

## University of Groningen

### The practice of tolerance by administrative authorities (summary)

Vermeer, F.R.

*Published in:*  
Gedogen door bestuursorganen

**IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.**

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2010

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*  
Vermeer, F. R. (2010). The practice of tolerance by administrative authorities (summary). In *Gedogen door bestuursorganen* (pp. 455-466).

#### Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

#### Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

*Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.*

## Summary

The subject of this research is the practice of tolerance, or *gedogen* by administrative agencies: a practice whereby administrative agencies do not comply with the rules by exercising adequate supervision and by imposing and enforcing corrective sanctions. Particular focus is on the extent to which tolerance can be practised under administrative law and the consequences of such practice under administrative, criminal and civil law for the agencies practicing tolerance (or the legal person, established by virtue of public law of which the administrative agency is part), the offender who is the object of the tolerance, third parties and the criminal law authorities.

The research revolved around three central questions. These central questions are addressed by answering nine sub questions.

Central question I:

*'With what national and European legal standards (the law of the European Union and the ECHR) should the practice of tolerance comply?'*

Sub questions:

1. What should we understand by tolerance as practiced by administrative agencies? (chapter 2)
2. What material standards under administrative law apply to administrative tolerance? (chapter 3)
3. What influence does European Union law (The Treaty on European Union and the Treaty Establishing the European Community) and the European Convention for the Protection of Human Rights and Fundamental Freedoms have in the field of tolerance? (chapter 4)
4. What standards under administrative law apply to tolerance for cannabis coffee shops? (chapter 5)
5. What official administrative standards apply to the practice of tolerance? (chapter 6).

6. What legal safeguards exist under administrative law in respect of the diverse decisions relating to tolerance? (chapter 6)

Central question II:

*'What are the judicial consequences of tolerance for the authority practicing tolerance, the tolerated party, third parties and the criminal authorities?'*

Sub questions:

7. What judicial consequences does the withdrawal of tolerance have for the tolerated offender? (chapter 7)
8. To what extent does the practice of tolerance affect criminal proceedings? (chapter 8)
9. What judicial consequences does the practice of tolerance have for a third party? (chapter 9)

Central question III:

*'Should the practice of tolerance be legislated and more specifically should legislation be introduced to regulate the practice of tolerance by administrative agencies?'*

In chapter 10 (Legislated tolerance?) central question III is addressed on the basis of material gleaned from previous chapters.

The first question is what we should understand by tolerance as practiced by administrative agencies (chapter 2). At a more contemplative level it is concluded that the practice of tolerance has its legal base in the policy granting administrative agencies the freedom to enforce and its material justification in the 'dilemma of the constitutional state'. On the one hand the principals of the constitutional state require the administrative agencies to supervise compliance with the laws and in the absence thereof to take suitable and effective enforcement measures and to implement these as needed. On the other hand the principals of the constitutional state imply that *no* enforcement measures need be taken in specific cases. In addition, considerations of effectivity can, in some circumstances, represent a valid reason to practice a policy of tolerance. Tolerance enables the authority to regulate the specific situation. Administrative agencies are regularly caught off-guard by a citizen who, under the motto 'He who builds wins', has prematurely begun on a building project without a permit. The citizen in question then claims his action should be tolerated because the illegal situation can be legalised by still granting a permit. A citizen who acts rashly without due consideration of the lawful interests of others, 'the rash citizen' does not deserve to be treated generously by the administration and courts. On the other hand citizens may be expected to show some understanding with regard to the genuine special circumstances of a fellow citizen, which could give rise to grounds for practising a policy of tolerance ('the tolerant citizen').

The concept of tolerance is explained using material and official descriptions of the concept. In view of the fact that for the application of administrative law the relevance of tolerance is largely derived from the extent to which it is expressed in a decision as provided for in art. 1:3 of the Netherlands General Administrative Act (Awb), the official description is formed on the basis of the decision. The official description of tolerance reads: 1) the competent administrative agency's decision to 2) refrain from imposing sanctions or to refrain from enforcing sanctions 3) with regard to an observed (or anticipated) violation, 4) whilst the imposition of a sanction is in principal a legal option with there being no factual obstacles present, as well as 5) the (temporary) withdrawal by the administrative agency of a decision taken by it to impose a sanction or the suspension of the enforcement of such a decision.

The research defines and describes thirteen forms of tolerance. Within the context of discussing one of these forms in which 'the supervisory task vested with the administrative agency is performed inadequately with the result that violations are not observed', a number of specific issues are addressed that arise with respect to tolerance in the supervisory phase. Issues such as horizontal supervision and the priority policy adopted with respect to enforcement, as well as the obligation for administrative agencies to give adequate supervision are examined. It is concluded that the failure to observe a violation due to the fact that the focus of the supervisory authority was directed to other potential violations on grounds of a reasonable priority policy cannot be equated with the practice of tolerance. Furthermore, it is suggested that alongside the (enforcement) decision provided for in art. 1:3 Awb, the resolve not to take a decision but, for instance, to adopt a policy of persuasion, recommendations or warnings, can contribute to effective enforcement and need not necessarily be classed as tolerance. However, if these methods of intervention are not applied systematically and with due consideration and no sanctions are imposed when the desired effect of these interventions is not produced, they will yet lead to the practice of tolerance.

Tolerance is largely case law. For this reason the tolerance case law of the administrative courts is examined in detail (chapter 3). Particular focus is given to the 'obligation in principle to enforce' developed by the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*): administrative agencies should in principle take measures of enforcement against violations unless there are exceptional circumstances. The 'obligation in principle' exclusively regards the phase in which sanctions are imposed; not the supervisory phase. Furthermore,

the ‘obligation in principle’ does not apply in all fields of law nor with respect to all administrative sanctions. Whether or not there is an obligation in principle to enforce must be determined based on the content of each special act. The instances in which the practice of tolerance is acceptable on the basis of case law are divided into five main categories, which are linked by the fact that enforcement should be deemed contrary to the principle of proportionality laid down in article 3:4, paragraph 2 of the General Administrative Act (Awb). This regards the following five categories: 1) transition situations; 2) situations involving important interests that oppose enforcement (the underlying interest or another interest worth protecting is best served through the practice of tolerance than enforcement, or enforcement will result in blatant inproportionality); 3) situations in which the enforcement policy is judged as being meaningless; 4) situations in which enforcement is contrary to general principles of proper administration: the principles of protection of legitimate expectations and legal certainty, the equality principle or the principle of fair play; 5) situations in which enforcement must be renounced for some other exceptional reason.

The importance a defined enforcement and tolerance policy has for the practice of tolerance is emphasised. Such an enforcement and tolerance policy promotes balanced and systematic procedures for making decisions on tolerance and thereby provides administrative agencies and citizens as well as judges and bodies responsible for administrative supervision with avenues of approach when making their decisions or when assessing the procedure for making decisions related to tolerance. Administrative agencies should therefore draw up a tolerance policy. This is often mistakenly not done.

The opportunities provided by Dutch case law to practice tolerance are not in line with those provided by the EU Court of Justice in the event that the EU norms apply. The chances of successfully appealing to the principle of legitimate expectations in the event of a violation of EU legislation are very slim. To date, against the background of the obligation to enforce contained in art. 10 EU Treaty (currently art. 4 EU Treaty), the Court has persistently ruled that in the direct application of community law the principle of legitimate expectations under community law may not be *contra legem*. In these circumstances the practice of tolerance is impossible. However, when EU law is applied indirectly the national principle of legitimate expectations provides limited opportunities to practice tolerance. (chapter 4).

When discussing the ECHR special attention is given to art. 2 (right to life). The following government task can be derived from art. 2 and the case law with respect to this article: the government is obligated to take all measures

that, partly in view of the powers granted to it, can be reasonably required of it to prevent a real and direct threat to life of which it is aware or should be aware from arising. Here it does not matter if this concerns threats caused by government services or third parties. In the light of this obligation the government must set up an adequate system of supervision and (preventive) enforcement; standard setting and the granting of permits on the basis of these standards should focus on the prevention of life threatening situations.

Chapter 5 addresses a special category of cases in which tolerance is practiced: the cannabis coffee shops. Since the entering into force in 1999 of art. 13b of the Netherlands Opium Act the mayor has the power, based directly on the Opium Act, to pursue enforcement activities with respect to cannabis coffee shops. As a result the authority to tolerate cannabis coffee shops is now also based on art. 13b. The principle underlying the tolerance policy with respect to cannabis coffee shops is the division between the market for hard drugs and the market for soft drugs (deemed desirable by the State, the mayor and the criminal authorities).

When weighing all the interests affected by the tolerance of cannabis coffee shops special meaning is given to the interests of public health protection and public order. In the positive decision to tolerate a cannabis coffee shop, contrary to 'regular tolerance', the temporary nature of the tolerance or the operation of the principle of proportionality only plays a role in exceptional cases; in fact no significance at all is given to the possibility of legalization because legalization is excluded. Thus neither is there an obligation in principle to pursue enforcement activities with respect to cannabis coffee shops, at the very most there is a 'qualified obligation in principle'. Tolerance case law such as that created under the obligation in principle formula has only a limited relevance to the practice of tolerance with respect to cannabis coffee shops.

In chapter 6 thirteen different types of *decisions* on the practice of tolerance are distinguished between and described. The formal requirements and requirements as regards content of two types of decisions on the practice of tolerance are examined more closely: the decision to award a tolerance permit and the decision to refuse such a permit. It is observed that the requirement formulated in the literature and the policy that a decision on tolerance should, with a view to the legal certainty and legal protection of third parties, be recorded in writing, is often ignored.

This chapter also focuses on the legal safeguards provided by administrative law in respect of the various types of tolerance decisions. In the last few years the Dutch Council of State has made some important rulings on the legal status of decisions on tolerance. What is most remarkable about this case law is that one and the same decision on tolerance can be both a decree and a factual act. Thus the awarding of a tolerance permit (stipulating term of tolerance and specifications) is a decree when this concerns the legal protection of a third party. The refusal to award a tolerance permit or the withdrawal of a tolerance permit is, as far as the applicant or the tolerated party is concerned, not a decree. Furthermore, the awarding of a tolerance permit with stricter requirements than was hoped for or for a shorter period of time than was hoped for is a decree for the third party but not a decree for the applicant. The withdrawal of a tolerance permit following an objection is, for reasons of legal protection, a decree.

The Council of State's approach is based on the consideration that when making such decisions the absence of legal consequences makes it hard to make a 'normal' decision. The distinction made by the Council of State is of huge importance to the legal protection of the tolerated party. According to the Council of State, in principle, in contrast to the third party, the applicant/tolerated party needs no legal protection with regard to a decision on tolerance (unfavourable for this party) because the relevant legal protection instruments are available to this party if the administrative agency imposes a recovery penalty after adopting the decision not to tolerate. This case law can create a very awkward situation for the tolerated party given that certainty with regard to the tolerated party's legal status is only obtained at a late stage in the proceedings. Some situations have been examined in which this could lead to an unfair result.

Chapter 7 addresses the tolerated party's status if, after a period of tolerance, the administrative agency still decides to enforce. In some circumstances the administrative agency may be bound to pay compensation for loss resulting from administrative acts or if the practice of tolerance is ended unlawfully, the agency may be bound to pay damages resulting from a wrongful act.

Article 3:4, paragraph 1 of the General Administrative Act (Awb) requires that the decision to actively end a situation in which tolerance is practiced must take account of all interests directly involved. Pursuant to this provision the disadvantages of the enforcement decree must not be disproportionate with respect to the interests to be served by it. As a rule the conclusion will be that there are no obstacles to enforcement. However, on occasion

in a situation in which tolerance is being practiced it may be necessary to take one or more of the following compensatory measures for the tolerated party: 1) active intervention by the administration to assist the offender on the ending of the tolerance, 2) the granting of a transitional period (e.g. the person-specific tolerance permit), 3) the payment of compensation for loss resulting from an administrative act.

The legal ending of a situation in which tolerance is practiced will generally have unfavourable financial consequences for the tolerated party. As a rule these are for the account of the tolerated party. Five exceptional circumstances are however examined in which the enforcing authority must compensate, either in part or in full, the tolerated party's disadvantage in the form of compensation for loss resulting from an administrative act. An important condition for the awarding of compensation for loss resulting from an administrative act in these cases is that the administrative agency played such a major role (sometimes an initiating role) in the practice of tolerance that the tolerated party justifiably developed high expectations; the administrative agency has some form of 'co-responsibility' for the situation. The expectations are proved groundless because the administration changed its initial attitude with respect to the tolerated party.

If the tolerated party is legally succeeded, e.g. if the tolerance relates to real estate, the legal successor (and the administrative agency) can be confronted with some exceptional problems. For instance, because there is no obligation to publish notice of the awarding of tolerance permits and because tolerance is often practiced tacitly, it may be long before the (potential) legal successor knows whether or not the situation he enters is based on tolerance. It is not unusual for the person concerned to be notified by the administrative agency that the situation in which tolerance is practised ends on the succession. Possible solutions are put forward for the diverse cases.

How, taking into consideration the principle of protection of legitimate expectations, the principle of proportionality and the prohibition on *détournement de pouvoir* does the decision on tolerance made by the administrative agency relate to the authority of the Public Prosecutor to prosecute the (tolerated) offence? Chapter 8 demonstrates that to avoid confusion with regard to the possibility of prosecution in a case in which the administrative agency is considering practicing tolerance, the administrative agencies and the Public Prosecutor must properly coordinate their mutual activities. Alongside this it is emphasised that tolerance does not formerly restrict the authority of the courts, but it can exert some influence especially with regard to the scale of penalties.



The significance of the practice of tolerance for the grounds on which justifications or excuses are based under criminal law is also considered. In this context it is observed that the use by the administrative agencies of the grounds for tolerance whereby the agency 'seeks to protect an interest requiring protection that is different from the interest that the provision which has been violated aims to protect', is not necessarily in parallel with a positive reasoning on the application of justifications under criminal law with respect to the tolerated party. In criminal law literature the exception 'absence of material illegality' is generally considered superfluous due to the existence of other exceptions. However, it is very doubtful whether these other exceptions can help with respect to all the acceptable grounds for tolerance referred to in the case law of the administrative courts and the policy papers. Some situations are described which can probably not be summarized under the heading 'other exceptions'. In these cases the exception 'absence of material illegality' could provide a solution.

Chapter 8 closes with a few paragraphs on the position of the government (the legal person, appointed under public law) and its officials as accomplices or even co-perpetrators in a case in which a violation of a statutory provision is tolerated by that legal person and/or its personnel (the complicity, the co-perpetration in this case regards the tolerance of the violation). Given the nature of the (decision making procedure regarding) enforcement of the statutory provisions and thus (the decision making procedure) regarding the tolerance of violations of these provisions and in view of the legislative system, this power is so inextricably bound to government that it can only be exercised by or for the competent administrative agency and under its full administrative responsibility (in all of its subtleties). This is an exclusive prerogative of public powers. Case law shows us that this means legal persons at a lower level, appointed under public law (as well as their personnel), are granted immunity if their practice of tolerance makes them guilty of (participation in) a criminal offence. When a government shies away from its enforcement duties, this is not a fair outcome.

The amendment to art. 42 Sr ('reasonably necessary offences committed by an official or legal person appointed under public law in the performance of a public duty assigned to them by a statutory provision shall not be punishable') suggested by Heerds, Van de Kamp and Anker in the draft proposal is particularly significant for legal persons and their officials appointed under public law who practice tolerance. Tolerance can be seen as the performance of a public power granted by a statutory provision; after all, according to the case law 'duty' is also assumed to include 'power'. If this practice of

tolerance is reasonably necessary, neither the official nor the legal person has committed a crime on grounds of public law.

The way in which the consequences of the practice of tolerance for third parties are dealt with is considered in chapter 9. The first question is whether in the case of lawful tolerance these parties are entitled to claim compensation as a result of an administrative act. In the context of awarding such compensation to a third party disadvantaged by the practice of tolerance the Council of State apparently applies a strict causal link. In line with its most far reaching reasoning the third party damage is not due to the tolerance permit but to the tolerated actions of the tolerated party. As I see it this line of reasoning cannot be used as a basis in all cases. Here it is useful to distinguish between two categories of public interests to be protected by the government on grounds of its public duty, i.e. individual interests and collective interests (community interests). Individual interests are the interests of private parties: a natural person or a legal person not appointed under public law. If these interests are protected by the government on grounds of its public duty, they also take on the character of a public interest: there is 'an individual public interest'. Collective interests are public interests not having an individual (private) nature that are protected by the government: there is 'a collective public interest'.

The causal link between the tolerance decree and the disadvantage of a third party can only be deemed strong enough if this disadvantage is (predominantly) induced to safeguard collective public interests.

A legal person appointed under public law can be held liable in tort in connection with tolerance if the administrative agency (belonging to the legal person) has been negligent in monitoring (supervising) compliance with the regulation or has not taken enforcement measures to prevent or to end the violation of the regulation as a result of which a third party has incurred damage. Not all negligent acts performed by the administrative agency in the context of supervision and enforcement result in liability. The negligence must be contrary to that which in accordance with custom is aspired to in social intercourse. In other words: there must be evidence of a violation of a legal duty to supervise or enforce ('the standard of due care').

With a view to the content of the standard of due care the obligation in principle to enforce as developed in administrative case law is dwelt upon. The obligation in principle may have restricted the policy freedom of administrative agencies with respect to enforcement but it has not undone it. Every decision on whether or not to resort to sanctions in a specific case must be preceded by a weighing-up of the interests that are directly involved. Partic-

ular weight is attached to enforcement, but the room left over for tolerance is anything but negligible. In the context of liability law this notion is of particular importance: indeed, with a view to determining the liability standard the question of whether or not the administration is at liberty to weigh-up interests when performing its enforcement duty through the imposition of sanctions is pivotal. The *supervision* of enforcement (control) is approached in a different way. There is no obligation in principle to supervise binding the competent administrative agency in principle to monitor all possible violations; there is 'merely' an obligation to exercise adequate supervision. On grounds of its policy freedom the administrative agency is allowed to prioritize the supervision. The failure to detect a violation due to prioritisation is not the same as tolerance and thus does not result in an unlawful act. For specific potential violations, where there is an indication or warning that a violation is being made or will be made, there is an obligation in principle to supervise. Ignoring this information is a form of tolerance and may be unlawful.

The obligation in principle to enforce is in my opinion a standard of case law which, in view of its specific administrative legal history, background and character, is not suitable (nor intended) to be applied automatically as a standard of due care in tort law.

There is no regular applicable standard of liability (standard of due care) with respect to inadequate supervision and poor enforcement. The standard varies from one statutory regulation to another and from case to case. There is an increased duty of care in cases involving health and safety risks. In such cases high requirements are imposed on supervision, the (temporary) omission of enforcement measures is only possible to a limited extent. In other cases a moderate standard of due care can apply. This standard boils down to whether the administrative agency acted in accordance with standards of reasonableness. It would seem that, although cautiously, the courts are tending to veer towards the same approach.

In a specific case the defining of the administrative agency's care duty in the field of supervision and enforcement depends on the enforcement activities that the administrative agency could be expected to perform at any moment in time in its capacity as a proper and diligent supervisor and enforcer. Hereby taking into account: *on the one hand*: 1) its statutory supervisory and enforcement duties and the objective of these duties; 2) the interests that the legal system seeks to protect; 3) the policy freedom granted to the agency, and *on the other hand*: 4) the relevant facts; 5) the interests to be taken into account. In the clarification of the care duty vested in the supervising and enforcing administrative agency, additional special significance

is given to the ‘Kelderluik-factors’ developed by the Supreme Court of the Netherlands (1) the degree of probability that another is sufficiently vigilant and cautious, 2) the likelihood that accidents occur, 3) the seriousness of the consequences, 4) the degree of inconvenience resulting from the measures).

As far as the timeliness and nature of the measures to be taken by the administrative agency are concerned the administrative agency should, depending on the circumstances, be granted some room for manoeuvre to achieve a legal status without imposing a sanction.

The *condicio sine qua non* requirement (causality) can pose significant problems for the party affected, given that the administrative agency has freedom of policy regarding its choice of the recovery sanctions to be imposed and the content thereof. In the specific situation it is the court that shall determine the instrument (and method) the administrative agency should reasonably have applied and more particularly whether, if this had been done, the damage would not have been incurred. Here factors play a part such as: 1) the feasibility of the factual application of administrative force; 2) the proportionality of the administrative force with respect to the offender; 3) the disadvantages for third parties of the continuation of the illegal status; 4) the risks the government would have been exposed to in connection with the exercise of administrative force in the event of the administrative force decree being nullified.

Chapter 10, the concluding chapter, addresses the question of whether it is recommendable to introduce legislation to regulate (aspects of) the practice of tolerance by administrative agencies. The answer to this question led to, among others, the following conclusions:

- I. From the perspective of adequate enforcement, with regard to the substance of the supervision of compliance with specific statutory provisions, particularly those affecting the health and safety of people and animals, the legislator should lay down rules at least with respect to: 1) the lower threshold of the frequency of the supervision; 2) the objects that are the focus of the supervision; 3) the way in which the supervision is exercised.
- II. In view of the great importance enforcement policy has for the regulation of the policy freedom of the administration with respect to supervision, imposition of sanctions and sanctions enforcement it is recommendable that a universal obligation be included in the General Administrative Act for administrative agencies to adopt an enforcement policy.
- III. The General Administrative Act need contain no material standards.

- IV. The General Administrative Act should include an obligation to record a decision on tolerance in writing.
- V. The General Administrative Act should stipulate that a decision on tolerance is a decree. Chapter 10 contains the components of the arrangements recommended in points IV and V.
- VI. For the benefit of the tolerated party, its successor, the interested third party and the administrative agency tolerance decrees on real estate should be registered in a public register that is accessible through internet.