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Third-party appeal rights and the regulatory state: Understanding the reduction of planning appeal options

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ABSTRACT

With the rise of the risk society came the regulatory state. Increasingly, governments are turning to law for achieving their policy goals, also in the field of urban and environmental planning. Legal rules do not only reduce the risks for society but also for policy makers, since those standardise decision-making, hence reducing discretion and chances of personal failure. The result is an increasingly complex legal system and a juridification of planning in practice. While planning has become more legalistic, in the Netherlands we see at the same time that the access to the legal system is being reduced. How can this seeming contradiction be explained? In this paper we explore, conceptually, the relationship between the risk society and the regulatory state. Then we turn to the empirical body of the paper, in which we observe that Dutch government is responding to the negative consequences of the regulatory state by taking major decisions with regard to the entrance to the legal system. Third-party rights are under scrutiny. We conclude our paper by arguing that government has chosen the easiest way out of the juridification of planning. Rather than a fundamental contemplation on the relationship between law and society, government pragmatically chooses to limit access to the legal system. This leads to a paradoxical situation where our (environmental) quality requirements for a land-use plan are becoming greater, while the means available to citizens for ensuring that these requirements are met move in the opposite direction.

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Introduction

On the 14th of September 2011, Dutch judges, barristers and solicitors went out on the street (in their gowns) to protest against an increase in court fees. Although it is partly a protest for banal financial reasons, it also reflects the changing and conflicting views on the role of law within society. It seems that not only this is confined to the Netherlands alone, but it also occurs elsewhere (see e.g. Moroni, 2007).

With the rise of the risk society came the regulatory state. More and more, governments have been using the law for achieving their policy goals, also in the field of urban and environmental planning. Legal rules do not only reduce the risks for society but also for policy makers, since it standardises decision-making and, through that, reduces discretion and chances of personal failure. The result is an increasingly complex legal system and a juridification of planning in practice. While planning has become more legalistic, in the Netherlands we see at the same time that the access to the legal system is being reduced. How can this seeming contradiction be explained?

In this paper we explore, conceptually, the relationship between the risk society and the regulatory state. In addition, we connect this to ideas about the role of laws in society. These conceptual explorations are empirically illustrated. Then we turn to the empirical body of the paper, in which we observe that an increase in the amount of law has led to an increase in the number of conditions that planning decisions have to take into account, leading to more planning appeal procedures. As a response to that, Dutch government sequentially took and is taking three major decisions with regard to the entrance of the legal system. First, in 2008 appeal against land-use plans was confined to legally defined 'stakeholders', instead of being open to everyone. Second, in 2010 the law was changed in such a way that these 'stakeholders' are now only allowed to bring to bear objections that affect their interest directly. And finally, government prepared a bill that imposed substantial increases in court fees, in some cases up more than 300%.[1] In the

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[1] Ranging from € 531 to € 2250. Example of appeal to a higher court given by the Council of State in a letter to the Minister of justice regarding the proposal of

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end, the bill was not adopted. But it clearly demonstrates shifting views on the relationship between society and law.

We conclude our paper by arguing that government has chosen the easiest way out of the juridification of planning. Rather than a fundamental contemplation on the relationship between law and society, government pragmatically chooses to limit access to the legal system. This leads to the paradoxical situation that the (environmental) quality and safety requirements for land-use plans are increasing, in number and scope, while the legal opportunities for citizens to make sure that these requirements are met move in the opposite direction.

This paper fits within the institutional literature in planning (e.g. Bolan, 1996; Healey, 1997; Salet and Faludi, 2000; Gualini, 2001; Alexander, 2005), particularly the literature that focusses on processes of institutionalisation, de-institutionalisation and re-institutionalisation. This paper addresses a topic that has been underexplored in that literature. Planning law gets modest attention in planning theory, while some argue that it should be in its core (Moroni, 2007). Only few exceptions of the theorisation of the relation between planning and law exist (e.g. Moroni, 2007, 2010; Needham, 2006; Salet, 2002; Buitelaar et al., 2011; Alexander et al., 2012). The same underemphasis applies to the issue of third-party rights, in particular the right to appeal. The involvement of the public has received a lot of attention in contributions that are within what some have called the 'communicative turn' in planning (Forester, 1999; Healey, 1997; Innes and Booher, 2000; Hajer and Wagenaar, 2003). They focus on deliberative processes of planning and decision-making: planning as co-production. Less attention has been paid to statutory 'rights', such as the right to be heard in plan-making and planning decisions (e.g. Alexander, 2002; Ellis, 2004). With the UK being the anomaly, virtually all advanced economies know the concept of third-party rights, especially those with a Napoleonic legal system. These third-party rights are now very topical because in several other countries too, such as New Zealand (Towns, 2006), Ireland (Clinch, 2006) and Australia (Hamnett, 2012), the right to appeal for third-parties has come under scrutiny. There has been quite some theorisation on the coming about of regulation, in other words on institutionalisation, but much less on the responses to its (perceived) negative side-effects, such as the limitation of third-party appeal rights. This paper aims to provide building blocks for understanding these processes of de- and re-institutionalisation.

In the next section ("The risk society and the regulatory state") we explore the relationship between the emergence of the risk society and the rise of the regulatory state. Section "Juridification of planning and the response of Dutch government" is empirical and deals with the way Dutch government responds to the negative effects of the regulatory state on planning appeal. The last section ("Conclusion and reflection") reflects on these responses and tries to 'lift' the empirical findings up to a more general level.

The risk society and the regulatory state

Modern society is complex. In itself complexity is not a problem, it gets meaning in relation to risks. Beck (1992) has shown us clearly that we live in a risk society. Complexity leads to uncertainty about the effects of our acts. The chance of negative effects makes complex situations problematic. Examples are safety risks, health risks, and the risks for nature and the environment.

Technology and science are crucial factors in understanding the notion of risk. Before the industrialisation of society, risks were primarily external affairs – think of natural hazards – while with the industrialisation and modernisation of society, risks have become the product of human action. Giddens (1999) refers to this as *manufactured risk* and, in line with that, to the *end of nature*. He argues that we are less aware of the dangers that nature poses to us and more of the negative impact that we have on nature. Science and technology in that respect are not only the means to solve societal issues but also the source of many. Nuclear technology is a good example. It allows for producing much and clean energy, while at the same time nuclear hazards can be immense as Chernobyl and Fukushima have shown us.

One of the problems is that society does not fully oversee the consequences of innovations. The complexity of technology and the speed with which technologies succeed each other nowadays does not allow for acting based on habit and routine; the uncertainty is too great for that. Therefore, Giddens does not only speak of an *end of nature* but also of an *end of tradition*.

Acknowledging the risks and the boundaries of modernisation and acting upon them is what Beck (1992: 21) calls *reflexive modernisation*. Reflexive modernisation is even included in Beck's definition of risk since he sees a risk as 'a systematic way of dealing with hazards and insecurities induced and introduced by modernisation itself' (Beck, 1992: 21). There is a clear link between the emergence of regulations – in particular public law rules – on the one hand and the growing complexity of modern society, and the risks associated to that, on the other. Much law-making can be seen as an act of reflexive modernisation. The emergence of the 'risk society' (Beck, 1992) and the 'regulatory state' (Majone, 1994) seems to go hand-in-hand:

> "The growth of administrative regulation in Europe owes much to (these) newly articulated perceptions of a mismatch between existing institutional capacities and the growing complexity of policy problems: policing financial markets in an increasingly interdependent world economy; controlling the risks of new products and new technologies; protecting the health and economic interests of consumers without impeding the free flow of goods, services and people across national boundaries; reducing environmental pollution" (Majone, 1994: 85 – brackets by the authors).

The increase of social risks resulting from the continuing modernisation and technological specialisation of contemporary society, leads to a new generation of purposeful regulations in order to cope with the uncontrolled consequences of social action. It is a new round in what Nonet and Selznick already some decades ago coined the 'responsive state of law' (Nonet and Selznick, 1988): the national administrations take action in response to social problems and risks, adding purposeful regulation most intensely there where the risks are considered as the most urgent (terrorism, distrust of financial systems, monetary deficiencies, environmental risks, change of climate, etc.).

Not only do regulations have the ability to reduce risks for society, but they can also do the same for policy-makers and politicians. Weaver (1986) argues that policy-makers are inherently blame avoiding, rather than credit claiming because 'voters are more sensitive to what has been done to them than to what has been done for them' (Weaver, 1986: 373). This inclination has become stronger in this age of mediatised politics (Hajer, 2009). Nowadays, political mistakes are illuminated, inflated and disseminated under large numbers of people in a short period of time. The chances of personal mistakes are reduced through regulations since these standardise, eliminate or overtake discretionary policy decisions. This is in line with Weber's bureaucratic ideal (Weber, 1922).

It is partly because of the mediatisation that we see an *immediate* response to revealed risks. The responsive state of law is guided by political urgency and 'rational' problem-solving (Kagan, 2001); media and society often require firm action when a risk has

cost-efficient court-fees, May 30, 2011, p. 4 (Brief betreffende consultatieverzoek kostendekkende griffierechten).

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