

BELEID - A VERY DUTCH LEGAL TERM¹

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Pragmatic consequences of legal language

Beleid is a Dutch term which is hard to translate. In German or French one has to use a whole sentence in order to produce the same meaning, while the English equivalent *policy* covers only part of its significance. As a legal term in the technical sense it is unique. It is generally used to describe the policy which a (public) body follows. The government, a community, a public transport corporation, the police, the public prosecutor all conduct activities which are legitimated on the ground that they implement law, but at the same time they follow *beleid*. The phenomenon per se occurs universally in relation to all written law. Legality seldom means simply and implicitly following the letter of statutes and regulations whenever the conditions they specify are met. It always involves additional guidelines of *goal-oriented* action. It also needs organization, which by its internal priorities and its very set-up entails the selection of those aspects of written law which are to be put into effect. Such *implementation infrastructures* are not only selective. They also shift the goals of the written legal texts, partly because they pursue their own interests, but also and to a greater extent because they seek more socially adequate and more realistic ends. Legal language usually neglects these practical necessities of implementation in the interest of the predictability of law. (*Rechtssicherheit* is the German term for the goal which in the continental legal tradition is often given priority over considerations of social equity).

Different legal languages have found various ways of coping with the dilemma of conditional rules and their goal-oriented application. Statutes may open spaces for

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situational interpretation by formulating margins of discretion. (German legal language allows for this by granting various forms of *Ermessen*). But the provision of such loopholes for interpretation immediately provokes a production of case law and doctrinal discussion directed to closing the gaps in conditional programming. The Dutch term *beleid* does not escape such a dialectic process, but it opens the gates more widely to policy considerations than any of the figures in other Western legal languages. As this paper tries to show, it thereby enables Dutch legal institutions to use more flexible, socially adequate control strategies.

However, although the use of *beleid* renders legal language more flexible, it at the same time allows for more intense social control. Dutch communities issue an abundance of rules on matters such as the building code, permits for markets or ambulant salesmen, the days when garbage is to be disposed of, and the places where public music is permitted. The obvious consequence is that daily practice deviates from the formulated norms. Government organizations try to win back legality by formulating their *beleid* with which they intend to deviate from strict law, sometimes vaguely as declarations of intent, sometimes explicitly as guidelines which their personnel have to follow. In public law *beleid* is used as a yardstick by which the performance of government, a community, public transport, police or prosecutors can be measured.

Once *beleid* is formulated in guidelines, it may achieve quasi-legislative power. It can even be used as a reference point in court: in a criminal case a defense lawyer may claim dismissal of a drugs case by pointing to the *beleid* of the public prosecutor to prosecute only dealing with large amounts of drugs and not with small amounts for an addict's own use, even though the Opium Act of course forbids both. In administrative law cases the use of *beleid* as an argument is even more frequent. A lawyer has a very good prospect of success if an administrative decision can be challenged on the ground that the *actual beleid* of the community does not follow the express rule but rather allows for a number of exceptions, not enforcing the rule under all conditions. *Actual beleid* has become an additional source of law.

The language of *beleid* thus expresses the tension between strict legality and its continuous adaptation to social equity. It is distinct from concepts such as that of 'informal law' which is used by legal pluralists to connote private or subcultural rules existing alongside the 'official law' of the state (Merry 1988). The language of *beleid* rather points to the alternatives which official law leaves to its implementing institutions. It is also distinct from what has been called the 'intuitive law' (Petrazycki 1955) of actors (mainly judges) when interpreting the law according to their sense of justice. *Beleid* rather belongs to the language of the administrators of official law, and emphasizes the alternative action frames which different

hierarchical levels can use. The formulation of their own *beleid* is often a way for lower level agencies to correct the upper level rules. It is particularly used for changing impractical, but legally valid statutes without having to bother the legislature. In summary, *beleid* forms part of a highly regulated system, rendering it viable when otherwise it might suffocate from its overproduction of rules.

The Workings of *Beleid*

The definition of *beleid* in Van Dale's dictionary refers to a halo of connotations: *beleid* means to manage and regulate (*besturen*) on the basis of principles and policies (*beginselen* and *gedraglijnen*). It may refer to strict planning, but it also includes the participation of all persons affected (*overleg*) and considerate treatment (*bedachtzaamheid*). Strictly speaking this set contains opposites: one can either strictly regulate, in which case one will make decisions against the wishes of some of those affected; or one can reach terms by mutual consent, which entails making no decisions in cases of veto and resistance. In theory and practice *beleid* is a mixture of both.

Drug enforcement policies in the Netherlands provide a well-known example. Drug laws clearly state that using and dealing in drugs is not permitted. Dealing in hard drugs may be punished with up to twelve years' imprisonment, and dealing in soft drugs (cannabis) with up to four years for import or export, and otherwise up to two years. These maximum penalties are the result of a 1976 amendment to the Opium Act. Judges, however, will usually stay below the maximum penalty; Dutch penal law does not prescribe any minimum penalties.

Prosecution guidelines elaborate on the distinction made in the Opium Act between 'soft drugs' and 'hard drugs'. Dutch penal law authorizes the prosecution of crimes, a provision sometimes said to exemplify the 'opportunity principle', rather than making prosecution mandatory, under the 'legality principle'. Non-prosecution can be a matter of *beleid*. In this vein the guidelines of the Dutch Prosecutors General of 1976 (*Nederlandse Staatscourant* 1980: 137) set explicit standards for the (non)-prosecution of drug violations: possession of up to 30 grams of soft drugs is considered negligible; except for cases involving persons with prior convictions, possession of small amounts of hard drugs can be ignored; dealing is punished by fines only if it is occasional and within a pattern of addiction; for systematic dealing, especially import and export, the prosecution is to demand stiff prison sentences.

It is obvious that the policy goal is not to encourage addiction but rather to avoid the costs of criminalizing the use of drugs. The policy of the police is aimed at reducing

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the costs of illegality as well as preventing the health dangers ensuing from clandestine stretching and mixing of drugs. A lobby of social workers, medical doctors and criminologists regularly emphasizes the escalating effects of illegality once a person is addicted to drug use (Scheerer 1982). They try to reserve penal law measures for large-scale dealing. As a matter of fact more than half the Dutch prison population (and almost all of its increase in the 1980s) have been convicted of drug-related crimes. Consequently the prosecution guidelines may be considered to represent a well-defined policy of cracking down on big dealers while tolerating small users. (For evaluations of the policy see Leeuw and Haen-Marshall 1994.)

However, in practice the borderlines of tolerance are constantly challenged and are hard to keep up in a way comprehensible to the actors. The difficulty, when the consumption of soft drugs is allowed, in regulating small-scale dealing may illustrate the problems. The *beleid* is to be formulated by the local authorities, especially the big city mayors. They have issued guidelines tolerating dealers if they guarantee to sell only soft drugs in small amounts for direct use, of good quality, and without overt advertising. In the beginning so-called 'house dealers' were restricted to a number of youth clubs which could be kept under reasonable control. Later a number of coffeeshops, most of them in Amsterdam, managed to have themselves placed on the list for non-harassment by the police. Some of them used suggestive names such as "Happy Times", some displayed blinking lights with marihuana leaves or price lists in their windows. The police, who suspected some of them of selling hard drugs, closed certain shops spectacularly hoping that the others would take the warning and comply more carefully. After some time, however, the border transgressions recurred. On the producers' side also the limits of tolerance had to be reset. Nobody saw a problem when a few Dutch users started to grow their own cannabis; but with a lot of experience in industrial agriculture, it did not take long for some entrepreneurs to produce Dutch cannabis (with the brandname *nederwiet*) on a grand scale. The police discovered some of the big producers and turned them over to the office of criminal prosecution. However, growing cannabis is not illegal per se - it can legally be used for pharmaceutical and food products - so that any criminal charge has to rest on the proof of illegal trading in drugs. The drug market is very inventive and likes to play cat and mouse with the police. Thus the police intensified their raids, and the mayors used their powers for the maintenance of order to close coffeeshops on the ground that they caused 'too much unrest for the neighbourhood'.

In the ever changing scene of drug consumption and the maintenance of order, city mayors have to give orders based on situational evaluations. Their *beleid*, however, is subject to policy guidelines which have to be made public, and can be discussed in political fora such as the city council. Preferably they will be agreed upon by those

affected, in this case the coffeshops, as they are based on the assumption of mutual understanding. This obviously had failed with some of the dealers (but not with all of them). As a result drug enforcement in the big cities has been stiffened. One can now observe regular police raids in Amsterdam and other big cities.

At the same time other policies are making the life of drug users harder: budgetary restraints are threatening the multitude of social and medical services for hard drug addicts. Foreign drug users are finding it harder to obtain social and medical help if they are unable to pay for it, and without running the danger of police registration. It is obvious that some of the savings on social work have to be disbursed to finance shelters for the homeless, if not prison cells. In 1996 the city mayor, whose responsibility for the maintenance of order included the function of implementing the drug *beleid*, even announced the licensing of coffeshops which observed the rules of toleration and the closure of all those which did not.

There are other, similarly controversial examples of the use of the gap between symbolic legislation and pragmatic implementation. In 1971 a highly controversial abortion law, put on the political agenda by the governing Catholic party, failed to pass through parliament, but a number of restrictive measures were introduced with the condition that only a number of certified clinics under the supervision of the national health inspection service were authorized to perform abortions. The compromise was evidently designed to delegitimize and at the same time control abortion. A limited number of non-denominational clinics were allowed to practice it in a medically controlled way. But when in 1976 the then Catholic Prime Minister ostentatiously closed one of the certified clinics, scandal broke loose. The right-to-life lobby emphasized the success of the clinics in curbing illegal abortions and in 1981 secured the express legalization of the special clinics. Today, with the help of active birth-control education, the incidence of abortions in the Netherlands is well below that of other European countries.

Restraint in using penal law for delicate moral issues and the delegation of control to the professions has also been the strategy regarding euthanasia. With the advances of medical technology in determining the borderline between life and death, the decision of when to stop life-preserving treatment has become a world-wide issue of medical ethics. Common knowledge had it that some clinics and especially house-doctors (with which everybody living in the Netherlands is supposed to be registered) were willing to help patients who had expressed their determination to end their suffering from terminal illness. Controversy within the profession about where to draw the borderline, however, led to criminal prosecutions in an increasing number of cases. Spectacular test cases drew the attention of the media and led to

growing uncertainty among doctors and to resistance by them to the registration requirements. A government commission therefore proposed guidelines which would require the prosecution not to prosecute as long as doctors followed the procedure of ascertaining the will of the patient and of consulting a second doctor before deciding to terminate treatment (Report of the R Emmelink Commission, a Government Commission: 1992).

It is not our object here to evaluate the soundness of Dutch drug policy. Our object is to examine the art of following a *beleid* which balances between the enforcement of rules sufficiently leniently to avoid becoming formalistic and sufficiently strictly not to lose control. In Dutch understanding penal law is a goal oriented program authorizing the authorities to punish undesired behaviour. Prosecution is empowered to charge, not required to do so. At the same time, however, the decision not to prosecute cannot be taken at will: equal treatment under the law, the rules of non-discrimination, and the principle of predictability of legal action require police authorities as well as prosecutors to follow rules as to when they apply their penal powers. Thus internal rule making has to supplement the legislative rule. Advocates may challenge the prosecutors' decisions on the basis of precedents and demand publication of the internal guidelines which legitimize them.² The pure theory of *beleid* requires every making of a rule to be based on explicit authorization: we might call it a process which is legal but without legislation. (A thorough treatment of the principle as well as the problems involved can be found in van Kreveld 1983.)

The Pure Theory of *Beleid*

In legal theory the difference between the *opportunity practice* of the Dutch and the strictly *legalistic* drug law enforcement of the Germans has been described as a contrast between *goal orientation* and *conditional programming* on the other (Luhmann 1974). It is obvious that the two are intertwined: conditional programs are oriented towards achieving policy goals, and policy programs use conditional norms to achieve their goals. The difference lies at the level of implementation. It lies in the degree to which implementors are free to interpret the program achieve the desired goals, or the degree to which they are bound to observe strict rules, which also are meant to be the means of achieving those same goals. In pure theory the principle of legality binds 'the state' to (its own) rules, and controls executive agents

² In the case of drug enforcement it is remarkable that the prosecution guidelines were not published in the *Staatsblad* (the government official gazette) until four years after they had been issued.

through rules made at the legislative level. However, in real life 'the state' breaks down into many different bodies; rule makers at the local level interpret the legislative rules coming from the centre; and street level agents form their informal rules governing the modes of handling the formal rules. While it holds true everywhere that law becomes a cataract of rules ever more specific the closer they come to the ground (to use Kelsen's imagery), this is the more true the more a political culture lacks experience with centralistic oppression and the longer the period for which it has enjoyed local autonomy.

Dutch legal language at the highest levels uses broad terms such as *beleid* to allow the agents at the bottom a range of interpretations as to how to follow the letter of the law. It explicitly empowers street level agents to use their discretion. Administrative law professors write scholarly articles on the principle of 'administrative tolerance' (*gedoog beleid*) which empowers administrators to declare that they accept deviations from the letter of the law, if that is instrumental in the overall achievement of the goods to which the law aspires (van Buren 1988). They differentiate between 'white administration' which follows the letter of the law, 'black administration' which covers illegal practices of public bodies and 'grey' administration which means that administrators tolerate divergence by others from the rules. Construction permits and environmental protection provide examples every day.

Every once in a while in the course of systematic auditing of conformity with rules and permits, researchers discover a generous use of administrative discretion. In 1986 they found a few thousand cases of environmental law violations, of which a mere 60% had been checked by the communities responsible for control, and of these they found that only 36% had been met with a sanction. In 1993 a parliamentary commission audited a sample of social benefit files in a number of communities. They found that none contained all the information required by law, and they suspected at least 25% of all recipients of having cheated in some way. Of course publication of these findings aroused a scandal. Critics of the failure to implement valid law are always at hand on the political scene. They ponder on quick measures to make the lower level administrations comply. But if there are good practical reasons not to seek 100% compliance, *beleid* can see to it that the rules are adjusted to fit reality.

The specificity of *beleid* does not lie in the fact that non-compliance by implementation agencies occurs. It rather lies in the systematic way the Dutch approach the issue. Comparative studies have shown that, in areas of public law which cannot easily be regulated by strict rules, such as environmental law, building codes, or the rules of safety in industrial settings, public administration normally resorts to flexible styles of implementation. By setting standards it they generates

authority for inspection and negotiation, but it rarely use punitive sanctions in the process (see e.g. Hawkins and Thomas 1984). There is a toleration of deviations from strict rules in any legal culture. The difference lies in the doctrinal construction, that is, largely in the language, with which they formulate such toleration. Legal cultures which are content with a wide gap between symbolic and practical rules of law, such as is the pattern in many Latin countries, officially ignore the contradictions. Legalistic cultures, such as those in the German pattern, ask for a case-by-case statement of toleration (*Duldung* being the term used especially in relation to the building code and to environmental law) within the frame of statutory discretion. And pragmatic legal cultures ask for the explication of a policy line (= *beleid*) along which toleration is handled (Huisman and Joubert 1996).

Such *beleid* does not allow public administration to close its eyes to deviations, but forces it to issue explicit guidelines within which toleration is handled. And as these are open to political as well as judicial scrutiny, its own rules may, according to a range of pragmatically justified reasons, deviate from those of statutory law. The rules of the City of Amsterdam regularly do with respect to national rules which they deem 'in-executable'. The City once even ran a campaign with big posters on the street cars asking: "Are they completely crazy now in The Hague?" Surely administrators in other countries think similarly about their national legislatures, but they are not so likely to advertise their discontent nor to develop so systematically their internal rules for ignoring and bending statutory law within an officially accepted policy of toleration (*gedoog beleid*).

Soft Law in the Shadow of Hard Law

"Rules cannot cover everything; compliance needs agreement and cooperation" was the headline of a special issue of the *Netherlands Juristenblad* on new forms of public law (NJB 14/1993: 475). This treated a strategy which public administration uses when long term planning asks for complex decision making. Administrators in such cases employ a 'round table'. They negotiate with all sides until they can agree on a plan. This does not apply only to town planning, environmental policies and investment, but also to the allocation of the functions of the police, the public prosecutor, and penal justice generally. So called 'triangular conferences' on criminal policy take place locally between town mayors, chief prosecutors and police chiefs; and they coordinate regionally as well as nationally with a triangle of high administrators and cabinet ministers. Very often other participants are involved: private and public organizations such as department stores or public transport, which are victims of massive theft and fraud as well as being agents of public order, the banking and insurance industries, the Bar association, police trade unions, and so on.

Criminal policy agreed upon among these partners is not strictly binding. Often agreements are simply laid down in a declaration of intent. Even when a contract is signed it often does not spell out any consequences of non-compliance. (*Convenant* is the technical term for such non-binding contracts.) The commitment lies in the common interest in long-term cooperation rather than in binding contract terms. Plans may turn out not to be feasible, costs and effects are unpredictable, some actors may not live up to the agreements - should any or all of these unpredictabilities lead people not to make any agreements at all? Of course not: if events require adaptations and flexibility, the administration reviews its agreements, renegotiates with all the parties, and tries to secure new commitments. Policies are not hard law, but continuously changing cooperative activities. However, they are also not non-law. They rest on formal competences of penal law and procedure, and they enforce ordinary law and contracts, but they do so in the context of ongoing social relationships between individuals and between organizations. Even criminal law in the Netherlands is sometimes handled as *beleid*, that is to say, according to agreed goal orientations by which the penal law is used opportunistically as empowerment rather than as a conditional program of binding rules.

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