Summary

Towards a ‘practical legal order’. Contributions from the social sciences

In the space of a few years, the term ‘a practical legal system’ has taken on a life of its own. As often as not, this term is used to refer to the Ministry of Justice’s programme entitled ‘a practical legal system’, the aim of which is to reduce the burden from regulations arising from detailed legislation for citizens, companies and institutions. However, when the concept of ‘a practical legal system’ was introduced in the 2003 policy agenda, its meaning was not limited to the context of deregulation. At that time ‘a practical legal system’ referred to rules that were practical for those involved in terms of protecting their interests and achieving their goals.

At the same time as the introduction of the concept of ‘a practical legal system’, the Ministry of Justice established that it was becoming increasingly difficult for the government to realise its policy aims. The increasing emancipation of the individual and the associated diminishing importance of community were identified as the causes. One of the consequences of both developments is an increase in the number of appeals to the courts and tribunals to settle disputes, either as a result of an increase in the number of conflicts, or as a result of the juridification of existing types of conflicts.

For the time being, the government is responding to the growing demand for the dispensation of justice in four ways: by increasing the capacity of the courts and tribunals ; by attempting to achieve a higher degree of efficiency by means of a more flexible use of personnel and by simplifying procedures; by decreasing the number of potential problems by means of reducing the number of conflict-inducing elements in legislation; and by introducing measures that influence the decision of whether to take legal action. The latter include court fees: a new regulation with regard to apportioning the cost of legal proceedings and the provision of alternative procedures for settling disputes.

This cahier focuses on a fifth option suggested in the 2005 policy agenda: the promotion of both the role that prosocial standards play in terms of people’s behaviour and the extent to which individuals participate in society. It was assumed that this could help to strengthen the mutual ties between members of society and that this, in turn, would reduce the risk of appeals to the courts and tribunals in the event of disputes.

A concept of the role of standards, participation and social ties was then developed on the basis of three social-scientific theories. This primarily concerned Griffiths’ ‘theory of litigation’ (1983). This theory constitutes a general and abstract process description of the behaviour of parties to disputes in the broadest sense of the word. In this context, Griffiths concentrates on the layered structure of communities or semi-autonomous social arenas (family, neighbourhood, school, company, municipality, club etc.) that make up a

society and within which (informal) enforcement of norms plays an important role.

In doing so, Griffiths (1983) distinguishes between a number of successive stages that disputes may go through. These stages can be regarded as situations in which the parties are faced with a decision between courses of action in a potential legal conflict. In the first instance, this is the decision that precedes the actual dispute: the decision to avert conflict, for instance by means of avoiding interacting in a certain way with certain individuals. In the second instance, the decision, once conflict has arisen, to either enter into confrontation or to yield. In the third instance, if confrontation has been entered into, the decision of whether to actively seek a consensus and whether or not to agree to the results of this. In the fourth instance, the decision of whether or not to seek help or advice from advisers or lawyers etc. in the dispute. In the fifth instance, the decision of whether to institute legal proceedings. In the sixth and final instance, the decision of whether or not to seek to reach a consensus during these legal proceedings.

The significance of this in respect of 'a practical legal system' is that the act of going to court is a step in the development of a conflict that is preceded by a number of other steps. If the demand made on the courts increases, this may mean that there has been a change in the way that conflicts develop before reaching the courts. This may have a bearing on the communities in which individuals participate, or on the manner in which and the extent to which they are connected to one another. If the higher level of participation in society consists of forging a greater number of simplex relationships, relationships that fulfil a single function and that are often business relationships, allowance will have to be made for an increase, rather than a decrease, in the number of appeals to the courts and tribunals.

The second theory used in this cahier follows on from this. It concerns Putnam's 'social capital' approach (2000), which focuses on the ties between individuals. Social capital refers to social networks and the associated standards of reciprocity and trust. In this context, Putnam considers both the instrumental use by the individual of his or her network and the effects of the network on the behaviour of that individual. He emphasises in this respect that social capital is 'good' for those who find themselves inside the network within which the standards of trust and reciprocity apply, however that the effects do not always favour those outside of the network. This is not solely due to the fact that networks by definition exclude people. Like any form of capital, social capital may be used in order to achieve social, antisocial or immoral goals.

Putnam (2000) speaks of two types of social capital from the perspective of the individual: bonding and bridging. The bonding variant is exclusive, orientated towards solidarity within an individual homogenous group (for instance an organisation based on ethnicity) and in an instrumental sense specifically suited to supporting the individual within his or her own community. However at the same time, bonding social capital restricts the individual in terms of his or her development. It discourages people from forging social relationships with individuals who do not form part of their individual homogenous group. The remaining members of the homogenous group see the forging of such relationships as a threat to the survival of the group and the standards that apply within the group. In contrast to the bonding variant of social capital, there is the bridging variant. Bridging social capital consists of ties between

social networks: individuals who maintain relationships with members of different networks and who, in doing so, facilitate an exchange between both networks.

The significance of the distinction that Putnam makes between bonding and bridging social capital lies, in terms of 'a practical legal system' and striving to reduce the demand on courts and tribunals, in emphasising the ties between different social networks. The frequency with which individuals approach the courts with regard to settling disputes not only depends on the nature and intensity of the relationships that they have with each other, but also on the extent to which and the manner in which the networks that they form are also linked together. It may be assumed in this respect that the frequency with which appeals are made to the courts and tribunals is in inverse proportion to the frequency and strength of these ties. The closer the links between the two parties in the conflict, the greater the chance of success through mediation. This is not simply because it is easier to find a mediator who will be accepted by both parties to the dispute if he or she forms part of both networks, but also because both parties have a shared interest in preventing the conflict from escalating.

At the same time, this would appear to be an optimal situation. If the networks are so closely linked that they form a close-knit group or a network with a high level of bonding social capital, the honour at risk as a result of the conflict and the response to this conflict, as well as the individual's standing within the group, may cause the conflict to escalate. This may lead individuals to take an independent course of action (honour killings or blood feuds), however it may also lead them to approach the courts.

The third theory used in this regard is Ellickson's 'theory of norms' (1991). This theory focuses on the role played by standards in explaining a certain type of behaviour: the extent to which most people are generally prepared to cooperate with others, whilst these people are, at the same time, selfish individuals seeking to protect their own interests. According to Ellickson (1991), this combination of prosocial behaviour and selfishness is facilitated by a system of social control that works with the assistance of normative rules regarding appropriate behaviour in accordance with the circumstances, rules which are supported by sanctions. In this context, Ellickson (1991) makes a distinction between two types of sanctions, five types of parties that both prescribe regulations and impose sanctions (regulators) and five types of regulations largely relating to enforcement.

Ellickson (1991) emphasises the importance of enforcement in setting standards. Enforcement has three functions: to remove any doubt as to whether or not the standard is actually active; to make behaviour that does not conform to the standard unattractive for the individual by means of potential punishment; and to punish those who contravene these standards so that those who are motivated to comply with the standards do not lose this motivation or gain the impression that they are selling themselves short by imposing restrictions on their behaviour for the benefit of a public interest that is only served by a few.

Weak enforcement and failure to adhere to standards may cause a reduction in the extent to which the individual expects and relies on the government to generally enforce the standards. If a person's trust in the government diminishes, it becomes more likely that this individual will expect the extent

to which others allow their behaviour to be governed by standards to decrease, as the chance that they will be punished if they contravene these standards has become low(er). This means that a reduction in the level of trust that people place in the government leads to a reduction in the level of trust that they place in each other and therefore a decrease in social ties.

In applying government enforcement, it must be considered that this may have a negative influence on the extent to which individuals believe that they themselves or others must conform to standards. This is a distinct possibility for example in those situations in which the individual is inherently motivated to conform to certain standards, however where intervention on the part of the government leads the individual to perceive the situation differently, which changes his or her frame. In other words, an individual who imposes his own standards may, as a result of a sanctioned policy intervention, feel that he is no longer faced with a decision that he should make on the basis of his personal ethics. Instead, he may believe that he is faced with a decision where he himself is not a regulator, but rather where a third party has claimed this responsibility. On the basis of this, he may believe that his consideration of the different behavioural alternatives must be based primarily on the opportunities for profit and the risks in respect of punishment associated with the various behavioural alternatives.

This type of counterproductive effect of government enforcement is not only a risk in terms of punishment, but also in terms of reward. An individual who, on the basis of his personal ethics or his cultural frame and with a view to the policy aims, has displayed desirable behaviour, may be made aware of the fact that there are other options in respect of the types of behaviour that he can choose from. This can be the result of a general policy intervention that rewards behaviour and is largely focused on achieving a higher level of compliance with the standards on the part of those who were previously not doing so to a satisfactory extent. Furthermore, this is a decision between options in which his sense of self-interest is deemed to play a role: after all, it is this sense of self-interest that has been chosen to incite him to continue to comply with the standards. It then becomes a question of whether the reward is sufficient in this respect. If the individual believes that now that this behaviour is being rewarded, he actually deserves a greater reward for his compliance than he is currently being apportioned, the effect of the policy intervention may be a lesser degree of compliance than that was demonstrated prior to the policy intervention.

The use by the government of both punishments and rewards in order to generate a higher level of compliance may therefore affect the willingness of the individual to allow him or herself to be governed implicitly or explicitly in his or her behaviour by non-egocentric self-restraining standards and to take the interests of others into account. The actions of the government may in turn lead these others to believe that their decision as to whether to sanction the aforementioned individual, if this person is no longer observing the standards, should also be driven by self-interest and that it is not they, but rather the government who is responsible for enforcing the standards. The extent to which the government then enforces the standards therefore determines whether the parties to which these standards apply will display the behaviour envisaged to a sufficient extent.

The debate with regard to the various theories has resulted in three comments and three policy perspectives. The comments concern the motivating elements of legislation that are intended to incite the parties to which the standards apply to comply with these standards, the consequences of inadequate enforcement and the consequences of a greater level of participation in society. The policy perspectives relate to strengthening control and increasing the opportunities to participate in networks in which standards exist whose effects contribute towards achieving policy aims; extending the scope of the networks in which these standards exist; and the introduction of standards within networks that support the realisation of policy aims.
In this context, any policy interventions must be carefully selected so that they do not damage, but rather strengthen, the existing social fabric of standards and informal enforcement, in so far as this supports the realisation of the policy aims. The direct and indirect effects of existing policy interventions on the behaviour of parties to which the standards apply and on the standard communities within which the standards, that are, in terms of their operation, intentionally or unintentionally supported or hindered by the policy intervention, exist must therefore be verified.