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Strategies of the Dutch Legislator to Stimulate Autonomy and Decrease Bureaucracy

Meike Bokhorst

Senior wetenschappelijk medewerker bij de Wetenschappelijk Raad voor het
Regeringsbeleid

bokhorst@wrr.nl

Abstract

In his last book Willem Witteveen added two extra problems to the list of Lon Fuller with eight problems of legislation. There is a lack of autonomy and too much bureaucracy as well. According to Witteveen, government has to stimulate selfregulation to solve these problems. This article reflects on the question what the intended and unintended consequences are of alternative strategies of regulation by the Dutch legislator for the legitimacy of regulation. The meta-analysis of the consequences of the alternative strategies shows that the intended consequences have been partly realised, but that unintended consequences and autonomous effects have occurred as well. Especially the participation on the individual level seems to have been reinforced by the use of liberal deregulation. However, participation on the social level by means of self- and co-regulation has been reinforced much less. Unintendedly, not only sources of participation are improved, but sources of authority as well.

Keywords

Witteveen – autonomy – bureaucracy – self-regulation – co-regulation – participation – authority

* This article is based on the summary of the author's dissertation 'Sources of legitimacy' (Bronnen van legitimiteit. Over de zoektocht van de wetgever naar zeggenschap en gezag. Den Haag: Boom Juridische uitgevers, 2014).

1 Introduction

In his last book *The law as artwork* (2014) Willem Witteveen elaborated the eight principles of better lawmaking which Lon Fuller introduced in his book *The Morality of Law* (1964). Laws must be general, public, prospective, understandable, consistent, reasonable, constant and enforceable. This ideal is difficult to realize. As a scientist and a senator Witteveen knew that there often is a lack of general rules, which leads to *ad hoc* and inconsistent adjudication. Rules are too complex and detailed to understand. There is retrospective legislation and there are contradictions in the law. Laws could contain demands that are beyond the power of citizens and organisations. Ministers revised laws again and again whereby they become unstable. And there is a divergence between administration and legislation. Although these eight problems are difficult enough to overcome, Willem added two extra problems. There is a lack of autonomy of citizens and too much bureaucracy. A responsive and results-oriented government has to stimulate selfregulation of citizens and avoid unnecessary bureaucracy. The Dutch legislator struggles with the realisation of these principles of autonomy and rulebased behavior.

Too detailed and freedom restricting regulation will sooner or later undermine the legitimacy of regulation. That raises the question how the legislator can strengthen the legitimacy of regulation by giving citizens, businesses and organisations more autonomy and less bureaucracy by means of selfregulation. What are the intended and unintended consequences of alternative strategies of regulation (like selfregulation) by the Dutch legislator for the legitimacy of regulation? This article will first examine the question why the lack of autonomy and the excess of bureaucracy can be seen as a problem of legitimacy (paragraph 2). Next, it will investigate the alternative strategies of regulation that government can choose to deal with lack of autonomy and the excess of bureaucracy (paragraph 3). After that there will be an analysis of the sources of legitimacy that the strategies of regulation want to increase (paragraph 4). Finally, there is an reflection on the possible intended and unintended consequences of the strategies of regulation (paragraph 5).

2 The Lack of Autonomy and Excess of Bureaucracy as Problems of Legitimacy

Citizens, employees and entrepreneurs alike complain about bureaucracy, the pressure of the rules, administrative burdens and the lack of autonomy. But at the same time don't hesitate to ask the government for new rules and measures

in situations of insecurity, risks and incidents. They have the contradictory desire that others should stick to the rules while they are exempted as much as possible from these rules. Rules satisfy the great social need to reduce complexity and to increase the predictability of the other's conduct. Consequently, citizens and legislators turn out to both cause regulatory burden and bear the consequences of it. Citizens are overcharged by the legislator, but at the same time citizen are overcharging the legislator. Also the legislator is overcharged and overcharging: first, the demands on legislator and public administration have become higher, but the political, legal and social context have become unfriendlier towards government. Second, there is a situation of overproduction of regulation and administration, while the government's capacity for execution and maintenance is limited.¹ That process of overcharging leads to the following symptoms of lack of autonomy and excess of bureaucracy (table 1).

Overcharged and overcharging citizens and legislators put pressure on the legitimacy of regulation. Problems of legitimacy emerge when normative expectations and demands of citizens are not evenly balanced with the capacities and objectives of the legislator. When governments structurally promise more and when citizens expect more than the government can live up to, the social and political acceptability of the policy in the long term could diminish. Political and social acceptability form important foundations of legitimacy

TABLE 1 *Symptoms of problems regarding the lack of autonomy and excess of bureaucracy*

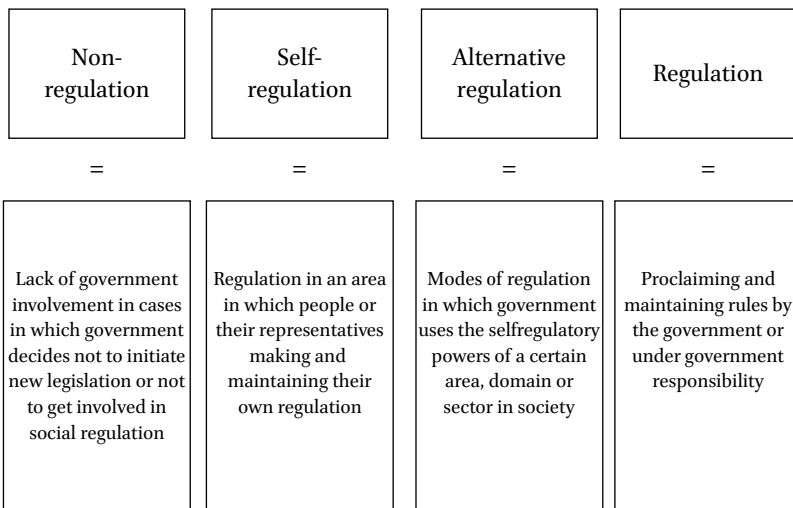
	Overcharging	Overcharged
Legislator	Overproduction of regulation and policy Accumulation of policy instruments Limited executive, maintaining capacity	Increasing demands Increasing costs Unmanageable social context
Citizens, businesses and organisations	Lack of risk acceptance Increasing expectations Aversion of responsibilities	Lack of legal certainty Increased administrative burden and complexity- Decreased room for manoeuvre

1 LA Geelhoed, 'Deregulating, herregulering en zelfregulering', in Ph. Eijlander, PC Gilhuis and JAF Peters (eds), *Overheid en zelfregulering: alibi voor vrijblijvendheid of prikkel tot actie?* (WEJ. Tjeenk Willink, 1993) 37–8.

in a modern democratic constitutional state. The broad working definition of legitimacy applied in this article follows that of David Beetham. Legitimacy is the justified, statutory, politically approved and socially accepted right to exercise authority. Legitimacy is determined by the extent to which power is morally justified, wielded in accordance with the law, consistent with political approval by the people and has the consent of subordinates in society.²

3 Alternative Styles of Regulation to Deal with Problems of Autonomy and Bureaucracy

In the regulatory policy of the Netherlands, the problems of the overcharged and overcharging citizens and legislators are dealt with by applying the principles of restraint, proportionality and subsidiarity with regard to the legislator, and the principles of representation and participation with regard to the citizens. Those principles are elaborated in the norm of participation: those to whom the norms apply should have as much influence on the strategy of regulation as possible. The presupposition is that participation leads to a more legitimate division of responsibilities between legislator and civil society. When citizens, organisations and businesses have more possibilities for participation and take their responsibilities, the government can scale down its ambitions and restrict itself to its core tasks. According to Willem Witteveen, government can use four strategies of regulation.³



2 D Beetham, *The legitimation of power* (MacMillan, 1991) 15–20.

3 Witteveen, W.J. (2007) Preadvies voor de Nederlandse Juristen Vereniging, p. 25.

To restrict the double problem of legitimacy of the overcharged and overcharging legislator and citizen and to realise the standard of participation that is experienced as legitimate, a number of different alternative strategies of regulation have been developed and elaborated over time: 1) to work even harder on the realisation of goals and expectations and on solving all the imperfections of the rules (better regulation), 2) to cooperate with other parties to realise the government's rules (alternative or co-regulation), 3) to controllably transfer tasks and responsibilities to other parties with minimal government intervention (conditional self-regulation) or 4) to abolish governmental rules and to choose other mechanisms of coordination than governmental control like privatisation, liberation and market forces (non-regulation or liberal deregulation).

Dutch regulation policy has encompassed all the four strategies of regulation.⁴ The Geelhoed Committee in the eighties and later the "Free Market, Deregulation and Legislative Quality" operation in the second half of the nineties wanted deregulation and a return to the basic necessities. Government should not want to regulate everything and, where possible, should not initiate regulation. The Legislative Projects Review Committee and the policy document *Zicht op Wetgeving* [Insight into Legislation] in the first half of the nineties wanted to call on the self-regulating capacity of civil society. The policy documents *Bruikbare rechtsorde* [A practicable legal system] and *Vertrouwen in wetgeving* [Trusting legislation] in the first decennium focused on alternative regulation and developing alternative regulatory concepts. Taken as a whole, Dutch regulation policy concentrates on the proper and professional regulation of statutory duties and a comprehensive assessment of all the aspects involved. The assessment framework proposes that lawmakers should rely on self-regulation and co-regulation. Dutch regulation policy now consists of all four regulation strategies, with the political strategies changing from one decade and Government to the next. None of the strategies has disappeared. Indeed, it seems as if they have been piled one on top of the other as the preferred political strategy changes.

4 Sources of Legitimacy that Alternative Strategies want to Increase

Democracy combined with the rule of law (nomocracy) is the best-known source in the Netherlands and Europe and perceived as having the greatest

4 DP van den Bosch, *Bruikbare rechtsorde. Hoger onderwijs als proeftuin. Preadviezen jaarvergadering NVOR 2005* (Sdu Uitgevers, 2005).

legitimacy. But it is certainly not the only source. Regulators can draw from a broad repertoire of potential sources of legitimate power; those sources are regarded as more or less promising depending on the functions they fulfil and the preference of the legitimacy communities. Which sources of legitimacy do the strategies of regulation want to increase? There are different sources of legitimacy that concentrate on increasing the participation of citizens in rule-making. The exercise of power by groups and citizens fits in with a legitimisation strategy focusing on boosting participation, with the legislator involving the citizens more closely in rule-making. The legislator makes groups and individuals co-regulators alongside or instead of the democratic lawmakers. Groups and individual citizens are assumed to be legitimate regulators for as long as they generate social cohesion and autonomy. Participation lies not only in the nature of the regulator, but also in the nature of the rules, the method of regulation, and the regulatees. Social norms can be the result of tradition (histocracy), which citizens accept as customs. The regulation method may be based on agreements made within and between groups by seeking out those rules that have backing (conventionocracy). Social groups and their representatives may be fully involved in politics and governance and bear partial responsibility (sociocracy). There is open and spontaneous self-regulation in social communities and networks (communocracy).

By taking their own decisions, citizens can express their preferences and have freedom of choice (liberocracy). Regulation may arise from the principle of utility, which states that rules are justified when they do the greatest good for the greatest number of people and prevent suffering (utilitocracy). Citizens also have considerable influence on and bear responsibility for the political system (civitocracy). Citizens and businesses can compete on markets (agoracracy). All these sources assume that citizens, either individually or as a group, play an active role in which they strive to gain advantage or adhere to custom, compete or make agreements, act themselves or mobilise as a group. The sources of legitimacy depend on the participation of citizens in organising society.

In better regulation, lawmakers work to improve the legislative process and democratic procedures (nomocracy and democracy). In co-regulation, the lawmaker seeks to cooperate with organised groups (sociocracy) and makes agreements with private parties and civil society organisations (conventionocracy). In self-regulation, the lawmaker lets the community shoulder responsibilities (communocracy) and attempts to key into social norms (histocracy). In deregulation, the point is to limit constitutional democratic duties and collective responsibilities, usually so that commercial parties and citizens can take responsibility for themselves. The aim is create more freedom for market forces (agoracracy) and citizens (civitocracy).

TABLE 2 *Overview of sources of legitimacy*

Dimensions Levels	Ethical nature of rules	Juridical nature of regulation	Political nature of regulator	Social nature of regulatee
Authoritarian authority	Theocracy (religion)	Judocracy (judges)	Autocracy (leaders)	Iconocracy (icons)
Institutional authority	Ideocracy (ideology)	Technocracy (technology)	Aristocracy (elite)	Mediacracy (media)
Collective participation	Teleocracy (objectives)	Nomocracy (laws)	Democracy (the people)	Counter-Democracy (opposition)
Group participation	Histocracy (traditions)	Conventiocracy (conventions)	Sociocracy (groups)	Communocracy (communities)
Individual participation	Utilicracy (utilitarianism)	Agoracracy (markets)	Civitocracy (citizens)	Liberocracy (freedom of choice)

5 Realised and Unintended Consequences of Alternative Strategies of Regulation

The Dutch regulation policy exists of elements from all four strategies of regulation, and the preference for a certain strategy differs per government term. Liberal ministers of Justice seem to give a central place to the perspective of deregulation, and Christian-democratic governments give more space to the perspective of co- and self-regulation. The official alternative strategies of regulation continue to developed and have become more bilateral in nature over time, because officials seek more contact with citizens, organisations and businesses via consultation, impact assessment and hotlines. The European Union's regulation policy focusses especially on (liberal) deregulation and better regulation. Since 2000, self- and co-regulation have only been advocated in the White Paper on Governance during a couple of years and in the beginning of the program Better Regulation.

Both the Dutch and the European legislator advocate alternative strategies of regulation in their legislation policy, starting from the presupposition that

they lead to more normative legitimacy of regulation (more participation), less problems of legitimacy (less of a regulatory burden and less democratic over-ambition) and more empirical legitimacy (more acceptance of and compliance with norms). Since the 1980s, the Dutch and the European regulation policies strive for a reallocation of responsibilities between government, society and market. Especially Christian-democratic ministers of Justice have advocated strengthening the self-regulating powers of society itself.

More space for diversity, flexibility and personal responsibility by using alternative strategies of regulation would diminish the problems of legitimacy such as regulatory burden and limited compliance with norms. The idea is that individuals and organisations that set their own rules are also more likely to comply with these rules. More social self-regulation would diminish the need for governmental regulation. These can be seen as communicating vessels. If the legislator is no longer overcharged with the quest for new rules, it won't overcharge the citizen by detailed rules and if the citizen is no longer overcharged, he/she won't overcharge the legislator. But the double problem of legitimacy of the overcharged and overcharging legislator and citizen turns out to be hard to eliminate.

The question is whether Dutch and EU legislators can achieve the objectives of regulation policy, i.e. to make citizens, organisations and companies more responsible for their own regulation and to alleviate legitimacy problems, like the regulatory burden and the strain on democratic governance. The fact that lawmakers have been working on these problems for several decades now shows how stubborn they are. De Jong and Herweijer observe that the rule-book has increased in volume by two per cent annually in the past thirty years.⁵ They have not come across any deviation from this annual two per cent increase. Any exceptional increases and decreases observed have been very gradual. It is therefore quite difficult to find a cause-and-effect relationship between regulation policy and regulatory output.⁶

They conclude that the ex ante legislative quality instruments investigated in their study are probably incapable of controlling the quantitative regulatory burden: "All the pros and cons are considered, but in the end, legislation is produced after all. By retracting legislation (ex post), some countries have occasionally achieved good results in quantitative terms, but such operations have had little impact on the actual regulatory burden. A few countries, specifically the

5 po de Jong and M Herweijer, *Alle regels tellen. De ontwikkeling van het aantal wetten, AmvB's en regelingen in Nederland* (Ministerie van Justitie, 2004).

6 po de Jong and S.E. Zijlstra, *Wikken, wegen en (toch) wetgeven: een onderzoek naar de hiërarchie en omvang van wetgeving in vijf Europese landen* (Boom Juridische uitgevers, 2009)16.

Netherlands and the United Kingdom, have been successful at reducing the administrative burden. They have done so by examining the regulatory process while streamlining the existing rules.”⁷

Many people see the overall complex of rules as constricting, but virtually every rule has its proponents, arguments in its favour, and vested interests behind it. Ministers are appointed to carry out plans, and they need laws to do so as their policy instruments. If limits are placed on the number of laws, lawmakers can also turn to secondary legislation, such as ministerial decrees. And that is precisely what they do; the evidence can be found in the output of such decrees, which continues to grow by leaps and bounds every year.⁸ It is difficult to truly change the culture of regulatory output. The fact that, on average, the number of rules and the perceived regulatory burden have not declined may indicate that the strategies have failed, that they are counterproductive, or that they perhaps serve only to prevent even worse.

While the strategic agenda put forward in regulation policy has, in recent decades, been uniform, consistent and principled, legislative practice has been diverse, mutable and pragmatic to the same degree. Each new policy agenda begins by noting the failure or marginal success of the previous agenda. Policy documents are only internalised and implemented by staff to a minimum extent. It is rare that the internal requirements – sufficient time, resources and manpower – are met, and external circumstances are decisive for the policy’s success. Ministries have to rely on other parties, such as parliament, other government bodies, civil society, those charged with implementation, and so on.

Looking back on his deregulation operation, Geelhoed concluded that it had failed and that the impact of such operations depends on the extent to which the requirement of policy neutrality can be left behind. As Van Gestel and Hertogh put it: “Geelhoed himself later regretted that the rationale behind government action had not been raised as a key point of discussion. As a result, the fight against regulatory burden became nothing more than an attempt to alleviate symptoms. As long as deregulation had to submit to the requirement of ‘policy neutrality’, a second deregulation operation would have been useless, in his view. Those who stick to policy neutrality, Geelhoed believes, mainly propagate more legislative work in a manner that can best be compared to ‘pruning brambles with a nail clipper’.”⁹

Unfortunately, there have been very few studies on the effectiveness of European and Dutch regulation policy. Of the four strategies described in this

7 *ibid* 18.

8 *ibid* 200.

9 RAJ van Gestel and M Hertogh, *Wat is regeldruk? Een verkennende internationale literatuurstudie*, (Wolf Legal Publishers, 2006); *Kamerstukken II 2006/07*, 29 279/40, 33.

article, deregulation has the longest track record in various countries. According to a review article by Ghertman, however, there has been disappointingly little empirical research into the effects of deregulation. The evaluation studies that are available paint a mixed or negative picture of the effects achieved. For example, Levy and Spiller (1994) have shown that deregulation alone is not sufficiently attractive to investors. Businesses want a stable investment climate and they also consider whether there are enough strong institutions to guarantee legal and other forms of certainty, for example an independent judiciary and reliable public administrators.

In their international comparative study of the energy sector, Holburn and Spiller (2002) show that countries with reliable institutions, such as Australia and the United Kingdom, can attract foreign investment after deregulation, but that the same does not apply for countries such as Mexico, Turkey and the Ukraine. One key source of uncertainty is a lack of institutions that can prevent direct government intervention. Shirley and Ménard (2002) found that reliable institutions and well-drafted contracts served to boost economic attractiveness in the drinking water sector. The final interesting study is by Delmas and Tokat (2005), who found that hierarchy and the market produced similar achievements as coordinating mechanisms, and that they performed better than hybrid arrangements.¹⁰

One striking and recurring research finding is that deregulation can be counterproductive. For example, Frans van Waarden claims that liberalisation and deregulation have a number of unintended consequences: more rules, more rigid application of the rules, more performance measures and controls, and higher regulatory costs (including the cost of litigation).¹¹ Private forms of regulation lead to more uncertainty, and citizens are less inclined to trust them. As soon as scandals or incidents occur, calls for reregulation increase in

10 M Ghertman, 'The puzzle of regulation: deregulation and reregulation', in C Ménard and M Ghertman (eds), *Regulation, deregulation, reregulation: institutional perspectives* (Elgar, 2009) 358; B Levy and P Spiller, 'The institutional foundations of regulatory commitment: a comparative analysis of telecommunications regulation' (1994) 10 *Journal of Law, Economics and Organization* 201–247; G Holburn and P Spiller, 'Institutional or structural: lessons from international electricity sector reforms' in E Brousseau and JM Glachant, *The Economics of Contracts* (CUP 2002); M Shirley and C. Ménard, 'Cities awash: a synthesis of the country cases' in M Shirley (ed), *Thirsting for Efficiency: The Economics and Politics of Urban Water Reform* (Pergamon Press, 2002); M Delmas and Y Tokat, 'Deregulation, governance structure and efficiency: the us electric utility industry' (2005) 28/2 *Strategic Management Journal* 189–209.

11 F van Waarden, 'Less rules, more markets? More markets, less rules?' in M McConkey and P Dutil (eds), *Dreaming of the regulatory village; speaking of the regulatory state* (Institute of Public Administration of Canada, 2006) 52–65.

volume. Deregulation and liberalisation can cause free markets to disappear and cartels to form (for example the taxi market); increase the level of hierarchy thanks to mergers and monopolies; make contracts and contractual details more important; generate more work for courts and lawyers; lead to more individual forms of regulation, more private self-regulation and private markets, and, in the end, to more statist regulation. New forms of regulation and control also often lead to higher costs.

Self-regulation and co-regulation, bilateral strategies involving both the lawmaker and society, require major changes and are time-consuming because they require finding a new balance of power. True bilateralism requires a change in culture and also entails risk: other parties are not always prepared or capable of taking over the regulatory duties and may interpret their responsibilities very differently from what the lawmaker intended. Even if the lawmaker succeeds in shifting duties and responsibilities to others, its own responsibility and involvement are not always diminished. Government can reregulate, but also tighten up supervision. Bilateralism can also lead to confusion concerning responsibilities and an accumulation of governance instruments. For example the number of persons involved in regulations rises by using social sources of participation. This often leads to more complex processes of decision making with more detailed conclusions and hybrid arrangements of regulation. In short, striving for legitimacy in the form of public support can have side effects in the form of a regulatory burden. Many problems of regulatory burdens on a collective level are also recognisable on the level of organisations and networks.

6 Conclusions

In his last book Willem Witteveen added two extra problems to the list of Lon Fuller with eight problems of legislation. There is also a lack of autonomy of citizens and too much bureaucracy, according to Witteveen. Government has to stimulate selfregulation to solve these problems. This article reflects on the question what the intended and unintended consequences are of alternative strategies of regulation (like selfregulation) by the Dutch legislator for the legitimacy of regulation. The meta-analysis of the consequences of the alternative strategies of regulation for the legitimacy of regulation in this article shows that the intended consequences have been partly realised, but that unintended consequences have occurred as well. Especially the participation on the individual level seems to have been reinforced by the use of liberal deregulation by which space for own interests and preferences (utilitocracy),

freedom for market forces (agoracracy), personal responsibility of citizens (civitocracy) and freedom of choice (liberocracy) have been reinforced. Especially the European treaties for completion of the internal market and the “Free Market, Deregulation and Legislative Quality” operation at the time of the Wim Kok-governments in the nineties have led to liberal deregulation and have thereby stimulated the sources of legitimacy on an individual level.

However, participation on the social level by means of self- and co-regulation has been reinforced much less. All kinds of agreements between governments and organisations (conventiocracy) have been made, but there hasn't necessarily been more space for social norms and habits (histocracy), power for social organisations and groups (sociocracy) and free space for communities and networks (communocracy). In cases where the legislator uses self- or co-regulation as a strategy quite often public interests play an important role, as a result of which the legislator keeps using its influence and does not let go of its tasks. Self-regulation as governmental strategy has a strongly conditional character and thereby turns into a form of co-regulation. The legislator is in this case willing to make agreements with organisations or to engage in a social dialogue (conventiocracy), but there has not been a real shift of power to the civil society organisations (sociocracy).

Alternative strategies of regulation turn out to have a number of unintended consequences as well, in which not only sources of participation are improved, but sources of authority on the institutional and authoritarian level as well. This way, liberal deregulation does not only lead to improvement of individual sources of participation such as freedom for market forces and freedom of choice, but also to more rules (nomocracy), a larger quest for expertise (technocracy) and the juridical power (judocracy) and to re-ideologisation of the public debate (ideocracy). Self- and co-regulation do not only lead to more regulating agreements (conventiocracy), but probably also to more power of the officials that monitor the process and hold the files (technocracy) and of new regulating elites (aristocracy).