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Gemeentelijk beleid en beleidsregels

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Summary

To the extent that an administrative authority has discretionary powers, it will inevitably make use of administrative guidelines or administrative rules that supplement rules in laws and statutes. These administrative rules are the soft law every organization applies in decision-making. In Dutch law, there is a category of administrative rules with a special legal status. They are called 'policy rules'. The Dutch General Administrative Law Act (Awb) defines policy rules as an 'order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority' (art. 1:3 (4) Awb).

In 2002 this codification has been evaluated. One of the main conclusions was that the administrative bodies in municipalities often use other administrative rules than policy rules. In other words, municipalities use administrative rules that do not (entirely) fit the legal requirements of the Awb 'policy rule'. Apparently, municipal authorities can do without administrative rules in their codified form of 'policy rule'. This leads to the central question of this research:

What is the supplemental value of policy rules for the quality of the municipal decision-making and is it possible to improve this quality with policy rules?

The definition of policy rules as an 'order' in the Awb means that the adoption of a policy rule requires a so called 'public law act'. This can be derived from the definition of an order in art. 1:3 (1) Awb: 'an order means a written decision of an administrative authority constituting a public law act'. The first requirement an administrative rule has to fulfil in order to qualify the rule as a policy rule is therefore that the rule has to be adopted by the competent administrative authority. The competence to adopt policy rules is regulated in article 4:81 Awb: 'an administrative authority may establish policy rules in respect of a power conferred to it or which is exercised under its responsibility'. In other cases the administrative authority may only establish policy rules if this is explicitly provided for in law or statute.

It is to be expected that, as a consequence of this strict definition of policy rules, not all the administrative rules to be found in municipal practice, will qualify as policy rules. Sometimes the rules are established by a decision of an administrative body that is not qualified. These rules are called 'guidelines'. Other rules are merely the result of internal standardization and are not formally promulgated by any administrative authority. These rules are categorized as 'unauthorized rules'.

The distinction between policy rules, guidelines and unauthorized rules is not without meaning as the Awb provides for more stringent requirements for adopting policy rules, more specifically pertaining to the preparation, the weighing of interests

and the motivation. These conditions do not apply to other soft law. However, the most interesting distinguishing characteristic of policy rules has to do with the binding effect of these rules.

In general soft law involves a collision of principles. On the one hand there are the basic principles of equality and legal certainty which require a certain regularity in administrative behaviour. This implies that administrative authorities have to apply existing administrative rules. This obligation however may conflict with the principle of proportionate decision-making which requires a weighing of interests. This principle would demand that the administrative body disregard the soft law if applying such a rule would have unwanted or disproportionate consequences.

The codification of the policy rule in the Awb leaves considerably less leeway for departing from policy rules than is generally acceptable when applying other soft law. According to article 4:84 Awb the administrative authority shall act in accordance with policy rules unless, due to special circumstances, the consequence for one or more interested parties would be out of proportion in regard to the purposes of the policy rule. Diverging from policy rules is restricted to the condition of 'special circumstances'. These special circumstances may constitute of interests, facts or consequences which were beyond consideration when the policy rule was adopted. Only when an administrative authority establishes 'special circumstances', it is allowed to reconsider the interests involved and to come to the conclusion that the rule need not be applied. If special circumstances are absent, the Awb requires the application of the policy rule, regardless of any possible unwanted consequences. Therefore the binding effect of policy rules can be considered stricter than the binding effect of other soft law.

The legal position of the Dutch municipality complicates the implementation of the concept of policy rules in that legal environment. The tradition of administrative law on the one side and that of municipal law on the other side seem incompatible. The key building block of Dutch administrative law is 'the acting authority' and its legal competence. Municipal law focuses on the regulation of accountability relations between municipal administrative authorities and the municipal council (the representative body). In municipal law the municipal council is considered the highest authority, but due to administrative law, its instruments to exercise this authority are limited and not very effective.

In the past the Municipalities Act (Gemeentewet) provided the councils with the authority to establish policy rules to regulate decision-making by municipal administrative authorities. In 2002 this act has been revised, as part of an effort to create more of a separation of powers in the municipal governance system. Despite the professed purpose of strengthening the position of the council vis-à-vis the municipal executive, one element of the revision was the cancellation of the council's authority to issue policy rules for other municipal administrative authorities. As a result the rules adopted by the municipal council cannot be considered to be policy rules anymore. At best, these rules are guidelines for other municipal administrative authorities to be taken into consideration, without the strong binding effect of genuine policy rules.

Thus arguably the revision of the Municipal Act was inconsistent with one of its main goals, since the municipal council lost an important instrument to affect deci-

sion-making of other municipal authorities. Furthermore, the revision seems incompatible with the prevailing municipal culture, according to which rules issued by the council rank way above rules issued by other municipal authorities.

The difference between policy rules and other forms of soft law could be relevant in terms of quality of decision-making. Does it make a difference whether a municipal administrative authority applies policy rules or other soft law? Quality of decision-making can be defined in four aspects: lawfulness, legitimacy, effectiveness and efficiency.

Lawfulness can be regarded as the bottom-line: a decision that is not lawful has no quality. In order to be lawful, a decision should not exceed the administrative discretion that comes with the relevant administrative power as granted by statute. Furthermore the decision should comply with the substantive principles of equality, legal certainty and proportionality. Policy rules affect all these aspects of lawfulness. First of all, a general rule that has been publicly promulgated will enhance equality and legal certainty. Furthermore, the grounds of a concrete order can be limited to a reference to the policy rule.

Legitimacy calls for transparency and accountability in decision procedures. Thus the legitimacy of a decision will be strengthened when the rule has been made public. For the *effectiveness* of a decision, the potential value of policy rules is more complicated. On the one hand one could argue that effectiveness will increase if professionals are allowed to deliver tailor made solutions. This calls for a large amount of discretion and little administrative regulation. On the other hand the bureaucracy and their employees often face a dynamic and critical environment. Operating effectively in such an environment requires a certain level of standardization. In particular, Dutch municipalities have to satisfy supervisors of provincial and national government. Therefore administrative rules will contribute to the effectiveness of decision-making.

The last aspect of quality of decision-making is *efficiency*. Applying rules will reduce the costs of every individual decision. Savings will increase with the number of decisions to be governed by the same rule. On the other hand there are costs involved in the process of creating a rule. The value of rules for the efficiency of the decision-making process therefore will depend on the decision costs of adopting an administrative rule combined with the frequency with which that rule is applied.

This research is concerned with the assumption that policy rules will improve the quality of decision-making. The next step of the argumentation involves a summary of the conditions under which the assumption that policy rules have a positive effect on the quality might be true. There are three types of conditions: properties of the relevant administrative power derived from statute law; conditions regarding to the supplementary rule itself and circumstances regarding the application of these rules. This ideal type model of decision-making can be enriched with insights from empirical research about routines inside governmental bureaucracies. This leads to fifteen hypotheses about the probability that administrative bodies will use supplementary rules, about the probability that these rules will meet the characteristics of policy rules and about the probability that the application of these rules will be in accordance with the expectations derived from the Awb. These hypotheses have

been tested in empirical research in eight municipalities on four different policy areas.

An application for a building permit needs to be checked against the current zoning plan. If the building plan is not in conformity with the zoning plan, the application has to be rejected, unless the municipal board ('mayor and aldermen') grants the applicant an exemption from the zoning plan. This power to grant exemption, conferred on the municipal board in the Act on Spatial Planning (WRO), allows for a large amount of discretion. In almost all municipalities administrative rules can be found that fill in this discretionary space. What explains the existence of these rules? First of all, the age of the zoning plans is an important factor that contributes to the existence of supplementary rules: the older they become, the less likely it is that they will reflect spatial reality and actual spatial policy. In case the zoning plan does no longer reflect current spatial visions, the administrative authority faces more applications for exemptions of the zoning plan. An increasing number of applications is an incentive to write administrative rules that in effect replace some of the regulations of the zoning plan. A second important factor is the political influence of the municipal council: sometimes a decision in a single case leads to a political debate in the council. As a result the board, being the administrative authority having jurisdiction, formulates a general norm for acceptable exemptions of the zoning plan. The last factor that contributes to the existence of administrative rules is the Inspectorate for the Environment (representing the Ministry of Housing, Spatial Planning and the Environment). This inspectorate only gives a positive judgement if the municipality shows that it has administrative rules.

Only a limited number of the administrative rules found can be classified as policy rules. Most rules origin from the shop-floor level inside the bureaucracy. Especially in the large municipalities many unauthorized rules were discovered. Sometimes the street-level bureaucrats are not convinced that the status of a policy rule is preferable to that of an unauthorized rule. Furthermore the procedure leading up to a decision about a policy rule takes time and entails the risk that the rule will be changed by other officials before it is promulgated.

The enforcement of compliance to public housing law and spatial law is another policy area in which the municipal administrative bodies often use soft law. Here again we find that the municipal board is endowed with a large discretionary space, both as to how to control compliance and how to investigate and sanction non-compliance.

In this area soft law is the result of an increasing pressure to police compliance in security sensitive sectors such as building and environmental protection. This has lead to far more systematic and organized ways of enforcement and increased numbers of enforcement decisions. Another factor contributing to administrative rules is the insistence, both from provincial and national administration, that municipal boards should write administrative rules to guide their enforcement activities. Furthermore, in this area, too, the Inspectorate for the Environment officially requires policy rules. Apart from these external incentives there is a more internal incentive that leads to the existence of administrative rules. Administrative rules are an impor-

tant instrument to strengthen the position of the street-level bureaucrats when they have to make unpopular enforcement decisions.

The social assistance benefit is regulated in the Work and Social Assistance Act (Wwb). The municipal board (the administrative authority in case) has very little leeway when it comes to issuing decisions on applications for general benefits. Yet the board also has the authority to supply special social assistance on an individual base, and this power comes, out of necessity, with a large amount of discretion. The need for decision-making on a case by case basis notwithstanding, all municipalities in the case study have administrative rules to fill this discretionary space. In some instances the rules are laid down in bye laws of the municipal council. This is remarkable as the council does not have regulatory authority in this area. Furthermore, it is striking that the rules create general schemes within the realm of special social assistance. When the national legislator enacted the Wwb in 2002 it was meant to put an end to general schemes. Municipalities should take all the individual circumstances involved into account before deciding whether or not special social assistance would be provided. Irrespective of this revision the categorical rules have remained. Thus the case of the special social assistance shows that bureaucratic decision-making contains a strong incentive for administrative rule making, even against the stated intentions of the national legislator. Efficient decision-making calls for administrative rules, regardless of the legal qualification of those rules.

For the organisation of an event several permits and approvals are needed. Inside the bureaucracy this leads to an internal consultation and coordination between a number of departments involved. As time goes by this results more or less spontaneously in an internal agreement laid down in a set of administrative rules. This agreement reduces the necessity of further consultation for future applications. In some municipalities the municipal council played an important role. Especially if a concrete event leads to accidents and complaints, for example caused by noise nuisance, the political debate that follows forces the administrative authority to formulate substantial norms for events. Most rules are promulgated by the municipal council or municipal board and can not be regarded as policy rules as meant in the Awb. The power to establish policy rules in this area is an authority of the mayor alone.

This research has affirmed that administrative authorities virtually always use some kind of soft law. These administrative rules often do not meet the characteristics of policy rules. In stead the legal status of this soft law is often rather obscure: it is not clear which authority laid down the rule or when and by whom the rule has to be applied. By contrast policy rules are the result of an act of a distinct administrative authority, drawn up for the clear purpose of regulating a specific discretionary space. On the strength or their specific characteristics it is argued that soft law in the legal form of a policy rule is preferable to other administrative rules. This leads to the conclusion that administrative authorities should be obligated to lay down their soft law in policy rules, especially for those instances when statutory rules allow the administrative authority a lot of latitude in exercising administrative powers.

This research shows, furthermore, that administrative authorities are often completely unaware of the legal status of the administrative rules that they are applying

when making administrative decisions. Thus they may unwittingly have adopted policy rules without being aware of all their legal consequences. It is argued here that administrative authorities should consider in advance the legal situation they want to create, and more specifically the legal binding that they want to generate, before promulgating a new rule.

In the third place, his research has demonstrated that the Dutch municipal culture has a deviant hierarchy of rules. Rules of the municipal council are regarded as of higher order than the (policy) rules promulgated by the municipal board. Of course, the culture of administrative law holds the opposite. To fill this gap between the two legal cultures, it is argued that the municipal council should be provided with the general authority to adopt policy rules that are binding for other municipal authorities. In order to attain this goal, the 2002 revision of the Municipal Act should be reversed.

The fourth finding from this research has to do with the quality of the policy rules. In general policy rules do not meet the basic prerequisites the law requires of an administrative decision, such as a careful preparation or a proper reasoning. When applying the rule, the administrative authority will often disguise these deficiencies by adding a written motivation to the decision in the single case. Such concealment tactics prevent an administrative judge, under present administrative procedural law, to assess the policy rule. Therefore it is argued here, that the Awb should be amended in such a way that it provides for an appeal directly against policy rules. This would force the court to assess the policy rule itself, and expose any lack of quality of policy rules. It might inspire administrative authorities to adopt policy rules of sufficient legal quality.

Finally, the research allows for a conclusion regarding the application of policy rules. As stated before, when the legislator created the legal entity of policy rules, it constructed a category of administrative rules with a legal binding that is different from that of other rules such as statutes, decrees or other administrative rules. In the practice of administrative rule application, there is no difference at all to be found. For the street-level bureaucrat a rule is a rule. He does not care about the legal qualification of the rule and will apply a rule as long as that rule is sufficiently precise for concrete decision-making. In practice article 4:84 Awb – the provision that requires deviation from a policy rule as the circumstances require – has no effect at all. Nevertheless the quality of decision-making might improve if courts review the application of rules is according to this article. At present it is customary that desired policy changes do not lead to new policy rules but to a more extensive interpretation of the existing rule, pleading unforeseen special circumstances to justify the exception to the rule. The courts so far cover this approach. A critical court review of policy rules themselves would result in a different administrative attitude with the effect that policy rules are changed whenever the administrative authority aims for a change in policy.