (*Wet Kinderopvang*) established a new system of childcare benefits for working parents with young children. The Tax Authority was made responsible for the implementation and enforcement of the scheme, including the assessment of claims, payment and fraud prevention.[81] By 2010, there were increasing concerns about high expenditures and the system's vulnerability to fraud, in part fuelled by the economic situation at the time, resulting in a sharpened focus on fraud prevention and chargebacks of benefit overpayments. An especially significant intensification of the enforcement regime was introduced in 2013 in response to a large-scale case of fraud that involved a Bulgarian criminal organization (the 'Bulgarian fraud affair').[82] In the ensuing years, more and more signals arose about the problems in the Tax Authority's enforcement regime. In August 2017, it became clear that the Tax Authority's termination and full recovery of childcare benefits caused long-term financial insecurity for many hundreds of families.[83] In November 2019 it turned out that the Tax Authority applied a biased, institutionally prejudiced self-learning algorithm to subject individuals to intensified supervision, and in March 2020, it came to light that these were no isolated incidents but a structural problem.[84] From 2012 onwards, the Tax Authority had wrongly accused thousands of benefit recipients of deliberate misuse by using a large database and computational algorithms. Based on a rigid application of the law, the government demanded full repayments of up to tens of thousands of euros without consideration of the financial impact for individual citizens, even though many chargebacks and sanctions were triggered by simple administrative errors.[85] Benefit recipients were unlawfully subjugated to a ruthless, zero-tolerance approach to chargebacks (tens of thousands of euros in many cases) and fines of up to 100% of the amount of fraud detected, driving many into financial and emotional

80 For a more detailed discussion of the developments within the administrative level, see the contribution of Van Thiel & Migchelbrink in this special issue. Other examples of reconstructions with detailed attention to the administrative level are Venice Commission 2021 and Frederik 2021.

81 Childcare Act (*Wet Kinderopvang*). This legislation falls under the broader framework of a general law for multiple income-related benefits in the domain of rent, children and healthcare, named *Algemene wet inkomensafhankelijke regelingen*.

82 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.

83 Nationale Ombudsman 2017.

84 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.

85 Ranchordás 2022.

destitution.[86] Moreover, the decision-making algorithm applied by the Tax Authority disproportionately targeted ethnic minorities as the model treated the existence of a second nationality as a 'risk indicator' for fraud.[87] The entire government cabinet (Rutte-III) resigned on 15 January 2021 following a parliamentary investigation that concluded that "fundamental principles of the rule of law have been violated."[88]

Although the 'rule of law mechanisms' (more specifically, judicial review and parliamentary scrutiny) eventually did work,[89] the childcare benefits scandal has come to be viewed as a manifestation of systemic failure in the Dutch *Rechtsstaat*.[90] Exercises of power by the Dutch Tax Authority were unlawful and in violation of rule of law principles (proportionality in particular),[91] and parliament and judiciary failed to prevent or timely put a stop to this practice. The following sections explain the role of (deficits in) parliamentary and judicial control in the childcare benefits scandal.

5.2 Parliamentary Control in the Legislative Process

In the aftermath of the childcare benefits scandal, it has been argued that the detrimental outcomes should be attributed in part to the phase of legislative design.[92] This first of all concerns the role of the legislative process in the domain of safeguarding the rule of law (and, more fundamentally, protecting individuals from arbitrary government action). In December 2020, the parliamentary investigation committee concluded that the legislature (parliament and executive government) can be blamed for having enacted legislation that was 'tough as nails' and unable to do justice to individual circumstances, showing insufficient attention to the principle of proportionality.[93] More specifically, some have argued that members of parliament could have posed more critical questions regarding the government's initiative not to include a hardship clause.[94] Hardship clauses are generally included in Dutch social security laws,[95] and the decision not to include one went against advice from the Council of State (the main advisory body in the Dutch legislative process) that such a provision would be crucial to preventing 'grave injustices'.[96] Based on these aspects, some have argued that the 'draconic'

86 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.
87 Adviescommissie Uitvoering Toeslagen (Commissie Donner) 2020.
88 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020, p. 7.
89 Indicating the willingness of the Dutch *Rechtsstaat* "to address and redress its mistakes", as perceived by the Venice Commission (2021, p. 27) in its report on the childcare benefits scandal.
90 Brenninkmeijer 2021.
91 Venice Commission 2021.
92 See, for example, Van den Brink & Ortlep 2021; Van Gestel 2022.
93 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.
94 Such a hardship clause could have been used to mitigate enforcement decisions in the case of unreasonably damaging outcomes in individual situations (Van Gestel 2022).
95 Vonk 2020.
96 *Kamerstukken* II, 2004/05, 29764, nr. 5, p. 10.

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childcare benefits legislation paved the way for the scandal,[97] while at the same time it has been emphasized that the law actually did enable the Tax Authority and the judiciary to ensure proportionality in individual cases.[98]

Besides this, there has also been a discussion on parliament's role in the domain of critically analysing empirical feasibility. In the aftermath of the scandal, the conclusion has been reached that parliament (the Second Chamber specifically) did not pay enough attention to the feasibility of the childcare benefits legislation. A specific issue was that little to no attention was given to possible future problems in the domain of fraud prevention and enforcement. More specifically, the possible negative consequences of chargebacks were not taken into consideration in the parliamentary deliberation of legislative proposals.[99] This limited attention to empirical feasibility may have been driven by overly optimistic expectations of future ICT developments to deal with the new payment systematics (based on advance payments and definitive calculations).[100] At the same time, the legislature was relatively conscious of the risk of potential errors, but this risk was intentionally shifted towards benefit recipients. It would be up to them to "be conscious of the (financial) risks that emerge from incorrect estimations and other data provided on the basis of expectations",[101] indicating the strong predominance of a neoliberal ideal of individual self-reliance during the legislative process.[102]

5.3 Parliamentary Scrutiny

A first thing to note regarding parliamentary scrutiny is that it played a key role in the uncovering of the childcare benefits scandal. Some individual members of parliament showed continuous critical scrutiny,[103] and the parliamentary investigation of 2020 helped to unravel the full scope and hold the government to account. Despite this, the conclusion has been reached that parliament for long failed to deliver the necessary 'countervailing force'. A first important aspect is that parliamentary scrutiny was structurally impeded owing to a lack of transparency from the government cabinet.[104] Requests for information from members of parliament were routinely dismissed under the guise of protecting "personal opinions on policy".[105] This made the trail of decision-making more or less

97 Van den Brink & Ortlep 2021, p. 365. More fundamentally, Brinkman & Vonk (2022) argue that the legislature had a shortcoming awareness of the normative dimension of fundamental social rights in the development of the childcare benefits legislation.

98 Marseille 2020; Damen 2021.

99 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020, p. 34.

100 Van Gestel 2022. This lack of attention to empirical feasibility fits into a broader criticism of the parliamentary control function (more specifically, the Second Chamber), which was the reason for the establishment of the *Tijdelijke Commissie Uitvoeringsorganisaties* in October 2020, see Kamerstukken II, 2019/20, 35387, nr. 1.

101 *Kamerstukken* II 2004/05, 29764, 3, p. 20.

102 Vonk 2020.

103 Venice Commission 2021.

104 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.

105 This dismissal of information was based on article 11 of the *Wet openbaarheid van bestuur* (Government information (public access) Act).

untraceable,[106] which has been deemed unconstitutional and detrimental to parliamentary democracy.[107] A specific aspect that illustrates this serious lack of transparency concerns the fact that the Second Chamber was for long informed incompletely on the use of second nationality as a risk indicator in the Tax Authority's fraud prevention regime.[108]

However, there was also a lack of assertiveness on the part of members of parliament in following up on signals steering towards policy reconsideration. Attention to an empathic treatment of benefit recipients was lost owing to an excessive focus on efficiency, an environment of distrust and tunnel vision on fraud prevention. This was not counteracted, but even fuelled by members of parliament who operated in a the political climate that for long revolved around an "overheated political demand to fight fraud".[109] The most prominent example of this overheated focus was the legislature's response to the Bulgarian fraud affair of 2013. In response, the government cabinet issued a legislative proposal (*Wet aanpak fraude toeslagen en fiscaliteit*) to intensify the fraud prevention and sanctioning regime.[110] This underlying political pressure seems to have diminished the capacity of parliament to critically assess the proposal in light of rule of law principles and the legal position of benefit recipients. Even though the Council of State had warned that the measures would impair benefit recipients' legal certainty and access to justice, the legislation was rapidly passed with unanimous support in both chambers of parliament.[111] As has become clear from 2019 onwards, this regulation not only increased the vulnerability of benefit recipients but also paved the way for the institutionally prejudiced algorithmic model applied by the Tax Authority.[112]

Besides this, the politicisation of benefit fraud (the pressure to 'fight fraud hard') weakened the Dutch parliament's capacity to critically assess policies and provide quality feedback. Interestingly, this concerns not only insufficient feedback but also an existence of perverse incentives. The most prominent example relates once again to the previously discussed anti-fraud legislation (*Wet aanpak fraude toeslagen en fiscaliteit*). Even though the State Secretary of Finance had warned that the rigidity of the new policy risked a disadvantaging of innocent citizens, most parliamentarians called for even more stringent provisions.[113] The legislation was passed with unanimous approval within 6 months after the debate on the Bulgarian fraud affair, a fairly short time frame.[114] There had been an explicit warning from the Council of State that the speed at which the proposal was processed might impede a meticulous assessment, which was deemed of special importance because

106 Brenninkmeijer 2021.
107 Voermans 2020.
108 This came to light in a news article from *RTL Nieuws* 2021.
109 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020, p. 7.
110 *Kamerstukken* II, 2013/14, 33754, nr. 3.
111 *Kamerstukken* II, 2013/14, 33754, nr. 4.
112 Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020; Frederik 2021.
113 *Handelingen* II, *2012/13, nr. 81, item 13*.
114 See Frederik 2021 for an extensive overview of the developments around the Bulgarian's fraud and the implementation of the strict enforcement and fraud prevention policy.

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of its far-reaching changes in punitive sanctions law,[115] but this warning did not bring forth a response in parliament. Later on, from September 2014 onwards, especially, there were many signals that many benefit recipients were in a precarious position against the Tax Authority's rigid enforcement regime. Problems in the childcare benefits scheme were increasingly highlighted in multiple Ombudsman reports. These reports already demonstrated the negative consequences of chargebacks for the well-being of vulnerable benefit recipients in 2013, the need to account for individual circumstances in 2015 and the severe financial hardship following the cancellation and full chargeback of childcare benefits in 2017.[116] Despite these signals, for long only a few individual members of parliament took significant action to address these issues.[117]

5.4 Judicial Review

As for parliamentary scrutiny, a first aspect to mention with regard to judicial review is that it eventually played an important role in putting an end to the childcare benefits scandal. In two reversal judgments in October 2019, the highest administrative court, the Administrative Jurisdiction Division of the Council of State, delivered a new interpretation of the law, which entailed that the Tax Authority could apply a more 'proportional approach' in the enforcement of the childcare benefits legislation.[118] Despite this, the core conclusion has been that judicial review, and more broadly the whole process of administrative adjudication, significantly malfunctioned. First, there were structural errors in the administrative appeals phase that substantially impaired citizens' access to justice. In 2017, the Ombudsman observed that the Tax Authority failed to account for financial and other hardships in individual cases and that the strict approach lacked due diligence and 'fair play', especially considering that appeals from many benefit recipients were insufficiently processed with substantial delays (sometimes taking multiple years). At the same time, parents were obstructed in reapplying for childcare benefits, causing long-term legal uncertainty.[119] Second, recipients who did reach the administrative judiciary encountered another difficulty: the rigid judicial interpretation of the applicable laws. For many years, the Council of State interpreted the law rigorously and consistently overruled judgments from the lower courts that opted for a less rigorous interpretation. The Council of State has received widespread criticism for this "unnecessarily rigid interpretation".[120] Some have argued that the judiciary failed for long to thoroughly scrutinize the Tax

115 *Kamerstukken* II, 2013/14, 33754, nr. 4.

116 Nationale Ombudsman 2013; Nationale Ombudsman 2015; Nationale Ombudsman 2017.

117 Venice Commission 2021.

118 In October 2019 the Council of State concluded that, contrary to its previous interpretation, the law actually does grant the Tax Authority discretion in determining the amount to be reclaimed and that it should ensure that adverse consequences of a decision are not disproportionate to its objectives (adhering to the principle of proportionality laid down in article 3:4 of the *Algemene wet bestuursrecht*). See Afdeling Bestuursrechtspraak van de Raad van State (ABRvS) 23 October 2019, ECLI:NL:RVS:2019:3535; ABRvS 23 October 2019, ECLI:NL:RVS:2019:3536.

119 Nationale Ombudsman 2017; Brenninkmeijer 2021.

120 Brenninkmeijer 2021, p. 12.

Authority's practices, especially with regard to its structural institutional prejudice.[121] In many cases the judiciary failed to fully consider the financial disasters that were inflicted on benefit recipients, which deprived citizens of the quality of legal protection they should be able to expect from the highest administrative court.[122]

Besides this weakened capacity for resolving individual grievances, there were problems in the feedback loops from the judiciary towards the executive government. In 2021, the Council of State recognized that it failed for long to identify the systemic failures within the Tax Authority, which was, accordingly, not incentivized to reconsider its approach.[123] The Tax Authority was systematically endorsed in holding on to its strict enforcement policy (without balancing and proportionality tests) because the case law dictated that this approach was prescribed by law,[124] which reinforced the Tax Authority's 'all or nothing' approach.[125] The president of the Council of State acknowledged, in January 2021, that the judiciary for too long went along with the systemic failure of legislature and executive. He acknowledged that the judiciary had failed to do justice to the real-life situations of individual citizens owing to an excessive focus on safeguarding legal consistency and coherence.[126] This prolonged absence of countervailing balance from the judiciary has been related to a more fundamental issue: the traditional conception of the administrative judiciary's role in scrutinizing government and providing independent feedback. The Venice Commission remarked that the cultural tradition that judges "are generally deferential to Parliament" (with respect to formal acts of legislation)[127] seems to have contributed to the prolonged endorsement of the rigid interpretation of the law. Others have more generally concluded that the Council of State lacked the necessary independent attitude in relation to both the executive and the legislative branch and that this fits into a broader critique of the judiciary being overly 'governmentalized'.[128]

6 Conclusion

This article forms a first step towards a fundamental understanding of 'rule of law system weaknesses' in recent cases of large-scale policy failure in the digital welfare

121 Vonk 2020; Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.

122 Besselink 2021. The Council of State also reflected on its role in the childcare benefits scandal in a special reflection report. It acknowledged that benefit recipients for long did not receive the legal protection they should be able to expect from the highest administrative court; see Raad van State 2021.

123 Raad van State 2021; Parlementaire Ondervragingscommissie Kinderopvangtoeslag 2020.

124 Venice Commission 2021.

125 Goossens et al. 2021.

126 Raad van State 2021. The president of The Council of State has remarked that the strict interpretation of the law was met with little counteraction from the lower courts, while acknowledging that the Council of State should have been more adamant in following up on initiatives for a more 'proportional approach' (e.g. initiated by the court of Rotterdam in 2013). See Van Ettekoven 2021.

127 Venice Commission 2021, p. 21.

128 Brenninkmeijer 2021.

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state. It departed from the observation that deficits in parliamentary and judicial control have partially determined the outcomes of 'enforcement fiascos' that recently emerged in multiple countries. By drawing on insights from the legal and public policy literature, the article developed an empirical framework to analyse parliamentary and judicial control in the Dutch childcare benefits scandal. While it is important to be aware of hindsight bias,[129] the results reinforce the notion that multiple deficits in these control mechanisms contributed to the emergence and prolonged duration of the childcare benefits scandal.

First of all, there were indications of a weakened capacity of ex-ante parliamentary control in the domain of safeguarding rule of law and protecting individuals from arbitrary government action (rule of law perspective). As co-legislators, parliament and executive government seem to have insufficiently safeguarded the principle of proportionality and room to do justice to individual circumstances. In later years, deficiencies in ex-post parliamentary scrutiny caused systemic injustices to remain unchecked. Besides this, parliamentary control malfunctioned in the assessment of empirical feasibility and government performance (public policy perspective), specifically with regard to weaknesses in the system for benefit provision and enforcement (advance payments, definitive calculations and chargebacks) and the negative effects of the Tax Authority's enforcement regime. The analysis also provides some insights into the causes of these shortcomings. Besides a structural lack of transparency from the executive government, parliamentary control was weakened by multiple factors in the political climate, including an overheated focus on fraud prevention, overly optimistic expectations of the future potential of digitalized decision-making and an overestimation of citizens' self-reliance.

Next to parliamentary control deficits, there were deficiencies throughout the system of administrative adjudication. Disadvantaged benefit recipients were obstructed in their attempts to find a legal remedy and were confronted with substantial legal uncertainty in the administrative appeals procedure. In the judicial process, many benefit recipients did not receive the legal protection they were allowed to expect 0wing to the Council of State's rigid interpretation of the law. Besides this weakened capacity for resolving individual grievances (rule of law perspective), there were problems related to the feedback effects of judicial review (public policy perspective). For years, court judgments actually reinforced the Tax Authority's interpretation of the law, which incentivized the detrimental 'all or nothing' approach to remain in place. There may be many underlying reasons for this weakened functioning of judicial review, but some aspects of specific interest are the presumed deferential attitude of judges towards parliamentary legislation and the broader critique of the 'governmentalization' of the judiciary. These findings are also insightful with regard to the hitherto understudied relationship between judicial review and policy failure. As reflected in the childcare benefits scandal, deficits in both the grievance-handling function and the feedback effects of judicial review may play a key role in the extended duration of policy failure. And, more generally, this study underlines the importance of applying an integral perspective in the study of parliamentary and judicial control (rather than focusing

129 The treatment of events as more foreseeable than they actually were, Toshkov 2016, p. 11.

in isolation on one) to capture the interactions between these control mechanisms. A specifically interesting aspect is the question of whether legislation 'paved the way' for the childcare benefits scandal or whether administration and judiciary could have done more to mitigate its extent and duration.

All in all, this study offers important insights into the broader issue of system failure in the digital welfare state. While the control mechanisms in the Dutch *Rechtsstaat* eventually put an end to the childcare benefits scandal, these developments should be seen as an important wake up call. The childcare benefits scandal has shown that the digital welfare state can form a hazardous environment, with a toxic combination of political pressures to combat fraud and a 'dehumanization' of government driven by digitalization. It shows that a robust system of parliamentary and judicial control of government is crucial to scrutinize and counteract the excesses of "repressive welfare states".[130] This notion remains, or, rather, is even more important in the age of the digital welfare state. It is crucial for parliaments and judiciaries to be aware of their key role as scrutinizers of government in the digital welfare state, in the domain of safeguarding rule of law as well as critically examining the quality of policies.

As said before, this article delivers only an elementary understanding of system failure in the digital welfare state. More research is needed to fully comprehend this broader phenomenon. Future research should focus more extensively on the causal background of system failures such as the childcare benefits scandal. This study has already pointed to some factors that deserve more extensive scrutiny, including the politicization of benefit fraud, the drawbacks of digitalized decision-making and the long-term institutional dynamics between parliament, executive and judiciary.

References

Adviescommissie Uitvoering Toeslagen, *Omzien in verwondering 2 (Eindadvies*), Adviescommissie Uitvoering Toeslagen (Commissie Donner) 2020.

Alston, P., *Note by the Secretary-General Report of the Special Rapporteur on Extreme Poverty and Human Rights (A/74/493)*. United Nations, Human Rights Council 2019.

Asimow, M., 'Five models of administrative adjudication', *The American Journal of Comparative Law* 2015-63(1), pp. 3-32.

Besselink, L.F.M., 'Hoogste rechter, hoogste onrecht: Over de rechter en de wet in de Toeslagenaffaire', *Nederland Rechtsstaat* 2021, www.nederlandrechtsstaat.nl/hoogste-rechter-hoogste-onrecht-over-de-rechter-en-de-wet-in-de-toeslagenaffaire/.

Bovens, M., 'Two concepts of accountability: Accountability as a virtue and as a Mechanism', *West European Politics* 2010-33(5), pp. 946-967.

Bovens, M. & P. 't Hart, *Understanding Policy Fiascoes*. Routledge 1998.

Bovens, M. & 't Hart, P., 'Revisiting the study of policy failures', *Journal of European Public Policy* 2016-23(5), pp. 653-666.

Bovens, M., T. Schillemans & P.T. Hart, 'Does public accountability work? An assessment tool', *Public Administration* 2008-86(1), pp. 225-242.

130 Vonk 2014, p. 202.

doi: 10.5553/RdW/138064242023044002003

Brenninkmeijer, A.F.M., '"De grondbeginselen van de rechtsstaat zijn geschonden" als "verschrikkelijk ongeluk": Over de noodzaak van behoorlijk bestuur', *Nederlands Juristenblad* 2021(1), pp. 6-13.

Brinkman, O. & G.J. Vonk, 'De menselijke maat', *Socialisme En Democratie* 2022-79(2), pp. 28-40.

Cane, P., 'Understanding judicial review and its impact', in: M.L.M. Hertogh & S. Halliday (eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge University Press 2004, pp. 15-42.

Carney, T., 'Robo-debt illegality: A failure of rule of law protections?', *Australian Public Law* 2018, https://www.auspublaw.org/blog/2018/04/robo-debt-illegality.

Carney, T., 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?', *Alternative Law Journal* 2019-44(1), pp. 4-10.

Cormacain, R., 'Legislation, legislative drafting and the rule of law', *The Theory and practice of legislation* 2017-5(2), pp. 115-135.

Damen, L.J.A., C.L.G.F.H. Albers, K. de Graaf, J.H. Jans, A.P. Klap, A.M. Klingenberg, A.T. Marseille, P. Nicolai, B.K. Olivier, H. Tolsma & F.R. Vermeer, *Bestuursrecht 1: Systeem, Bevoegdheid, Bevoegdheidsuitoefening, Handhaving*. Boom Juridische uitgevers 2013.

Damen, L., 'Ik was het niet, ik was het niet, het was de wetgever!', *Nederlands Juristenblad* 2021(5), pp. 371-374.

De Vrieze, F. & P. Norton, 'The significance of post-legislative scrutiny', *Journal of Legislative Studies* 2020-26(3), pp. 349-361.

Dougherty, A., A. Gryskiewicz & A. Ponce, 'Measuring the rule of law: The world justice project's rule of law index', in: D. Valentina Malito, G. Umbach & N. Bhuta (eds.), *The Palgrave Handbook of Indicators in Global Governance*. Cham: Palgrave Macmillan 2018, pp. 255-276.

Dunleavy, P., 'Policy disasters: Explaining the UK's record', *Public Policy and Administration* 1995-10(2), pp. 52-70.

Dunleavy, P., 'Chapter 5.2: The core executive and government', in: P. Dunleavy, A. Park & R. Taylor (eds.), *The UK's Changing Democracy*. London: LSE Press 2018, pp. 204-222.

Einarsen, T., 'NAV-skandalen: Et utslag også av uvilje og tynn domstolsprøving?', *Rett24* 2019, https://rett24.no/articles/nav-skandalen-et-utslag-ogsa-av-uvilje-og-tynn-domstolsproving.

Elliott, M., *The constitutional foundations of judicial review*. Oxford: Hart Publishing 2001.

Epstein, L. & A.D. Martin, *An introduction to empirical legal research*. Oxford University Press 2014.

Fagan, E.J., 'Political institutions, punctuated equilibrium theory, and policy disasters', *Policy Studies Journal* 2023-51(2), pp. 243-263.

Fox, J. & M.C. Stephenson, 'Judicial review as a response to political posturing', *American Political Science Review* 2011-105(2), pp. 397-414.

Frederik, J., *Zo hadden we het niet bedoeld: de tragedie achter de toeslagenaffaire*. De Correspondent 2021.

Goossens, J., G-J. Leenknegt, C. van Oirsouw & E. van Vugt, 'The Netherlands: 2020 global review of constitutional law', in: R. Albert, D. Landau, P. Faraguna & S. Drugda (eds.), *The I·CONnect-Clough Center 2020 global review of constitutional law*. Clough Center for the Study of Constitutional Democracy 2021, pp. 202-206.

Graver, H.P, 'Fundamental kunnskapssvikt fra topp til bunn' (kommentar), *Rett24* 2019, https://rett24.no/articles/fundamental-kunnskapssvikt-fra-topp-til-bunn.

Harlow, C. & R. Rawlings, *Law and Administration* (Third Edition). Cambridge University Press 2009.

Henman, P.W.F., 'Digital social policy: Past, present, future', *Journal of Social Policy* 2022-51(3), pp. 535-550.
Heringa, A.W., *Constitutions Compared: An Introduction to Comparative Constitutional Law* (Fifth Edition). Intersentia Ltd 2019.
Hertogh, M., 'Coercion, cooperation, and control: Understanding the policy impact of administrative courts and the ombudsman in the Netherlands', *Law & Policy* 2001-23(1), pp. 47-67.
Hertogh, M., 'Administrative justice and empirical legal research', in: M. Hertogh, R. Kirkham, R. Thomas & J. Tomlinson (eds.), *The Oxford Handbook of Administrative Justice*. Oxford University Press 2021, pp. 355-374.
Hertogh, M. & S. Halliday, 'Judicial review and bureaucratic impact in future research', in: M.L.M. Hertogh & S. Halliday (eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge University Press 2004, pp. 169-284.
Holzhacker, R., 'The power of opposition parliamentary party groups in European scrutiny', *Journal of Legislative Studies* 2005-11(3-4), pp. 428-445.
Ikdahl, I., 'Rettssikkerhet i velferdsstaten', *Tidsskrift for Familierett, Arverett Og Barnevernrettslige Spørsmål* 2020-18(1), pp. 3-6.
Jennings, W., M. Lodge & M. Ryan, 'Comparing blunders in government', *European Journal of Political Research* 2018-57(1), pp. 238-258.
Jørgensen, R.F., 'Data and rights in the digital welfare state: The case of Denmark', *Information Communication and Society* 2023-26(1), pp. 123-138.
Karlas, J., 'Parliamentary control of EU affairs in Central and Eastern Europe: Explaining the variation', *Journal of European Public Policy* 2011-18(2), pp. 258-273.
Kiely, E. & K. Swirak, 'Disciplining the poor: Welfare conditionality, labour market activation and welfare 'Fraud'', in: E. Kiely & K. Swirak (eds.), *The Criminalisation of Social Policy in Neoliberal Societies*. Bristol University Press 2022, pp. 34-55.
King, A. & I. Crewe, *The Blunders of Our Governments*. Simon & Schuster 2014.
Klosse, S. & G.J. Vonk, *Hoofdzaken socialezekerheidsrecht* (zesde druk). Boom Juridische uitgevers 2022.
Koopmans, T., 'Judicial review of legislation', in: T. Koopmans (eds.), *Courts and Political Institutions*. Cambridge University Press 2010, pp. 35-62.
Larasati, Z. W., T.K. Yuda & A.R. Syafa'at, 'Digital welfare state and problem arising: An exploration and future research agenda', *International Journal of Sociology and Social Policy* 2022-43(5/6), pp. 537-549.
Marseille, A.T., 'Kinderopvangtoeslagen: wel of geen beleidsvrijheid voor de Belastingdienst/Toeslagen?' *Ars Aequi* 2020-4, pp. 393-399.
Maxwell, J., 'Judicial review and the digital welfare state in the UK and Australia', *Journal of Social Security Law* 2021-28(2), pp. 94-109.
McCarthy-Cotter, L., 'The flawed legislative process' in: L. McCarthy-Cotter (ed.), *The 1991 Child Support Act: Failure Foreseeable and Foreseen*. Cham: Palgrave Macmillan 2019, pp. 133-171.
McConnell, A., 'Policy success, policy failure and grey areas in-between', *Journal of Public Policy* 2010-30(3), pp. 345-362.
McConnell, A., 'A public policy approach to understanding the nature and causes of foreign policy failure', *Journal of European Public Policy* 2016-23(5), pp. 667-684.
McConnell, A. & S. Tormey, 'Explanations for the Brexit policy fiasco: Near-impossible challenge, leadership failure or Westminster pathology?', *Journal of European Public Policy* 2020-27(5), pp. 685-702.

Recht der Werkelijkheid 2023 (44) 2
doi: 10.5553/RdW/138064242023044002003

Molander, A., H. Grimen & E.O. Eriksen, 'Professional discretion and accountability in the welfare state', *Journal of Applied Philosophy* 2012-29(3), pp. 214-230.
Mousmouti, M., 'Legislative failure', in: M. Mousmouti (ed.), *Designing Effective Legislation*. Edward Elgar Publishing 2019, pp. 129-149.
Nationale Ombudsman, *In het krijt bij de overheid: verstandig invorderen met oog voor maatschappelijke kosten*. Nationale Ombudsman 2013(003).
Nationale Ombudsman, *Gevraagd: maatwerk! Een onderzoek naar de uitvoeringspraktijk bij de Belastingdienst/Toeslagen*. Nationale Ombudsman 2015(025).
Nationale Ombudsman, *Geen powerplay maar fairplay: Onevenredig harde aanpak van 232 gezinnen met kinderopvangtoeslag*. Nationale Ombudsman 2017(095).
Ng, G.Y., *Quality of judicial organisation and checks and balances*. Utrecht University 2007.
Norges offentlige utredninger (Norway's Public Reports), 'Blindsonen' (2020:9), 4 August 2020.
Royal Commission into the Robodebt Scheme, *Royal Commission into the Robodebt Scheme (Report, Volume 1)*, Australian Government (Royal Commissioner Catherine Holmes) 2023.
Parlementaire Ondervragingscommissie Kinderopvangtoeslag (Parliamentary Inquiry Committee on Childcare Benefits), *Ongekend Onrecht (Verslag Parlementaire ondervragingscommissie Kinderopvangtoeslag)*, Tweede Kamer der Staten Generaal 2020.
Pelizzo, R. & R. Stapenhurst, 'Tools for legislative oversight: An empirical investigation', *World Bank World Bank Policy Research Working Papers* 2004-3388.
Peters, B.G., *The politics of bureaucracy* (Fifth Edition). London and New York: Routledge 2001.
Peters, B.G., 'State failure, governance failure and policy failure: Exploring the linkages', *Public Policy and Administration* 2015-30(3-4), pp. 261-276.
Raad van State, *Lessen uit de kinderopvangtoeslagzaken*. Raad van State 2021.
Ranchordás, S.H., 'Empathy in the Digital Administrative State', *Duke Law Journal* 2022-71(6), pp. 1340-1389.
Rijksoverheid, 'Verklaring van minister-president Mark Rutte over het aftreden van het kabinet', Rijksoverheid 2021, https://www.rijksoverheid.nl/documenten/publicaties/2021/01/15/verklaring-van-minister-president-mark-rutte-over-het-aftreden-van-het-kabinet.
Ringeling, A., 'Public administration as a study of the public sphere: A normative view', Eleven International Publishing 2017.
Roberts, A., 'Bridging levels of public administration: How macro shapes meso and micro', *Administration & Society* 2020-52(4), pp. 631-656.
RTL Nieuws, 'Toeslagenaffaire: Kamer onvolledig geïnformeerd over gebruik tweede nationaliteit', *RTL Nieuws*, 16 January 2021, https://www.rtlnieuws.nl/nieuws/nederland/artikel/5198633/toeslagenaffaire-menno-snel-tweede-nationaliteit-tweede-kamer.
Schuck, P.H., *Why Government Fails So Often: And How It Can Do Better*. Princeton University Press 2014.
Sejersted, F., 'Norway: Parliamentary scrutiny of the government and the administration', *European Public Law* 2000-6(4), pp. 484-495.
Sellers, M.N.S., 'What is the rule of law and why is it so important?', in: J.R. Silkenat, J.E. Hickey & P. Barenboïm (eds.), *The legal doctrines of the rule of law and the legal state (Rechtsstaat)*. Cham: Springer 2014.

Simonse, O., G. Vanderveen, L.F. van Dillen, W.W. van Dijk & E. van Dijk, 'Social security or insecurity? The experience of welfare participation by financially vulnerable households in the Netherlands', *Social Policy & Administration* 2022-57(3), pp. 1-17.
Spanou, C., 'Judicial controls over the bureaucracy', in: Thompson, W.R. (ed.), *Oxford Research Encyclopedia of Politics*. Oxford University Press 2020.
Sunkin, M., 'Conceptual issues in researching the impact of judicial review on government bureaucracies', in: M.L.M. Hertogh & S. Halliday (eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge University Press 2004, pp. 169-284.
Thomas, R. & J. Tomlinson, *Immigration Judicial Reviews: An Empirical Study*. Palgrave Macmillan 2021.
Toshkov, D., *Research design in political science*. Macmillan International Higher Education 2016.
Van den Brink, J. & Ortlep, R., 'Kinderopvangtoeslagaffaire: De democratische rechtsstaat wordt als staal in de wind gehard', *Nederlands Juristenblad* 2021(5), pp. 353-370.
Van der Schyff, G., *Judicial review of legislation: A comparative study of the United Kingdom, the Netherlands and South Africa* (Vol. 5). Springer Science & Business Media 2010.
Van Ettekoven, B.J., 'Tussen wet en recht': Reactie van de voorzitter van de Afdeling bestuursrechtspraak van de Raad van State op het rapport Ongekend onrecht van de Parlementaire ondervragingscommissie Kinderopvangtoeslag', *Nederlands Juristenblad* 2021(2), pp. 98-107.
Van Gestel, R., 'Een ongekend parlement. Over de Toeslagenaffaire en de Trias', in: J. Goossens, J., J. de Poorter, G. van der Schyff, T. Geldof & C. van Oirsouw (red.), *Rechtsvorming in een hypercomplexe samenleving. Bundel n.a.v. de Staatsrechtconferentie 2022 (Tilburg University)*. Wolf Legal Publishers 2022, pp. 25-60.
Van Ommeren, F.J., 'De rechtsstaat als toetsingskader', in: F.J. van Ommeren & S.E. Zijlstra (red.), *De rechtsstaat als toetsingskader*, 2003, pp. 7-23.
Venice Commission, *Report on the role of the opposition in a democratic Parliament*. Council of Europe 2010.
Venice Commission, *The Netherlands: Opinion on the legal protection of citizens*. Council of Europe 2021.
Vince, J., 'Integrated policy approaches and policy failure: the case of Australia's Oceans Policy', *Policy Sciences* 2015-48(2), pp. 159-180.
Voermans, W., 'Rutte schermt informatie af en dat is ongrondwettig (opinie)', *NRC* 2020, www.nrc.nl/nieuws/2020/12/22/rutte-schermt-informatie-af-en-dat-is-ongrondwettig-a4024861.
Vonk, G.J., 'Repressive welfare states: The spiral of obligations and sanctions in social security', *European Journal of Social Security* 2014-16(3), pp. 188-203.
Vonk, G.J. & Katrougalos, G., 'The public interest and the welfare state: A legal approach', in: G.J. Vonk & A. Tollenaar (eds.), *Social Security as a Public Interest (Social Europe Series; Vol. 24)*. Intersentia 2010, pp. 63-84.
Vonk, G.J., 'Inkomensafhankelijke toeslagen in zwaar weer', *Nederlands Juristenblad* 2020(17), pp. 1220-1228.
Watts, B. & Fitzpatrick, S., *Welfare conditionality*. Routledge 2018.
Whiteford, P., 'Debt by design: The anatomy of a social policy fiasco – Or was it something worse?', *Australian Journal of Public Administration* 2021-80(2), pp. 340-360.
Woehrling, J.M., 'Judicial control of administrative authorities in Europe: Toward a common model', *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave* 2006-6(3), pp. 56-56.
World Justice Project, *World Justice Project Rule of Law Index* 2022.

Wu, X., M. Ramesh & M. Howlett, 'Policy capacity: A conceptual framework for understanding policy competences and capabilities', *Policy and Society* 2015-34(3-4), pp. 165-171.

Wu, X., M. Ramesh & M. Howlett, 'Policy capacity: Conceptual framework and essential components', in X. Wu, M. Ramesh & M. Howlett (eds.), *Policy capacity and governance: Assessing governmental competences and capabilities in theory and practice*. Palgrave Macmillan Cham 2018, pp. 1-25.

Zouridis, S., *De resonante rechtsstaat: Over de institutionele crisis van de rechtsstaat en hoe er weer uit te komen*. Boom Uitgeverij 2021.