Rechtsrelativering: een verkenning op het terrein van het overheidshandelen

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Summary

Brushing the law aside
An exploration of the disregard of the law within the public service

Lawyers and the public service

In the Netherlands lawyers have traditionally been strongly represented within the public service. Even though they do not hold the preeminent position they used to have for a long time, there are still a fair number of lawyers working as civil servants. The number of Members of Parliament with a law degree is also relatively high.

Notwithstanding the substantial amount of lawyers in the civil service and in parliament, there is a lot of criticism regarding the relationship between the law and the government. On the one hand some politicians are critical about the law. They argue that subjecting government actions to the rule of law is no longer feasible because of the ample opportunities for members of the civil society to obtain legal protection against these actions, the plethora of legal rules and the broad competences of the courts. On the other hand criticism is also raised by lawyers outside the government, who state that the government employs the law in an instrumental way. Some of them are of the opinion that the law is sold off and that a '*raison d'état*' regularly takes precedence over legal thinking. Others talk about 'disposable law' or the end of the rule of law.

Disregarding the law

The criticism levelled at the relationship between the government and the law triggered the question whether a disregard of the law by the government is discernible. In this study 'disregard of the law' means any government action which ignores applicable legal norms without a serious justification. It is distinguished from 'legal relativism', which means that officials consider the law to be relevant or important, even though it may be balanced with other normative options. As such it seems plausible that there is something like a disregard for the law in the light of legal developments since the end of the 19th century. History shows an adaptation of the law to the needs of society,

which gradually resulted in an adaptation of the law to the needs of the government.

In this thesis I investigate the phenomenon of disregard of the law by the government. To that end four questions have been researched. In the first place a definition of 'disregard of the law' has been given, also in order to enable the observation of this phenomenon. In the second place the question was posed whether disregard of the law actually takes place and whether it is incidental or might be considered a practice. The third question concerns the way in which disregarding the law occurs in the interaction between ministers and government lawyers. The role of the government lawyers in these processes is also investigated. The final question regards the matter of cause and effect. The focus is in particular on the impact of the disregard of the law on the profession of the government lawyer.

OPERATIONALIZATION

The concept of 'disregard of the law' has been operationalized for research purposes. To be able to speak about a disregard of the law, it must in the first place be determined whether there is a conflict between a government action and applicable legal standards. Secondly, it must be investigated whether or not a serious justification has been given by the government.

The first element, regarding the violation of legal norms, has been operationalized by means of four terms which indicate whether a solution is untenable, arguable, defensible or optimal from a legal point of view. The second element, i.e. the seriousness of the given justification, has been operationalized using four more categories: no justification, strategic justification, policy justification and political justification. Thus maximum disregard of the law is defined as government action which is legally untenable and without any justification. The other side of the scale – no disregard whatsoever – is the case where government action is legally optimal and also politically justified.

In order to be able to determine whether disregard of the law took place, the context in which government action is taken must be considered as well. In this study this context is simplified to a large extent to the interaction between ministers and government lawyers. The assumption is that disregarding the law will mainly be the result of an interaction between these two groups. In this interaction a minister can be seen as the dominant party, prone to ignoring the law. A government lawyer is considered to be in a subordinate position. His ability to counterbalance the disregard of the law by the minister depends, hypothetically, on two aspects. In the first place the lawyer will tend to counterbalance only when he believes that law is autonomous from politics and not embedded in political discourse. Secondly, the more the lawyer is loyal to the minister, the less he will be inclined to counterbalance. Thus, in this study there is an operationalization of the approach of the government

lawyer to the law (in terms of autonomous versus embedded) and of his attitude towards the minister (in terms of loyalty, voice or exit).

DISREGARDING THE LAW AS AN INCIDENT

Three cases

Armed with this operationalization of 'disregard of the law' I looked for instances in which this phenomenon occurs. To that end relevant documents and literature were examined and ministers and higher civil servants interviewed. As disregard of the law is considered to be a delicate matter, these civil servants initially showed reluctance to mention recent or current cases. Thus I selected some cases which have already been discussed extensively. The cases vary with regard to the source of law which is impinged upon, though all pertain to rules of a higher level (human rights, European law and international law). They also differ with regard to the departments involved and the sentiments they provoked within government. The cases are (1) the Burqa ban case, (2) the Blind spot mirror case and (3) The Iraq case.

The Burqa ban case concerns the decision by the Minister for Immigration and Integration on a motion by Parliament which urged the government to prohibit the wearing of burqas by Muslim women. Government lawyers as well as an external committee of legal experts advised against a ban on the grounds of a conflict with the freedom of religion. However, on behalf of the Cabinet the Minister decided to go along with a ban, using ad hoc argumentation. In this case the Minister turned out to be less dominant and the government lawyers less counterbalancing than might have been expected, taking into account their approach and attitude.

The Blind spot mirror case is about the decision of the Dutch Minister of Transport to oblige trucks to be fitted out with that kind of mirror. Such an obligation was not in accordance with European law. In this case it turned out that, to a large extent, the Minister and the civil servants cooperated closely.

The Iraq case concerns the decision of the Dutch Government to support the American and British military attack on Iraq. Lawyers specialized in international law were unanimous in their conclusion that this attack violated international law. Nevertheless, the Minister of Foreign Affairs reached the conclusion that there was no breach of international law at all. Like the Minister for Immigration and Integration in the Burqa ban case, the Minister of Foreign Affairs stated afterwards that from the beginning he had been determined to support the attack. In both cases nothing, not even serious legal considerations, could have changed their minds and thus legal considerations did not have any impact.

The Iraq cases compared

In the study the decision by the Dutch Government on the Iraq attack has been compared with those taken by the governments of the United States and the United Kingdom.

In the US both the responsible ministers and government lawyers showed a substantial willingness to brush the law aside. The ministers did not need to dominate in the discussion, as high ranking lawyers had been appointed who were extremely loyal to the Bush Administration. Furthermore, the seat of the highest government lawyer, the Attorney General, had been kept empty for a long time. In the U.K. the Attorney General had a much stronger role, even though at the last minute he revised his opinion in favour of the government's desired position. Afterwards the British ministers stated before the Chilcot Commission that they would not have decided to join the military actions against Iraq if the legal advice of the Attorney General had been negative. The two highest legal advisers of the British Ministry of Foreign Affairs considered resignation. One of them, Elizabeth Wilmshurst, actually resigned.

The rank which Dutch government lawyers have in the hierarchy of the government organization is much lower than those of their British and American colleagues. The British Attorney General is positioned at the Cabinet level, the U.S. Attorney General functions at the level of senior civil servants, while the highest legal advisers within the Dutch Ministries are positioned at the middle management level. Another striking aspect of the situation in the Netherlands is that the Government frequently consults external legal advisers.

In the three cases, discussed before, it turned out that government lawyers counterbalance disregard of the law only in the initial stage of their advice on a certain matter – if they counterbalance at all. They generally believe it is not their responsibility to offer further resistance if a minister does not agree with their opinion that a decision impinges on legal standards, but contribute where necessary to implement the minister's decision. Dutch government lawyers also appear to build in some reservations in their reasoning, more so than their American and British colleagues. For example, a Dutch government lawyer will not write in his advice that the proposed decision is 'impossible', but will consider it 'nearly impossible'. Ministers tend to read this 'nearly impossible' as 'possible'.

Disregarding the law as a practice

Publications analysis

Does the government disregard the law incidentally or is it a common – though not the most common – course of action? To reach an answer to this question,

a secondary analysis of publications by government lawyers has been made. This analysis was followed up by interviews with 'chief legal officers' of the ministries, i.e. the directors of the central legal units.

The publications were read, looking for the three factors which, hypothetically, indicate disregard for the law as a practice, namely the ideas that government lawyers (1) have a subordinate position, (2) have an 'embedded' view of the law vis-à-vis political discourse and (3) have an obedient, even subservient attitude towards ministers. These factors were encountered regularly in these publications, which makes it plausible that disregard of the law happens as a practice. To corroborate this finding, the directors were interviewed, leading to a further confirmation of the assumption.

Interviews

In the interviews with the directors of the central legal units of the departments, the discussion frequently focussed on the question whether disregard of the law occurs more often. It turned out that ministers regularly wish to brush aside applicable but inconvenient legal norms. The directors do not put up a great deal of resistance to this. Their professional approach to the law appears to be that in most cases the law is embedded in political discourse. Thus, they do not resist political primacy. They also seem to become increasingly less impressed by the law over the course of their career within the civil service. However, this does not mean that they consider every instance of disregarding the law by their ministers as entirely unproblematic. Most of them frequently insist on limits to a disregard for the law which must not be crossed. Moreover, they feel very uncomfortable when disregard by a minister takes the form of a depreciation of the role of the law in the decision-making process, or even of the lawyers involved.

When interviewed, the directors made it clear that an appeal to the rule of law will quickly result in irritation from the ministers and that government lawyers – or at least the directors themselves – never say 'no' to their political superiors. Their opinions differ on this. Some directors are frequently concerned about the limited role the law plays in decision-making. Others suggest that often, if not always, the law offers alternative solutions. In the unlikely event that there is no alternative to the undesirable solution, they use their ability to translate their legal objections in terms of political problems, which the minister might be more receptive to.

In conjunction with the professional view of the embedded approach to the law, a development in attitude of the government lawyer is discernible. This development can be characterized as a gradual transition from a neutral role, similar to an arbitrator or judge, to an advocacy role.

Additional cases

Despite their initial reluctance to provide examples of disregard of the law, the interviews with the chief legal officers also yielded some more cases I was allowed to write about. I investigated four of these cases for this study.

The first case concerns the credit crisis of late 2009 and focussed on the (lack of) justification for a violation of the Accounting Act. The second case involves the decision-making with regard to the Hedwige polder. The Dutch Government failed to fulfil its legal obligations under a treaty with the Flemish Government, but did not appear to be worried by this failure. The question arose at what time the Government was supposed to have failed to fulfil its obligations when the decision-making is delayed by instigating new research. In this case also a breach of the European Habitats Directive was at stake. The third case is about a private member's bill to allow municipalities to purchase residential care for its citizens without the obligation to tender. Government lawyers, the Council of State and the Legal Service of the European Commission pointed out that this bill infringes European law. However, a majority of the parties in Parliament voted in favour of the bill. The fourth and final case involves the naturalization exam for Turkish immigrants. Again, three legal authorities had warned that incorporating the obligation to take this exam in the Integration Act is contrary to the Association Agreement between the European Union and Turkey. Their warning did not deter the minister to push the plan through.

Conclusion

This analysis of the publications of government lawyers and the interviews with the directors led to the conclusion that disregard of the law can be plausibly considered an existing practice within the government. Examples of such a practice are:

a) the depreciation of considerations regarding constitutional law in legal advice;
b) a diminishing attention of law-making institutions to a legal review of policies;
c) shrugging off the failure to follow up on advice, given by the Council of State;
d) providing risk analyses by government lawyers, which emphasize political consequences instead of conflicts with the law.

The analysis also showed that ministers repeatedly show a disdain for the necessity to make government actions conform with applicable legal standards. In so far as ministers value, or pretend to value, the idea that, despite the lack of legal grounds, their policies need to be legitimate from a legal point of view, four strategies appear to be adopted:

1 expressing the opinion that the law does not apply to the area in question;
2 shopping around for legal opinion and consulting various legal advisers (within and outside the government) until the desired advice has been obtained;
3 presenting a novel interpretation of the law, which does not need to be shared by other legal experts, and legitimizing a policy with this interpretation;
4 delaying the violation of a legal norm.

Further research

Other relevant questions

This study aims at setting a research agenda. It introduces the phenomenon of disregard of the law in government and shows that this phenomenon occurs in practice, more often than occasionally. However, the research which has been carried out cannot answer all relevant questions about disregarding the law, like, for example, how it developed over time or under which conditions it arises. Thus, it is still unclear whether disregard for the law depends on the individuals involved, their interaction, their perspective on and approach to the law, or their political beliefs. Other conceivable causes for the phenomenon might be found in organizational conditions or in the characteristics of the policy area in which the government action is taken.

Other causal theories

Further research is needed to answer those questions. That research can also test other hypotheses for the explanation of the phenomenon, in addition to the adaptation theory presented in the first chapter of this study. That theory considered the emergence of a disregard for the law as a by-product of the trend to adapt the law to the needs of society and ultimately to the needs of the government. In the fifth chapter three other theoretical frameworks have been considered as well, namely that of modernization, democratization and the development of administrative law. The explanatory powers of the latter two frameworks seem to be the most promising.

The effects of a disregard for the law

The problem with disregarding the law

The fifth chapter not only looks at the causes, but also at the possible consequences when the government brushes the law aside. There are a number of

perspectives. One notion is that disregarding the law is unproblematic. This view is based on the belief that the responsibilities of the government do not stop when legal restrictions arise. It also springs from a general tendency towards relativism which seems to be characteristic for modern lawyers, or from the point of view that the law should be considered a matter of aspiration, more than a matter of obligation. Another notion is that disregard of the law is a transitional phenomenon. Those who consider it as transitional are uncertain about its effects for the future. Yet another view is that disregarding the law has serious consequences, like as loss of value orientation, a loss of social cohesion or an increase in civil disobedience. People who are critical of the phenomenon may point out that the loss of legitimacy is particularly risky, as most governmental policies are realized by the creation of legal instruments, whose effectiveness depends on legitimacy.

Consequences for the government lawyer

Disregarding the law also appears to have consequences for the legal professionals within the government. In this respect there are two dilemmas facing the government lawyer. The first dilemma is that the government lawyer has to choose between, on the one hand, his loyalty as a civil servant, which means participating in the disregard of the law, and on the other his professional responsibility as a lawyer, which leads to counterbalancing such disregard. Ultimately the government lawyer has to decide whether or not to cooperate when the law is brushed aside. The second dilemma concerns the choice a government lawyer has to make between an advocacy role or a neutral, arbitrational role.

Taking these dilemmas into account, there are four possible strategies or positions which the government lawyer may adopt:

a) the professional adviser (no disregard for the law and a neutral role);
b) the creative adviser (no disregard for the law and an advocacy role);
c) the political adviser (disregard for the law and an advocacy role);
d) the flexible adviser (disregard for the law and a neutral role).

In so far as a trend can be observed, a development from position a to position c seems to occur.

For the future a strategic choice with regard to the role of the government lawyer must be made. In that respect attention must be paid to his position within the organization of the government. As disregarding the law entails serious risks and the Dutch government lawyer has a relatively humble position within the organization of the government, this study recommends the creation of a function which is comparable to that of the British or the American Attorney General. In addition, government lawyers should contribute more to the professional and social discourse about current constitutional developments. Less conventional contributions than the usual forms of publication in learned periodicals and debate among fellow civil servants may be

considered as well. An option is to publish articles about the development of the law by high ranking government lawyers which are comparable with the annual article by the Secretary-General for Economic Affairs, Agriculture and Innovation in which he discusses economic policy critically.

THE GOVERNMENT LAWYER AND THE RULE OF LAW

An empirical approach

Evidently an important pillar of the rule of law is taken away when the government ignores the law. However, this study does not reach the conclusion that the rule of law in the Netherlands is in a crisis or close to collapsing. In the first place these terms are not compatible with the approach of this study, which is mainly empirical, not normative. In the second place drawing normative conclusions may result in a deadlock between contrasting ideas. Examples of such contrasting ideas are the imperatives of democracy and the rule of law, or the work ethics of government lawyers with an accommodating mindset versus those in a formalistic vein. This study only intended to show that a difficult phenomenon like the disregard of the law can be described and understood by approaching it as factually as possible.

Threats to constitutional democracy?

An important reason not to speak in apocalyptic terms about the survival of constitutional democracy in the Netherlands is that this study did not examine actual threats to it. Potential effects of disregarding the law have been identified, but they have not been observed in reality yet, nor is there any indication that they will occur in the near future. Thus the image of the removal of a pillar seems to be really appropriate: its absence does cause the risk of a collapse, but no one is sure if this will actually occur.

The main risk of disregarding the law is that legal legitimacy is lost. This is an important risk, since a large part of government action takes the shape of legal instruments. This risk alone makes it worthwhile to conduct further research into the occurrence and the meaning of a disregard for the law. In that respect not only the question must be researched whether and how constitutional obligations can be fulfilled better, but also whether the concept of the rule of law needs to be adjusted. Is the rule of law, in particular the idea of binding the government to the law, still feasible and meaningful today?

Professional standards for government lawyers

Another outcome of this study is the recommendation to make explicit what professional conduct of government lawyers entails, especially when there

is a tension between a democratically legitimized policy and the constitutional constraints that apply to it. The four positions or strategies described in this study may be helpful. The idea is not so much to provide a directive regarding professional standards or to insist on transparency, but primarily to make this conduct receptive to reflection and modification. A motive for modification may be found in political, legal or social change, for example when the relationship between democracy and the rule of law is reappraised.

A final observation is that disregard of the law coincides with a substantial representation of lawyers in the public service. Apparently, those lawyers do not prevent this phenomenon. The conclusion may be that, although lawyers have an aptitude for public service, this is not primarily related to the core of their professional duties: realising the rule of law.