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**Dutch intelligence sharing interests versus the protection of civil rights: An analysis of the Dutch Wiv through time (1987-2021) to determine the possible consequences for the legal protection of fundamental civil rights after the intended revision of the Wiv 2017 regarding the system of oversight**

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# **Dutch intelligence sharing interests versus the protection of civil rights**

*An analysis of the Dutch Wiv through time (1987-2021) to determine the possible consequences for the legal protection of fundamental civil rights after the intended revision of the Wiv 2017 regarding the system of oversight.*

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## Abstract

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This study focuses on the changing legislation towards protecting national security and the consequences of those changes regarding the legal protection of civil rights. Through an analysis of a longitudinal case study (1987-2021), the question has been answered what the possible consequences will be for the legal protection of civil rights after the last revision of the Dutch Intelligence and Security Service Act 2017 (Wiv 2017) which took place in 2021. This revision contains extensions regarding intelligence sharing operations of the Dutch intelligence and security services. This means that fundamental civil rights stated in the European Convention of Human Rights could be more easily affected than before. This will be the case when foreign intelligence and security services share the received intelligence with third parties without consent from the Dutch intelligence and security agencies. Additionally, shared intelligence might thus be more easily used by the receiving agency for harmful purposes that do not correspond with the interest of the Dutch intelligence and security services and the Dutch state. Moreover, the receiver agency might interpret the intelligence regarding a citizen that this person is perceived as serious terrorist threat by the sending agency and therefore affect the life of the person in question. Thus, incorporating the ex-ante review of the Review Committee on the Deployment of Powers (TIB) besides the authorization of the appointed minister and ex-post review of the Intelligence and Security Services Oversight Committee (CTIVD) might improve the actual legal protection of the fundamental civil rights in the Dutch society.

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## List of abbreviations

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<b>AIVD</b>	<i>Algemene Inlichtingen- en Veiligheidsdienst</i> General Intelligence and Security Service
<b>BID</b>	<i>Buitenlandse Inlichtingendienst</i> Foreign Intelligence Service
<b>BVD</b>	<i>Binnenlandse Veiligheidsdienst</i> Homeland Security Service
<b>CIVD</b>	<i>Commissie voor de Inlichtingen- en Veiligheidsdiensten</i> Committee on Intelligence and Security Services
<b>CTIVD</b>	<i>Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten</i> Intelligence and Security Services Oversight Committee
<b>CVD</b>	<i>Centrale Veiligheidsdienst</i> Central Security Service
<b>ECHR</b>	<i>Europees Verdrag voor de Rechten van de Mens</i> European Convention of Human Rights
<b>MIVD</b>	<i>Militaire Inlichtingen- en Veiligheidsdienst</i> Military Intelligence and Security Service
<b>GS III</b>	<i>De derde selectie van de Generale Staf</i> The third selection of the General Staff
<b>IDB</b>	<i>Inlichtingendienst Buitenland</i> Foreign Intelligence Service
<b>LAMID</b>	<i>Landmacht Inlichtingendienst</i> Army Intelligence Service
<b>LUID</b>	<i>Luchtmacht Inlichtingendienst</i> Airforce Intelligence Service
<b>MARID</b>	<i>Marine Inlichtingendienst</i> Navy Intelligence Service
<b>MID</b>	<i>Militaire Inlichtingendienst</i> Military Intelligence Service
<b>NCTb</b>	<i>Nationaal Coördinator Terrorismebestrijding</i> National Coordinator for Counterterrorism
<b>NCTV</b>	<i>Nationaal Coördinator Terrorismebestrijding Nederland</i> National Coordinator for Counterterrorism of the Netherlands
<b>OHCHR</b>	<i>Hoog Commissariaat voor de Mensenrechten van de Verenigde Naties</i> United Nations High Commissioner for Human Rights
<b>TIB</b>	<i>Toetsingscommissie Inzet Bevoegdheden</i> Review Committee on the Deployment of Powers
<b>Wiv 1987</b>	<i>Wet op de Inlichtingen- en Veiligheidsdiensten 1987</i> Intelligence and Security Service Act 1987
<b>Woo</b>	<i>Wet open overheid</i> Open Government Law
<b>WODC</b>	<i>Wetenschappelijk Onderzoek- en Documentatiecentrum</i> Scientific Research and Documentation Centre

## Chapter 1 Introduction

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In the war on terror, the sharing of intelligence between intelligence and security services in Western countries is an important measure taken by these agencies to combat terrorism. Recently, in the Netherlands, the existing intelligence legislation named the *Wet op de Inlichtingen- en Veiligheidsdiensten 2017* (Intelligence and Security Service Act 2017, hereafter *Wiv 2017*), has been revised; this was done in the light of the recommendations of the Jones-Bos-committee (Rijksoverheid, 2021a). On January 20, 2021, the Jones-Bos-committee presented their evaluation report to the Dutch government (Rijksoverheid, 2021a).

The main purpose of this evaluation report was to assess the knowledge of the operations and work of the *Algemene Inlichtingen- en Veiligheidsdienst* (General Intelligence and Security Service, hereafter *AIVD*) and the *Militaire Inlichtingen- en Veiligheidsdienst* (Military Intelligence and Security Service, hereafter *MIVD*), regarding intelligence services, security services and military services in the Netherlands. The goal was to assess their compliance with legislation and human rights (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2020).

In the context of safeguarding civil rights of intelligence sharing operations, the most important recommendation of the Jones-Bos-committee to the Dutch government was to slightly limit the role of the oversight committees on the operations of *AIVD* and the *MIVD* (Jones-Bos et al., 2021; Modderkolk, 2021). The oversight committees of the *Toetsingscommissie Inzet Bevoegdheden* (the Review Committee on the Deployment of Powers, hereafter *TIB*) and the *Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten* (the Intelligence and Security Services Oversight Committee, hereafter, *CTIVD*), argued in response that supervision and control of the operations of the *AIVD* and *MIVD* are necessary to safeguard the fundamental civil rights of Dutch citizens (Pasveer, 2021).

Although the *AIVD* and the *MIVD* support this point of view, they indicated that it is more difficult than before, in the ever evolving and changing –(digital)- world, to effectively conduct their tasks, such as sharing intelligence in order to protect national security (Modderkolk, 2021; Pasveer, 2021). In addition, this also includes the ongoing ex-ante and ex-post reviews of the *TIB* and *CTIVD* on the executed operations of the agencies. This means that before the *AIVD* and the *MIVD* can share intelligence with foreign intelligence and security services or conduct

other operations, the TIB has to give permission beforehand (ex-ante) (Jones-Bos et al., 2021). Afterwards, an additional review (ex-post) is conducted by the CTIVD.

Nevertheless, the oversight committees argued that without a proper system of oversight, safeguarding civil rights could become problematic (Pasveer, 2021). More specifically, sharing intelligence between intelligence and security services to protect national security could potentially violate the fundamental rights of citizens (United Nations High Commissioner for Human Rights (OHCHR), 2018; Privacy International, 2021; Sepper, 2010; Walsh, 2006). At last, the House of Representatives accepted the committee's recommendations; during the writing of this thesis, the evaluation report was accepted by the Senate on June 15, 2021, and its content was implemented on July 14, 2021 (Eerste Kamer der Staten-Generaal, 2021a).

### **1.1. Research objective and research question**

The aim of this study is to analyse the political dilemma between protecting national security versus the safeguarding of civil rights (Hagens, 2018). This can also be seen as a field of tension between protecting national security in context of sharing intelligence with foreign intelligence and security services on the one hand and safeguarding civil rights on the other. More specifically, this study will analyse this field of tension in the context of the system of oversight on these intelligence sharing operations of the Dutch intelligence and security services.

The motivation for this research is the revision of the Wiv 2017 by the House of Representatives and the Senate after the recommendations of the Jones-Bos committee (Rijksoverheid, 2021a). More particularly, the cause for writing this thesis is the recommendation to slightly limit the role of the oversight committees on the operations of the AIVD and the MIVD (Jones-Bos et al., 2021; Modderkolk, 2021). This means that it remains important to analyse what the possible consequences of the revision of the Wiv 2017 are for the legal protection of civil rights. This has resulted in the following research question:

*'What are the potential consequences of revising the oversight on intelligence sharing in the Dutch Wiv 2017 for the legal protection of fundamental civil rights?'*

To provide an answer to this research question, this study will use a longitudinal case study to analyse the Dutch Wiv through a specific period in time: the Wiv 1987, the Wiv 2002, the Wiv 2017 and the revised Wiv 2017 will be analysed. Each Wiv will be analysed with the use of the



policy theory. The policy theory will be used to obtain an in-depth understanding of the motivation behind the implementation of each Wiv, the intelligence sharing practices, the system of oversight on these practices and regulations for the protection of civil rights within the respective Wiv and to determine the end goal(s) of the Wiv's.

The 'outcome' and 'impact' factors of the policy theory of each Wiv will be further analysed to explore if a trend can be discovered within the Dutch Wiv regarding the 'balance' towards protecting national security or safeguarding civil rights. In other words, does the Dutch Wiv tend more towards protecting national security or protecting civil rights through time? Ultimately, it can be determined what the possible consequences will be of the revision on the oversight on intelligence sharing within the Wiv 2017 for the legal protection of citizen's fundamental civil rights. This study focuses on the civil rights mentioned in the European Convention of Human Rights of 1950, this will be further explained in section 3.4.

Since the focus of this study is motivated by the recommendation of the Jones-Bos committee regarding the revision of the Dutch Wiv 2017, and considering the feasibility of this research, this study solely focuses on this dilemma in the context of intelligence sharing within the Netherlands. It extends the existing research and evaluation report of the Jones-Bos committee; therefore, focusing on other countries or conducting a comparative research would not apply; nor would it benefit the research question and study.

It should be noted that there was no access to classified information from the AIVD and the MIVD nor were there any confidential sources used. Therefore, this study is limited to the use of publicly accessible sources, since it is not feasible to incorporate classified data from the AIVD and MIVD into this study. Moreover, this study is based on factual information of publicly accessible sources and not on the personal opinions of the researcher.

## **1.2. Academic relevance**

The political dilemma between ensuring national security on the one hand and guaranteeing legal protection of civil rights on the other hand is a very actual and difficult one. This dilemma was posted by Hagens (2018, p. 86) in the publication of *Judicial Explorations* regarding the Wiv 2017 by the *Wetenschappelijk Onderzoek- en Documentatiecentrum* (Scientific Research and Documentation Centre, hereafter WODC) of the Ministry of Justice and Security. Although this dilemma cannot be fully answered by this study, nor by any other study, the analysis of this

study might provide more insight into the dilemma. Furthermore, it will provide an answer to the question posed by Hagens in the context of intelligence sharing operations of the AIVD and MIVD in the Netherlands and might form a new basis for further research.

### **1.3. Societal relevance**

The societal relevance of this study lies in assessing whether the existing oversight committees of the TIB and the CTIVD adequately can safeguard the legal protection of civil rights after the revision of the Wiv 2017. The public debate regarding this revision expressed concerns regarding the protection of civil rights after implementing the revision of the Wiv 2017 (Modderkolk, 2021; Pasveer, 2021). Therefore, it is important to determine what the revision of the Wiv 2017 could mean for the legal protection of civil rights in the Dutch society.

### **1.4. Reading guide**

The following chapter consists of a literature review to provide a thorough understanding of how the mentioned political dilemma on protecting national security and civil rights has developed in the context of intelligence sharing over time. Subsequently, this chapter elaborates on the benefits and criticism of scholars on intelligence sharing operations, how the public international perception towards intelligence sharing and civil has changed and how a system of oversight on the agencies might contribute to the protection of civil rights.

In the third chapter, the theoretical framework will be presented. At first, the four most important concepts that were derived from the literature review will be conceptualized, namely national security, intelligence sharing, the system of oversight on intelligence and security agencies and civil rights. This will be done to gain a better understanding of these main concepts, since they will be used throughout this study. Secondly, it will be explained how the policy theory is commonly used by the *Rijksoverheid* (the Dutch Central Government) to analyse existing policies. Moreover, the challenges and limitations of the use of the policy theory will also be described in this chapter.

The fourth chapter outlines the methodology: the use of qualitative research methods, data collection, data analysis, operationalization and the internal- and external validity and reliability will be explained. This chapter will also discuss the limitations of this study. Chapter five consists of two parts: the first part consists of the description of the longitudinal case study of

the Dutch Wiv and the use of the policy theory. To provide a clear structure, each Wiv will be presented from a historical, political, and societal perspective.

The second part of chapter five consists of the analysis of the ‘outcome’ and ‘impact’ factors of the policy theory of each Wiv. This will be done within the context of the four themes discussed in the operationalization. The purpose of the analysis is to explore whether a trend can be discovered within the changing process of the Dutch Wiv. Finally, chapter six will focus on answering the research question and providing conclusions that can be drawn from the research; it will also discuss the limitations of this study and recommendations for further research.

## Chapter 2 Literature review

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The debate between protection national security and safeguarding civil rights is constantly evolving through time. Within this literature review, an overview will be given on how this dilemma has developed over time in the context of intelligence sharing operations. Besides the benefits of intelligence sharing, criticism on intelligence sharing is discussed. Moreover, to address how the public and international response towards intelligence sharing operations and civil rights has changed and how a system of oversight on the agencies might contribute to the protection of civil rights. This will be done to understand the position of this study within the academic context. This is necessary, to determine what the potential consequences are for the legal protection of civil rights if the oversight of intelligence sharing operations is being revised.

### **2.1. The changing debate on national security, civil rights, and intelligence sharing**

Liberal democratic countries are constantly facing challenges during occurring security threats, caused by the changing geopolitical security landscape and ongoing digital and technological innovations (Hadji-Janev, 2021). For example, the power shift from state actors to non-state actors, such as terrorist groups, contributes to this challenge (Christakis & Bouslimani, 2020; Hadji-Janev, 2021; Morris, 2020). These changes urge governments to take extraordinary measures to protect national security in the war on terror, since any State has the legitimate right to protect their national security from external security threats. These new security challenges also affect the existing political dilemma between protection national security and safeguarding civil rights (Hagens, 2018).

Several scholars argue that it was a logical step for Western states to enact new or amended legislation after 9/11 to counter terrorism (Christakis & Bouslimani, 2020; Golder & Williams, 2006; Michaelsen, 2006; Morris, 2020). The most important change in countering terrorism legislations was the extension of powers of the intelligence and security services and law enforcement bodies to, amongst other activities, authorize digital surveillance of potential terrorist suspects on a global scale (Golder & Williams, 2006). Increasing the powers of the intelligence and security services was legitimate and necessary to, as Christakis and Bouslimani (2020) and Morris (2020) argue, protect national security from external security threats such as terrorism.

Another consequence of 9/11 was that the United Nations implemented Resolution 1373 on September 28, 2001, emphasizing the need for the intensification of intelligence sharing between member states (Clough, 2004; Lefebvre, 2003; Roach, 2012). Subsequently, European institutions such as Europol, the Club of Berne, the European Union Military Staff, and the European Union Situation Centre also pushed for more cooperation and sharing of information between the intelligence and security services of the European member states (Lefebvre, 2003; Roach, 2012; Walsh, 2006). Many scholars agree that these developments caused an upsurge in the cooperation between intelligence and security agencies in the West and created the current essential role that these agencies fulfil, with intelligence sharing as their *modus operandi* in the war on terror (Clough, 2004; Lefebvre, 2003; Roach, 2012; Sepper, 2010; Walsh, 2006).

## **2.2. Benefits of and criticism on intelligence sharing operations**

Clough (2004), Lefebvre (2003), Roach (2012) and Sepper (2010) continue to elaborate on the positive effects of intelligence sharing, such as the rapid exchange of information between agencies regarding the gathered tactical information of an opponent, disseminating information to gain a competitive advantage over an opponent and preventing the deception of information which are essential in preventing possible terrorist attacks. However, Hadji-Janev (2021) points out that the geopolitical landscape is continuously changing due to ongoing digital transformations and technological innovations. This also means that adversaries such as terrorists continuously find more creative ways to conduct their malpractices; therefore, it is even more necessary for intelligence and security services to adapt to these digital transformations.

Other scholars, however, also express their criticism on extending the powers of intelligence and security services regarding intelligence sharing and the effects on civil rights (Christakis & Bouslimani, 2020; Hadji-Janev, 2021; Sepper, 2010; Walsh, 2006). Sepper (2010) and Hadji-Janev (2021) both state that the authorizations of the intelligence and security agencies can also result in the potential misuse of technologies by intelligence and security services; thus, affecting civilians instead of non-state actors, according to the Snowden revelations. In paragraph 2.3, the Snowden revelations will be explained briefly. Hadji-Janev (2021) continues by stating that: ‘utilizing disruptive technologies at a high rate on a national security contextual basis is affecting both the everyday life on an individual level and the functioning of democracies’ (p. 87). Christakis and Bouslimani (2020) underpin this by arguing that protecting national security has often been used by governments and intelligence and security agencies as:

‘a pretext to violate human rights and fundamental freedom’ (p. 2). Intelligence sharing is used in the context of protecting national security, but could also potentially harm civil rights.

In the war on terror, Western intelligence and security services depend on worldwide intelligence and security liaisons in their hunt for terrorist operatives, even from authoritarian regimes (Sepper, 2010). Yet, Sepper (2010) claims that if Western intelligence and security agencies rely on intelligence shared by ‘disreputable or brutal’ agencies, the possibility of the detention, disappearance, and even torture of individuals remains a serious risk (p. 180). Sepper (2010) and Walsh (2006) state that there are three potential dangers of sharing intelligence with foreign intelligence and security services. First, the information can be shared on purpose with a third party without consent from the sender agency. Second, intelligence can be shared inadvertently with other persons, who can possibly share it with unauthorized third parties. Third, states can be reluctant to sharing intelligence, due to the civil and political rights record of the recipient state. This means that there is a possibility that the recipient agency, and thus the state, uses the received intelligence for possible harmful purposes, that do not correspond with the interest of the sending agency and state.

Apart from authoritarian regimes, liberal democracies could also engage in the violation of civil rights through the sharing of intelligence, according to Sepper (2010). She states that ‘liberal democracies encourage and solicit violations for which they are not held accountable’ (Sepper, 2010, p. 175). For example, sharing intelligence regarding one or multiple civilians with a foreign agency, can potentially be understood by the recipient agency as information that this person or these persons are perceived as a serious terrorist threat by the sending agency. This is illustrated by the case of Omar Shishani, where the Russian Federal Security Service provided the United States (U.S.) with intelligence that Shishani was identified as an Islamic radical linked to terrorist activities in the 1990s in Chechnya and was currently residing in the U.S. Ultimately, this appeared to be a case of false identity and therefore, the shared intelligence turned out to be inaccurate. The U.S. intelligence and security services still decided to accept the information unconditionally and therefore linking a citizen to terrorist events based on inaccurate information.

It should be noted, however, that the right to privacy is not an absolute right (Hadji-Janev, 2021, p. 91). Hadji-Janev (2021) and Michaelsen’s (2006) state that citizens partly sacrifice their freedom to receive protection from their government. This means that when an individual is

subjected to a formal investigation or suspected of terrorist activities by intelligence and security agencies or law enforcement, surveillance practices on this person are legitimate in the context of counterterrorism and law enforcement purposes (Hadj-Janev, 2021). However, this should be prevented in the context of inaccurate intelligence. Additionally, this does not diminish public and international criticism regarding the way the intelligence and security services operate. The sharing of intelligence, discussed in this study as one of the intelligence and security agencies' tasks, still raises questions and concerns regarding the protection of civil rights.

### **2.3. Public international response towards intelligence sharing and civil rights**

In June 2013, a former consultant of the American National Security Agency and whistleblower Edward Snowden leaked roughly 1.7 million classified documents to the media on the operational details of the Western intelligence and security services (Deeks, 2015; Hintz & Dencik, 2016; Lashmar, 2017; Ruby et al., 2017). Deeks (2015) and Hintz and Dencik (2016) explain how citizens, through the Snowden revelations, learned how intelligence and security agencies collect and share 'bulk' data from the internet's cables, internet companies and social media platforms through programs called Prism, Tempora, Muscular and Squeaky Dolphin. These programs are used for breaking encryptions, hacking communication infrastructures, conducting corporate and political espionage, and monitoring the online communication of citizens and thus unsolicited entering the personal sphere of citizens without their knowledge (Hintz & Dencik, 2016). Based on the Snowden disclosures, the intended 'seamless flow of sharing information' transformed power relations in terms of exploiting data and intelligence, changing the positive effects of intelligence sharing into the negative perception of 'everyone is being watched' (Bauman et al., 2014, p. 127).

The Snowden revelations also triggered international criticism of non-governmental organizations such as Amnesty International (2018) and intergovernmental organizations like the OHCHR (2018). The Snowden revelations created the most significant geopolitical development over the past several years for Western governments, requiring a massive change in the intelligence legislation and the oversight mechanisms on the operations of intelligence and security agencies (Deeks, 2015; Macaskills & Dance, 2013; Setty, 2015).

## **2.4. The protection of civil rights**

Yet, Waldron (2003) questions why there seems to be a general acceptance that ‘some adjustment of civil liberties is inevitable’ since the 9/11 terrorist attacks (p. 191). Burke-White (2004) explains that if citizens believe that they face threats, the protection of the nation will ‘trump’ the promotion of human rights (p. 253). The protection of national security and promotion of human rights are therefore mainly perceived as an inherent tension and treated as two mutually exclusive goals (Burke-White, 2004; Golder & Williams, 2006; Morris, 2020). This means that protecting national security is seen as undermining human rights and that safeguarding human rights is at the expense of national security, i.e., it is a zero-sum game.

The promotion of civil rights is therefore seen as subordinate to national security and moreover regarded as a ‘luxury’ that can be pursued when national security is not being jeopardized (Burke-White, 2004, p. 251; Michaelsen, 2006, p. 6). Golder and Williams (2006) underpin the prior arguments of Christakis and Bouslimani (2020) and Morris (2020), by explaining that certain civil rights can be abolished or altered in the context of protecting national security since this is the legitimate right of a State. Based on their research regarding international, national, and domestic human rights instruments, ‘human rights, whilst central to the operation of modern Western liberal democracies, are nevertheless not inviolable’ (Golder & Williams, 2006, p. 44).

According to Golder and Williams (2006), national security and civil rights can be protected through human security legislation. The concept of human security recognizes that ‘national security legislation can promote civil liberties by preserving a society in which rights and freedoms can be exercised’ (p. 51). This relies on the effectiveness of counter terrorism legislation. Additionally, a balance can be found between the interests of protecting national security and safeguarding civil rights, i.e., by using a balancing approach. More specifically, since ‘not all human rights protections will necessarily weaken national security and vice versa, not every security measure will necessarily derogate human rights’ (Golder & Williams, 2006, pp. 44-52; Waldron, 2003, p. 192). Therefore, both national security and civil rights can be protected simultaneously.

Nevertheless, Burch (2007) points out that democracies are, due to their nature, always faced with conflicting dilemma’s regarding counter terrorism legislations. If democracies do not undertake actions to combat terrorism this may affect the national security and its citizens. However, if democracies chose to fight terrorism it might endanger freedoms which these



democracies are bound to protect. Therefore, ‘balancing’ the protection of national security and civil rights at the same time remains more difficult to achieve in real life. Gill (2009, p. 78) suggests that in order to protect human rights without compromising the intelligence and security agencies' ability to maintain national security, it is necessary to strengthen the system of oversight on the intelligence and security services.

Bochel and Defty (2017) and Gill (2009) argue that oversight mechanisms try to ensure, amongst others, that intelligence and security services are managed effectively, adhere to national and international law and respect civil rights. A system of oversight on the intelligence and security services can increase and keep public confidence while simultaneously legitimize intelligence operations (Bochel & Defty, 2017).

## **2.5. Position of this study within the academic context**

To conclude, this study can be placed within the discussed literature by focusing on the political dilemma between ensuring national security by sharing intelligence with foreign intelligence and security services on one hand and guaranteeing effective legal protection of civil rights on the other by the system of oversight on these intelligence sharing operations. The literature discussed that more attention should be given to both ensuring the protection of national security and civil rights, e.g., through human security legislation and the balancing approach (Golder & Williams, 2006; Waldron, 2003). However, establishing this society through counter terrorism legislation, such as intelligence legislation, remains more difficult in Western democracies since human rights remain central to the operation of democracies such as the Netherlands (Burch, 2007; Golder & Williams, 2006). However, as Bochel and Defty (2017) and Gill (2009) explain the focus should be aimed at implementing a system of oversight to ensure that intelligence and security services, amongst others, respect civil rights.

This study focuses on this political dilemma in the context of the revision of the oversight on intelligence sharing in the Netherlands. This has been questioned by Hagens (2018, p. 86) in the publication of the Judicial Explorations regarding the Wiv 2017 by the WODC. Although the dilemma cannot easily be solved, it can be analysed; it is interesting for the academic debate to obtain more concrete information from the analysis of the intelligence legislation process in one country. Information can be gathered from the case study of the Dutch Wiv about the coherence between historical, political, and societal changes on the one hand and the consequences of policymaking on the other hand. Direct generalizations to other countries are

not included, but the case study could provide a decent study, which could be repeated for other countries in the future.

## Chapter 3 Theoretical framework

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This chapter is divided into two sections. The first section outlines a theoretical framework of the most important concepts derived from the literature review: national security, intelligence sharing, the system of oversight and civil rights. This will be done to gain a better understanding of the main concepts that will be used throughout this study and more specifically in the analysis. The second section presents the analytical framework and will explain the policy theory which is also used by the Dutch Central Government to analyse existing policies. The analytical framework will discuss the theory behind the policy theory, its benefits, and limitations. The concepts and the policy theory form the theoretical basis for the analysis in chapter five in order to answer the research question.

### 3.1. The concept of national security

Zelikow (2003), Mangold (1990), Wolfers (1952) and Viotti (2016) argue that national security remains a contested concept. Yet, national security can be understood as a social construction which is internalized by decision makers and their advisors and therefore always remains subjected to multiple interpretations (da Cruz, 2021; Viotti, 2016). Wolfers (1952) explains that the concept of national security and the national interest of a state are mostly intertwined. National security policy predominantly focuses on 'life-and-death matters of safety, well-being and even potentially the physical existence of the country and its citizens' (Snow, 2013, p. 1). According to da Cruz (2021), Viotti (2016), Snow (2013) and Zelikow (2003) the perception of national security is constantly evolving through time. Prior in the 'traditional world' populations, governance, commerce, and culture would evolve at a slow pace and therefore change gradually over time (da Cruz, 2021, p. 211; Zelikow, 2003, p. 17). Security threats also emerged slowly and were also visible, since the biggest threats came mainly from states that were able to engage in warfare by equipping armies and material (Zelikow, 2003). However, globalization catalysed social and technological changes that created a 'modern world' where change and the accompanying challenges itself became the constant factor (Ripsman & Paul, 2010, p. 3; Zelikow, 2003, p. 18). Therefore, security threats can now emerge quicker from smaller states without large armies or equipment and also from non-state actors (da Cruz, 2021; Zelikow, 2003).

This required societies to adapt quicker to the ongoing transnational changes (Ripsman & Paul, 2010; Zelikow, 2003). This means that cooperation with other states, international and non-governmental organizations is necessary (da Cruz, 2021). Since the state's primary purpose is to provide security against internal and external threats within a geographically defined territory, the protection of national security is the state's hallmark (Ripsman & Paul, 2010). Redefining national security can thus be seen as a function of time (Mangold, 1990; Ripsman & Paul, 2010; Wolfers, 1952; Zelikow, 2003).

This study understands the concept of national security through the constantly evolving perception of the Dutch government to protect their national security interests and citizens against internal and external security threats. More specifically, by sharing intelligence with foreign intelligence and security services as a measure taken by the AIVD and the MIVD to combat terrorism in order to protect the Dutch national security. The Dutch Wiv will therefore be assessed on increasing the authorizations of the Dutch intelligence and security service in the context of a changing geopolitical security environment, ongoing digital transformation, and the public debate regarding these security challenges.

### **3.2. The concept of intelligence sharing**

Gill and Phythian (2012), Pili (2019) and Warner (2002) argue that although intelligence is also perceived as a contested concept, a more universal understanding of this concept can be defined as the secret process started by a decision-makers request of targeting, collecting, analysing and distribution of raw unevaluated material. This raw unevaluated material is obtained from domestic or foreign human, technical and open sources analysed through existing intelligence agencies databases. Breakspear (2013), Bruce (2008), Gill and Phythian (2012), Pili (2019), Vrist Rønn and Høffding (2013), also add that this entails the creation of knowledge, foresight, and insight to identify possible future changes regarding threats and/or opportunities to give expert advice to these decision-makers in order to enhance security and maintain power towards competitors. In general, intelligence is predominantly perceived as classified information which remains hard to obtain for actors outside of the intelligence community (Breakspear, 2013).

Gill (2010) and Jackson (2010) explain the concept of intelligence from a more political perspective, stating that the existence of intelligence originates in the basis architecture established by states in combination of their historical development and the perception of facing threats against national security. Intelligence practices are therefore essentially seen as a political activity (Jackson, 2010). Jackson (2010) adds that political agendas determine what is

regarded as a threat and what not and decide which important information needs to be collected. Bruneau and Matei (2010) and Gill (2010) connect intelligence in political context to the protection of national security by stating that the core mandate of intelligence agencies is to safeguard national security. This can therefore be related to the prior conceptualization of the concept of national security. The purpose of intelligence sharing is thus the expectation that this will provide the recipient intelligence service with ‘the advantage, predictive and actionable insights’ on possible threats (Breakspear, 2013, p. 682).

The concept of intelligence sharing is understood in this study as sharing information with foreign intelligence and security agencies to gain ‘advantage, predictive and actional insight’ on possible threats in order to protect national security (Breakspear, 2013). This means that in the Dutch intelligence legislation over time the regulations regarding the sharing of intelligence with foreign intelligence and security services are examined to determine to what extent the regulations contribute, or not contribute, to the protection of the civil rights.

### **3.3. The system of oversight on intelligence and security services**

Bruneau and Matei (2010) explain that the control of intelligence agencies consists of direction and oversight conducted by checks and balances of five mechanisms, namely the executive, legislative, judicial governmental branches, internal oversight within the intelligence agency and external oversight on domestic and national level. First, the executive control is carried out by the Ministry of Defence, national security councils or directors of intelligence communities who are responsible for the basic structure of the intelligence agency, priorities, roles, directives, and missions.

Second, the parliament embodies the legislative control and oversight responsible for creating the legal framework in which the intelligence agency operates (Bruneau & Matei, 2010). Additionally, the legislative control is also responsible for establishing oversight committees within the legislatures that control and review the activities, budget and personnel of the intelligence and security agency. Additionally, oversight committees need to be simultaneously critical of the possible failures of intelligence agencies and contribute to the debate on how these failures can be minimized (Gill, 2010). Third, the existence of judicial review control, i.e., courts of justice, to assure that the intelligence agencies use their powers in adherence with domestic and international law (Bruneau & Matei, 2010). Fourth, internal control consists of the ‘intrinsic professional codes of ethics and institutional norms’, and the existence of counsels and inspector generals within the intelligence agency (Bruneau & Matei, 2010, p. 765).

Fifth, external control on a domestic level consists of reviews by outsiders such as independent think tanks, lobby organizations and the free press. External control on an international level exists of reviews by non-governmental or intergovernmental organizations. Gill (2010) stresses that these oversight mechanisms and checks and balances are crucial to increase the probability that intelligence activities, such as intelligence sharing, are executed in an effective and proper manner, respecting domestic law, international law, and civil rights. More specifically, to prevent trading off effective intelligence sharing against the protection of civil rights since the Snowden disclosures has raised more concern regarding the effectiveness of intelligence sharing operations of intelligence and security services.

In this study the system of oversight is understood as the independent oversight mechanisms on the Dutch intelligence and security services based on the five aforementioned criteria. This means that the system of oversight in the Dutch Wiv will be assessed through the criteria of: executive-, legislative-, judicial-, internal- and external oversight since these are crucial to increase the probability that intelligence activities, such as intelligence sharing, are executed in an effective and proper manner, respecting domestic law, international law, and civil rights (Bruneau & Matei, 2010; Gill, 2010). In order to determine the contribution of the system of oversight on the protection of civil rights.

### **3.4. The concept of civil rights**

Golder and Williams (2006) and Hadji-Janev (2021) explain that, according to the philosophy of Thomas Hobbes (1651) and John Locke (1690), in liberal democratic countries, citizens transfer a part of their rights and liberties to the State to ensure common goods, such as security. Additionally, in the light of Jean-Jacques Rousseau's (1762) notion of the social contract, where individual liberty can be seen as a precondition of national security, Michaelsen (2006) elaborates that 'a citizen's full enjoyment of civil liberties depends upon a secure environment in which human rights and fundamental freedoms can be realized' (pp. 4-5). This means that the State can therefore put restraints on certain rights and liberties to safeguard national security and thus community safety (Golder & Williams, 2006). Christakis and Bouslimani (2020) and Morris (2020) emphasize that, in the international community, any State has the legitimate right to protect their national security from external security threats. Yet, the State remains prohibited to interfere with certain civil rights (Michaelsen, 2006).

The non-governmental organizations of Privacy International (2021) and the OHCHR (2018) argue that civil rights can potentially be harmed in the context of intelligence sharing. The European Convention of Human Rights of 1950 (ECHR) provides a description of the protected human rights. According to Gill (2009) the human rights described in the ECHR that are the most affected by intelligence activities can be classified into three categories, namely 'absolute', 'limited' and 'qualified' (p. 86).

The first category refers to the right to life and the prohibition of torture, inhumane and/or degrading treatment and punishment, i.e., these human rights cannot be restricted in any circumstances, even in war time or public emergencies (European Court of Human Rights & Council of Europe, 1950, § 1, art. 2, 3; Gill, 2009). Yet, it should be noted that a state cannot violate the right to life in the circumstances of the defence against unlawful violence or through conducting lawful arrests, precipitating a riot or insurrection.

The second category is aimed at rights that can be limited to some extent in times of emergency (European Court of Human Rights & Council of Europe, 1950, § 1, art. 15; Gill, 2009). This means that during war or public emergencies that threaten the life of any nation, the State may take measures that derogate from the ECHR. These rights concern the right to liberty and security of a person, the right to a fair trial and the freedom of thought (European Court of Human Rights & Council of Europe, 1950, § 1, art. 5, 6, 9; Gill, 2009). However, these rights cannot be limited in context of the public interest.

The final category focuses on the rights that can be limited in circumstances that affect public interest (Gill, 2009). This means that the right to privacy, the right of freedom to manifest religion or belief, the right of freedom of expression, the right of freedom of assembly and the right of freedom from discrimination can be restricted by the state in circumstances such as protecting public safety, preventing disorder, the protection of the rights and freedoms of others and the protection of national security (European Court of Human Rights & Council of Europe, 1950, § 1, art. 8, 9, 10, 11, 14; Gill, 2009).

The concept of civil rights in this study is understood as the civil rights mentioned within the ECHR. The ECHR was the first instrument to implement the rights established in the Universal Declaration of Human Rights (European Court of Human Rights, n.d.). With the implementation of the ECHR, these rights became binding for the member states of the European Union. Moreover, the legal developments of the ECHR have influenced the Dutch

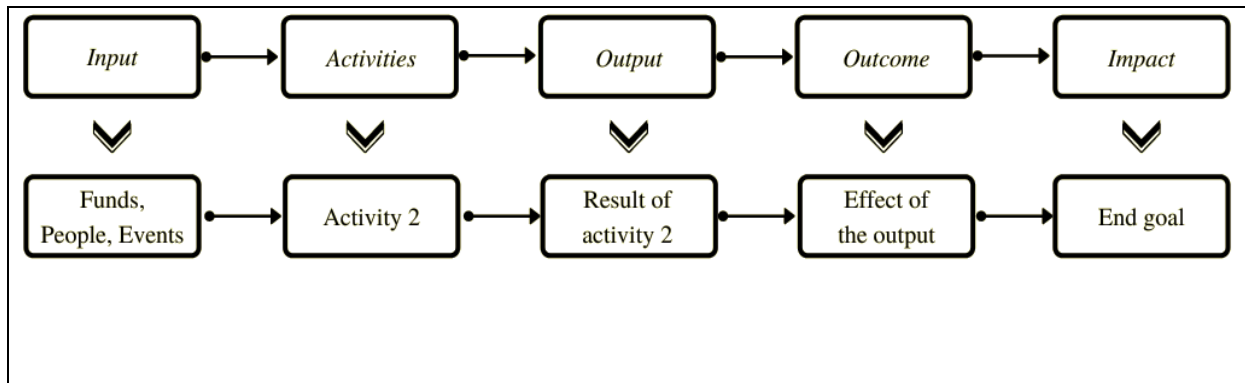
Wiv. Therefore, these civil rights are being used in this study and understood as the safeguarding of the ‘absolute’, ‘limited’ and ‘qualified’ categories (European Court of Human Rights & Council of Europe, 1950; Gill, 2009, p. 86). Particularly the first two categories should be safeguarded, since the rights in the third category might be limited in certain circumstances such as protecting national security (European Court of Human Rights & Council of Europe, 1950, § 1, art. 8, 9, 10, 11, 14; Gill, 2009). The Dutch Wiv will be assessed based on the extent of safeguarding all three categories to increase the protection of civil rights, yet the protection of civil rights could potentially decrease when one or more categories are affected by the intelligence sharing regulations of the Dutch Wiv.

### **3.5. Analytical framework: the policy theory**

In order to answer the research question, this section discusses the analytical framework of this study. This thesis uses the policy theory used by the Dutch Central Government (Rijksoverheid, 2021b). The Dutch Central Government uses the policy theory to analyse existing policies in order to determine the effectiveness of the respective policy by establishing if the end goal(s) have been met.

More specifically, the policy theory is used to study the motivation behind the policy, the description of the actual policy and the intended goals of the policy in question (Rijksoverheid, 2021b). The policy theory can be seen as the set of beliefs of an actor that underpin the respective policy. Preferably, the policy theory is represented in a model through which these relationships emerge, such as a results chain. Subsequently, the underlying presumptions to achieve the end goal are also added to this schematic representation such as presented in Figure 1.





*Figure 1.* Schematic presentation of the policy theory (Rijksoverheid, 2021b).

The policy theory scheme has several benefits. Figure 1 presents the relationship between the goals and the policy instrument; it enables the formulation of measurable indicators, e.g., for the input, output, outcome and intended impact (Rijksoverheid, 2021b). However, it is also important to indicate whether there have been any changes in the policy and to incorporate these changes in the policy theory since this also determines the extent to which conclusions can be drawn regarding the effects of the policy.

The limitation of the use of the policy theory in this study is that the existing Dutch intelligence legislations already has been analysed through the policy theory (Jones-Bos et al., 2021). Important to note is that the aim of this study is not to repeat this. This study distinguished itself by being an extension of the existing research by Jones-Bos committee. By using the policy theory, it is possible to research what the potential consequences are for the legal protection of civil rights after the revision of the oversight on intelligence sharing operation within the Wiv 2017.

To conclude, this means that the policy theory in this study is specifically used to establish and analyse the outcome and impact of the Dutch Wiv's in the case study. This will be necessary to determine whether a trend can be distinguished between protecting national security and civil rights in order to formulate an answer to the research question. This is the reason why within this study the policy theory was chosen in order to answer the research question and not any other analytical framework. How the policy theory will be used to conduct the analysis in chapter five, will be further explained in the following chapter of the methodology.

## Chapter 4 Methodology

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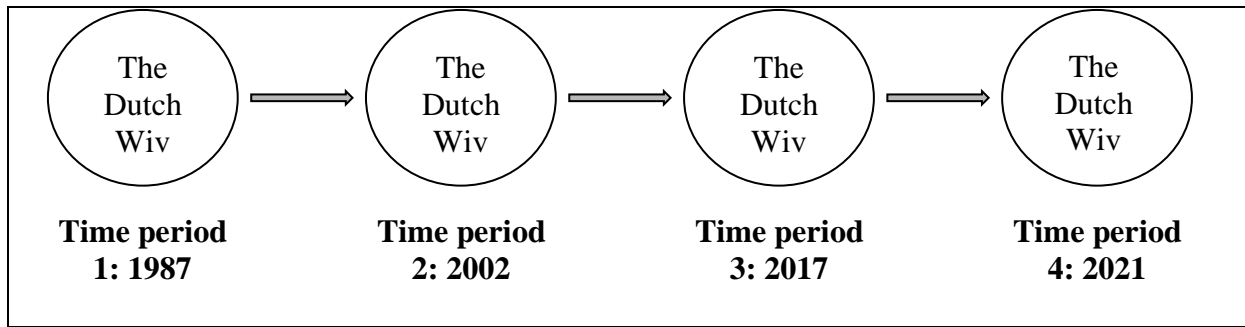
To analyse what the potential consequence on the legal protection of civil rights are after revising the oversight on intelligence sharing within the Wiv 2017, in this chapter the methodological approach will be explained and justified.

### 4.1. Methodological approach

The methodological approach of this inductive study is based on qualitative research methods and consist of a literature review to obtain theories and concepts from the collected data in order to gain a better understanding of the debate between protecting national security versus safeguarding civil rights in the context of intelligence sharing (Bryman, 2012; Golafshani, 2003). In addition to this literature review, a longitudinal case study is used in this study and the policy theory will be applied onto this case study.

The longitudinal case study method will focus on the Dutch Wiv through time. This means that the Dutch Wiv will be studied over four time periods, namely in 1987, in 2002, in 2017 and, to the extent possible, in 2021. A longitudinal case study has been chosen since this will help to obtain a deeper understanding of the underlying mechanisms that led to the implementation of the Dutch Wiv in the mentioned time periods. Through the analysis of the Dutch Wiv over time it will become clear whether a trend can be distinguished regarding the protection of civil rights in the context of oversight on intelligence sharing operations in the Wiv's.

This will be necessary to determine and predict what the potential consequences will be of revising the system of oversight on intelligence sharing in the Wiv 2017 for the legal protection of civil rights within the Netherlands. Therefore, the use of a longitudinal case study instead of any other research design is the most suitable approach for answering the research question. A visual representation of the longitudinal case study applied to the Dutch Wiv is presented in Figure 2.



*Figure 2.* Visual representation of a longitudinal case study of the Dutch Wiv.

Moreover, the policy theory will be used to obtain a deeper understanding of the underlying mechanisms that led to the implementation of the Dutch Wiv. In the following section, it will be further discussed how the policy theory will be used to conduct the longitudinal case study within the analysis chapter of this study to find answer on the research question.

### **The policy theory**

The policy theory is being used in the longitudinal case study of the Dutch Wiv to study the motivation behind the respective Wiv, describe the actual policy of the Wiv in question and present the end goal(s) of the discussed Wiv in a schematic presentation. More precisely, in order to provide a clear structure, each Wiv will be presented from historical-, political- and societal perspectives. This will be done since the historical perspective corresponds with the motivation behind the Wiv of the policy theory. The political perspective corresponds with the actual policy of the Wiv and the ‘outcome’ factor of the policy theory. The societal perspective corresponds with the ‘impact’ factor of the policy theory to determine what the actual change in society is. This will be done in the descriptive part of the case study in section 5.1 of the analysis chapter.

This study will focus on the ‘outcome’ and ‘impact’ of the policy theory of the Dutch intelligence legislation over time. From such an analysis, an image derives of the attention given to national security and civil rights in the Wiv’s (outcome) and the actual change in society regarding the protection of national security and civil rights after the implementation of the Wiv’s (impact). Through comparing the outcomes and impacts of the different Wiv’s, this image might give more insight into the dilemma as noted before. The following section will discuss how the data for this analysis has been collected.

## **4.2. Data collection**

To provide an answer to the research question, the qualitative data for the literature review, case study and policy theory have been conducted through desk research. The literature was selected and used based on key words of the debate between protecting national security and safeguarding civil rights in the context of intelligence sharing. In addition, more literature was searched and selected based on key words of the system of oversight and the safeguarding of civil rights in relation with intelligence sharing. The search was done by a snowball approach to identify and study relevant literature. The used qualitative data for the literature review predominantly consists of primary and secondary resources such as literature from different academic scholars, (inter)national research reports from governmental and non-governmental organizations such as the WODC, Amnesty International and the OHCHR and several well-known (inter)national media sources.

The data for the theoretical framework and the case study are obtained from primary resources of the Dutch government, particularly official legislation documents of the Wiv 1987, Wiv 2002, Wiv 2017, the revision of the Wiv 2017 and the evaluation reports of the evaluation commissions from the official website of the Dutch government. Additionally, secondary resources were used consisting of academic literature, (inter)national research reports from governmental and non-governmental organizations as mentioned before, parliamentary documents and several (inter)national media sources.

## **4.3. Operationalization**

Distinctive for a qualitative study is the use of sensitizing concepts rather than definitive concepts. Sensitizing concepts are used to ‘create a general sense of reference and guidance in approaching empirical instances’ (Bryman, 2012, p. 388). This means that the main concepts in this study (national security, intelligence sharing, the system of oversight on intelligence sharing and civil rights) are not ‘fixed’ concepts but can be used to provide a broader general understanding in which different aspects of a concept can be assessed to understand this respective concept in a better way (p. 388). Therefore, the previously discussed main sensitizing concepts within the theoretical framework will be used and applied as themes in the case study and analysis in chapter five.

#### **4.4. Data analysis**

In order to answer the research question, this study will use the collected qualitative data to carry out the analysis in the following chapter by conducting a longitudinal case study research method through the policy theory. The analysis chapter consists of two parts. The first part consists of the longitudinal case study of the Dutch Wiv considering four different time periods: the Wiv 1987, the Wiv 2002, the Wiv 2017 and the 2021 revision of the Wiv 2017<sup>1</sup>. Subsequently, the policy theory regarding the respective Wiv will be presented in a schematic presentation to highlight the ‘outcome’ and ‘impact’ factors of the policy theory, which will be necessary for the second part of the analysis.

The second part of the analysis consists of analysing the outcome and impact factors of the policy theory of each Wiv. The outcome and impact factors of all the Wiv’s will be analysed within the context of the four themes discussed in the operationalization. After the analysis, it will become clear whether a trend can be distinguished regarding the protection of civil rights in the context of revising the oversight on intelligence sharing operations within the Wiv’s. This will be done to determine and predict what the potential consequences are for the legal protection of civil rights within the Netherlands after the implementation of the revision of the Wiv 2017.

#### **4.5. Reliability and validity**

To establish the reliability of this study, the collected data is obtained through online search engines such as Google Scholar and the online library of Leiden University. This is done to ensure the credibility of the used sources, since it is common knowledge that not every source found on the Internet contains correct information. Moreover, the steps of the methodological approach, data collection and data analysis, are constantly documented to provide the reader and future researchers with clear steps on how this study has been conducted and can be replicated in the future. More specifically, the correctness of the references and bibliography also contribute to checking and examining the used sources within this study. Subsequently, the use of the policy theory is aimed at incorporating changes through time, which increases the

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<sup>1</sup> It should be noted that there is not yet an official policy name for the revision of the Wiv 2017, however since the revision of the Wiv 2017 has been carried out in 2021 this study will use the term ‘2021 revision of the Wiv 2017’ throughout this study for analysing the revision of the Wiv 2017.

dependability of the case study, since this study remains responsible for describing and analysing potential changes that may occur in the longitudinal case study (Golafshani, 2003). To establish the validity of the study, the research instruments such as a literature review, a longitudinal case study and the policy theory are specifically chosen. The literature review contributes to the understanding of how this study is positioned within the academic context of the debate between protecting national security and civil rights in context of intelligence sharing operations. Subsequently, the longitudinal case study provides a further in-depth understanding of the Dutch Wiv through time regarding intelligence sharing operations in relation to the protection of civil rights by using the policy theory to help establish the accurateness of this qualitative research.

#### **4.6. Limitations**

This study is limited mainly due to choices made by the researcher in terms of methodology, literature, and sources of information. Secondly, in terms of time and word count it is not feasible to reproduce every aspect within the literature review and case study. Therefore, solely the necessary information is explored. Finally, as mentioned before, direct generalizations to other countries are not possible since this study focuses on a specific period of time in a specific country. Yet, since this study provides a clear and structured analysis, this research could be repeated for other countries and periods of time in the future.

## Chapter 5 Analysis

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This chapter consists of two parts. The first part presents the longitudinal case study of the Dutch Wiv, focusing on four time periods of 1987, 2002, 2017 and 2021. The historical, political, and societal backgrounds will be described. Subsequently, the actual policy will be discussed and finally, the intended goal(s) of each policy will be presented in a schematic way for each Wiv. In this part, the policy theory will be applied onto the different Wiv's. The second part will analyse the outcomes and impacts of each Wiv. More precisely, similarities and differences between all the policy outcomes and impacts applied to the four main themes of national security, intelligence sharing, the system of oversight and civil rights will be analysed. After this analysis, it will become clear whether a trend can be distinguished regarding the protection of civil rights in the context of oversight on intelligence sharing in the Wiv's. Finally, it will be determined and predicted what the potential consequences will be of revising the system of oversight on intelligence sharing in the Wiv 2017 for the legal protection of Dutch civil fundamental rights.

### 5.1. Case-study: the Dutch Wiv

In each section of this paragraph, the respective Wiv will be discussed from the historical perspective first, highlighting the changing geopolitical security environment. Second, the political perspective focuses on the actual policy of the Wiv, particularly aimed at the intelligence sharing practices of the Dutch intelligence and security services, the system of oversight on these agencies and the regulations regarding the protection of civil rights. Third, the societal perspective consists of the public debate regarding the implementation. Finally, a schematic overview of the policy theory will be given that concludes the section of the discussed Wiv.

#### 5.1.1. The Wiv 1987

##### 5.1.1.1. Historical perspective

The greatest conflicts of the 20<sup>th</sup> century, such as the First and Second World War and the end of the Cold War have influenced the developments of the Dutch intelligence and security services in a decisive manner (Engelen, 2001). The Second World War ended the operations of the *derde sectie van de Generale Staf* (the third section of the General Staff, hereafter GS III). The GS III was the first military intelligence agency and is the predecessor of the intelligence

and security services that the Netherlands had known through time (De Graaff, 2015; Engelen, 2001; Hijzen & Scheepmaker, 2018). However, in 1946, the civil services of the *Centrale Veiligheidsdienst* (Central Security Service, hereafter CVD) and the *Buitenlandse Inlichtingendienst* (Foreign Intelligence Service, hereafter BID) were established and politically run by the prime minister.

Through time, the CVD transformed into the *Binnenlandse Veiligheidsdienst* (Homeland Security Service, hereafter BVD) in 1949 aimed at homeland security and counterintelligence operations (De Graaff, 2015; Hijzen & Scheepmaker, 2018). The BID became in 1972 the *Inlichtingendienst Buitenland* (Foreign Intelligence Service, hereafter IDB) with the task of protecting the democratic legal order, national security, and counterintelligence by combating espionage of (malicious) foreign powers. However, after the IDB was ended by the prime minister due to ongoing issues hence the Netherlands lacked the existence of a civil foreign intelligence service for several years (Hijzen & Scheepmaker, 2018).

During the 1970s, the Netherlands experienced home grown terrorism from left-wing ideological and separatist terrorism, such as the group of the Molluccans, the Red Youth or the Red Resistance Front; external security threats came from, amongst others, the Irish Republican Army, the Basque Separatist Movement, and the *Rote Armee Fraktion* (De Graaff, 2015). This demanded a shift in the operations of the BVD to combat internal and external terrorism as main priority. It was thus necessary for the Dutch intelligence and security services to adapt their operational activities and powers to these ongoing changing circumstances to protect national security (Hijzen & Scheepmaker, 2018).

Yet, the post-war branches of the armed forces such as the *Landmacht Inlichtingendienst* (Army Intelligence Service, hereafter LAMID), the *Marine Inlichtingendienst* (Navy Intelligence Service, hereafter MARID) and the *Luchtmacht Inlichtingendienst* (Airforce Intelligence Service, hereafter LUID) also had their own intelligence services; these acquired knowledge about the enemy's forces as well as about the safety of their own personnel and materiel (Engelen, 2001). The LAMID, MARID and LUID operated separately from each other, which led to competency issues with each other and the BVD and therefore caused unrest within the Dutch intelligence community (de Graaff, 2015).

The Wiv 1987 was implemented under political pressure, based on the need for new relationships between intelligence and security services in the Dutch intelligence community (Engelen, 2001). The government, unanimously though, agreed upon the implementation of the



Wiv 1987, which also meant that separate military intelligence agencies should be combined and merged into one central integrated military intelligence and security service, named the *Militaire Inlichtingendienst* (Military Intelligence Service, hereafter MID) (De Graaff, 2015; Engelen, 2001; Hijzen & Scheepmaker, 2018).

#### **5.1.1.2. Political perspective**

The Wiv 1987 was implemented on December 3, 1987. A coordinator of the intelligence and security services was appointed by Royal Decree, to coordinate the tasks of the agencies and to present proposals to the appropriate ministers on these agencies' performance. (Wiv, 1987, § 1, art. 1, lid 1; Wiv, 1987, § 2, art. 4, lid b, c, art. 7). Based on the new legislation, the BVD had three main responsibilities (Wiv, 1987, § 3, art. 8, lid 1, 2). At first, gathering data about organizations and persons who, due to the goals they pursued or the activities they enacted, have raised the serious suspicion that they might pose a danger to the democratic legal order, to national security or to other important interests of the State (Wiv, 1987, § 3, art. 8, lid 2). Second, conducting security screenings and third, facilitating measures to ensure the security and secrecy of data that were of interest to the State, the public service, and the corporate sector.

Derived from these responsibilities, the three main tasks of the MID consisted of: the collection of information regarding the capabilities and strengths of other armed forces, which is necessary for the proper construction and effective use of the Dutch armed forces (Wiv, 1987, § 3, art. 9, lid 1, 2). Second, conducting security screenings (Wiv, 1987, § 3, art. 9, lid 2). Third, gathering necessary information in order to take measures aimed at preventing activities that are harmful to national security or the preparedness of the armed forces, protecting confidential information about the armed forces and facilitating the mobilization of these forces.

#### **5.1.1.3. Elements of the Wiv 1987**

This study will only focus on the specific elements of the different Wiv's that are relevant to the research topic: intelligence sharing, the system of oversight and the regulations for the protection of civil rights.

#### **Intelligence sharing**

In the Wiv 1987 it is solely mentioned that the BVD and MID shall cooperate by providing intelligence to the extent possible and that the head of the services needed to ensure the cooperation with foreign 'appropriate' intelligence and security services (Wiv, 1987, § 4, art.

13, lid 1, 2). The Wiv 1987 does not specifically mention the operations of intelligence sharing with foreign intelligence and security services.

### **The system of oversight**

The coordinator, focused on the operational tasks of the intelligence and security services and informed, cooperated with the relevant ministers regarding the activities of the agencies. This means that the activities of the BVD were discussed with the Minister of Internal Affairs and the operations of the MID were discussed with the Minister of Defence (Wiv, 1987, § 1, art. 1, lid 1; Wiv, 1987, § 2, art. 4, 6, 7). An institutionalized system of oversight was not specifically mentioned in the Wiv 1987.

### **Regulations for the protection of civil rights**

In the Wiv 1987, the protection of individual rights was linked to the way data was obtained, since only the coordinator and the head of the agencies were authorized to obtain information from other governmental bodies, governmental services, civil servants or any individual who was deemed to be able to provide such information (Wiv, 1987, § 4, art. 15). Article 16 states that only personal data was collected, recorded, and provided to third parties if this was necessary for the execution of tasks that were defined by law (Wiv, 1987, § 4, art. 16, lid 1).

If data is shared with third parties, other than government bodies, the head of the department needed to act according to the instructions of the relevant minister and the minister of justice (Wiv, 1987, § 4, art. 16, lid 2, 3). The relevant minister and the minister of justice needed to agree about the rules regarding the purposes of data collection, the protection of the confidentiality of the recorded data, the verification of the accuracy of the data, the period during which the data may remain recorded as well as other grounds for the removal and destruction of data from the collections (Wiv, 1987, § 4, art. 16, lid 4). There were no regulations within the Wiv 1987 regarding intelligence sharing with foreign intelligence and security agencies.

#### **5.1.1.4. Societal perspective**

During the implementation of the Wiv 1987, a societal anti-military organization stole documents from the LAMID (Engelen, 2001). These published documents showed the far-reaching influence of the LAMID in anti-military and other peace movements which had led to political commotion. Also, questions were asked in the House of Representatives to the Minister

of Defence (De Graaff, 2015; Engelen, 2001; Hijzen & Scheepmaker, 2018). However, this had caused little public commotion, since the public still considered the work of the intelligence and security agencies as ‘a proper security service that knew as little as possible about Dutch citizens’ (De Graaff, 2015, pp. 257-259).

**5.1.1.5. Schematic presentation of the policy theory applied on the Wiv 1987**

As can be seen in Figure 3, the input for the implementation of the Wiv 1987 was the end of the Cold War, the emergence of globalization and the occurrence of new internal and external terrorist threats. The Wiv 1987 created the legal framework for the establishment of the BVD and MID and their operations. This increased the attention for the protection of national security within the Wiv 1987 and improved the national security by combatting internal and external terrorist threats. Yet, within the Wiv 1987 there was not so much attention for implementing regulations to safeguard civil rights. This contributed to the insufficient protection of civil rights in society. In addition, the perception of the citizens that the BVD and MID were perceived as ‘a proper security service that knew as little as possible about Dutch citizens’, was in line with the little attention for civil rights (De Graaff, 2015, pp. 257-259).

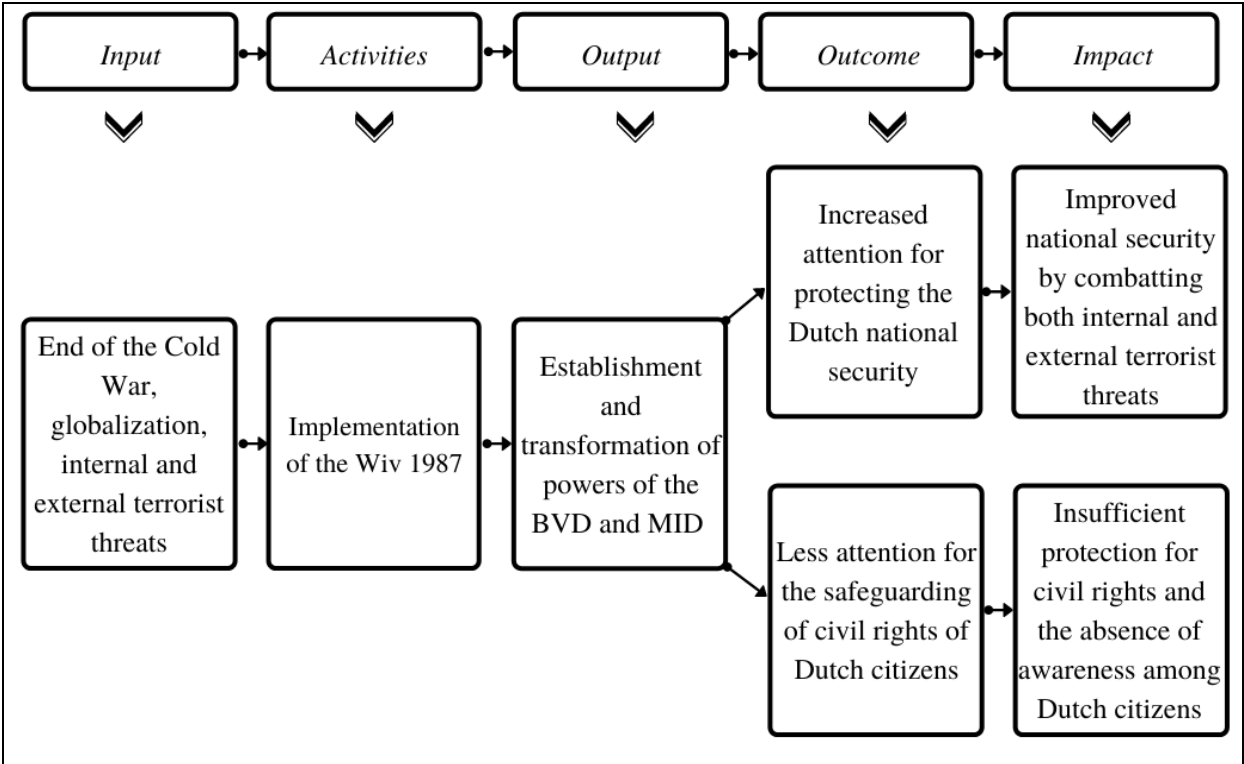


Figure 3. Schematic presentation of policy theory regarding the Wiv 1987.

## **5.1.2. The Wiv 2002**

### **5.1.2.1. Historical perspective**

Due to the changing security environment after the implementation of the Wiv 1987, a civil foreign intelligence service was missing in the Dutch intelligence community and therefore, the previous tasks of the IDB were integrated with the existing tasks of the BVD (De Graaff, 2015; Hijzen & Scheepmaker, 2018). This created a clear distinction between a civilian (BVD) and military intelligence service (MID) (De Graaff, 2015). The distinction between the agencies proved to be fruitful during the emerging terrorist threats (Hijzen & Scheepmaker, 2018). For example, to obtain knowledge regarding extremist networks of communist parties. After experiencing more home grown and external terrorist threats, especially after the well-known terrorist attacks of 9/11, the tasks of the BVD shifted from gathering intelligence of communist groups towards gathering intelligence regarding terrorist groups (De Graaff, 2015).

The events of 9/11 catalysed the revision of existing intelligence legislation in many Western countries (Clough, 2004; Lefebvre, 2003; Roach, 2012). It was evident that previous intelligence legislation was not as sufficient as before to counter the new terrorism threats. Although Western intelligence agencies have been cooperating for a long time after the Second World War, sharing intelligence with each other was not self-evident. Therefore, in the aftermath of 9/11, governments in Western countries revised their counter-terrorism legislation and expanded the powers of their intelligence and security services. Subsequently, international cooperation between intelligence and security agencies increased, with intelligence sharing as their *modus operandi*.

Yet, the Wiv 1987 was not only in need of change due to changing security threats and the ongoing digitalization, but also since the European Court of Justice determined that the procedure for Dutch citizens to file complaints regarding the operations of the BVD and MID was inadequately regulated (De Graaff, 2015). It was, according to the European Court of Justice, not clear to whom the use of special intelligence resources would concern. Therefore, the Dutch government decided to revise the existing Wiv 1987 by improving measures to combat terrorism in the ongoing war on terror and implementing regulations based on the recommendations of the European Court of Justice.

### **5.1.2.2. Political perspective**

The Wiv 2002 was implemented on February 7, 2002. Since the BVD gained the additional task of conducting foreign intelligence, the BVD was transformed into the current AIVD (De Graaff, 2015; Hijzen & Scheepmaker, 2018; Wiv, 2002, §1, art.1). Subsequently, the MID was renamed into the MIVD (de Graaff, 2015). In the Wiv 2002, it was specifically noted that both the AIVD and the MIVD should both operate within the interest of protecting national security, which was not explicitly mentioned in the Wiv 1987 (Wiv, 2002, § 2, art. 6, art. 7). The AIVD was now part of the Minister of the Interior and Kingdom Relations, the MIVD was subjected to the Minister of Defence and the coordinator was subordinated to the Prime Minister of the Ministry of General Affairs (Wiv, 2002, §1, art.1).

The AIVD focused on five tasks; the first three tasks were similar as in the Wiv 1987 (Wiv, 2002, § 2, art. 6, lid 2). The fourth task consisted of conducting research concerning other countries, with respect to the subjects that were designated by the Prime Minister, Minister of General Affairs and in agreement with the relevant ministers. The last task was aimed at preparing threat and risk analyses at the request of the Minister of the Interior and Kingdom Relations and the Minister of Security and Justice for the joint purpose of securing persons, the surveillance and security of objects and services.

The MIVD focused on six tasks. Besides the collection of information regarding the capabilities and strengths of armed forces of other nations, as mentioned in the Wiv 1987, the MIVD now also needed to conduct research concerning the factors that (might) affect the maintenance and promotion of the international rule of law, as far as the armed forces were involved or might be expected to be involved (Wiv, 2002, § 2, art. 7, lid 2). One additional task for the MIVD was the same as one of the new tasks for the AIVD: conducting research regarding other countries based on the subjects that were assigned by the Prime Minister, Minister of Internal Affairs; preparing threat and risk analyses at the request of the Minister of the Interior and Kingdom Relations and the Minister of Security and Justice was the sixth task. However, this task was only aimed at individuals, objects, and services with a military relevance.

### **5.1.2.3. Elements of the Wiv 2002**

#### **Intelligence sharing**

Similar to the prior Wiv, the Wiv 2002 contained a separate section stating that the AIVD and MIVD needed to cooperate with each other and other agencies as much as possible by sharing intelligence and providing technical and other forms of support in accordance with the appointed minister (Wiv, 2002, § 5, art. 58, lid 1, 2). The minister involved carried the responsibility for the actual execution of the activities (Wiv, 2002, § 5, art. 58, lid 3). In addition to the Wiv 1987, in the Wiv 2002 it says that cooperation can only take place when the interests of foreign intelligence and security services were compatible with those of the Dutch agencies (Wiv, 2002, § 5, art. 59, lid 2). Moreover, any form of support could be given to a foreign intelligence and security service, only if this did not affect the interests or executed operations of the AIVD and MIVD (Wiv, 2002, § 5, art. 59, lid 4). This could only be executed with approval of the appointed minister (Wiv, 2002, § 5, art. 59, lid 6).

Yet, if information had been provided, given that this information should not be shared with other parties, the relevant Minister, or the head of the department in question was still able to grant permission for the distribution of this data to other persons or agencies (Wiv, 2002, § 5, art. 59, lid 3). Moreover, it was noted that conditions might be attached to the granted authorization afterward, however, it remains unclear what these conditions entailed.

#### **The system of oversight**

Besides the previously mentioned coordinator and the corresponding tasks such as in the Wiv 1987, the CTIVD was appointed by Royal Decree; the CTIVD, an oversight committee, consisted of three members, including the chairman and was in function for a period of six years (Wiv, 2002, § 1, art.1, § 6, art. 64, lid 1, art. 65, lid 1, 2). The committee focused on a number of tasks: executing supervision of the legality of the Wiv 2002, providing (solicited and unsolicited) information and advice to the ministers regarding the identified findings of the agencies; also, advising ministers regarding the investigation and assessment of complaints and finally, overseeing the execution of the power to revoke the Dutch nationality by the Minister of Security and Justice, particular regarding the effectiveness and proportionality of the execution of this power (Wiv, 2002, § 6, art. 64, lid 2).

## **Regulations for the protection of civil rights**

In the Wiv 2002, the notion of personal data was more specified than before, stating that this concerned personal data in order to identify individuals (Wiv, 2002, § 1, art.1). In line with the recommendation of the European Court of Justice, the Wiv 2002 contained a section on the handling of complaints (de Graaff, 2015, p. 258; Wiv, 2002, § 6, art. 83). This meant that every citizen in the Netherlands has the right to file for a complaint with the National Ombudsman regarding the actions, or alleged actions, of the involved ministers, the heads of the AIVD and MIVD, the persons who worked for the services and the coordinator (Wiv, 2002, § 6, art. 83). Moreover, the CTIVD was established as an independent oversight committee to watch over the legality of the agencies' actions through ex-post reviews, to safeguard civil rights.

### **5.1.2.4. Societal perspective**

Due to the emergence of internal and external terrorist threats, the acceptance of the Dutch intelligence and security services within society had significantly increased over the past years (De Graaff, 2015). If citizens would feel threatened by internal and external threats, the protection of the nation would 'trump' the promotion of human rights (Burke-White, 2004 p. 253). This might also have changed the perception of the public that 'a proper security service that knew as little as possible about Dutch citizens', should gather more information about its citizens in order to prevent possible future terrorist attacks (Burke-White, 2004; De Graaff, 2015, pp. 257-259; Golder & Williams, 2006; Morris, 2020).

### **5.1.2.5. Schematic presentation of the policy theory of the Wiv 2002**

As can be seen in Figure 4, the main input for the implementation of the Wiv 2002 was the aftermath of 9/11 and the recommendations of the European Court of Justice. This contributed to the revision of the Wiv 1987 and resulted into the implementation of the Wiv 2002. There was increased attention for protecting national security within the Wiv 2002. Based on the recommendations of the European Court of Justice, the attention for implementing regulations to safeguard civil rights also slightly increased. This contributed to the slight increase of the protection of civil rights in society since citizens could file for complaints at the National Ombudsman. Potentially the awareness among Dutch citizens regarding the operations of the AIVD and the MIVD increased in need to protect the civil rights by preventing future terrorist attacks (Burke-White, 2004; De Graaff, 2015, pp. 257-259; Golder & Williams, 2006; Morris, 2020).

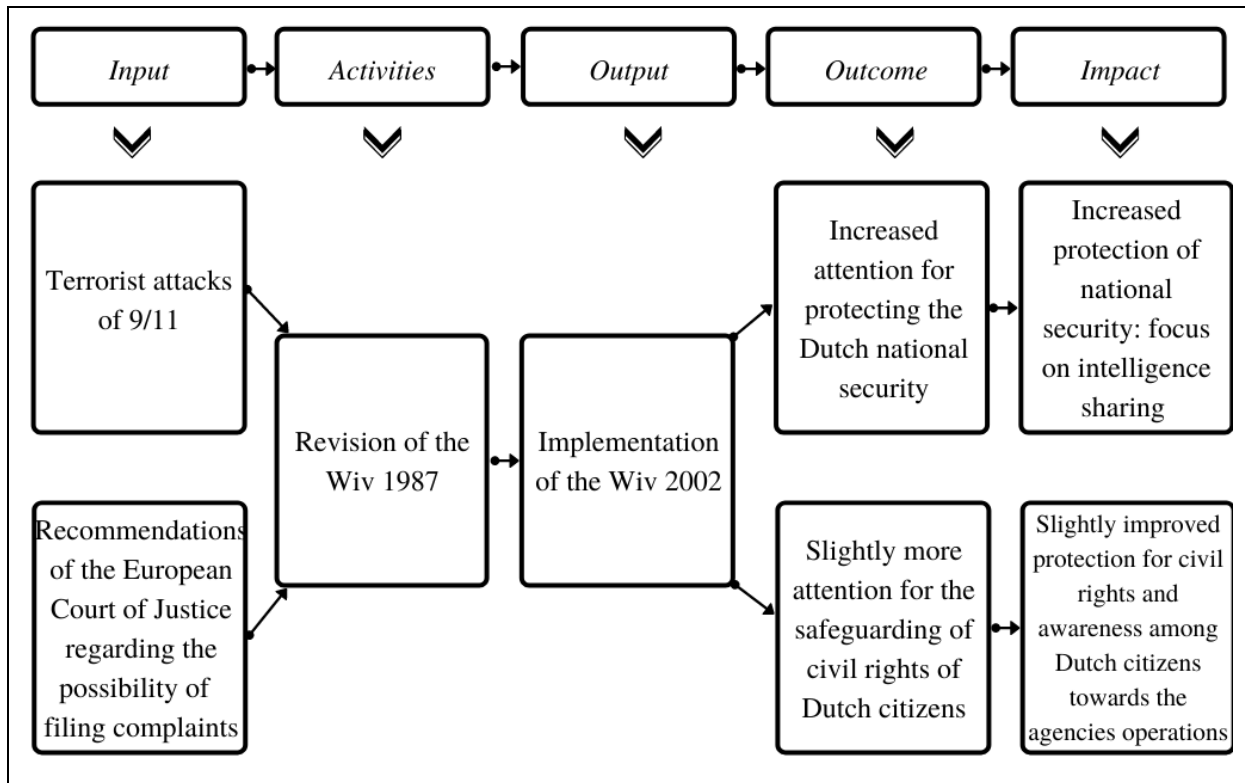


Figure 4. Schematic presentation of policy theory regarding the Wiv 2002.

### 5.1.3. The Wiv 2017

#### 5.1.3.1. Historical perspective

Although the Wiv 2002 is significantly more comprehensive than the Wiv 1987, terrorist threats still occurred, even after implementing and revising new and existing legislature regarding countering terrorism in Western countries. The terrorist attacks of 2004 in Madrid and of 2005 in London, combined with home grown terrorism regarding the murders of Pim Fortuyn in 2002, Theo van Gogh in 2004 and the attack on Queen’s Day in 2009 in the Netherlands required yet another revision of the existing Dutch intelligence legislation (Abels, 2018; De Graaff, 2015).

The Dutch government had also established the institute of the *Nationaal Coördinator Terrorismebestrijding* (National Coordinator for Counterterrorism, hereafter NCTb) (De Graaff, 2015). The aim of this institution was not to add a third intelligence and security agency; the NCTb was responsible for the coordination of general safety within the Netherlands. The NCTb was eventually renamed in the current *Nationaal Coördinator Terrorismebestijding Nederland* (National Coordinator for Counterterrorism of the Netherlands, hereafter NCTV).



Moreover, the Snowden revelations sparked a new public debate about the operations of the intelligence and security services in the West, more specifically regarding the extent of the protection of civil rights during the executed operations of the services (Bruneau & Matei, 2010; Burch, 2007; Hadji-Janev, 2021; Roach, 2012; Setty, 2015). Like in many Western countries, this had also contributed to the need to revise the existing intelligence legislation once again in the Netherlands. Particularly, sharing non-evaluated data in bulk between intelligence and security agencies was seen as the main point of criticism since this could potentially harm civil rights (Dielemans, 2018; Sepper, 2010; Walsh, 2006).

The geopolitical security environment continued to change due to digital transformations (Hadji-Janev, 2021). This means that terrorists or other adversaries continuously found more creative ways to conduct their malpractices, and to recruit new people for terrorist activities, for example, through social media. It was necessary for intelligence and security agencies to adapt their operations to these changing circumstances in order to effectively keep protecting national security. This also meant that the power of the intelligence and security services needed to be extended to meet the digital transformations.

### **5.1.3.2. Political perspective**

Over time, some bottlenecks emerged for the AIVD and MIVD, particularly regarding technological developments (Dielemans, 2018). The Wiv 2002 was therefore evaluated by the Dessens-Committee, appointed by the Dutch government in 2013. Their evaluation report provided the formal impetus for revising the Wiv 2002. This meant that the revision of the Wiv 2002 was aimed at bringing the power of the AIVD and MIVD ‘up to date’ by formulating their power in a technology-neutral way.

Simultaneously, legal developments on the protection of civil rights in the ECHR were taking place; this required the implementation of regulations regarding the safeguarding of civil rights within the new legislation (Dielemans, 2018). Combined with the effects of the Snowden revelations and the ongoing public debate, the safeguards imposed on the activities of intelligence and security services that infringe on civil rights, often in a covert manner, would have to be included in the Wiv 2017. The Wiv 2017 was implemented on July 26, 2017.

As in the Wiv 2002, the AIVD and MIVD operated under the Minister of the Interior and Kingdom Relations and the Minister of Defence in de Wiv 2017(Wiv, 2017, § 1, art. 1). The

coordinator was still subordinate to the Prime Minister of the Ministry of General Affairs and had the same responsibilities as in the Wiv 2002 (Wiv, 2017, § 1, art. 1). The AIVD received an additional task, with a total of six tasks. The first five tasks were the same as the tasks within the Wiv 2002. In addition, if any data has been collected and processed from a person or institution, the AIVD needed to report this to the person or institution in question if this is requested by the appointed minister (Wiv, 2017, § 2, art. 8, lid 2). Simultaneously, the MIVD got an additional task in the Wiv 2017. The first six tasks remained the same as in the Wiv 2002. The additional task was comparable to the new task of the AIVD, but is slightly different: the MIVD should only inform persons or institutions of the derived and processed data by the request of the relevant minister if this concerns persons or institutions with military relevance (Wiv, 2017, § 2, art. 10, lid 2).

### **5.1.3.3. Elements of the Wiv 2017**

#### **Intelligence sharing**

Similar to the Wiv 2002, the Wiv 2017 focused on intelligence sharing operations with foreign intelligence and security services. Yet, the most important change within the Wiv 2017 regarding intelligence sharing operations was the establishment of the *wegingsnotitie* (hereafter weighing memo) (Wiv, 2017, § 6, art. 88, lid 2). The weighing memo consisted of five criteria to which a foreign intelligence and security agency needed to comply with before the AIVD or the MIVD engaged in a cooperation and shared intelligence. This means that a foreign intelligence and security service needed to comply with the following five criteria: the relevant State is being assessed on the democratic embedding of the service in the respective country, the respect for human rights, the level of professionalism and reliability of the service in question, the legal powers and capabilities of the service within the relevant country and lastly, the level of data protection provided by the respective service (Wiv, 2017, § 6, art. 88, lid 3).

Also, the relevant minister or the department heads of the services needed to authorize the collaboration in question (Wiv, 2017, § 6, art. 88, lid 4). In addition, the department head of the AIVD or MIVD could also decide to re-evaluate the relationship with another agency based on the five criteria whenever this would be necessary (Wiv, 2017, § 6, art. 88, lid 5). Moreover, a written request from the receiving agency should be presented explicitly stating the needed technical or operational support. However, if the shared intelligence consisted of unevaluated information, the relevant minister needed to authorize this before unevaluated information

could be shared with third parties (Wiv, 2017, § 6, art. 89, lid 2). In addition, the CIVD will be informed of this authorization.

Yet, it was still possible to share intelligence with foreign intelligence and security services that did not comply with the five listed criteria (Wiv, 2017, § 6, art. 90, lid 4). This meant that if the requested support of the receiving agency was not in accordance with the five listed criteria, the relevant minister could still grant permission for complying with the requested support. There is no oversight committee that needs to be informed regarding the authorization of the minister. Similar as stated in the Wiv 2002, the sharing of intelligence with other agencies should not interfere with the interests and operations of the AIVD and the MIVD (Wiv, 2017, § 6, art. 89, lid 1, 4, 5; Wiv, 2017, § 6, art. 90, lid 5).

### **The system of oversight**

An additional *Commissie voor de Inlichtingen- en Veiligheidsdiensten* (Committee on Intelligence and Security Services, hereafter CIVD) was appointed in the Wiv 2017 and consisted of the Ministers of the Interior and Kingdom Relations, the Minister of Defence, the Minister of General Affairs, the Minister of Foreign Affairs and the Minister of Justice and Security or by designated deputies from these ministries (Wiv, 2017, § 1, art. 5, lid 1, 2). The CIVD was in charge of identifying the intelligence demands of Ministers on an annual basis, preparing proposals concerning the investigations that should be carried out, as well as the planning and prioritization of these investigations (Wiv, 2017, § 2, art. 5, lid 4).

The tasks of the CTIVD remained predominantly similar to the tasks stated as in the Wiv 2002 (Wiv, 2017, § 7, art. 97). However, in addition, the CTIVD consisted of one department focused on oversight and one focused on the processing of complaints. Moreover, the committee consisted of four members instead of three, including the chairman (Wiv, 2017, § 7, art. 98, lid 1).

In addition, a new oversight committee was established, namely the TIB (Wiv, 2017, § 3, art. 32, lid 1, 2). The committee consisted of three members including the chairman appointed by Royal Decree for a period of six years. This committee is still in charge of reviewing the legality of the granted authorization by the relevant minister regarding the executed powers of the AIVD and MIVD today. This means that before an authorization is granted by the appointed minister to the AIVD and MIVD to execute their powers, the minister in question first needs to submit

this request to the TIB (Wiv, 2017, § 3, art. 36, lid 1). The TIB is responsible for the ex-ante review regarding the legality of this request (Wiv, 2017, § 3, art. 36, lid 2).

Therefore, the judgment of the TIB is binding, this means that if the committee decided that the authorization is not legitimately granted, the request of the minister shall be legally cancelled (Wiv, 2017, § 3, art. 32, lid 2; Wiv, 2017, § 3, art. 36, lid 2, 3). It should be noted that if permission is given to the AIVD and MIVD in case of an emergency by the appointed Minister, the TIB will review the authorization request afterwards. If the TIB determines that the permission was not lawful, the collected data will be destroyed immediately (Wiv, 2017, § 3, art. 37, lid 3).

### **Regulations for the protection of civil rights**

In the Wiv 2017, an explicit difference was made between general and special power used by the AIVD and MIVD. Moreover, since the use of special powers of the agencies always needed to be authorized by the appointed minister or department head (Wiv, 2017, § 6, art. 90). This meant that in the context of conducting a general power, data could only be derived from publicly accessible sources, informants, or through cooperation with foreign intelligence and security services (Wiv, 2017, § 3, art. 25, lid 1). In addition, the data should be processed only for a specific purpose and only to the extent necessary for the end goal and proper implementation of this legislation (Wiv, 2017, § 3, art. 38, lid 1). Subsequently, the obtained data should be processed in accordance with the law in a proper and careful manner and should be provided with an indication of the degree of reliability or a reference to the document or source from which the data was derived (Wiv, 2017, § 3, art. 38, lid 2, 3). Moreover, the execution of a power ought to be as specific as possible (Wiv, 2017, § 3, art. 26, lid 5).

However, if it was necessary to collect data from another source of information the appointed minister or department head needed to grant permission (Wiv, 2017, § 3, art. 25, lid 2). The special authorizations of the agencies consisted of observing, following and, in the context thereof, recording data concerning the behaviour of natural persons or data, employing individuals for undercover operations, searching confined places, searching closed objects, conducting investigations to identify persons, identifying and verifying the identity of an individual based on DNA research, opening letters and packages of individuals and hacking into secure digital environments (Wiv, 2017, § 3, art. 40-45). However, to execute these special powers, permission should always be requested from the appointed minister or department head

and preferably reviewed beforehand by the TIB. In addition, the General Data Protection Regulation (AVG) was implemented in 2018 and is also applicable for processing personal data obtained by the intelligence and security services (Eerste Kamer der Staten-Generaal, 2021b).

#### **5.1.3.4. Societal perspective**

The political-social acceptance of the work of the AIVD and MIVD before 2017 changed through the factors of the increased public attention on the intelligence operations, the digitalization of human communications behaviour and the effects of the Snowden revelations; an adverse reaction to the work of the services was created (De Graaff, 2015; Hijzen & Scheepmaker, 2018). Especially the leaked Snowden documents in 2013 made clear that civil rights were also affected by the intelligence operations of the Dutch intelligence and security services.

The formation of the Wiv 2017 therefore stirred up a lot of public interest (Dielemans, 2018). This became evident, for example, in 2015 when an online consultation was conducted in which more than 1,100 citizens, telecommunications corporations and civil society organizations submitted responses to the formation of the Wiv 2017. The participants predominantly reacted critically to the expansion of the special powers of the AIVD and MIVD, such as cable-based interception of bulk telecommunications, the safeguards surrounding the exercise of the services' special powers and the supervision regarding the revision of the Wiv 2002.

These concerns were also extensively discussed in the parliamentary process of the new intelligence legislation; this convinced many Dutch citizens to vote in favour of the implementation of the Wiv 2017 during the advisory referendum on March 21, 2018 (Dielemans, 2018). Opponents of the revision of the Wiv 2002 received the most votes with 49,44 percent; however, only 48 percent of the eligible voters within the Netherlands casted their vote in this advisory referendum (Het Parool, 2018). This means that the turnout for the advisory referendum remained low. Yet, it did not diminish Dutch citizens' concerns regarding the protection of their civil rights such as the right to privacy and (online) freedom of speech (Dielemans, 2018; Hijzen & Scheepmaker, 2018; Rijksoverheid, 2018).

**5.1.3.4. Schematic presentation of the policy theory of the Wiv 2017**

As can be seen in Figure 5, the input for the implementation of the Wiv 2017 consisted of the effects of the Snowden revelations, continuously emerging internal and external terrorist threats and the legal developments on the protection of civil rights within the ECHR. This contributed to the revision of the Wiv 2002 and resulted into the implementation of the Wiv 2017. There was increased attention for protecting national security within the Wiv 2017 and improved protection of national security, through effectively sharing intelligence with the intelligence community and the establishment of the NCTV. Based on the legal developments on the protection of civil rights within the EHCR, attention for implementing regulations to safeguard civil rights also increased within the Wiv 2017. This contributed to the increase of the protection of civil rights in society. However, the effects of the Snowden revelations caused for public outrage and criticism towards the operations of the AIVD and the MIVD in the context of protecting civil rights (Bauman et al., 2014; Deeks, 2015; Hintz & Dencik, 2016).

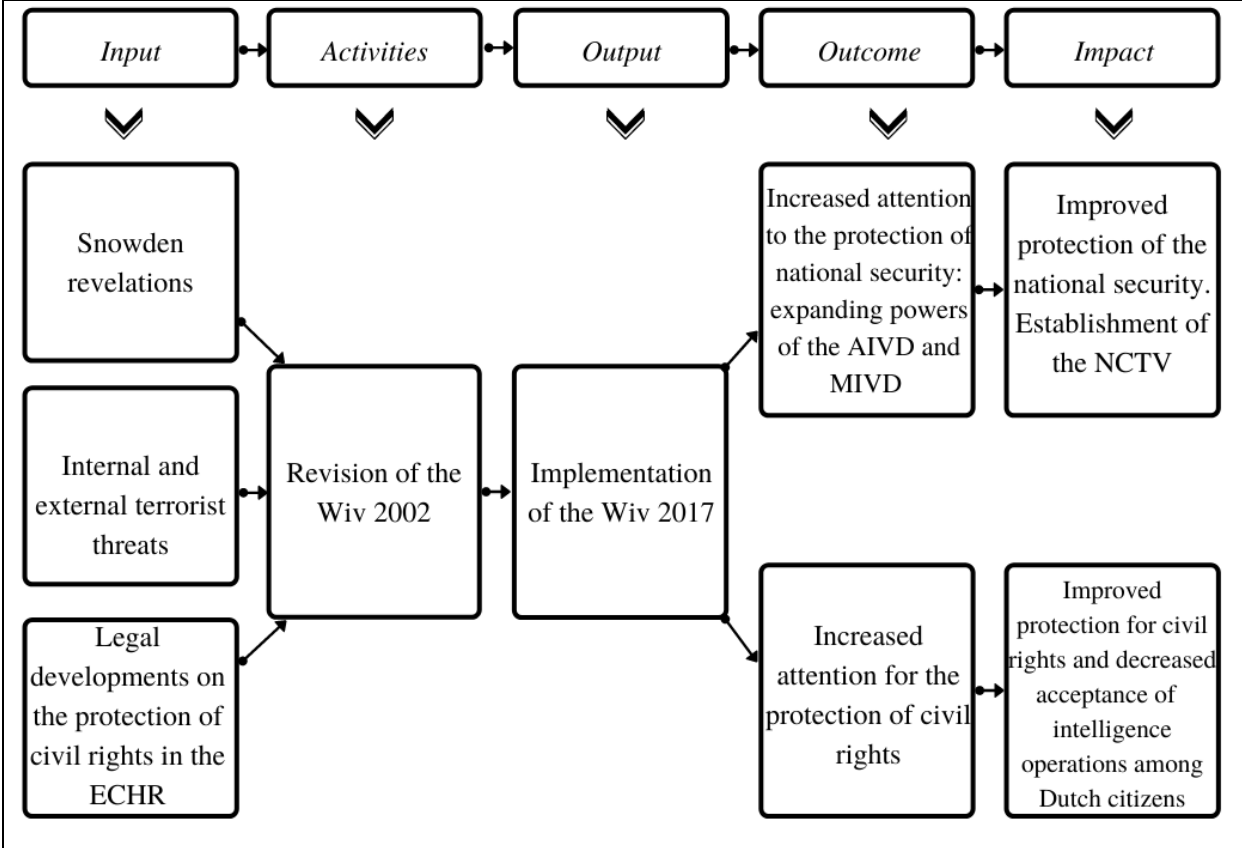


Figure 5. Schematic presentation of policy theory regarding the Wiv 2017.

#### **5.1.4. The 2021 revision of the Wiv 2017**

##### **5.1.4.1. Historical perspective**

Two years after the implementation of the Wiv 2017, the council of Ministers appointed an independent commission to evaluate the Wiv 2017 on May 1, 2020 (Rijksoverheid, 2021). This evaluation commission consisted of seven members including the chairman drs. Jones-Bos; the main purpose of this evaluation was to assess the knowledge of the operational work of the AIVD and the MIVD and its compliance with legislation, human rights, and privacy rights. The Jones-Bos commission presented their evaluation report to the Dutch government on January 20, 2021.

The AIVD and MIVD stated that they could not sufficiently carry out their responsibilities to protect national security since their powers were not ‘up to date’ (Modderkolk, 2021; Pasveer, 2021). More specifically, the ever-evolving geopolitical security environment and ongoing digital transformations had caused the threat level for terrorist attacks in the Netherlands to be "significant" since October 2020 according to the NCTV (NCTV, 2021). On a scale of one to five, the NCTV assigned a three, meaning that ‘a terrorist attack is predictable in the Netherlands and the threat can come mainly from terrorist loners’ (NCTV, 2021, p. 13). For example, internal and external threats such as global jihadism, jihadist movements in the Netherlands, Salafism, right-wing extremism, and polarization and extremism driven by social discontent are threats the agencies had to be countered to prevent terrorist attacks from happening in the Netherlands.

The Dutch intelligence and security agencies requested more leeway to execute their operations (Modderkolk, 2021; Pasveer, 2021). The Jones-Bos commission recommended that the intelligence and security services should be given more leeway by slightly limiting the role of oversight on the agencies (Jones-Bos et al., 2021). The recommendation of the Jones-Bos committee was accepted by the House of Representatives and the Senate agreed to revise the Wiv 2017 (Eerste Kamer der Staten-Generaal, 2021a; Jones-Bos et al., 2021; Modderkolk, 2021). What this means for the intelligence sharing operations of the AIVD and the MIVD and the relation to the protecting of civil rights will be discussed in 5.2. and 5.3.

##### **5.1.4.2. Political perspective**

The revision of the Wiv 2017 was published in the Official State Journal of the Kingdom of the Netherlands on June 25, 2021; it was called the ‘*Wet van 16 juni 2021 tot wijziging van de Wet*

*op de inlichtingen- en veiligheidsdiensten 2017*' (Act of June 16, 2021, to amend the Intelligence and Security Services Act 2017, hereafter 2021 revision of the Wiv 2017). The revision gives more attention to the subject of intelligence sharing with foreign intelligence and security services, subsequently establishes requirements for the execution of special powers of the services to be adjusted to the proposal of the *Wet open overheid* (Open Government Act, hereafter Woo)<sup>2</sup> (2021 revision of the Wiv 2017). However, classified information is not accessible through the Woo (2021 revision of the Wiv 2017, § 1, art. 157a). The main tasks of the AIVD and the MIVD remained similar to the Wiv 2017, however, some sections were clarified or modified.

#### **5.1.4.3. Elements of the 2021 revision of the Wiv 2017**

##### **Intelligence sharing**

In the 2021 revision of the Wiv 2017, the focus is aimed at reducing the period within the establishment of the weighing memo's regarding the cooperation with foreign intelligence and security services must be completed by the AIVD and the MIVD. Moreover, it is explicitly stated within the 2021 revision of the Wiv 2017 that the AIVD and MIVD are now authorized to share intelligence with foreign intelligence and security services, even if no cooperation had been established previously, based on the five criteria of the weighing memo (2021 revision of the Wiv 2017, § 1, art. 64). In addition, intelligence may now also be shared with foreign intelligence and security services that were initially rejected based on the five criteria outlined in the weighing memo. Similar to the Wiv 2017, this can only be done if the relevant minister grants permission. Simultaneously, the CTIVD will be informed about the granted permission of the respective minister.

These aspects of the amendment can affect the legal protection of civil rights within the Dutch society. For example, based on inaccurate intelligence from the Nigerian intelligence and security service, human rights activist Sunny Ofehe, was suspected of having ties with terrorists and was charged with terrorism by the Dutch prosecution (Terlingen et al. 2017; Wittenberg, 2014). Although the prosecution dropped these charges due to the lack of evidence, Ofehe's life is still affected by these allegations (Wittenberg, 2014). His name is still linked to terrorist

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<sup>2</sup> The Woo is intended to make governments more transparent in order to ensure that governmental information is easier to find, to exchange, to access and to properly archive. When the Woo will be implemented, this will replace the current *Wet openbaar van bestuur* (Public administration act, Wob) (Woo, 2021).



activities in global databases, which prohibits him from opening a bank account, applying for a mortgage, travelling to countries such as the United Kingdom, and his application for Dutch citizenship was initially rejected.

### **The system of oversight**

The tasks of both the CIVD and the CTIVD remain similar as within the Wiv 2017. Besides the permanently appointed members of the TIB, deputy members may be appointed to replace the initial members in the event of their absence or inability to act (Wiv, 2021, § 1, art. 33, lid 1). The members and deputy members shall also be appointed by Royal Decree on the recommendation of the relevant ministers for a period of six years and may be reappointed once (Wiv, 2021, § 1, art. 29, lid 2). This means that the position of the TIB and their oversight role on the intelligence sharing operations of the AIVD and the MIVD was enhanced.

### **Regulations for the protection of civil rights**

In the 2021 revision of the Wiv 2017, obtained intelligence information regarding persons or institutions can be destroyed in the context of a pending complaint or objection (Wiv, 2021, § 1, art. 20, lid 5). This can be done through the Dutch courts of justice, however, as part of proceedings before a court of law, the destruction of intelligence shall be suspended until the decision on the complaint has been made or until the court ruling has become irrevocable.

Also, the AIVD and MIVD need to provide a description of how to ensure the most targeted use of the relevant power, to give a reason why the exercise of the relevant power may be considered proportionate to fulfil the intended purpose and to give a reason why the exercise of a less intrusive power would not be sufficient to achieve the intended purpose (Wiv, 2021, § 1, art. 29, lid 2).

#### **5.1.4.4. Schematic presentation of the policy theory of the 2021 revision of the Wiv 2017**

As can be seen in Figure 6, input for the implementation of the 2021 revision of the Wiv 2017 consisted mostly of the evaluation report of the Jones-Bos committee. This increased the attention for protecting national security within the 2021 revision of the Wiv 2017 by expanding the regulations for intelligence sharing operations that supersede the five criteria of the weighing memo. Simultaneously, the attention for implementing regulations to safeguard civil rights increased within the 2021 revision of the Wiv 2017 since the AIVD and MIVD need to specify more why they use the power in question. Moreover, the revision needs to comply with

the regulations of the Woo. However, since the 2021 revision of the Wiv 2017 has been implemented very recently, it is not yet possible to determine the actual impact of the legislation in society; and thus, it is not possible to present facts about its impact. However, the analysis of the aforementioned Wiv 1987, Wiv 2002 and Wiv 2017 might give more information to ascertain whether or not there has been a trend between 1987 and 2021. This will be analysed in the following section.

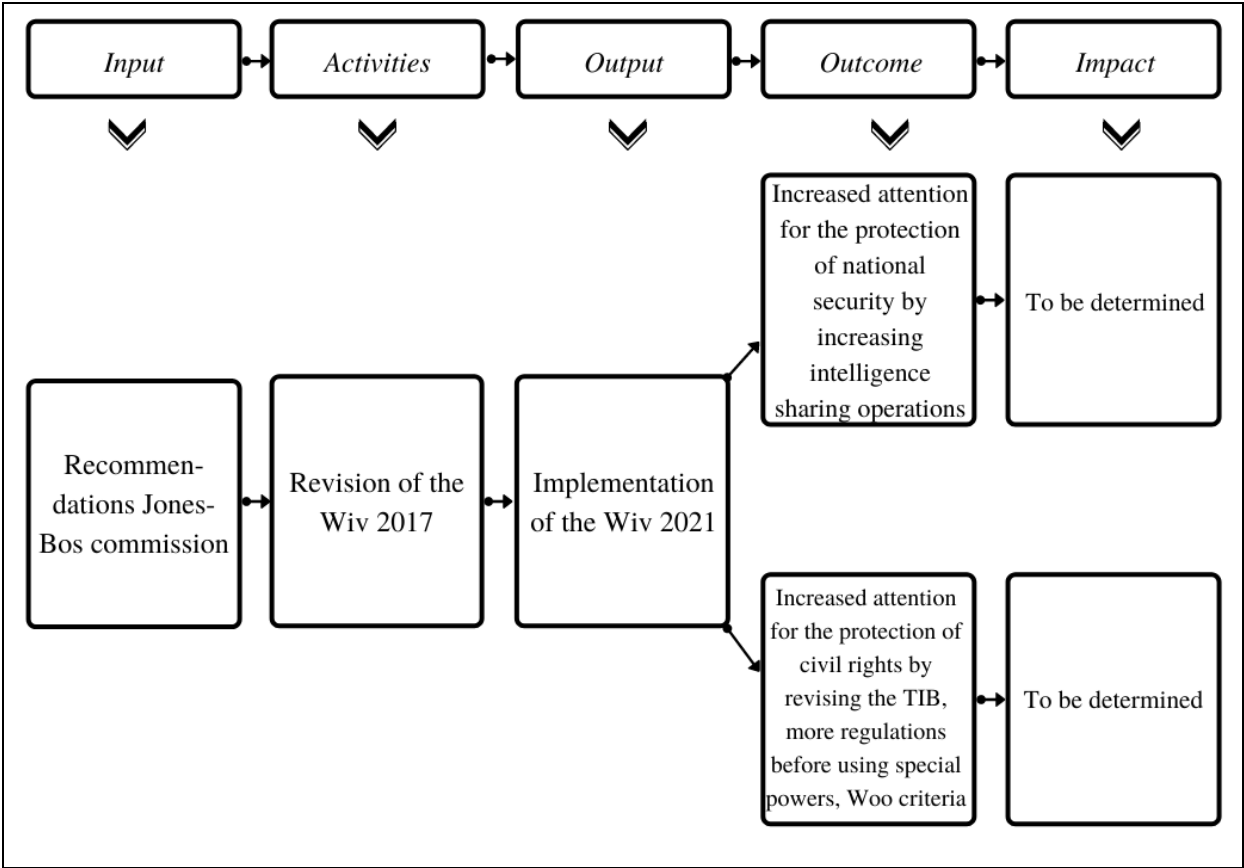


Figure 6. Schematic presentation of policy theory regarding the 2021 revision of the Wiv 2017.

**5.2. Analysis of the policy theory’s outcome and impact**

This section focuses on analysing similarities and differences between the outcome and impact factors of the policy theory discussed in 5.1. The outcome of the policy theory reflects on the attention given to the protection of national security and civil rights in the context of intelligence sharing within the Dutch Wiv. The impact of the policy theory reflects on the actual change in society after the implementation of the Dutch Wiv regarding the protection of national security and civil rights in the context of intelligence sharing.

The outcome and impact factors of the policy theory regarding the different Wiv's will first be analysed in the context of the four themes of national security, intelligence sharing, the system of oversight and civil rights, as was discussed in the theoretical framework. This will be done to determine if a trend can be distinguished considering the legal protection of civil rights in relation to the intelligence sharing operations of the Dutch intelligence and security services. It should be noted that the analysis is based on the information derived from the case study of the Dutch Wiv in section 5.1.

### **5.2.1. National security: the outcome and impact**

The Wiv 1987, Wiv 2002, Wiv 2017 and the 2021 revision of the Wiv 2017 were all implemented to counter internal and external threats in the context of terrorism, with the goal of protecting both national security and its citizens. In the international community, a country has the legitimate right to protect its national security from security threats (Christakis & Bouslimani, 2020; Morris, 2020). Therefore, in every Wiv, there is more attention for the protection of the Dutch national security than for the protection of civil rights.

Although the Dutch Wiv has been revised three times after 1987, including the 2021 revision of the Wiv 2017, the Netherlands still faces security threats. According to the NCTV, since October 2020, the threat level for terrorist attacks in the Netherlands remains "significant" (NCTV, 2021). According to the NCTV (2021) this means that 'a terrorist attack is predictable in the Netherlands and the threat can come mainly from terrorist loners' (p. 13). The perception of the Dutch government is continuously focused on protecting Dutch national security and its citizens through the continuous expansion of the powers of the intelligence and security services.

Yet, the threat level indicated by the NCTV indicates that Dutch intelligence legislation is in fact always lagging behind to the continuous digital developments and changing geopolitical security environment. Hence, it is logical that a continuous revision of the Wiv, particularly by expanding the powers of the AIVD and the MIVD, is necessary to counteract new and existing security threats. These attention for the changes in the Dutch Wiv over time to protect national security did not automatically contribute to an increase for the protection of civil rights within each Wiv nor in society.

### **5.2.2. Intelligence sharing: the outcome and the impact**

Defining intelligence sharing operations has not always been a key component within the intelligence legislation. Therefore, it received little attention in the Wiv 1987, which focused more on the cooperation of the Dutch intelligence and security services with foreign intelligence and security services. The Wiv 1987 does not specifically mention the operations of intelligence sharing with foreign intelligence and security services, only that the cooperation with foreign ‘appropriate’ intelligence and security services needs to be ensured (Wiv, 1987, § 4, art. 13, lid 1, 2). This means that sharing intelligence with foreign intelligence and security services could have impacted the protection of civil rights negatively in society, since there was no definition within the Wiv 1987 of what an ‘appropriate’ agency entailed.

After the terrorist events of 9/11, the focus shifted to sharing intelligence with foreign intelligence and security services (Clough, 2004; Lefebvre, 2003; Roach, 2012; Sepper, 2010). Therefore, the attention for intelligence sharing increased within the Wiv 2002. In contrast to the Wiv 1987, within the Wiv 2002 it is added that the AIVD and MIVD need to cooperate as much as possible with each other *and* foreign intelligence and security agencies by sharing intelligence and providing technical and other forms of support (Wiv, 2002, § 5, art. 58, lid 1, 2). The increased attention for intelligence sharing practices within the Wiv 2002 contributed to an increase of intelligence sharing operations in society since the agencies used intelligence sharing as their *modus operandi* (Clough, 2004; Lefebvre, 2003; Roach, 2012).

Yet, intelligence can only be shared with foreign intelligence and security services if the interests of the foreign intelligence and security services are not incompatible with, or affect, the interests or executed operations of the AIVD and the MIVD (Wiv, 2002, § 5, art. 59). However, if information has been provided, which initially should not have been provided to other parties, the relevant minister or the head of the department can still grant permission afterward. Yet, conditions may be attached to the granted authorization afterward. However, since it remains unclear what kind of conditions may be attracted to the mentioned ex-post granted authorization, the minor regulations within the Wiv 2002 regarding sharing intelligence operations might not be able to adequately protect the civil rights in society.

While the terrorist attacks of 9/11 demonstrated the importance of increased intelligence sharing between intelligence and security agencies, the Snowden revelations in 2013 demonstrated the importance of regulating these intelligence sharing operations, given the possibility of harming the same civil rights that countries seek to protect through their national security legislations.

Therefore, the most important change in the context of intelligence sharing operations from the Wiv 1987 and Wiv 2002 was the establishment of the weighing memo within the Wiv 2017 mentioned in section 5.1.3.3.

The option to share intelligence with foreign intelligence and security services with insufficient weighing memos increased within the 2021 revision of the Wiv 2017. This means that shared intelligence, regarding one or multiple civilians, can potentially be understood by the receiving agency as information that this person, or these persons, are perceived as a serious terrorist threat by the sending agency, i.e., in this case the Netherlands (Sepper, 2010). Moreover, there could be a possibility that the recipient agency, and thus the state, uses the received intelligence for possible harmful purposes that does not correspond with the interest of the Netherlands (Sepper, 2010; Walsh, 2006). This possibility might still impact the protection of civil rights in society in a negative way, by providing insufficient protection of the citizen's civil rights, such as with the case of Omar Shishani, as explained in the literature review (Sepper, 2010).

Democracies are, due to their nature, always faced with conflicting dilemmas regarding countering terrorism legislations (Bochel & Defty, 2017; Burch, 2007; Gill, 2009). The establishment of oversight mechanisms could perhaps ensure, that intelligence and security services are managed effectively, adhere to national and international law and respect civil rights in the context of intelligence sharing operations.

### **5.2.3. The system of oversight on intelligence and security services: the outcome and impact**

There was little attention for a system of oversight, since an institutionalized system of oversight was not specifically mentioned within the Wiv 1987. The judicial oversight consisted of the Dutch courts of justice (Wiv, 1987, § 4, art. 23, lid 1). There is no knowledge or information present regarding internal oversight mechanisms of the BVD or MID. The external oversight on the agencies happened after the implementation of the Wiv 1987 since the European Court of Justice recommended to improve the regulations of the Wiv 1987 (De Graaff, 2015). Without a system of oversight in the Wiv 1987, civil rights were protected insufficiently against the intelligence sharing operations of the BVD and MID interfering with the personal sphere of citizens in the Netherlands without their knowledge.

The attention for a system of oversight increased during the implementation of the Wiv 2002. Although the executive oversight remained similar as within the Wiv 1987, the legislative

oversight was expanded by the implementation of the CTIVD in charge of the supervision of the legality of the Wiv 2002 (Wiv, 2002, § 6, art. 64, lid 2). This was done by conducting ex-post reviews of the executed powers of the AIVD and MIVD (Wiv, 2002, § 6, art. 73, lid 1). Additionally, the National Ombudsman was appointed for citizens to file possible complaints against the actions of the involved Ministers and organizations (Wiv, 2002, § 6, art. 83). This caused a slight increase in the actual protection of civil rights in society since Dutch citizens were able to file complaints with the National Ombudsman regarding the action of the agencies.

The judicial oversight regarding the section of the confidentiality of the work of the AIVD and MIVD remained similar to the Wiv 1987 (Wiv, 2002, § 7, art. 87, lid 1). However, within the Wiv 2002 it is also stated that the relevant minister or the CTIVD decides when the court can review classified intelligence documents. Moreover, the courts of justice can only rule based on these documents, with permission of the relevant Minister or the CTIVD. If these parties do not grant permission, the Dutch courts can still rule without having knowledge of the classified information. Similar to the Wiv 1987, there is no knowledge or information present regarding internal oversight mechanisms of the AIVD and MIVD.

As a part of external oversight, this was provided on an international level by the United Nations Resolution 1373 in 2001 and European institutions such as Europol, the Club of Berne, the European Union Military Staff, and the European Union Situation Centre pushing for the increase in intelligence sharing between agencies (Clough, 2004; Lefebvre, 2003; Roach, 2012; Walsh, 2006). Although this was done in light of the protection of national security, parallel with the increased political-social acceptance of the Dutch intelligence and security services, the public attention to the work of the services increased as a form of external oversight on a domestic level (Burke-White, 2004; De Graaff, 2015; Golder & Williams, 2006; Morris, 2020). This means that potentially the public awareness among the Dutch citizens increased regarding the work of the AIVD and the MIVD in society in need to safeguard civil rights by preventing terrorist attacks.

Through the Snowden revelations citizens learned that the intended ‘seamless flow of sharing information’ transformed power relations in terms of exploiting data and intelligence, changing the positive effects of intelligence sharing into ‘everyone is being watched’ (Bauman et al., 2014, p. 127; Deeks, 2015, p. 293; Hintz & Dencik, 2016, p. 2). Therefore, the expansion of the system of oversight gained more attention within the Wiv 2017. The executive oversight expanded by establishing the CIVD as mentioned in section 5.1.3.3.

The legislative oversight within the Wiv 2017 consisted of the Dutch parliament that implemented the Wiv 2017 and the CTIVD. However, the CTIVD consists now of a department focused on oversight and an additional department focused on the processing of complaints (Wiv, 2017, § 7, art. 97, lid 2). Additionally, the oversight committee of the TIB was established and is in charge of binding ex-post assessments of the legality of the granted authorization by the relevant minister regarding the executed powers of the AIVD and MIVD (Wiv, 2017, § 3, art. 32, lid 2). Similar to the Wiv 2017, the tasks of the CTIVD and the TIB remain the same within the 2021 revision of the Wiv 2017. However, the only change is that deputy members may be appointed to replace the initial members in the event of their absence or inability to act (2021 revision of the Wiv 2017, § 1, art. 33, lid 1). This means that the position of the members of the TIB are always fulfilled in every circumstance, thus enhancing the position of oversight of the TIB on the agencies.

Subsequently, the judicial oversight of the Dutch courts of justice is similar as within the Wiv 2002. However, within the Wiv 2017, the Dutch courts of justice also determine whether the confidential information between a lawyer or journalist and his client or source is obtained through the execution of a special power of the agencies and whether this power is being used for the intended purpose or not (Wiv, 2017, § 3, art. 27, lid 2; Wiv, 2017, § 3, art. 30, lid 2). If the Dutch courts of justice do not grant permission for the latter, the confidential information needs to be destroyed immediately. This means that both journalists, attorneys and their sources are more protected from the operations of the AIVD and the MIVD.

Similar to the Wiv 1987 and Wiv 2002, there is no knowledge or information present regarding internal oversight mechanisms of the AIVD and MIVD. The attention for external oversight on the intelligence agencies increased on an international level after the Snowden revelations. Amnesty International (2018) and the OHCHR (2018) demanded governments to act on the problematic relationship between the secret and often closed character of intelligence agencies; oversight mechanisms needed to ensure that intelligence practices are in accordance with domestic and international law and respect civil rights (Deeks, 2015; Hadji-Janev, 2021; Sepper, 2010). Simultaneously, from a domestic level, the Dutch citizens gained a more critical stance towards the AIVD and the MIVD with concerns for the protection of their civil rights. This means that the external oversight on the agencies increased on both a domestic and international level.

Therefore, the establishment of a system of oversight gained the most attention during the implementation of the Wiv 2017. Yet, this also caused the most change in society by conducting ex-ante and ex-post reviews to determine the legality of the operations of the AIVD and the MIVD with the aim of contributing to the legal protection of civil rights. However, the increased public awareness of the work of the agencies, due the Snowden revelations, contributed to the declining societal acceptance of the work of the AIVD and MIVD, since citizens were now more concerned about the actual protection of their civil rights in society.

#### **5.2.4. Civil rights: the outcome and the impact**

In the Wiv 1987, there is less attention for the protection of individual rights since this is only linked to the way that data was obtained. Moreover, only the coordinator and the head of the agencies are authorized to obtain information from other government bodies, government services, civil servants or any individual who is deemed to be able to provide such information (Wiv, 1987, § 4, art. 15). However, if data is shared with third parties, other than government bodies, the head of the department must act accordingly with the instructions of the relevant minister and the minister of justice (Wiv, 1987, § 4, art. 16, lid 2, 3). This means that insufficient regulations within the Wiv 1987, also had the greatest impact on the actual protection of civil rights in society. This also means that without proper regulations, the executed powers of the agencies can potentially harm all three civil rights categories.

The right to life and the prohibition of torture, inhumane or degrading treatment could be harmed if the receiving agency perceives the received intelligence regarding a citizen as a serious terrorist threat by the sending agency and uses the received intelligence for possible harmful purposes that do not correspond with the interest of the Netherlands (Sepper, 2010; Walsh, 2006). It might also affect the citizen's right to liberty and security, the right to a fair trial and the right of freedom of thought in the context of countering terrorism (European Court of Human Rights & Council of Europe, 1950, § 1, art. 5, 6, 9; Gill, 2009). More specifically, it is more likely that the right to privacy, the right to freedom to manifest religion or belief, freedom of expression, freedom of assembly and freedom from discrimination can be restricted by the state in circumstances such as protecting national security from internal and external threats (European Court of Human Rights & Council of Europe, 1950, § 1, art. 8, 9, 10, 11, 14; Gill, 2009).



In line with the recommendation of the European Court of Justice, the Wiv 2002 contains a section on the handling of complaints at the National Ombudsman (De Graaff, 2015; Wiv, 2002, § 6, art. 83). Moreover, the notion of personal data is more specified within the Wiv 2002, stating that this concerns personal data to identify individuals (Wiv, 2002, § 1, art.1). Therefore, there is slightly more attention for the regulations regarding the protection of civil rights within the Wiv 2002 than before. However, similar the Wiv 1987, in the Wiv 2002 there is a lack of proper regulations regarding intelligence sharing. This means that the aforementioned civil rights still could have been harmed by intelligence sharing operations of the agencies.

The Wiv 2017, compared to the other Wiv's, contains the most regulations to actually protect civil rights in society. The regulations on the protection of civil rights in the Wiv 2002 and Wiv 2017 were predominantly stimulated by the European Court of Justice, the developments over time in the ECHR and were pushed by non-governmental organizations such as Amnesty International, the United Nations, specifically OHCHR and European institutions (Amnesty International, 2018; Lefebvre, 2003; OHCHR, 2018; Roach, 2012; Walsh, 2006). Yet, the implementation of the civil rights regulations had been accelerated by the Snowden revelations. Simultaneously, the Snowden revelations raised critical questions within governments of Western democracies whether the existing legal frameworks and oversight mechanisms provided enough constraints on intelligence and security agencies to adhere to domestic and international law with respect for civil rights (Bruneau & Matei, 2010; Burch, 2007; Hadji-Janev, 2021; Roach, 2012; Setty, 2015).

Combined with the digitalization of human communications behaviour, this led to a more critical attitude of citizens towards the work of the services and expressing their criticism and concern of the protection of their civil rights within the public debate (De Graaff, 2015; Hijzen & Scheepmaker, 2018). This was also seen in the outcome of the advisory referendum prior the implementation of the Wiv 2017 (Dielemans, 2018; Hijzen & Scheepmaker, 2018; Rijksoverheid, 2018). Therefore, in accordance with the public concerns, the government ensured that the powers of the AIVD and MIVD were further divided in the Wiv 2017 between general and special powers of the agencies (Wiv, 2017, § 3, art. 38, lid 1). In addition, the establishment of the TIB provided extra oversight through ex-ante reviews on the intelligence sharing operations of the agencies. The TIB reviews the legality of the authorization request before the agencies can conduct a specific special power (Wiv, 2017, § 3, art. 40-45). Yet, one of the largest and most important differences in the intelligence legislations, is the increased

attention for and the actual implementation of the protection of civil rights within the Wiv 2017.

Compared to the Wiv 1987 and the Wiv 2002, the Wiv 2017 devotes the most attention to the protection of civil rights, due to the implementation of the weighing memo and establishing of the additional oversight mechanism of the TIB.; this means that civil rights that cannot be restricted in any circumstances and civil rights that can be limited are protected to a greater extent than before; however, the AIVD and the MIVD could still carry out their powers in cases of emergency, without an ex-ante review by the TIB. This means that, although the collected data will be destroyed afterwards based on the decision of the TIB, civil rights might have already been harmed.

Within the 2021 revision of the Wiv 2017, the agencies need to provide a description of how they ensure that the relevant power only targets the specific end goal. Also, a reason needs to be given why the exercise of the relevant power may be considered proportionate to fulfil the intended purpose and why the exercise of a less intrusive power would not be sufficient to achieve the intended purpose (2021 revision of the Wiv 2017, § 1, art. 29, lid 2). However, simultaneously, the intelligence sharing operations with foreign intelligence and security services are expanded within the 2021 revision of the Wiv 2017. Regulations have been added that now explicitly state that intelligence can even be shared with foreign intelligence and security services without any priorly established relationship or if the receiver agency failed to comply with the five listed criteria (Wiv, 2021, § 1, art. 64, lid 1). Although the appointed minister still needs to grant authorization and this is reviewed afterwards by the CTIVD, the 2021 revision of the Wiv 2017 lacks an ex-ante review of the TIB regarding the expansion of intelligence sharing operations; therefore, this could entail that civil rights might be potentially harmed.

Most likely, this will affect the right to privacy, the right to freedom to manifest religion or belief, the right of freedom of expression, the right of freedom of assembly and the right of freedom from discrimination can be restricted by the state in circumstances such as protecting national security from internal and external threats (European Court of Human Rights & Council of Europe, 1950, § 1, art. 8, 9, 10, 11, 14; Gill, 2009). This could also mean that certain civil rights are still not fully protected within the current 2021 revision of the Wiv 2017.

**5.3. Conclusion of the analysis**

To give an overview of this development through time into the current intelligence legislation, the information is presented in Table 1. Both the attention for and the actual impact on society of protecting national security and civil rights in the context of intelligence sharing are displayed.

**Table 1**  
*Overview of the protection of national security and civil rights within the Dutch Wiv.*

<b>The Dutch Wiv</b>	<b>The protection of</b>	<b>Outcome (Attention within the policy)</b>	<b>Impact (Change in society)</b>
<b>1987</b>	<b>National security</b>	More attention	Improved protection
	<b>Civil rights</b>	Less attention	Insufficient protection
<b>2002</b>	<b>National security</b>	Increased attention	Increased protection
	<b>Civil rights</b>	Slightly more attention	Slightly improved protection
<b>2017</b>	<b>National security</b>	More increased attention	More improved protection
	<b>Civil rights</b>	Increased attention	Improved protection
<b>2021</b>	<b>National security</b>	Increased attention	To be determined
	<b>Civil rights</b>	Increased attention	To be determined

Note: Table 1 has been established based on the policy theory’s outcome and impact within the case study of the Dutch Wiv of this study.

Given the information in Table 1, a trend can be distinguished that both the protection for national security in the context of sharing intelligence with foreign intelligence and security services and the safeguarding of civil rights through the system of oversight on the intelligence

sharing operations of the AIVD and the MIVD, gained more attention between 1987 and 2021. The increased attention contributed to an increased tension between ensuring that national security is protected through intelligence sharing and civil rights are protected through the system of oversight on these intelligence sharing operations. This emerged within the evaluation report of the Jones-Bos committee, which recommended that the role of oversight should be slightly limited to give more leeway for the AIVD and the MIVD to conduct their operations (Jones-Bos et al., 2021).

Within the 2021 revision of the Wiv 2017, the TIB and the CTIVD retain their tasks to carry out an ex-ante and ex-post review on the executed powers of the AIVD and the MIVD. Moreover, the position of the TIB is slightly more strengthened, since from now on deputy members can be appointed to the TIB to replace the initial members in the event of their absence or inability to act (2021 revision of the Wiv 2017, § 1, art. 33, lid 1). This means that the TIB will always have enough capacity to perform the ex-ante reviews regarding the operations of the AIVD and the MIVD.

Within the 2021 revision of the Wiv 2017 are more regulations implemented for the agencies to adhere to. In addition, as seen in Table 1, the attention within the Dutch Wiv has slightly shifted through time from predominantly aiming to protect national security towards giving more attention to the protection of civil rights. The actual regulations of the 2021 revision of the Wiv 2017 underpin this by keeping the role of oversight committees and their tasks, adding extra regulations for the AIVD and the MIVD before they carry out their powers and increasing the regulations for citizens regarding the destruction of obtained data and the possibilities of the Woo (2021 revision of the Wiv 2017, § 1, art. 29, lid 2; § 1, art. 33, lid 1; § 1, art. 157a).

Yet, the intelligence sharing operations with foreign intelligence and security services are also expanded within the 2021 revision of the Wiv 2017. The priorly discussed weighing memo in the Wiv 2017 contained five criteria on which new and existing relationship with foreign intelligence and security services needed to be assessed (Wiv, 2017, § 6, art. 88, lid 2). However, intelligence sharing that did not meet the criteria of the weighing memo could only take place through authorization of the relevant minister. Simultaneously, the CTIVD has to be informed about this authorization. This remained similar in the 2021 revision of the Wiv 2017, however regulations have been added that now explicitly state that intelligence can even be shared with foreign intelligence and security services without any priorly established

relationship or if the receiver agency failed to comply with the five listed criteria (Wiv, 2021, § 1, art. 64, lid 1).

Although the appointed minister still needs to grant authorization which is reviewed afterwards by the CTIVD, this could entail that civil rights might already be potentially harmed. As discussed before, this could mean that shared intelligence regarding one or multiple civilians, could potentially be understood by the receiving agency that this person, or these persons, are perceived as a serious terrorist threat by the sending agency, in this case the AIVD or MIVD (Sepper, 2010). Moreover, there could be a possibility that the recipient agency, and thus the receiving state, uses the received intelligence for possible harmful purposes that does not correspond with the interest of the Netherlands (Sepper, 2010; Walsh, 2006). This means that civil rights are still not fully protected within the 2021 revision of the Wiv 2017 in the context of intelligence sharing; this might have consequences for the legal protection of civil rights in the context of intelligence sharing operations in individual cases, such as the case of Sunny Ofehe shows (Terlingen et al., 2017; Wittenberg, 2014). It can be concluded that civil rights within the Dutch society can still be affected by the intelligence sharing practices of the AIVD and the MIVD in 2021 and in the future.

The field of tension between protecting national security and civil rights in the context of intelligence sharing is thus increasing. This means that the protection of civil rights in the Dutch society needs even more attention, since the AIVD and MIVD are more authorized to share intelligence with foreign intelligence and security services that do not comply with the five criteria of the weighing memo. This could result into consequences, as discussed before, for the legal protection of civil rights within the Netherlands. However, if the AIVD and MIVD perceive in the future that there is not enough leeway to conduct their operations and request for more leeway, this might affect the role of the TIB and the CTIVD such as during the recommendation of the Jones-Bos committee. The increasing attention for both aspects - protecting national security and civil rights in the context of intelligence sharing – leads to increasing tension. Thus, it can be said that this field of tensions is a vicious cycle which could lead to further problems and therefore could provide the impetus for further research. This will be further discussed in the following chapter of the conclusion.

## Chapter 6 Conclusion

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In this chapter, the research question will be answered. Subsequently, it will be discussed how the findings relate to the literature review of this study. After that, the limitations of this study will be discussed; finally, recommendations for further research, both political and scientific research recommendations, will be given.

The purpose of this study was to analyse the field of tension between the protection of national security (in context of sharing intelligence with foreign intelligence and security services) and safeguarding civil rights (in the context of the system of oversight on these intelligence sharing operations of the Dutch intelligence and security services). The motivation for this study was the revision of the Wiv 2017 by the House of Representative and the Senate in the light of the recommendations of the Jones-Bos committee (Rijksoverheid, 2021a). In particular, the recommendation of the Jones-Bos committee to slightly limit the role of oversight of the TIB and the CTIVD on the operations of the AIVD and the MIVD within the 2021 revision of the Wiv 2017. Although the debate on this field of tension is a worldwide debate, this study has been limited to the Netherlands; this has been done in terms of feasibility regarding the time, word count, and to keep the analysis as clear and structured as possible.

In this study, a qualitative research has been conducted by analysing a longitudinal case study and the policy theory in order to formulate an answer to the research question: ‘What will be the potential consequences of revising the oversight on intelligence sharing in the Dutch Wiv 2017 for the legal protection of Dutch citizen’s fundamental rights?’. The analysis of this study shows that, within the 2021 revision of the Wiv 2017, both the TIB and the CTIVD retain their tasks to carry out an ex-ante and ex-post review on the executed operations of the AIVD and the MIVD.

Yet, sharing intelligence with foreign intelligence and security services is being expanded in the 2021 revision of the Wiv 2017. The priorly discussed weighing memo in the Wiv 2017 contains five criteria on which new and existing relationships with foreign intelligence and security services needs to be assessed (Wiv, 2017, § 6, art. 88, lid 2). This means that, before the AIVD and the MIVD could share intelligence with foreign intelligence and security services, the foreign service in question needed to comply with the five listed criteria of the weighing memo.

In the current 2021 revision of the Wiv 2017, regulations have been added that explicitly state that intelligence can be shared with foreign intelligence and security services *without* any priorly established relationship with the receiving agency; this is also the case when the receiving agency has failed to comply with the five listed criteria (2021 revision of the Wiv 2017, § 1, art. 64, lid 1).

Although the appointed minister still needs to grant authorization and this is reviewed afterwards by the CTIVD, the 2021 revision of the Wiv 2017 lacks an *ex-ante* review of the TIB regarding the expansion of intelligence sharing operations. This means that civil rights will potentially be harmed. Foreign intelligence and security agencies could share received intelligence with third parties more. This means that the receiver agency can more easily use provided information for harmful purposes that do not correspond with the interest of the Dutch intelligence and security services (Sepper, 2010; Walsh, 2006). In addition to this, the receiver agency could share this information inadvertently with other persons who can possibly share it with unauthorized third parties. The receiver agency might also misinterpret received intelligence regarding a citizen more easily: an innocent citizen could be perceived as a serious terrorist threat more often; and this would – euphemistically speaking – negatively affect this person’s life (Sepper, 2010).

It is possible to provide an answer to the research question: the potential consequences for the legal protection of Dutch citizen’s fundamental rights within the 2021 revision of the Wiv 2017, are that a number of civil rights are affected by this revision. Most likely, this revision will affect the right to privacy, the right to freedom to manifest religion or belief, the right to freedom of expression, the right to freedom of assembly; besides that, the right to freedom from discrimination can also be restricted by the state in circumstances such as protecting national security from internal and external security threats (European Court of Human Rights & Council of Europe, 1950, § 1, art. 8, 9, 10, 11, 14; Gill, 2009). This means that, because these civil rights are still not fully protected within the 2021 revision of the Wiv 2017, this might affect the citizens in the Dutch society.

### **Discussion on how the findings relate to the literature review**

The literature on the debate between protection national security and safeguarding civil rights in the context of intelligence sharing shows that this field of tension is a worldwide debate; it has also changed through time continuously. The analysis of this study underpins that the

political debate changed between 1987 and 2021 in the Netherlands. More specifically, a trend can be distinguished: both the protection for national security, as well as the safeguarding of civil rights competed for increasing attention between 1987 and 2021 in the Netherlands. As the literature review has also pointed out, attention should be given to both ensuring the protection of national security and civil rights, through human security legislation and the balancing approach (Golder & Williams, 2006; Waldron, 2003). Since it remains challenging to achieve this balance in society, the implementation of a system of oversight could ensure that the AIVD and the MIVD adhere to the intelligence legislation and respect civil rights (Bochel & Defty, 2017; Gill, 2009).

Therefore, this study points out the importance of the implementation of a system of oversight on the intelligence sharing operations to adhere to national and international law and create actual change in society regarding the protection of civil rights (Bochel & Defty, 2017; Gill, 2009). Moreover, this study tried to contribute to enrich academic knowledge by taking on an open question from Hagens (2018) considering the difficult political dilemma between ensuring national security on the one hand and guaranteeing legal protection of civil rights on the other hand; thus, partly answering this question in the context of intelligence sharing operations within the Netherlands.

### **Limitations of this research**

This study consists of a longitudinal case study in a specific time period and in one country, the Netherlands. A simple and direct generalization of this study to other countries is not possible. Moreover, in terms of methodology, there was no access to classified information from the AIVD and the MIVD, nor were there any confidential sources used; it was not feasible to incorporate classified information from the AIVD and the MIVD. This means that detailed information on discussed examples might be missing. Subsequently, in terms of time and word count, it was not feasible to reproduce every aspect from the literature and only necessary information was displayed.

### **Recommendations**

Since an ex-ante review is not conducted anymore within the 2021 revision of the Wiv 2017, certain civil rights are less protected than before in the context of intelligence sharing. Therefore, a political recommendation could entail that an ex-ante review of the TIB will be incorporated into the 2021 revision of the Wiv 2017. This means that if the AIVD and the



MIVD would execute the new authorizations regarding intelligence sharing, the TIB would need to provide an ex-ante review of the granted permission of the appointed minister instead of solely conducting an ex-post review by the CTIVD after the powers of the agencies already have been executed. This could contribute to the actual legal protection of civil rights in Dutch society.

The use of a comparative (longitudinal) case study between one or two European countries could prove a more exhaustive in-depth research on this subject. More specifically, it could provide more insight on the question of how the endangered protection of civil rights within the Netherlands could be tackled. Furthermore, access to internal information from the AIVD and the MIVD could increase the credibility of this study. Moreover, conducting semi-structured interviews with (former) employees of the AIVD and the MIVD could provide a more in-depth insight in the perception regarding the intelligence sharing operations to protect national security. In addition to this, conducting semi-structured interviews of citizens in the Netherlands could also provide a more in-depth understanding of their perception towards the legal protection of their civil rights in the context of the intelligence sharing operations of the agencies. Finally, this study could be repeated within five or ten years, when the impact of the 2021 revision of the Wiv 2017 is known and can, again, be analysed in the policy theory.

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