

THE INEVITABLE AND CONTINUING GROWTH OF REGULATIONS FOR PLANNING AND BUILDING

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Abstract

This paper aims at answering the question: How can we explain the evidently unstoppable growth of regulations for planning and building? The answer to this question is of relevance, since we have been (and still are) confronted with the negative consequences of an overly complex and comprehensive legal framework for planning and building. This does not only apply to the Netherlands but to many (if not all) other countries as well.

This paper shows that a variety of factors is responsible for the ever growing complex of rules for planning and building. Important reasons for growth of regulations are: (1) the liberal interpretation of the principle of legality, (2) the rise of the welfare state, (3) the failure to deregulate and (4) the law of increasing complexity.

The prospects of limiting or reversing the growth of regulations are bad. According complexity theory any addition to the system will make it more complex and instable. This will eventually lead to a collapse of the system. Only once that has happened, a new and less complex system may be established.

Keywords: regulations, legislation, deregulation, complexity theory, legality principle.

INTRODUCTION

Traditionally, governments have felt the need to regulate *land-use*. The (local) government wants to determine the purpose for which a certain piece of land can be used, with examples including agriculture, housing, streets, public green spaces, industry or flood defence. Likewise, the government also wants to exercise its influence on *building plans*, which apply to, for example, permitted building height, structural safety and fire safety of buildings, aesthetic appearance and building physics features (daylight access, ventilation, heat regulation, and moisture and noise reduction). The motivation for regulations surrounding land use and building plans were, and still remain, grounded in the public interest.

In the course of the decades, this regulatory framework started to grow and continued to grow. In recent years, the growth of the regulations more and more is seen as a problem. The problems typically relates to matters such as:

- regulations contradict each other;
- regulations are too complex for private building initiators;

- regulations are too complex for governmental bodies as well;
- the abundance of regulations causes unnecessary bureaucratic delays;
- regulations require overly detailed and costly research reports (regarding for instance archaeology, energy performances, nature compensation) from building initiators.

At the same time, initiatives to cut regulations (deregulation) seem to be of limited success. In that context, the research question of this paper is: *How can we explain the evidently unstoppable growth of regulations for planning and building?* Even if we know that the size and complexity of the regulatory framework for planning and building has negative consequences, its growth seems unstoppable. Which forces are at work here? The method of literature review will be used to answer these questions.

HISTORIC GROWTH OF REGULATIONS: EXAMPLE OF THE NETHERLANDS

Historically, building regulations in the sense of legal instructions have existed in the Netherlands for a long time. In fact, they have been around since the first cities were established in the Low Countries around the year 1200. Kocken recently wrote an interesting monograph about the first period of Town Planning Law (Kocken, 2004). It is amazing how wide-ranging the motivation was for the regulation of the city, even in the Middle Ages. Kocken (2004: 69) lists such motives as:

- the defence of the local community;
- the fire safety of the buildings;
- the structural reliability of the buildings;
- the concern for the appearance of city and land (building aesthetics);
- the provision of necessary living space (making land available for building);
- residential protection (i.e. protection against trouble resulting from the building activities of neighbours);
- traffic safety considerations.

Many of these regulations are staggeringly topical; they are just as relevant today as they were then. To give a concrete example in relation to the *public thoroughfare*: in 1413, awnings in Amsterdam could be no more than 7/4 ell wide and had to be at least 8 feet above the ground (Kocken, 2004: 172).

In modern times, the *1901 Housing Act* (Dutch: Woningwet) provided the impetus for the preparation of urban development plans that had legal significance. This Act contained a regulation relating to the 'expansion of built-up areas'. The Municipal Council was given the authority to prohibit the construction of buildings on land that was intended for a street, canal or square. The plans to set aside public spaces sought to prevent poor living conditions. For councils with more than 10,000 inhabitants or a strong growth it was compulsory to adopt an *expansion plan*, in which land was designated that would be used for streets, canals and squares in the near future. Expansion plans could be combined with a building ban. Bregman labels this a case of a legally binding regulation for particular types of (infrastructural) works (Bregman, 2001: 34).

An important amendment to the Housing Act came in 1921, when the expansion plan was no longer limited to streets, canals and squares. The scope of action expanded into a plan

‘whereby the use in the near future of land included in the plan is allocated.’ From that moment, the expansion plan could regulate the nature and location of permitted structures (Van Buuren et al., 2006:14). This expansion plan was, in fact, the predecessor of the current land-use plan.

Another important aspect of the 1921 amendment concerned the building permit. Conflict with the expansion plan became compulsory grounds for the rejection of a building permit application (Bregman, 2001: 35). The connection between the building permit and the statutory urban development plan that was established then still exists today. (The ‘statutory urban development plan’ refers to the urban design in its statutory form. Based on the 1901 Housing Act, this is an expansion plan; based on the Spatial Planning Act, this includes the land-use plan.)

Since the 1901 Housing Act took effect, the expansion plans had been regulated in a paragraph concerning urban planning. In 1962, an Act was drawn up exclusively for statutory development plans: the *Spatial Planning Act* (Dutch: *Wet op de Ruimtelijke Ordening*). This act introduced the local *land-use plan* as the successor of the expansion plan. Since then, the Spatial Planning Act has been changed on several occasions, but the core has always been the power of the Municipal Council to adopt a land-use plan.

Nowadays the Constitution (article 21 of the Constitution of the Kingdom of the Netherlands 2002) refers to planning tasks of government:

It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.

The *conclusion* of this very brief historical exploration is that (spatial) planning has always gone hand in hand with rules and regulations. Furthermore, since the first cities were established, regulations regarding planning and building started growing. I used the example of the Netherlands, but other countries have gone through a similar process of growth of regulations.

Planning & building on the one side and law on the other side turn out to be inseparable phenomena. In the next chapters of this paper their relationship will be further explored.

THE ORIGINS OF REGULATORY POWERS: THE PRINCIPLE OF LEGALITY

With regard to existing land-use, landowners as a rule already concur with the public interest, as specified (in a plan) by the (local) government. Should existing land-use not be in accordance with such a plan, many landowners are prepared to adapt the land-use voluntarily, with or without financial help from the government. The same applies to building plans. Initiators are usually willing to comply with the building regulations proposed by the government of their own accord.

However, it is also possible that the current use of land is not in agreement with what the government considers to be in the public interest, and landowners may have no intention of changing their plans. Furthermore, it is also possible that the initiators of building plans (building planners) do not intend to comply of their own accord with building regulations concerning, for example, the aesthetic appearance of a building.

The government would be fairly powerless to implement its plans and regulations if they were solely dependant on the voluntary compliance of citizens and companies. Public interest, which after all constitutes the foundation of regulation, would be poorly served as a consequence. Private interests, in the case of landowners and initiators of building plans, could then thwart the public interest. To prevent this, the government must be able to require compliance from citizens and companies, which it cannot do without good cause. Landowners and initiators of building plans cannot be forced to comply with governmental plans and building regulations just like that. This is interrelated with the operation of a crucial cornerstone within a constitutional state: the *principle of legality*. The principle of legality is also known as ‘the rule of law’.

This principle holds that the government is only authorised to intervene in and determine limitations on the freedom and property of its citizens on the basis of statutory power (P. de Haan et al., 2001:21). Without such a statutory basis it is not allowed for government to determine limitations on freedom and property. When applied to land use and building plans, this principle signifies the following: we cannot prohibit an individual or organisation from building on or using their land as they see fit, unless a democratically ratified act is in place that regulates the issue. The principle of legality, therefore, relates to the *powers* of public bodies (Michiels, 2006: 10).

The principle of legality expresses two core values: (1) universal equality before the law, which means that the law applies equally to everyone, and (2) legal certainty, which means that the powers of public bodies are predetermined (Boon et al., 2005:4).

Currently, the principle of legality is interpreted liberally in the Netherlands. The belief is that government action *in general* must be founded on statutory power. This, therefore, includes not only actions of a restrictive, authoritative or prohibitive nature, but also actions of a favourable nature, such as the granting of benefits or subsidies. This results in a growing number of laws and other regulations (Herweijer et al., 2005:12). This also applies to the realm of spatial planning.

Following on from the principle of legality, there are acts in a constitutional state that regulate ‘land-use’ and ‘building regulations.’ In this case, there are acts that give the government the authority to terminate land use that is in conflict with the governmental plan. Likewise, acts are in place that authorise the government to require initiators of building plans to obtain a permit before commencing with construction. Should the building plan fail to satisfy the building regulations, the permit will be denied. In point of fact, the principle of legality contains the rationale behind the many laws concerning planning and construction. Without such statutory foundations, the government is not authorised to require compliance from its citizens, organisations and companies.

We can draw as a *conclusion* that the use of the principle of legality and especially the liberal interpretation of the principle of legality is one of the factors responsible for the enormous growth of regulations.

THE RISE OF THE WELFARE STATE: PROACTIVE LEGISLATION

Powers in the field of spatial planning and building, which are attributed to the government by law, fall into two categories: reactive powers and proactive powers. The difference made here between reactive and proactive powers is inspired by the distinction Buijs made between two basic functions of spatial planning: the regulatory function of planning (reactive) and the development function of planning (proactive) (Buijs, 2000).

Reactive powers

Reactive powers are powers with which the government reacts to private sector development initiatives, which generally mean building activities. The government reacts to development initiatives from individual citizens, companies or organisations. The key reactive governmental power is based on the Environmental Licensing (General Provisions) Act (Dutch: Wet algemene bepalingen omgevingsrecht) and requires initiators of building plans to be in possession of an environmental permit. The government makes a preventive assessment of private sector development initiatives. Private parties require governmental *permission* before the initiative can be carried out. Permission is only granted after certain predetermined criteria have been satisfied. These criteria make up the assessment framework.

Proactive powers

Proactive powers are powers that enable the government to take development initiatives, which may concern urban expansion, infrastructure construction, land development and hydraulic engineering works, for example, but also the development of a buffer zone. This type of development always requires a certain form of control over the use of land. Sometimes the government already owns the land, which negates the need to arrange for control.

However, the land is often owned by someone other than the government, necessitating that it gains some form of control. Sometimes 'absolute' governmental control of land is necessary in connection with intended developments, such as the construction of new roads. In this case, the government can *purchase* the land under private law. Land can also be acquired by exercising what are known as *pre-emption rights* (Dutch: voorkeursrecht), which are based on the Municipal Pre-Emption Rights Act (Dutch: Wet voorkeursrecht gemeenten). This gives the municipality the right to be the first to enter into negotiations with a seller who intends to sell land and buildings. A forced means of acquiring land is via *expropriation* on the basis of the Expropriation Act (Dutch: Onteigeningswet).

In most cases, absolute governmental control of land (ownership) is not necessary to achieve planning objectives. The government can limit itself to stipulating to the landowner what the land can be used for, in combination with issuing building regulations applicable to that land (such as maximum building heights). This is done in a *land-use plan*. The municipality's power to determine land-use plans in their territory is laid down in article 3.1 of the 2006 Spatial Planning Act. More accurately, the municipality not only has the power, but is obligated to do so. It is easy to see that land-use plans can significantly influence the financial and economic value of property by allowing or denying development possibilities. The municipality's authority to determine land use by means of a land-use plan therefore comes with the duty of the Municipal Executive to award (on request) damages to parties that have suffered financial losses in specific cases. This falls under *the right to compensation* (Dutch: tegemoetkoming in schade).

After the Second World War the *welfare state* came to a rise. In the welfare state, the state plays the primary role in the protection and promotion of the economic and social well-being of its citizens. In the welfare state, the state actively seeks to promote public goals. Thereby, the welfare state has led to a strong growth in the field of 'proactive' legislation.

PUBLIC LAW AND PRIVATE LAW PLANNING INSTRUMENTS

The discussion of the growth of regulations for planning and building cannot be limited to *public law* regulation. To get a full grip on government's steering of planning and building, we should include government's use of *private law* instruments.

The law that is mostly relevant to planning and development can roughly be divided into two parts: public law and private law. Public law and private law differ from each other regarding the topics that are regulated, the way of enforcement and the interests that are served and protected.

Public law is that part of the legal system that regulates the structure of the state and the relationship between the state and individuals (citizens, companies). This includes constitutional law and administrative law. Examples of public law acts in the field of urban planning and development are: the Spatial Planning Act (Dutch: Wet ruimtelijke ordening), the Environmental Licensing [General Provisions] Act (Dutch: Wet algemene bepalingen omgevingsrecht) and the Expropriation Act (Dutch: Onteigeningswet). Many of the public law acts relate to the powers of government towards citizens.

Private law is that part of the legal system that involves relationships between individuals, without direct involvement of the state. This includes the law of contracts, property law and family law. Examples of private law in the field of planning and development are: the Civil Code (Dutch: Burgerlijk Wetboek) and public-private partnership agreements.

We can simplify the differences between public law and private law as follows: public law focuses on the state itself and of issues that affect the general public. Private law focuses on issues affecting private individuals and corporations, without direct involvement of the state.

Governmental bodies, for instance municipalities, can make use of private law. For example: a municipality commissions a contractor to build a new city hall. In this example the municipality concludes a contract. In this case the municipality acts just like a private person would: concluding a contract with a contractor. The contract between municipality and contractor therefore falls under private law.

The description of public law and private law shows the differences in the topics that are regulated and differences in the interests that are served and protected. Further, both parts of law differ in the way of enforcement. In private law, enforcement is in the hands of the interested parties themselves. If necessary for enforcement, or if the law says so, the help of certain bodies – for instance the judge – can or must be called in. If, for instance, a contract is not properly executed, the injured party may call in the judge to force correct implementation of the contract.

In public law, however, government lays down a set of (general or specific) standards. Government then is the only party that has the power to change the standards and – if the

standards are not observed – the power to enforce them. The justification of laying down standards by government and enforcement of standards usually lies in the fact that government must look after the public interest. By example, suppose a permit is granted by the municipal executive to a company in order to build a new office. If the conditions to the permit are not observed, only the municipal executive has the power to withdraw the permit.

Public law planning instruments

Dutch municipalities, as said, have the most important powers in Dutch spatial planning. Seen from the viewpoint of statutory law (and in practice) national and provincial governments have less power than municipalities. Municipalities have control of many *public law* instruments for spatial planning and development. The powers relate to both development *projects* and spatial *plans*.

Private law planning instruments

Apart from public law instruments, government – particularly municipalities – may also use *private law* planning instruments. For example, municipalities have the power to purchase land, on which ‘private objectives’ are planned, such as residential areas or office areas. Municipalities can buy undeveloped land, prepare it for construction and then sell it to developers. The developers, subsequently, realise the houses and offices. In this way, municipalities can make substantial profits. Furthermore, Dutch municipalities are allowed to participate in public-private partnerships by which market risks are carried by government. In the Netherlands, public-private partnerships in the form of a legal entity in which (financial) risks are shared between the public and the private parties, are legally allowed and commonly used. This demonstrates that the Netherlands, unlike Anglo-Saxon countries, does not follow the principle of a strict division between the public and private domains. With that is meant here that in the Netherlands local government in principle can act as a market party. Municipalities can, as it were, act outside the public domain and inside the private domain.

COMPLAINTS OF OVER-REGULATION AND ATTEMPTS TO DEREGULATE

For many years, different parties in planning and construction in the Netherlands (particularly developers, designers and contractors) have expressed their discontent about the number of permits required to build and the complexity of the permit assessment framework. To draw attention to their problem, regular actions are held: hand trucks filled with building regulations are literally put on stage in the presence of an outraged public. The complainants do have a point – building regulations are extensive and quite complex. Various governments have made deregulation of the planning and building regulations into policy objective, which has been successful in several areas. The introduction of the environmental permit in 2010 has – in any case for developers/applicants – brought a major simplification.

The new environmental permit replaces around 25 previously existing permits. This one permit holds permission for demolition, as well as building, renovation, causing environmental nuisance (for instance noise, bad smell, air pollution) and other activities. The former situation, in which an applicant needed to collect all kinds of different permits, has come to an end. The former permits that have been replaced by the environmental permit include, amongst others, the building permit (Dutch: bouwvergunning), the environmental permit of the Environmental Management Act, the demolition permit, the construction permit

(Dutch: aanlegvergunning), the felling license (Dutch: kapvergunning) and the monuments permit. All these permits do not exist anymore. They are replaced by the single environmental permit as regulated in the Environmental Licensing (General Provisions) Act. However, not all previously existing permits have been replaced by the environmental permit. Some separate permits still exist, for instance for projects in nature conservation areas.

The single environmental permit can be seen as a successful example of deregulation. However, given the enormous amount of regulations in the field of planning and building, it can merely be considered to be a relatively small success. At the same time it appears that our highly developed, complex and demanding society continually sets new and even stricter requirements. These are then laid down in regulations. Deregulation is difficult, because 'behind' every rule there is an interest and, most likely, a special interest group to 'protect' this interest. Complaints from an overly regulated planning and construction will, therefore, continue to exist.

GROWTH OF THE REGULATORY SYSTEM AS A RESULT OF THE LAW OF INCREASING COMPLEXITY

Another explanation for the growth of regulations can be found in 'complexity theory'. My summary of this theory is based on the discussion of complexity by Janssen (2010). Janssen refers to W. Brian Arthur. Arthur explained (Arthur, 1993) that every system is subject to 'the law of increasing complexity'. This also goes for legal systems. Every system has the inclination to connect to its surroundings. New functions are added to the system and adjustments are made to the system, in order to push out frontiers or to cope with changing conditions. Thus, new elements are added to the system, in order to improve it. This results in extension of the legal system and further refinement (Demeersseman, 2011).

At a certain point in time, new additions only complicate the system and do not have any more added value. Under those circumstances, usually radical attempts are made to 'save' the system. However, chances are that this will not succeed and people lose their trust in the system. This may eventually lead to a collapse of the system (Arthur, 1993). In that case the legal system would become unmanageable. A legal problem that has more and more aspects, solutions will require more and more intermediate steps (Demeersseman, 2011). The legal system would be trapped in its own size and complexity. This would severely affect the implementation of planning policies and building projects.

My assessment is that - in the Netherlands - we have not (yet) reached the point of collapse of the legal system for planning and building. Indeed, radical attempts are made to save the system. An example can be found in the Dutch Crisis and Recovery Act (Dutch: Crisis- en herstelwet). This act aims at reducing complexity and shortening of procedures for new large infrastructure and major urban developments. However, by adding new instruments, it further complicates the system.

CONCLUSION

This paper aims at answering the question: *How can we explain the evidently unstoppable growth of regulations for planning and building?* The answer to this question is of relevance, since we have been (and still are) confronted with the negative consequences of an overly

complex and comprehensive legal framework for planning and building. This does not only apply to the Netherlands but to many (if not all) other countries as well.

The analysis in this paper shows there are multiple explanations:

- The use of the principle of legality and especially the liberal interpretation of the principle of legality is one of the factors responsible for the enormous growth of regulations.
- The rise of the welfare state has led to a strong growth in the field of 'proactive' legislation. In the welfare state, the state actively pursues goals in the public interest. The legitimisation of the powers to do so, requires legislation.
- Deregulation is proven to be difficult, because 'behind' every rule there is an interest and, most likely, a special interest group to 'protect' this interest. Deregulation requires that legislators in parliament will have to 'hurt' these special interests. Doing so is, in essence, opposite to nature of politicians since it may cause the loss of voters.
- The legal system is, just like every system, subject to 'the law of increasing complexity'. There is no escape from this law. Only after the collapse of a system, a new and less complex system may be established.

It may be argued that at this moment in the Netherlands radical attempts are made 'to save the system'. However, according to complexity theory this type of attempts eventually will not solve the problems, since every new attempt further complicates and thereby destabilises the system. If that is true, we are close to the collapse of the legal system for planning and development and a new and less complex system can be established.

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