

# VU Research Portal

## Zelfstandigheid in gebondenheid

van Haaren-Dresens, C.B.M.

2018

### **document version**

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

### **citation for published version (APA)**

van Haaren-Dresens, C. B. M. (2018). *Zelfstandigheid in gebondenheid: Een onderzoek naar de vraag hoe de interbestuurlijke verhoudingen en het gerevitaliseerde interbestuurlijk toezicht zich verhouden tot de constitutionele positie van decentrale overheden*. [, Vrije Universiteit Amsterdam]. Wolf Legal Publishers (WLP).

### **General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

### **Take down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

### **E-mail address:**

[vuresearchportal.ub@vu.nl](mailto:vuresearchportal.ub@vu.nl)

## Summary

In this thesis the constitutional position of provinces and municipalities in the Dutch decentralised unitary state is researched and analysed, the main questions being what their stance in the structure of public government is and should be as well as how their relations to the national level are and should be, seen in view of the European Charter of Local Self-Government.

The Netherlands, the European part of the Kingdom of the Netherlands, is a decentralised unitary state. Besides the bicameral Parliament, the Government and the individual Ministers, which all belong to the public authority at national level, there are other public authorities with their own competences and constituencies. These other public authorities are either in charge for a specific territory or for a specific function (e.g. water boards). The entities with a general authority to govern their own territories are the provinces and the municipalities. In Dutch constitutional law, the State, the Province and the Municipality are considered public legal entities or bodies; they act through their organs. The representative at provincial level is the Provincial Council whereas at local level the Municipal Council is the representative authority. The executive organs for the province are the Board of the King's Commissioner and Provincial Aldermen and the King's Commissioner. For the municipality the Board of Mayor and Aldermen and the Mayor have executive powers. The national public authority is the State, its representative organ being Parliament and the executive powers being conferred to the Government (also referred to as the Crown). The national Parliament consists of two chambers, the Chamber of directly elected representatives (called Second Chamber), and the indirectly elected Senate (called First Chamber). Although strictly speaking not correct as there is no constitutional hierarchy amongst the authorities at the three levels, the provinces and the municipalities are often still referred to as lower bodies with respect to the national state being the higher body. One could better define this as municipalities being the first tier, provinces the second tier and the state the third tier of Dutch public government. The main reason for the allocation of powers to authorities at three levels of government is the vertical distribution of public responsibilities in order to avoid concentration of power on a single level and/or with few public authorities. Within a decentralised unitarian state, the principle of decentralisation and that of unity are competing as the decentralized authorities must be able to exercise their own competencies whilst the unity of the state can only be guaranteed if there are mechanisms that can assure that the three levels of government are on the same playing field when national interests are concerned. Therefore in a unitarian state, provisions for administrative supervision are necessary. In this thesis, background and developments in the supervision system are described and commented.

In Dutch law, the Constitution, the Municipality Act and the Province Act include the most important legal provisions regarding tasks and competences of municipal and provincial authorities. But the Netherlands is also obliged by the European

Charter of Local Self-Government, a treaty concluded within the framework of the Council of Europe in Strasbourg. The Charter has come into effect for the Netherlands on 1 July 1991. It should be noted that the Dutch government has made some declarations and has voiced reservations regarding articles 7.2, 8.2, 9.5 and 11. For this book the reservations concerning article 8 paragraph 2 and article 11 are relevant. The first one is meant to safeguard the possibility of inter-administrative supervision for expediency reasons; this supervision is thought necessary to annul decisions that could harm the so called general interest. This kind of supervision can seriously threaten the autonomy of a municipality or a province. Although in practice, annulment for expediency reasons is not often applied, it would be more in line with the principles of the Charter to abolish the possibility of supervision for expediency reasons altogether. Unfortunately, the Government holds the opinion that the interest of the unity of the state may set aside the principle of decentralisation here. The reservation concerning article 11 was thought necessary as in 1991 there was no general recourse to the judiciary for decentral authorities. Nowadays, in nearly all situations where a decentral public authority has a legal interest, it also has a right of recourse under the General Administrative Law Act. Although Dutch law nowadays gives provinces and municipalities the right to appeal to a judge when a decision concerns their interests, neither declarations nor reservations have been withdrawn by the Netherlands until now.

According to Dutch constitutional law, the provisions of a concluded treaty are part of the legal order. For the applicability of treaties the system of monism is followed which means that the treaty is adopted in national law and its provisions as such are legally binding. Consequently, the treaty has internal effect without transformation in national legislation being required. This system is not laid down in written law but has been accepted in jurisprudence. All treaty provisions are part of the Dutch legal order but not all provisions have the same legal effects. Dutch Constitution declares that provisions that are binding for everyone i.e. that are self-executing, must be published before they will be binding. After publication they have direct effect without any interference of the legislature being required. Public authorities, either legislature, executive or judiciary, have to apply them and citizens can invoke them before a judge. Ultimately it is the judge who decides in an actual case whether a provision has direct effect or not. He can base his judgment on the text, the nature, the tenor and/or the history of the clause; also the treaty concluding parties' intentions can be taken into consideration although these intentions are not decisive. I have made an analyses of all Dutch jurisprudence in which the Charter has been invoked. In all cases, the judgments declare the relevant provisions of the Charter not to be self-executing and therefore not eligible for invocation. From my perspective these judgments show too much restraint as various provisions in the Charter do not need any further implementation in order to be clear enough to be applied by judges. When entering into the Charter, the Dutch government has declared Dutch constitutional law to be in accordance with the Charter, except for the provisions for which reservations have been made. Therefore Dutch law is thought not to need adaptation in order to implement the Charter. Against this background it is quite strange that the provisions in the latter are being considered not to be applicable. Notwithstanding this point of view, I would like to raise the question whether the

right of appeal for public authorities in article 11 of the Charter is appropriate. In the national legal system, recourse to a judge is meant to ensure the proper application of subjective rights. Public authorities do not hold subjective rights but have to ensure the public interest. When, in doing so, differences of opinions with other public authorities occur, the path to be taken is that of an administrative procedure in which a higher ranking public authority decides upon the conflict instead of recourse to a judge. In this respect, it could be worthwhile to examine whether the provision for conflicts in article 136 of the Constitution could be revitalised and/or extended.

Decentral government has its own chapter in the Dutch Constitution since 1983 and is regulated in two organic laws, the Municipality Act and the Province Act that came into force on January 1, 1994. According to Dutch law, municipalities can initiate regulation and management of their own affairs, called their 'household'. Especially municipalities have been established long before the state was born and therefore they are considered not to take their competence from attribution or delegation by the Constitution or the legislature but to be entitled to self-government in their own right. This is the foundation for the competence that is called autonomy of decentral authorities in the Netherlands. The autonomous competence allows them to initiate regulation and management of all affairs that concern their own 'household'. But regulation and management can, in accordance with the Constitution, also be required from local authorities by legislation of public body at national and – in case of a municipality – provincial level. The level of policy freedom in case of required co-government – in Dutch 'medebewind' – may vary from almost none in the case of mechanical application of national law to almost full freedom of policy. Theoretically, 'medebewind' is of a different nature than the autonomous competency. However, the right to self-government as guaranteed in the European Charter, concerns both Dutch autonomous competency as the required one that leaves freedom for decentral policy. The 'household'-doctrine has been introduced by statesman Johan Rudolph Thorbecke. He is thought to have known the ideas of Alexis de Tocqueville on the advantages of the allocation of public power to local communities. The book goes into the ideas of Tocqueville on decentralisation that are inspired by what he has experienced during his travels in the United States of America. In Thorbecke's days, in the midst of the 19th century, the 'household' had a clear meaning, as the state, the provinces and the municipalities were thought to have their own natural spheres of competence. The nature of a matter determined the competence area to which it belonged and public authorities were considered to only move within this field. However, Thorbecke has also acknowledged that the system should be dynamic and if necessary should be adjusted to developments in later times. As the public responsibilities have increased over the years, it has become harder and harder to assign a responsibility to a specific sphere. Often more than one circle has become involved in a matter and responsibilities have developed in time. As a consequence, the concept of three spheres has been substituted by the principle that a duty should be fulfilled by the authority that can do so most appropriately. In the European Union and in the European Charter, the ideas of subsidiarity, as I point out in this book, have been brought forward by the Roman Catholic social doctrine, also have influenced the allocation of public powers. Authorities that are as close as possible to the

citizens should be entrusted with public powers as they are familiar with local needs and alternatives and thus can serve the citizens in the best way. Nowadays, this principle is also a tenet in Dutch law. This means that in recent years, responsibilities of the national government and legislature are being decentralised on a large scale to municipalities and provinces by invoking them in 'medebewind'. The state also has taken over rather many responsibilities from local authorities and has, after the taking over, often transferred the formerly autonomous competencies to the decentral authorities again by legislation requiring local or provincial 'medebewind'. Recently, there has been a huge decentralisation operation in the field of social-medical and youth care. Many tasks that were formerly assigned to central government are now required from local government. But the State does not always transfer the necessary financial means which causes problems for the decentral authorities. Their scale can also cause problems regarding governability. Therefore co-operation, especially between small municipalities, is necessary. Central government considers amalgamation of smaller communities to be a solution for these problems but in my opinion amalgamations should be initiated by decentral authorities themselves and should be supported by the local communities. Otherwise, the principle of subsidiarity could be considered undermined.

In Dutch constitutional doctrine there is no formal hierarchy between parliamentary laws but the Province Act and the Municipality Act are considered general acts. This means that they contain provisions stating that specific laws which require regulation and management from provinces or municipalities ('medebewind') or which alter their competences, must be in correspondence with the respective general act, except in case a difference is required by a special public interest. These status provisions are meant to give the Province Act and the Municipality Act a special significance in relation to other laws. According to these status provisions, specific acts must, whenever possible, follow the system for the allocation of responsibilities to the different organs that is laid down in the general acts: the primate for legislative and executive responsibilities lies with the councils, daily management with the boards. However the legislator of today cannot bind the legislator of tomorrow and if a specific act does not respect the general act, nothing can be done as there is no (constitutional) court that can annul legislation made by the national legislator that does not respect a previous law of the same legislature.

Notwithstanding the fact that there is, as said already, no general hierarchy between the three tiers of government in the Dutch constitutional law, for administrative control the national government certainly is the higher ranking authority. Government supervises the decisions of authorities of the lower level and this can have substantial impact on local and regional authorities. As previously indicated, that supervision is seen as a means to equalise the principles of unity (the sovereign state) and decentralisation (the decentralised state). The ex ante approval of decentral decisions has seriously been diminished in the last decades but decisions based on autonomous and 'medebewind' competencies can still be annulled, both on the grounds of unlawfulness or for expediency reasons. Administrative annulment is an instrument for general supervision, as are the provisions for situations in which local authorities neglect their duties. Over the years, the system of inter adminis-

trative supervision in the Netherlands had become very unclear as specific laws on different policy fields introduced various forms of supervision ranging from e.g. the simple announcement of a decision, binding indications given by the higher level authority and other instruments of positive or steering control. In order to clean up the opaque forest, many provisions for specific supervision have been abolished and the general forms of supervision have been revitalised recently. Now there are two general forms of supervision, i.e. the ex post annulment of a decision or a regulation of a decentral authority by central government, and the provisions for neglect. According to the latter, if a local authority neglects its duties, a higher ranking authority can take over these responsibilities. If the negligence concerns the autonomy of a decentral authority a special act has to be made to appoint a commissioner who can govern temporarily; since the 1950's when communists in charge in some municipalities in the north of the country did not govern the municipalities according to the law, this possibility has not been applied any more. These various provisions for neglect of public duties nowadays comprise the only difference in legal effect between autonomous and required competencies. As also pointed out above, decisions or regulations can be suspended and can be annulled by the higher level authority if they are in violence with the law or with the general (public) interest. The latter criterion allows central government to influence the policy of decentral authorities to a large extent although in jurisprudence it has been decided that the supervising authority must weigh all relevant aspects: the general interest of the central authority may be opposite to another general interest of a decentral authority. In these circumstances both general interests have to be weighed and courts can examine, although marginally, whether this has been done in a proper way. This book contains an analysis of the jurisprudence concerning all inter administrative annulments on expediency grounds since 1980. It also provides an overview of instruments, sorts and objectives of supervision and of ideas and suggestions of many advisory committees on supervision. The choices made by the legislature are commented and the provisions in Dutch law are confronted with the provisions in the European Charter of Local Self-Government.

The principles of the decentralised unitarian state in my opinion must lead to the allocation of public powers to authorities that are as close to the local community as possible. This is necessary to serve the citizens best and to create as much involvement of society members as possible, thus assuring a true and lasting democracy. But special attention should be paid to the constitutional right to equality of citizens. In situations when citizen's basic needs are at stake, the right to equality should prevail over the principle of government close to the citizen in my opinion. In a decentralised state, national government should try to hold back in the execution of its supervision competencies and must only act if consultations have no results and intervention is strictly necessary. Simultaneously the complexity of society requires all tiers of public authorities to take responsibility in mutual co-operation and efforts whenever needed for society to be governed properly. Since there are no other legal effects of the difference between autonomous and required competencies than in case of neglect of public duties, the difference should be abolished altogether and be replaced by the concept of shared responsibilities. In cases of authorities not adhering, an ad hoc law should regulate the measures necessary in the occurring situa-

tion. Thus the Dutch constitutional system would be more in line with the European Charter and both central and decentral authorities will, whilst allocating competencies at the most decentral level as decentral authorities are the foundation of true democracy, be able to do justice to their mutually bonded responsibilities.