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LEGISLATURE INTO RETREAT¹

by

Agnes Schreiner

Sheena Carmichael's article in *The Independent* newspaper, 18 November 1992, *Major's Citizen's Charter and Clinton's Code of Ethics both aim to win back the confidence of the public*, gives us a good description of a situation that is almost universal: the existence of "a gap between the rulers and the ruled". The alienation of the public from the political system has not only been characterized by crisis, scandals and misfortune, but also by mistrust. Governments all over the world attempt to find solutions by devising charters or codifying codes. But whether they use the accepted approach or opt for less conventional methods, it is not clear that they will be able to regain the confidence of the people and their cooperation as well. The politicians have resorted to new legislation and have referred the problem to their civil services. Isn't it, however, precisely the proliferation of regulations and administrative measures that is one of the main causes of the lack of confidence and of society's unwillingness to cooperate?

The ethics gap or the ethical dissonance between politicians and public, as Carmichael puts it, is the subject of this article. The author analyses the Dutch situation during the last two decades, in which rulers were faced with the fact of public indifference. Instead of giving a theoretical outline or the necessary methodological details, the author launches immediately into her subject. By staying close to the empirical material she tries to open up a new and perhaps more appropriate approach to diagnosing this contemporary phenomenon. She doesn't go along with the current explanations of the "crisis of democracy" as provided by Anthony Sampson, for instance, in *No wonder Britain's in a mess* (*The Independent*, 2 November 92). Like most analysts in the Netherlands, he believes that the continuation of a single party in office combined with remorseless elimination of effective oppositional forces in local government, and in the unions and the universities ("which have all been demoralised and alienated by central government") has been one of the main factors behind the crisis. In Agnes Schreiner's article those analyses that highlight the disillusion of ordinary people are treated as part of the situation and part of the empirical material.

The author also refuses to join the chorus of post modernist analysts. Currently numerous politicians and even Cabinet Ministers in Holland make knowing allusions to the post modern condition. They sing along with the greatest of ease in the song of the

¹ This article is the revised version of a paper that was presented at the 1992 International Conference of the Law and Society Association in Philadelphia Pennsylvania USA. It is based upon two Dutch articles, translated by Donald Gardner, *Het afzien van de moraal* (Schreiner 1990: 47-56) en *Naar de vorm wetgeving* (Witteveen 1992: 171-177).

need for new ideas, with its refrain of the end of the future and of politics. Even in finding alternatives, the rulers - who are part of the study - do a better job in formulating post modern concepts, performatives, incentives and other forms of "creativity". Instead, the author takes a hard look at these legislators who are in favour of a renaissance of the so-called "social middleground", i.e. the creation of an ethical buffer between the isolated state and its lost citizens (the subject of the first part, *Morality in trouble*). The same legislators are concerned with the "virtual reality" of incentives, i.e. a policy of self-regulation by remote control (the subject of the second part, *Designer's law*). In both parts Schreiner also attempts an analysis of the counterpart of the legislature. She diagnoses the strategies of the mass, fatal or ironic as they may well be, to use the terms of Jean Baudrillard.

I. MORALITY IN TROUBLE

In polite society twenty years ago you would have made a gaffe if you had defended marriage. Breaking or even not entering upon the marriage bonds was highly approved of, because it offered exciting prospects of self-development and free experiments with cohabitation. Tabooed institutions had to make way for communes and collectives. But at the present day it is no longer bad taste to argue for the rehabilitation of marriage and to speak out against the number of premature divorces. The reasons for this "new prudishness" cannot with any certainty be identified (a reaction to AIDs is one possibility, or an increasing realization of the harm that is done to young children by divorce, or else a renewed need for certainties and conventions). Few people let the opportunity go by of blaming the 60s and 70s for the disappearance or decay of the ethics of marriage, an institution which is now once again held in high esteem.

In those days the relations between Law and Morality and between State and Authority were both suspect. Confrontations between the police and the citizenry had led to a break in what had once been a very solid marriage. Authorities and moralists were given a symbolic and playful burial to make way for the emancipation of individuals and society. Law and the state found themselves isolated and so they also had to join in the tendency to self-development. All this meant was more of the same: because just as the individual was involved with his individuality and society with its own socialization, law lost itself in the problematic of law while the state became involved in a process of becoming more "statified". What we have seen happening to the institution of marriage also occurred with the law and the state. Because currently it is *bon ton* among all echelons from university professors to cabinet ministers to appeal to authority or the moral code to recreate the bonds between state and individual, and between law and society. An attempt is being made to mediate between these partners who have become so thoroughly estranged. Zijderveld in a theoretical memo, *Macht, gezag en recht* (Power, authority and law): "Since the 60s we have seen how a polarization has occurred in the welfare state between increased statism on the one hand and subjective individualism on the other. In this process the so-called "social middleground" - which has consisted since roughly 1960 of a host of separate institutions and lobbies - has been eroded. (...) An erosion like this of the social middleground leads to an erosion of legitimacy with all the consequences that this has for the law." (Zijderveld, 1986: 52-53) The hope that Zijderveld placed in a social middleground is akin to the expectations that morality has of marriage. Because just as the man, according to the moral code of marriage, can only find self-realization in marriage,

so the law, according to Zijderfeld, can only achieve self-fulfilment in the social middleground, where it finds *legitimacy* like a faithful partner at its side. In other words if the law is to undergo a process of self-development, it may well preserve its legality ("law is law") in the process, but this will mean legality on its own without legitimacy, without the somewhat more intimate link of content or moral involvement. It becomes a top-heavy bureaucratic monster, witness the "declining welfare state". Zijderfeld and many others like him conclude therefore that authority must once again be called in and every authoritative institution must be brought to bear on the situation. The middle-ground must become operative in order to allow the forces of legitimization do their work, as a result of which the law will no longer merely be instrumental but can regain its moral force.

The present appeal to a greater moral involvement of society with the law (on its death bed), or of the citizen with the state (which is sick) would seem at first sight to be a return to old-fashioned bourgeois morality. But bourgeois morality had to do with the struggle for power between state and citizens or between law and society. The immoral aspects of the bourgeois and industrial revolutions made it necessary for morality to enter the field. But since that time much has changed and much has been lost. Having fought the good fight morality enjoyed a well-earned rest, retiring to the luxurious residences of authority, only to be aroused once more by students and provos (a Dutch protest movement of the 60s). This gave it such a fright that it ended up dying from it. In the meantime the balance of power has also disappeared, because the state no longer takes on its own citizens; the law is no longer at war with society. The law has regulated too much and therefore no longer wages war on anyone but itself, just as the state is presently only in conflict with its own "statifying" process.

Government in the 90s has gone into retreat in order to devote itself to an internal "redistribution of tasks" and an "evaluation of its functions"; its principal concern here is with its own function that is on the line. There is also another aspect to "the retreat of government", one that has to do with its meddling with society. In the Dutch national daily, the *NRC Handelsblad*, 24 February 1990, the Justice Minister, Hirsch Ballin, is quoted as saying: "the police and the lawcourts cannot cope with all the work. And on the other hand it is against an even greater involvement of government with society that we should be struggling." (see Jensma, 1990) The minister considers that action has to be taken, but with admirable candour says that he is not the right person to do this (not any longer, that is). His candour has been seized on by many critics in order to accuse government of impotence in the face of a crisis of legitimacy. But by denying his responsibility for taking action the minister neatly avoids the accusation that the legitimacy of government activity is at present considerably impaired. The minister has gone a long way in his attempt to boost morale within the sphere of government. But the question remains what should happen to society now that there's nobody to keep an eye on it (any longer). By going on retreat the government has created a void, a sort of job vacancy for men or women who are willing to be responsible for society and to do the government's work for it. (Society also needs its morale boosting, somehow or other). Government pins its hope on private initiatives and on the social middleground. It ropes in "headhunters" to recruit job applicants.

Applying for each other; the modern form of getting things moving. In fact it is the only way to keep moving, to remain in circulation and to maintain the pretence that something is still actually happening. In fact all it means is a reallocation and reorganization of functions, that achieves nothing more than just that (except that far-

reaching government interventions are cut down on). In an earlier age government and society met in a trial of strength in which duty or morality functioned as referee or guide. At present they only see each other on both sides of the interviewing table where the feeble progeny of Duty and Morality is appealed to: by encouraging society to share the responsibility and to put its shoulder to the wheel, government is asking it to be a sort of accomplice in creating moral responsibility and to accept the middleground role. The description of this role was given by Hirsch Ballin in answer to questions by Folkert Jensma, in the same interview for the *NRC Handelsblad*: "We cannot do without imprisonment and fines, but we cannot leave it all to imprisonment and fines. More anti-vandalism projects and alternative forms of punishment should be implemented in which an appeal to people's sense of responsibility is made. This way of wiping the slate clean can be used for more kinds of offence. We should act in tandem with government to influence existing relations in society, but with the proviso that if it doesn't work police and justice will be available." (see Jensma, 1990) In other words, government and the law will act together on existing social relations and this means that they will induce the social middleground to apply for jobs and to take a share in government. For one thing is certain: the minister will not hand over or abandon his prerogative to another, but he will be only too pleased to call in the social middleground to do the work that was previously dealt with by his department or offices. One advantage of this is that people who occupy the middleground unlike civil servants do have the right to go on strike. The disadvantage: a tedious sort of gambling with results or certainties, by which the ball never leaves midfield.

Gambling on certainties, this is the only thing that every post-modernist - either in desperation or in ecstasy (can anyone still distinguish between them?) - is still prepared to consider, now that every system that used to function without any problems is now suffering from overload or breakdown. He wants to be able to go on "working on projects", to use the upbeat 90s expression for "job fulfilment". Because a meaningful way of continuing to build on settled functions and ideas is no longer available, the post-modernist, following his own intuition, looks to the past in search of quotes that he feels safe with. Induced by resentment and sentimental reevaluation he picks out striking passages, that he then heaps together in equally intuitive fashion in order to give his post-modern project some padding. Sour grapes or resentment towards the sixties and seventies, because they allowed the social middleground to erode, is the fashionable thing at the moment. The fifties and earlier decades, on the contrary, bask in the nostalgic, that is, sentimental interest of the project organizers of our times. Because in the present impasse we don't only have to deal with law that has become "juridical", but with sentiment that is sentimentalized and of course with a middleground whose operation has become operationalized: a control field, an interface. As every operator knows, the familiar middleground of yore will not return. Even our minister shows himself fully aware of this, when he declares that a restoration of the old basis of society with its socio-politico-religious groupings is "neither desirable nor feasible" and expresses his approval for "the openness that we have developed". With the disappearance of the plain unvarnished character of functions and the erosion of meaning, which is accompanied by the melting and merging of every line or direction in history, everything ends up wide open. All ideas are free. In other words only the thoughts that have already been thought are available, because one does not get any genuinely new ideas from a work of reference (which is what history has now become for the post-modernists). It is no longer possible for any idea to

remain dormant in the background of the dominant tendency in society only then to pop up as antithesis on the road to an entirely new thought. (The restoration of dialectics therefore is also no longer on the cards.) The openness that we have developed is filled to overflowing with all visible and conceivable kinds of pluriformity. The free and uncontrolled circulation of our pluriform corpus of ideas throws us into uncertainty or despair, and - if we don't watch out - it will reduce us to a state of depression. The true post-modernist, on the other hand, is optimistic and has an ecstatic faith in management and in organizational expertise. Management that functions purely as design, and not as the last resort of a state that has become unmanageable. The latter is a prospect that is often mentioned not without some gloom, for instance in *Sturing van de samenleving - Managing society* (Bovens e.a., 1986). It is not the project of the post-modernist to give a touch on the steering wheel of the past; his game is the virtual reality of the future: his copyright is on the design. The middleground is what he comes up with, his "product" ready like a new detergent for a new generation: Persil washes whiter than ever. *Social renewal* - the Cabinet's programme with added Social Element, now completely new. In selling us his middleground, the Minister of Justice is an excellent representative for post-modernism and not an archaic spokesman for past values, someone who is nostalgic for the good old days. He doesn't preach the gospel of good citizenship as the press would have us believe; rather he is a post-modernist who, to quote his own words, has vetted "all the projects and sub-projects" that the Justice Department is currently considering, in terms of their implications for the "post-modern, technological and highly complex society" of the present day. And who comes to the conclusion that the "beliefs", "convictions", "moral fabric", "codes of conduct, community spirit and citizenship" (freely available at least in quotes) must be linked horizontally. This is how the middleground is designed. His aim or at least his dream is that through "its concern for vulnerable interest groups" society will focus on the various normatively coloured identities that are available to it, drawing on them to fill in the middleground. The minister does not mind which norm or belief one adheres to, "as long as one does not fall into a non-normative egotistic attitude or look to the government for everything" (see Jensma, 1990). All he cares about is that everyone is a subscriber, connected up with the middleground network.

The field is once more open to the voluntary services and to welfare workers and voluntary workers in particular. As far as the minister is concerned they can cheerfully put their shoulder to the wheel. They can take the initiative in choosing an identity, an ideology or a lifestyle from the series of existing varieties. With this as baggage they can start out on their "project to establish norms". They will be able to establish or confirm norms or cultural values internally, taking care that enough attention is paid to ensuring that they are complied with; they will also offer lessons in good citizenship and in taking responsibility. These workers should aim to delegate responsibility and not take it all on themselves as happened in the past. The "sixties and seventies": the phrase is used as a negative criticism. It is one that welfare workers hear constantly now that that period has been brought to a close; it was made, for instance, by most of the authors of *De stagnerende verzorgingsstaat - The welfare state in decline* (Van Doorn e.a., 1978). The suggestion was that they took on and organized too much, that they only acted "strategically", to use Habermas' phrase. (Habermas 1981: I 384, 446) By acting strategically they had themselves created the demand for the service they had to offer. They had professionalized their profession and put their clients in a position of super-dependency. The solution to the problem of the excessive proliferation of social work will be similar to that of too much government and too much control on the part of the

government and the law. The tendency is becoming general: the welfare workers must *retreat* and let the people do the work themselves. It is a question of a strategic action *at a distance*, in other words, a *laissez-faire* approach without the violent and immoral possibilities of *laissez-passer* that are implicit in this attitude. The communicative approach that Habermas argues for and which he proposes should replace strategic action will not escape this trend. Because by communication he also means *allowing communication to happen* within the context of a "moral procedural rationality" (Habermas, 1988: 52, 78-87). The procedural framework controls the moral argumentation and communication from a distance, so that all transactions are carried out in a *telecommunicative* way. In short, the middleground provides *soft* programmes, the minister controls or subsidizes the *hard* equipment, so that in addition to telecommunication and "home banking", teleregulation and do-it-yourself government also become possible.

The curious thing about teleregulation and DIY government is that it is possible to switch it all off with one push on the button or still worse that it can stay on without anyone having to look at it: about the readiness of the users to consume there is indeed very little certainty. Viewing statistics may measure subscribers' involvement but whether people are genuinely watching cannot be proved. The control, discipline and supervision that in earlier times were macroprocesses that were carried out with gusto over peoples' heads continue to exist even today but only in the form of microprocessors, process controllers that relate simply and solely to the technology. They don't meddle with the input side: people are free to decide how and why the electronic equipment is used. If something is put into it, then what will eventually come out of it is also predictable. The government is free then to feed its *laissez-faire* policy into the middleground network, so achieving society's cooperation and moral involvement. But it can never be sure that society is really involved in the process: it might well respond to the appeal to govern with indifference, with a *laissez passer*. Because one thing is certain: no society has ever seen itself as a government. Society may bear fruit in something like a tenants' association, a neighbourhood vigilante group or a concierge's job. But in the end these institutions are on the side of the authorities who have need of a society: otherwise there will be nothing to govern.

II. DESIGNER'S LAW

The legislative policy of the 1980s that was known as a policy of "deregulation" was intended to combat the instrumentalism that had resulted in a situation of excessive legislation. In the past, it was argued, the political ambitions of administrators had led to a hasty and inadequately considered recourse to legislation. This had in its turn resulted in a proliferation of "disposable" laws. Policy in the 1990s is also directed against the same ill of instrumental administration. Its aim is to continue the struggle waged by its precursors. Hirsch Ballin (1991: 19): "Current legislative policy is partially influenced by the trend towards deregulation that prevailed in the decade before us. This policy of deregulation was a reaction to the enormous spate of rule-making, that has led to a cluttered and impenetrable mass of regulations that often only partially achieves the desired result. Deregulation was intended to reduce and simplify the basic supply of regulations." Hirsch Ballin, the Dutch Minister of Justice since 1989, used the past tense because as a new

minister he wanted to change tack. Instead of excluding the idea of the provision of laws and statutes as was implied in the term "deregulation", the minister held out the prospect of using the statutory instrument once again. *Zicht op wetgeving* (legislation in sight) is the title of his policy document.

The minister would seem to have planned his policy entirely in the spirit of the art. In order to come to a code of conduct for the future he has held himself in check for the moment; in this way he hopes to be able to arrive at a judgement of the nature of our present pass. The minister employs the critical model which by eliminating the bad leads to an identifying and reinforcing of what is good. He abandons the overzealous focus on the excessive amount of legislation; instead he defends the policy of "maintenance and improvement of the quality of legislation". (Hirsch Ballin 1991: 20) This promotion of quality is not only intended to make a splash on the stock exchange or in boardrooms and managing directors' offices. The New Stylishness also rules in ministerial departments. This prospect of qualitatively good legislation: this would seem to be the outlook for policy in the 90s.²

Zicht op wetgeving, however, had another end in view. Instead of allowing its policy to ramify outwards, the government turned its gaze inwards. In bold type the policy document emphasized "the need for the government itself to obtain a better insight into the process of legislation in order to have it more firmly under control". (Hirsch Ballin 1991: 12) The legislator focuses on himself and tries to gain insight into his own *modus operandi*. The result is an incestuous situation in which a processing of legislation is devised in order to impose restraints on the legislation process. This incest on the part of our lawmakers has meant that the relation between the legislator and society has become chilly to say the least. If we read the first sentences of the first chapter of the policy document we will begin to suspect that it is even too late for marriage guidance therapy. "Society must have an insight into what legislation is: the legislation to which it is subordinated and which gives it its rights. The government for its part must also have an insight into its own legislative process, and in particular into what its legislation implies or does not imply for society. This means that in its legislative capacity the government can only provide the required quality when it has and continues to have an insight into society." (Hirsch Ballin 1991: 11)

Perhaps it would be better if government and society got a divorce. The question even arises whether they ever had anything in common. Right from the start government has defined itself as an institution over and against its own citizens. In its capacity as ruling subject the government has tried time and again to identify the dividing line between the act of ruling and the object to be ruled. Three periods in this process can be identified:

- first of all there was a period in which the citizens could keep the government at a distance (the 19th century laissez-faire state);
- then came a period in which the government kept the citizens at a distance (the welfare

² This was not the first occasion that the idea of high-quality legislation had been mooted. Hirsch Ballin came to the post of Justice Minister with a proposal that a post-modernist would not be ashamed of. The "social middleground" (the quotes were intentional) was resurrected from the past and pushed to the fore. The restored or reoperative middleground would give the administration a let-out that would enable it to beat a retreat in the face of its own excessive provision of regulations. See above *Morality in trouble*.

state)³;

- now we live in a period in which the government keeps a distance from itself.

This distance or aloofness that the government maintains consists of a distance multiplied by itself. Distance squared. The government withdraws behind the position it has adopted against society. Up until now government, while adopting this position, had always attempted to bridge the distance and to get across to its citizens by promulgating laws. But at this moment it is trying to distance itself from its own position as issuer of laws. It has resolved in future to retire to the terrain that precedes that of actual legislation: "the initiation and development of the process of issuing legislation". *Zicht op wetgeving* concentrates on the internal process by which laws and regulations are prepared. Round the drawing table sit all the participants in the process of law-making - civil servants, legislative jurists, cabinet ministers and members of Parliament. (Hirsch Ballin 1991: 8-9) They communicate with each other in modern designer's jargon, bandying phrases like "creativity", "professional approach" and "packaging". (Id.: 7, 20 and 36 respectively) The participants are expected to keep to the "Guidelines for regulations" and the "Scenario for making laws". (Id.: 48) Participants are required to search more "energetically and creatively" (Id.: 21) for alternatives. Hirsch Ballin has more in mind than forms of emancipation, deregulation and decentralization; he is also thinking of "remote control", "incentive control" (influencing by means of incentives, stimulation or inducing motivation), "output control", "network control". (Id.: 15) Instead of issuing a law that gives form to policy vis-à-vis society, the process by which a law is made itself undergoes a *design process*. The lawmaker comes to a halt on a terrain that comes before the real thing, *before* the actual making of the law. The time-hallowed connection between good ideas leading to solid results that affect the life of society is no longer made. It is in fact broken for good and all because the backward movement towards a policy that comes before a policy, goes hand in hand with a similar movement in the terrain that would in the normal dialectic course of events issue from it. Here too we see an exponential process. The minister even wants an "ex-post-evaluation" and is planning to issue another policy document on this follow-up process. (Hirsch Ballin 1991: 31, 43 and 44) Don't ask me what he means by "ex-post-evaluation". All I do know is that the Minister of Justice will see to it that this form of evaluation will have a part to play in the process of producing legislation. The wheel has come full circle. A picture emerges of the legislator who as a result of a centrifugal movement has opted out of his relation with ordinary social processes.

The government however will never want to vanish from the social stage (that can, in fact, only be achieved by the intervention either of something or someone else; by a coup, an assassination attempt, murder or sacrificial death). The government will continue to have and maintain a relation with society. From the heights or distance to which it has withdrawn it continues to exert supervision. From this distance normal communication is no longer possible. The government consequently transmits "control signals" (Hirsch Ballin 1991: 26) to society. This extremely remote form of control gets a reception that is

³ Many people would argue that in the welfare state the government has in fact come too close to the citizen and that it is exactly this that has brought about the disintegration of the welfare state. The opposite is in fact the case. Like the protectors and guardians of former times the government has tried to think and do too much for its citizens. It revealed a paternalism in this that ensured that in the end the citizen was kept at a distance.

no less extreme. For a fraction of a minute, society is thrown off balance by a signal like this. A shock reaction occurs that any road-user knows who has panicked on suddenly seeing a police automobile. We are all familiar with the near-accidents that result. All the know-how we had - and which we will regain a second later - is replaced by paralysis or even aggression. It is an open secret that it is the guardians of the law who are the real troublemakers. The discovery of a hidden camera or a rule you have never heard of produces a panic reaction. The arm of the lawmakers has a long reach and it seems determined to put the frighteners on us. We are all familiar with the feeling of panic when our insurance agent tells us that we should have had witnesses to the accident just when we thought we had settled the matter in good faith with the other party. Government proposals can also cause a brief shock reaction: 100 Dutch guilders fine for travelling without a ticket, legal proceedings against people who make marriages of convenience, the reduction of people's rights to sickness benefits, old age pensions and Social Security, 10% of all university lectures to be given in English. Other more extreme examples could be given.⁴ Practically all government proposals seem to have no other purpose than a supervisory one: they are sent up like kites to see which way the wind is blowing. One cabinet proposal will certainly cause a storm in a teacup. This will make it a punishable offence to plan something that would be criminal if it were carried out. To plan to do something that does not bear scrutiny - if Hirsch Ballin has his way - will be punishable in future.⁵ Should his plan be accepted, it is not inconceivable that the minister will suggest bringing preparations of this sort under the *Lex Mulder*⁶ which would enable them to be dealt with without going through the courts. A fine will quite simply be deducted from your bank account. Incidentally, almost every cabinet proposal at present has this idea back of it. The cabinet makes more and more bids to deduct fines from our incomes, our student loans and our unemployment or social security benefits. Fines for being sick, for driving a car, for being a student, for going on holiday, for having a job on the side, for growing old or for being involved in protest actions.

With a view to developing new forms of government regulation intended to reach sections of the society that "are with difficulty and only to a limited extent influenced by signals from outside" (Hirsch Ballin 1991: 26), an instrument of super-supervision is projected in *Zicht op wetgeving*. The government that no doubt means very well when it proposes "to strengthen self-regulating mechanisms in sectors of society, to give them an institutional form and if need be to exert influence on them" has hit on the idea of a *legally structured and conditioned form of self-regulation* (Hirsch Ballin 1991: 26 - the italics are

⁴ The government even sent itself a control signal on one occasion: just before the Christmas parliamentary recess in 1991 it circulated a report to the effect that the number of governmental departments would be reduced. Result: shock, protest and ministerial statements playing it all down.

⁵ Hirsch Ballin announced this proposal on 16 September 1991. (*Algemene strafbaarstelling van voorbereidshandelingen*, Tweede Kamer 1990-91, 22 268, nos. 1-3). It provoked an immediate response from the press. In Frank Kuitenbrouwer's opinion the draft proposal implied an infringement of the *Lex certa*, that is the principle that "thoughts are free". (NRC 19 September 1991). The shock has already died down - pending further developments.

⁶ Published in *Staatsblad* 1989, 300. This Bill - called Mulder, accordingly the name of the designer of this Bill - provides in a short and administrative treatment in stead of a judicial punishment in small criminal cases.

in the document). On first sight this is only a contradiction in terms; but on closer inspection this typical piece of officialese contains the same extreme aloofness that we already came across when we looked at the government's control signals. A form of supervision that holds society hostage - in this case as far as its self-regulatory function is concerned. The legislator imposes duress on the instrument of self-regulation before it has even been implemented, before it has begun to operate, that is, before it has even had the chance to go wrong or prove ineffective. What is more, what could go wrong with self-regulation beyond the fact that it regulates itself? This attitude of holding the public hostage, which the government displays on all fronts as well as in the most hidden recesses of the departments, does not even wait for something to happen before it springs into action. All the necessary preparations have been made. Legally structured and conditioned. We land up in a situation that differs little from that in which a defendant might find himself if sentence were passed before he had even had a chance to defend himself.

But society gets its own back: the hostage taker can't escape from the hostage. However aloof the government is, it cannot get rid of society. Within the walls of the ministries society is fed and kept alive. It demands the attention which would otherwise be given to legislation policy. The presence of society sees to it that the departments do not remain immune to its good qualities and still less to its bad ones. The quality in society that persuades it albeit reluctantly to total and unqualified cooperation is described here as the "failure factor". (Hirsch Ballin 1991: 29) This is why the document grumbles at fixed intervals about something that follows from what is described as the existence of separate "families of law"⁷, that is, the "sectarian divisions within and between the departments", "squabbles about status between departments and sub-departments" and even "interdepartmental or intramural clan warfare". (Hirsch Ballin 1991: 17, 36 and 29 respectively) Not only are elements of legislation pushed to an extreme; elements of society make a comeback that also has its extreme aspect: society gets its revenge in primitive guise. It sees to it that the Justice Department goes to the fore like a head chieftain. From now on the departments will come like litigants to knock at the door of this village elder; they will however not be seeking justice or legislation but only a legislation policy.

The fact that the departments are infected by their contact with society raises yet another spectre. This too is an extreme phenomenon that can be traced back to a bad quality of society: its tendency, that is, to make hole-and-corner arrangements, to work with sleeping partners and hidden contacts, to make alliances or agreements in secret. When people want to arrange something in the everyday world, they prefer to make a

⁷ The term "families of law" was invented by Van Poelje (1974: 63-71). Van Poelje suggested that the preparation of laws by individual departments in isolation was the possible reason why laws do not mesh with each other, and that illogical differences of procedure and an unmanageable proliferation of regulations prevail. "A department that drafts laws concentrates on the legislation that already exists in the catchment area of the department concerned, a body of law that is tried and trusty (the almost sacrosanct idea of "precedent"!)." This is how distinct "families of law" arise with - to a certain extent - their own phraseology, their own formulations and constructions." (Van Poelje, 1974: 65). The separate departments have conceived of themselves as genuine clans ever since. They do not only fight their own internal feuds; they also engage in feuds with other neighbouring clans.

phone call to someone in the ministry or to meet in the lobby of a 5 star hotel rather than use the official public channels. It is this characteristic that at the moment operates like a wild growth within the Justice Department. "The more that ministries succeed in creating and maintaining a network of contacts with individuals, organizations and social groupings who possess the knowledge, expertise and experience that the legislator needs, the more it will be sufficient to rely on more informal types of consultation." (Hirsch Ballin 1991: 34) Hirsch Ballin considers that these more "informal methods of consultation" are more appropriate for obtaining information about society. He argues for the maintenance of contacts with the outside world in order for the government to keep better informed. By opening up channels that bypass the formal and surveyable advice organs, it would, in his opinion, be possible to create an informal network. Once again the government makes an attempt from its position of aloofness vis-à-vis society to force contacts, resorting on its own initiative to something that is virtually conspiracy. What the government fails to take account of however is that it has itself been infiltrated by society. Hirsch Ballin's "intelligence" network is not so much the product of the excessive aloofness of the government; it comes into being rather at the instigation and prompting of society which continues to dwell in the immediate vicinity of government. Society's "incentive" has gone one better than government control. A simple appeal to the government's self-interest serves as a stimulus for the government to institute a legislation policy.

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