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REVIEW ARTICLE

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Contextualisation of policy and law in sustainable urban development

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The old tension between planning and law is revived in current practices of sustainable development. Urban professionals often blame central regulation for frustrating an inventive integration of local initiatives and policies. Against this background, the authors focus on the potential of 'legal contextualisation': the challenge of how to improve on regulation in such a way that it guides local practices in a normative sense but simultaneously enables optimal use of local – context bounded – option space. In order to make legal contextualisation researchable, the next four operational avenues of analysis are constructed in this paper: the normative dimension (requiring quality of legal norms); the relational dimension (studying the alignment of norms in different positions, such as the legislation, the court, and social compliance); the temporal dimension (searching the alignment of different moments of legal validation); and the functional dimension (making transparent the different roles that government agencies may take).

Keywords: sustainable development; planning and law; urban governance; legal contextualisation

1. Introduction

Urban development projects are structured by environmental and spatial objectives in many ways. Environmental rules and policies set conditions for the choice of development location and for the arrangement of functions within a development plan or other local development initiatives. The need to mitigate and compensate for the environmental effects of development or – vice versa – the need to mitigate the effects of environmental hazards on the built environment involve requirements for the design of development. Furthermore, urban development projects can be used to contribute to sustainability, by for example including a park or water storage within development plans. Many of the incentives to accommodate environmental objectives in urban development projects – that can be initiated by a variety of (public, market, civic, or grass-roots) actors – emanate from national or supra-national legislation (Baker *et al*. 2002; Jordan and Adelle 2012; Priemus and Davoudi 2013).

We study local initiatives and urban development projects as deliberate transformations within cities – brownfields – as well as within intermediary zones of urban regions – often urbanising green fields. Depending on their size, these transformations are initiated by actors operating at local or regional levels of scale. Primarily driven by local and regional aspirations and policy problems, these actors have to incorporate, often many, environmental and other regulations from higher

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governments. In this coordination of social initiatives and regulation, "higher levels may have a wider and more strategic perspective on ecological problems, and lower levels may have a better conception of the complexities of the local 'spatially bounded' level at which ecological problems must ultimately be addressed" (Jones 2012, 41). 'Because threats to the environment take so many forms, the appropriate strategies to address environmental degradation are likely to be context specific' (Gunningham and Sinclair 1999, 855). As a result of the time-space characteristics of environmental systems, environmental problem solving is more successful and sustainable when it 'more consciously address[es] scale issues and the dynamic linkages across levels' (Cash *et al*. 2006, 8). 'More generally, it has been suggested that the present era of late-modernity requires a fundamental rethinking of the relationship between centralised governing through, for example, national and supra-national environmental regulations, and decentralised decision-making in areas such as urban planning' (de Vries and Zonneveld 2018; van Tatenhove, Arts, and Leroy 2000). In other words, understanding the relationship between, on the one hand, environmental regulation that emanates from national and international levels of scale, and on the other hand, locally and regionally initiated urban development, is a key issue in solving environmental, including ecological, problems. In essence, this highlights the importance of interpretation and argumentation in law (MacCormick 1995) for urban development planning.

The coordination of the different aspirations and legal conditions in sustainable urban development requires inventive processes of policy integration to bridge the divergent interests and conditions. The motive for this paper was triggered by the frequent complaints from practitioners (OECD 2007; de Zeeuw, Puylaert, and Werksma 2009) and in the academic literature (de Roo, Hillier, and van Wezemael 2012; Davoudi and Madanipour 2015) that efforts to find inventive solutions for sustainable urban development are frustrated by detailed central regulation. We framed this problem as the challenge of 'contextualising environmental regulation and policies': How to incorporate the specific space and time bounded characteristics of urban context in the processes of policy-making and law? Considering the increasing complexity of urban processes (both with regards to spatial conditions and with regards to the dynamic actor constellations) there is an increasing consensus on the need for central norms and rules that respect the need for option spaces for policy-making in the urban context. The question in this paper is how to avoid a clash between central rules and the complexity of social initiatives and policy-making in local contexts and how to convey a productive interaction (Folke *et al*. 2005). The need for contextualisation requires that two fundamental questions be addressed.

The first question is how central regulation might pay tribute to the space and time bounded characteristics of local context in addressing local practices of policy-making. This question faces the classic dilemma of policy and law which will never be definitively solved and requires new responses time after time (Fuller 1964; Dworkin 1985; Brunnée and Toope 2010). When the legislator or the central policy-makers decide to incorporate contextual details in their general regulation, they run the risk of hindering contextualisation as the local conditions differ from context to context. However, also vice versa, when deciding to define regulation in a general way they face the problem of how general rulings might make sense in highly specific situations. In other words, this is a puzzling challenge: central regulation is due to conditions of generalisation and durability, as central rulers cannot create new legislation for every new situation, but at the same time they have to make sense in very specific and completely different situations (van Rijswick and Salet 2012). There are no permanent solutions for this

dilemma and in contextual investigation some will appear to be more inventive than others.

The second question is how formal regulation and processes of (often informal) local and regional policy-making and planning interrelate. Practices of sustainable urban development usually do not start in compliance with central ruling but in local policy tasks and social initiatives to solve problems. Practitioners of this policy-making (both within and beyond the public sector) attempt to build coalitions for collective action, negotiating different visions, interests and possible resources of action. In the last two decades, such alternatives to the traditional top-down policies have received considerable attention. It is no longer self-evident that initiatives for new development emanate from the central or local government: they might be raised in society or in cooperation with the public sector (Rhodes 1996; Blokland and Savage 2008). Informal processes of policy-making and negotiation increasingly involve agents of different sectors and at different levels of scale (LeGalès 2002; Haughton, Allmendinger, and Oosterlynck 2013). However, sooner or later, policy-making initiatives encounter central regulation (national and European). This encounter is often perceived as a painful confrontation because the legal conditions encounter all efforts of negotiating outcomes in a context of multi-actor and multi-level governance.

In practice, this interface between, on the one hand, the regulation of national and supra-national government and, on the other hand, policy negotiation in the local and regional arena of governmental and non-governmental actors, implies a confrontation of two steering philosophies: a 'legal steering' philosophy and a steering philosophy often labelled as 'interactive governance'. From a legal perspective, environmental norms are often imposed at central level and include conditions that are to be complied with in a similar way across the whole territory under the jurisdiction of a government. From the interactive governance perspective, the environmental objectives conditioned by legal rules should be part of the local process of balancing interests. While the potential tension between these steering perspectives has been acknowledged in the academic literature previously (John 2001; van Rijswick and Salet 2012), the treatment of this tension is often one sided. In other words, many authors take sides in advance, by either emphasising the legal perspective (Hart 1997) or the governance perspective (Rhodes 1996). Legally inspired steering philosophies often prevail in areas where interactive governance is weak, and vice versa. Therefore, ways in which both approaches would reinforce each other is highly desirable. Nevertheless, the clash of the two steering philosophies has not yet yielded an adequate synthesis.

This article sets the stage for debating and researching the confrontation between regulation and interactive governance. In doing so it develops different areas of interest for empirical research that result from elucidating both steering philosophies and elaborating on the tensions between the two that emerge in the practice of urban development projects. Subsequently, the paper introduces the concept of legal contextualisation as a means to establish a synthesis of both approaches. Finally, the paper will conclude with the design of a conceptual framework to enable a systematic empirical investigation of the contextualisation of policy-making and law at the interface of the two approaches. The framework has been developed as a heuristic device (Kelle 2010) for the identification of relevant problem areas, concepts and hypotheses with regard to the question of contextualisation.

For the purpose of this paper, there is no need to focus on particular environmental laws or directives. Nevertheless, some indication of the scope of our exploration is desirable. First, by environmental legal norms we primarily mean 'hard law', which

means that it is about rules that are legally binding (they form an obligation), precise (unambiguously define the conduct they require, authorise, or proscribe) and authority has been granted to third parties to implement, interpret, and apply the rules (most often a court) (Abbot *et al*. 2000). Nevertheless, it must be noted that in reality legal norms vary in their degree of 'hardness'. For example, they might be binding but not precise or not binding but still play a role in the way the courts judge concrete cases. As a result, the concepts of hard and soft-law should be seen as the extremes of a continuum (Abbot *et al*. 2000). Second, the discussions and analyses in the remainder of this paper are influenced by the Dutch background of the authors and their thorough knowledge of Dutch planning practices (but not exclusively). The Netherlands has a distinct planning culture (de Vries 2015) and legal culture (Nelken 2004; Salet 2002). For example, as a member of the 'civil law family', legal practices are different from those in, for example, common law countries such as the United Kingdom and the United States and its legal culture is known for the availability of alternative ways of dealing with disputes in order to reduce the high litigation rate (Nelken 2004). Nevertheless, for several reasons, we assume that the analysis and conceptual framework presented are relevant to different legal and planning cultures. As a result of the characteristics of environmental problems and urban development challenges, the question of contextualisation presents itself in any situation where environmental norms formulated on a high level of scale have to be applied on a local scale. Furthermore, the conceptual framework is formulated at such a level of abstraction that it has heuristic value in different legal contexts.

2. Legal frameworks for policy-making

Legal legitimacy has a wide tradition in the evolution of state and law, respecting a wide gamut of principles that have to guarantee – first of all – that no misuse might be made of the power of the state by those who are in power. With regards to regulation, a number of principles (such as the rule of law, the equality for the law, the generality and durability of legislation) have been institutionalised to endorse the plausibility of legal authority ensuing that citizens may comply with the legal norms. The principles of law and state see a 'tacit reciprocity' between state and citizens (Fuller 1964): Why would citizens respect legal norms if other people (including those in power) are not held to the same norms? In addition to these fundamental legal principles the evolution and performance of legal frameworks provide an important perspective for understanding the effects of the legal steering philosophy on the practice of urban development projects.

Although guided by general principles, such as indicated above, legislation is often not limited to general standards, but also contains many instrumentalist clues about how the standards should be met. This contrasts with the principle that regulation should be of a generic and durable nature (Fuller 1964). Generic means that legislation should avoid detailed specification, but it should still be normative. In finding solutions for societal problems, highly prescriptive instruments lack flexibility and raise costs (Gunningham and Sinclair 1999). Durable means the legislator should not have to produce new rules for every specific problem. At first glance, this may seem almost self-evident, but in practice these basic notions are often neglected, in particular in the post-war epoch of the welfare state. Politicians, policy-makers and legislators do not evidently concentrate on the 'principled', the 'general' and the 'durable' quality of legislation. Policy aspirations and social problems almost never emerge as 'general', 'principal' or 'durable' phenomena, they become manifest in specific spatial-temporal contexts of the here and now. This is why in legislation one does not often find general rules with principled material norms

(such as 'healthy food', 'clean and safe water', 'clean air') but instead numerous specifications of input and output conditions. In other words, to deal with specific problems at the level of the 'general, the principal and the durable' the legislator has to generalise the specific to another level of abstraction (van Rijswick and Salet 2012). Properties of 'good' regulation therefore generalise from particular situations, without losing their normative quality. This is a complicated requirement; in practice it is not always optimally done.

As a result of the increasing instrumentalism, the law-making becomes a tool for quite specific objectives (Tamanaha 2006; van Dijk and Beunen 2009). Because (European and national) legislators cannot oversee the widely varied contexts in which these detailed regulations will take effect, these rules are bound to have unintended effects. For example, the Habitat guideline that is meant to protect certain species causes land owners to take measures – such as ploughing and removing surface water – that prevent the protected species from locating on their land (van Dijk and Beunen 2009) and in doing so avoiding their property falling under the European guideline. It should be noted that this push towards detailed regulation for an increasing amount of subject areas, is not driven by characteristics of legal thinking or the legislative process. It mirrors society's and political desires for reducing risks in an increasingly complex society (van Tatenhove, Arts, and Leroy 2000; Sorel *et al*. 2011).

This predisposition to instrumentalism resulted in overregulation and over-inclusive regulation which has lead to national programs of deregulation all over Europe for almost two decades. However, simultaneously, new legislation has been established because of ongoing specialisation in society and its accompanying risks. For example, in the Netherlands the amount of legal rules has steadily increased by 2% per year over the last three decades (de Jong and Zijlstra 2009). Furthermore, tendencies of liberalisation and privatisation require the involvement of diverse stakeholders. Finally, cross-scalar reconfiguration of urban activities implies that in concrete localities problems of collective action are connected to a variety of geographical scales (Brenner 2004). All tendencies have led to more uncertainty and confrontations between multifarious interests. These new conditions can only be met through solutions that fit local circumstances. The latter though is at odds with centralist regimes and the ongoing trend of overregulation.

3. Governing urban transformation

Responding to problems of increasing societal complexity, alternative approaches have emerged in public administration and policy sciences, considering legal formalism and hierarchical policy-making as negative points of reference. The corresponding steering philosophy is frequently labelled as (interactive, adaptive, self- or network) governance. The term governance is widely used in social science but has very different meanings (Hendriks 2014). This paper focuses on the concept of 'interactive governance' which is associated with the emergence of new arrangements for collective action that differ significantly from post-war welfare state arrangements. Where in the post-war decades the central government used to dominate through intervention by central rule and provision of funds, in the current situation economic actors and civil society have gained much more policy weight vis-à-vis state actors. Furthermore, the conception of interactive governance is characterised by less regulation and more cooperation (Oosterlynck *et al*. 2011). Gradually, practice has moved to types of planning characterised by negotiations, consensus building, visioning, public-private partnerships

and horizontal decision-making: stakeholders meet to find pragmatic solutions to complex problems of collective action (Klijn and Koppenjan 2000). This shift should not be perceived as radical or total, but rather as gradual and resulting in a mixed picture in which different styles of spatial planning exist alongside.

The emergence of governance as a steering philosophy is seen by many as a response to fundamentally changing societal circumstances. Different authors, however perceive it critically as the logical result of the increasing neo-liberalism in recent decades (Healey 1997; Jessop 2002; Swyngedouw 2005) of which the dismantling of the post-war welfare state was part and parcel. Characteristic of this process is the importance of private and non-governmental parties in the supply of public goods and common pool goods, previously provided by the state. This shift includes a spreading of power over more and diverse actors, resulting in differentiated polity (Rhodes 1996). This implies a need for bargaining and cooperation in order to provide public and common pool goods. As a result, the public sector has become more dependent on others and is therefore less in a position to unilaterally set rules.

An important driving force behind the emergence of networks of – public and private – actors is what Hajer (2009) calls the loss of territorial synchrony, i.e. the misfit between the scale of territorial government and the scale of societal problems. Classical-modernist modes of governing took place "against the backdrop of historically contingent 'territorial synchrony' of political institutions, cultural adherence, and economic development" (Hajer 2009, 27; see also Gualini 2001; Haughton, Allmendinger, and Oosterlynck 2013). The socio-economic developments of recent decades have led to an increasingly complicated rescaling of social-processes and cultural identities (Brenner 2004). Government institutions, in general, have had difficulty adapting themselves to these new circumstances. As a result, there is an increasing gap between the territorial and scalar characteristics of government on the one side and socio-economic processes and cultural identities on the other, requiring the crossing – literally and metaphorically – of traditional borders of government.

The conditions of late-modernism are a further motive for addressing collective action problems in interactive governance networks (van Tatenhove, Arts, and Leroy 2000). Social-economic processes, such as globalisation and individualisation, have led to a more and more complex and turbulent socio-economic environment. This, in turn, leads to growing uncertainty, which demands more flexible forms of collective action (Brownhill and Carpenter 2009). In addition, a more pluralistic society creates a more diversified demand for goods, such as housing and residential environments, which is increasingly difficult to cater for. Lifestyles are said to be more important in determining one's preference for a living environment than traditional indicators such as household composition, income, and education (Heijs *et al*. 2009), resulting in a more diversified demand for housing and residential environments.

Supporters of interactive governance suggest that it is better at dealing with uncertainty, integrating multiform interests and providing tailored solutions than traditional ways of dealing with collective action problems. Nevertheless, the rise of interactive governance has also brought shortcomings to the fore. Long-term interests are not evidently secured in interactive strategies. Furthermore, interactive strategies are likely to reproduce inequalities of power, which definitively is a risk for sustainable urban development, as many environmental interests can be considered weakly represented (Lefevre 1998). There is the danger that consensus among participating stakeholders becomes the ultimate criterion for success, even if the result can be qualified as 'negotiated non-sense' (de Bruijn and ten Heuvelhof 2008) and often can hardly be

labelled as innovative (Grin, Rotmans, and Schot 2010). The involvement of a multitude of actors also carries the risk of avoiding responsibilities for difficult problems, such as environmental quality, in order to avoid the blame for failure (Stoker 1998). Furthermore, governance can lead to problems with principles of democratic accountability under the rule of law, due to a mismatch between the government structures that traditionally provide legitimacy to the characteristics of interactive governance. Centrally established legal norms may provide clarity about safeguarding weak interests, designating responsibilities and about legitimacy and in doing so, reducing uncertainty for citizens and stakeholders. The governance analysis should appreciate the positive contribution of central norms to governance (Jones 2012).

In analyses from the perspective of interactive governance, the useful function of central norms to protect environmental qualities and to guarantee fair process, is often neglected. Interactive governance is often put to the fore as an alternative for unilateral and top-down government intervention – which often heavily relies on legal regulation – and in so doing provides a way around existing institutional conditions (Folke *et al*. 2005). Contributions that take a governance perspective often consider institutional conditions, such as national and European legislation, as obsolete barriers for new and creative societal problem solving. In doing so, staunch supporters of governance steering seem to ignore that many environmental norms are badly needed. As has been brought to the fore, this article argues that the focus should be more on the mutual interaction of planning and law instead of showing that legislation provides insurmountable obstacles. It asks whether, and – if so – how creativity and a pro-active attitude towards legislation provides opportunities to accommodate the sustainability goals of rules and still reach development objectives.

4. Tension between governance and law

In order to obtain a good understanding of the dynamic interaction between planning and law, it should be well understood where both clash. Conflicts between central legislation and local urban development projects, have been pointed out, in many studies internationally, especially when rules are too detailed and instrumentalist (Tamanaha 2006; Sorel *et al*. 2011; Zonneveld *et al*. 2011),

- rules can become too inclusive (including details of a specific context while local contexts are different) and therefore severely limiting the possibilities for balancing the interests in a concrete instance;
- a myriad of legal rules severely limits the search for creative and innovative solutions;
- rule-based policies have a tendency to lead to compartmentalisation;
- rules may demand a level of certainty that is hard to deliver in practice;
- the existence of a wide variety of specific rules gives many opportunities to hinder the chances of collective action as it provides opponents with the possibilities of using the court for reasons of adversarial tactics;
- rules, particularly those aimed at protecting environmental qualities, in fact do little to improve environmental quality;
- rules move (local) governments in a double role, in which they, on the one hand, act as enforcers of the law – occasionally including the role of granting deviations from the law – and on the other hand are promoters of a particular development;

- in the (informal) preparatory phase of governance processes, detailed legal rules are often largely ignored, leading to problems in later stages of formalisation of plans and their implementation.

Often a tension is felt between fixed and detailed rules and the desire to balance environmental interests against other (including other environmental) interests. Local policy-makers aiming at the integration of development and environmental objectives are often in search of inventive ways for integrated decision-making but feel hampered by regulation that is established within separate policy sectors. Often, also the detailed and directive nature of this regulation (instrumental use of the law) does not enable the tailoring of decision-making in specific contexts. Next, local policy-makers find it difficult to apply and to establish their own regulation while the processes of project development still entail high uncertainties. The search for certainty of protective regulation and the uncertainty of actual development prove difficult to match. Absolute guarantees that certain urban transformations will not lead to environmental deterioration are often hard to give due to scientific uncertainties and the long time span of developments and environmental effects.

The combination of detailed rules and the fundamental legal principle of access to court offer ample opportunities for individual stakeholders to frustrate – often painstakingly achieved – consensus around particular urban development projects. While in many instances (i.e. environmental groups trying to protect a specific species) appealing to the court is based on motives that are in accordance with the purpose of environmental legislation, in many other cases the use of environmental rules is opportunistic and meant to serve other interests. The latter is the case when local residents try to use the Birds Directive to prevent the development of an asylum-seekers' centre in their neighbourhood. From a review of lawsuits concerning the Birds and Habitats directive it is concluded, "that many plans and projects have been delayed, but that most of them, nonetheless, proceeded in the long run" (van Dijk and Beunen 2009, 1807).

In many situations, environmental rules provide restrictions to development but do not in fact contribute to solving the environmental problem in question, for example, when as a consequence of the European air quality directive housing is not permitted in a certain location, the air quality will not improve by this restriction (Koeman 2009). When plans for this housing development would be sustainable (e.g. built according to the cradle to cradle philosophy) then a chance for improving the environment would actually be missed. When confronted with environmental regulation, local governments, on the one hand, often have to implement this and act as enforcers of these rules. On the other hand, they might have an interest in the realisation of an urban development project. This might be, for example, a financial stake as they benefit from land sale or increased tax revenues or because a project fits the political agenda of the actual government. Therefore, it can happen that the local government decides on exemptions for noise regulation in projects in which they are themselves the primary initiators (Dembski 2013).

In practice, detailed "norms are not usually considered until the design process is in its final stage" (Glasbergen 2005, 429). In the first stages, the negotiations between stakeholders determine the process. This is often the informal phase of the governance process (which frequently also takes the longest time in the whole process). Only when stakeholders have reached an overall consensus about the development, the planning process switches to the formal procedures of making a zoning plan and applying environmental regulation (Sorel *et al*. 2011). As a result, the process turns from negotiations and consensus building to the legal arena. All together this often results in

sub-optimal integration of environmental norms and involves the risk of the project being cancelled at a late stage.

5. Contextualisation of legal rules in sustainable urban development governance

The previous section makes clear that the current debate focuses on the incompatibility of law and governance. Therefore, we assume that societal problem solving does not optimally benefit from the innovative potential of legal rules, and this also counts for environmental rules that are aimed at sustainable innovation in urban development. On one hand, this is the result of a tendency within informal approaches of policy-making to turn away from excrescent regulation. On the other hand, central regulation often does not seem to pay much tribute to the highly differentiated characteristics of local contexts. Legal norms, however, are not necessarily opposed to innovative practices of urban development. On the contrary, we consider legal contextualisation as a challenge of mutual enrichment: it should enable *a mutual fit* of legal rules and practices of sustainable urban development. To achieve this fit both the legal side and the informal practices have to meet specific requirements.

Exploring this potential of legal contextualisation, we developed a conceptual framework that sets an agenda and provides the 'search lights' for empirical investigation (see Figure 1). The key components of the framework – the four dimensions – are intended as heuristic devices (Kelle 2010) for this exploration.

First of all, we analytically distinguish the existence of two orders: the order of *aspirations* and the order of *duties* (Fuller 1964). The order of aspirations consists of the intentions of stakeholders and other involved agencies and individuals who take the initiatives for a certain development or transformation in urban regions. These initiators may be governmental or semi-governmental agencies, but also market agencies or civic groups that are operating in the urban scene. These initiators have their own, often completely different aspirations and resources, and they have different routines for organising or negotiating joint action. The initiative for urban development and transformation is usually explorative, informal and very dynamic. The process of bringing together actors with highly different aspirations around a development plan is

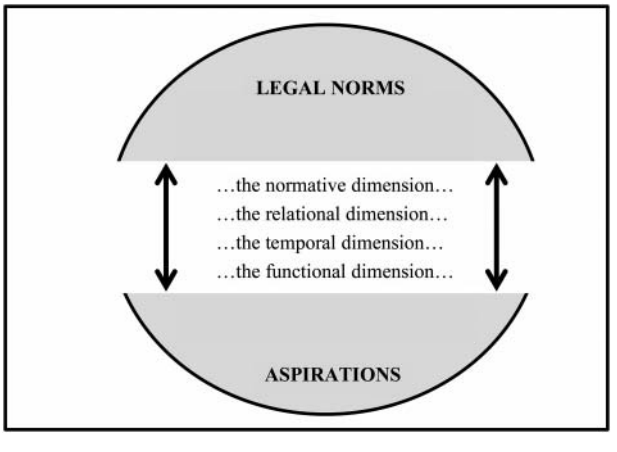

Figure 1. Investigating legal contextualisation.
Source: Salet and de Vries (2013).

often characterised by wheeling and dealing in a more or less informal network of actors. The weight of market forces is significant, but often the local government also has a powerful stake in these networks because of its political prerogatives and considerable resources of action. These local initiatives of urban development are highly situational, but at the same time they are conditioned by a large set of legal norms and policies of national and supranational entities. Here, they meet the second order mentioned above, the legal norms and duties that condition the deliberate activities. Legal norms are the codes of behaviour that social agents and local agencies have to meet while fulfilling their own aspirations. They act upon these legal conditions in very different ways depending on local aspirations and the different circumstances of specific context. Practices of urban development are the interfaces where legal norms and local aspirations meet (Salet forthcoming). Often, also central regulation carries specific aspirations of urban change; then at some point this central regulation will meet both the legal duties and the local sets of political, economic and social aspirations. It is important to note that this analytical distinction (of the different spheres of duties and aspirations) enables us to investigate the dynamic interface between legal norms and purposive practices of development. This perspective does not assume a mechanical implementation of central norms in local policies.

The framework brings together the two different traditions of thought about societal steering. As argued above, synergy between these two traditions is all but evident. It is our conviction that it requires reflective intelligence on both sides to achieve the full potential of a mutual fit. Often it is suggested that central regulation should be more open and flexible to enable local policy considerations that differ from place to place and from time to time. This may indeed bring relief in some cases but in most cases the challenge of achieving synergy between the two orders is far more complicated. Flexibility of legal norms might even create new problems in local contexts, for instance when delegation via 'loose legislation' results in new and almost uncontrolled power at other places within the state, rather than generating discretion for local stakeholders. Vice versa, it may occur that straight regulation of environmental norms does evoke inventive practices in the order of local aspirations, rather than frustration of local initiatives. In other words, the relationships between the two orders are not simple and easy to understand but need careful empirical exploration of different conditions of intervention and of the different states of fit or misfit.

The conceptual framework is a starting point for exploring the potential of legal norms to guide urban development while simultaneously enabling local actors to make optimal use of context specific interests, resources and knowledge. Four key dimensions of the interface between legal norms and local political practices of aspiration (see Figure 1) are constructed to make the dynamic interaction at this interface researchable; they are intended as heuristic devices or sensitising concepts. By using previous knowledge developed within the two steering philosophies, it allows for sensitive analytical exploration of insights at the junction of these two viewpoints. As heuristic devices, they need to be elaborated in empirically grounded categories, which can subsequently be turned into hypotheses (Kelle 2010). The framework tentatively indicates the directions for this elaboration.

5.1. The normative dimension

The first dimension concerns the specific requirements to the establishing of legal norms that enable validation in highly different context bounded arenas of action. The classic but still very actual and complex question here is how general rules can provide

generalised meaning in such a way that it gives normative hold in a variety of (usually at forehand unknown) specific situations. Legal norms cannot be made for any specific problem in any specific context; they need abstraction (Fuller 1964). It requires a great deal of reflection to establish abstract legal norms that still make sense under such seemingly paradoxical requirements of highly different and specified local contexts. In the evolution of legislation and policy-making many inventive ways have been developed to bridge the 'specific' and the 'generic' (Faure and Peeters 2010). International environmental law is a rich source of legal innovation aimed at maintaining the balance between large-scale (e.g. European) norms while respecting lower scaled option spaces of action (within the member states) (van Rijswick and Salet 2012; Sabel and Zeitlin 2010). For example, sustainable development implies the 'non-shift' principle, "which among other things, aims to prevent responsibility for environmental problems from being shifted from one area to another, or shifted to future generations" (Driessen and van Rijswick 2011, 568). This principle means (among others) that urban development projects may not negatively affect the water system resulting in increased risks elsewhere. It clearly sets a norm for urban development, but leaves ample room for the type of interventions in different specific contexts (i.e. arranging the performance of prevention, mitigation or compensation) that prevent negative impacts from happening. This principle, *while being abstract* may have very precise and differentiated normative implications in different local contexts. Other example of an abstract – but nevertheless powerful – legal principle that needs to be charged with concrete meaning in local and regional practices, is the 'pre-caution principle', which forces new projects to explicitly clarify how their proposals are climate proof (van Buuren *et al*. 2013). The challenge is to bridge the generic character of the norm and the specific conditions of time and place bounded contexts (van Rijswick and Salet 2012).

The level of abstraction of legal norms is clearly a variable that influences the extent to which local aspirations can be accommodated. Another variable could be described as the degree of prescription, which refers to the extent to which the level, type and method of environmental improvement are defined (Gunningham and Sinclair 1999). When central norms are too inclusive – i.e. when they include detailed restrictions or prescriptions in the ways how to comply with the goal of the norm they may frustrate alternative local solutions – a misfit of legal norm and local practice is not unlikely. Another relevant characteristic of legal norms with regard to contextualisation is the aspiration level of the norms. Target values often allow for reasoned deviation of the norm and requiring the obligation to monitor and report efforts to reach these target values. In doing so they are able to take local conditions into account. Limit values as minimum standards do not allow for deviation and have to be respected irrespective of local circumstances (van Holten and van Rijswick 2014).

5.2. The relational dimension

A second aspect of understanding contextualisation is that legal norms should be understood in relation to the wide configuration of subject-positions involved in establishing and implementing norms. Legal norms are established, enforced and complied with in different social configurations. The meaning of legal norms may be assessed differently in these settings. The process of establishing legal norms is already subdivided itself. It starts in public debates on whose norms are at stake and it is often arranged in a multi-scalar governance of norm setting. For instance, EU Directives are translated in national legislation and policies and finally arrive in local practices of decision-making. From a point of view of legal contextualisation these are highly

sensitive relationships. For instance, legal norms at European level may have open and generic characteristics while the elaboration of this Directive at the level of the different nation states may become very inclusive (such as happened with the CO_2 Emission Directive, and with the Birds Directive) (Waterhout, Zonneveld, and Louw 2013), causing in this way specific obstacles for compliance at the level of urban development. This makes it important to investigate the different involved tiers of government at which legal norms are established. Turning to enforcement of the norms, the different practices by the courts are an important factor in understanding contextualisation. The courts may establish a different appreciation of the norms than the legislators. For example, 'open' norms in the legislation may be 'closed' by the courts that tend to a stricter interpretation, resulting in their turn into the tendency among local decision-makers to act cautiously ('court-proof') instead of searching for inventive solutions. The land-use plans in the Dutch case studies (with numerous detailed obligations of environmental research) give ample evidence of this type of problem (Dembski 2013). The third aspect of the relational dimension concerns the compliance with norms, where citizens in social interaction validate the practical meaning of legal norms. In summary, the relational dimension of legal norms regards the need to consider the different angles of the establishment and enforcement of norms.

The relational dimensions should also be investigated from the other side (bottom-up and outside-in) starting in the world of aspirations and experiences that require urgent solutions for problems in specific situations. The local configuration of involved actors is driven by a different, problem solving agenda and by the negotiation of different interests and interdependent coalitions of action. It has been suggested (Jones 2012) that existence of 'bracing social capital', which enables a dialogue between local subjects and central authorities, is an important factor in the translation of central norms into local practices. This bares close parallels with the work of Gunningham and Sinclair (1999) on environmental regulation and the business sector, who, using the work of Braithwaite (see Braithwaite 2011), plea for responsive regulation based on a dialogic regulatory culture. Under this model, regulators begin by assuming virtue to which the ruled should respond by offering cooperation, "but when […] expectations are disappointed, regulators respond with progressively punitive and deterrent-oriented strategies until the regulatee conforms" (Braithwaite 2011, 864). 'Really responsive regulation' should take into account the cognitive frameworks of actors that are subject to rules and regulations (Baldwin and Black 2008).

5.3. The temporal dimension

The temporal dimension pays attention to the changeable aspects of legal contextualisation through time, during the processes of decision-making and validation of norms in practices of urban development. Practices of urban development and transformation often start in explorative processes of stakeholders and involved agents with aspiring attention to direct policies in search of a larger support. Also practices of urban planning – characteristically – tend to start with open processes of brainstorm, scenario building and design, the exploration of future visions and knowledge building, the framing and the exchange and sharing of objectives in processes of negotiation. The legal conditions of planning are rarely manifested in the explorative stages of decision-making (Glasbergen 2005). The legal dimension often comes in only in the final stage: as operational vehicles to seal in instrumental way the pathways of action. In the above, we also considered this primary attitude of neglecting the formal dimension in practices of

interactive governance. The normative potential of legal norms is not always adequately reflected in these explorative processes of consensual decision-making, while in the 'stage of implementation' as a repercussion legal sophistry tends to become paramount. Empirical studies frequently demonstrate a temporal disequilibrium of legal norms and policies of aspiration (see van Dijk and Beunen 2009; Schoukens and Cliquet 2014). Being aware of the normative meaning of legal rules (instead of purely instrumental interpretation) may enrich the explorative processes of policy negotiation, and may prevent the instrumental practices of legal hair-splitting in latter stages.

5.4. The functional dimension

The fourth dimension of legal contextualisation considers the tensions that emerge from the different roles that (local) governments take in the production of the built environment. In the post-war welfare state, particularly in continental Western-Europe, local governments assumed a productive role in the provision of goods and services. A case in point is the role of Dutch local government in the provision of housing in general and social housing in particular. Local governments pursue an active land policy of buying land at market prices – backed up by the possibility of using compulsory purchase, through which land can be expropriated – reselling to developers. This enables local governments to recover the costs for provisions such as utilities and infrastructure and allows for value capturing, especially in the case of greenfield development where the land values are raised overnight by changing the zoning plan from agriculture to housing (Buitelaar 2010). Through acting as a public actor applying public law to change the zoning plan and acting as a private actor buying and selling land, a hybrid situation emerges in which the financial stakes are high. These types of supply side policies have dominated in post-war western states until the early 1990s and never completely disappeared. Nevertheless, under the influence of New Public Management (NPM) and ideas about governance (Peters and Pierre 1998) new balances were being explored between market and state regulation. In particularly NPM has a tendency to deny "any political or cultural specificity of the public service and argues that by emulating corporate organisations many problems of the public service—inefficiency, indifference toward the needs of its clients, and so forth—should be ameliorated" (Peters and Pierre 1998, 232). The authors go on to conclude that "more than anything else, the trade-off between legality and legal security on the one hand and efficiency on the other has been a complex issue. What most governments seem to have done is, interestingly, to simply ignore the trade-off" (Peters and Pierre 1998, 236). This situation leads to calls to better include democratic values and legal rationality in shaping public administration (Bryson, Crosby, and Bloomberg 2014). In the current stage of liberalisation, one may still find reminiscent 'state provision' but also increasingly upcoming 'conditioning roles', 'facilitating' roles and 'mediating' roles for governmental agencies. The concentration of various public-sector functions on one hand urges to guard the transparency and deliberate architecture of normative governance. The normative consideration of different roles that governmental agencies may take is therefore a very topical issue in processes of legal contextualisation.

6. Concluding remarks

The solution of many environmental problems requires some sort of multi-level approach. National and supra-national level regulation is often a pre-condition, or at least an

important incentive, for sustainable development. Effectuation of sustainability in the built environment is regularly a matter of local or regional action. In the process, two steering philosophies – governance and law – collide and a variety of tensions emerge. By providing a heuristic framework, research directions are given to overcome these tensions and to contribute to successful contextualisation of environmental law in urban development projects.

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