# THE NETHERLANDS / PAYS-BAS

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*European Integration and Subnational Governments*

HESSEL, B. (ed.), *In de Europese Houdgreep? Over de (on)wenselijkheid van zwaarder ministerieel toezicht op de decentrale overheden (In Europe's grip: how desirable is stricter ministerial supervision of subnational governments?)*, Deventer 2003

BROEKSTEEG, J.L.W., et al, *De Nederlandse Grondwet en de Europese Unie (The Dutch Constitution and the European Union)*, Deventer 2003

BESSELINK, L.F.M., et al, *De Nederlandse Grondwet en de Europese Unie*, Groningen 2002

IN 2002, an interesting study on the influence of the European Union on the Dutch Constitution was published, which addressed the question of whether it was necessary to amend the Constitution of the Netherlands as a result of its membership of the European Union. In 2003, under the auspices of the *Staatsrechtkring* – the Dutch Association of Constitutional law – a commentary on this book was published with a similar title, with contributions from several 'young constitutionalists'[1]. It is clearly outside the scope of this book review to give here a full account of all aspects of the debate about whether and how the Dutch Constitution should be amended. Instead, I will focus on one important issue discussed by BROEKSTEEG in this book, namely, whether there should be any amendment to the Constitution in order to clarify the position of the Dutch provinces and municipalities vis-à-vis European law. This question is part of a

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[1] As the Preface of the book describes them.

wider debate currently taking place in the Netherlands on the question of whether there should be stricter ministerial supervision of these subnational governments as a result of EU membership, discussed by HESSEL in his book.

As is well known, the relationship between the subnational governments within the European Union and European law is a complicated and paradoxical one. On the one hand, it follows from the *Fratelli Costanzo* case that the principle of Union loyalty as articulated in Article 10 EC also applies to subnational entities[2]. In this case, the failure of the Italian government to transpose a Directive did not exclude subnational authorities from applying directly effective Community provisions. The applicability of this principle to provinces and municipalities implies that they have to comply with the positive and negative obligations of primary and secondary Union law. In doing so, they must sometimes even disregard national legislation.

On the other hand, the national authorities are the ones which will be held responsible in infraction procedures under Article 226 EC[3] for breaches by 'their' subnational authorities[4]. Even the fact that the Constitutions of EU Member States sometimes grant certain regions autonomy from central government does not excuse the government (the state) from being liable for these regions[5]. This is important in the Netherlands as well, where Article 124(1) of the Dutch Constitution provides that "the powers of provinces and municipalities to regulate and administer their own internal affairs shall be delegated to their administrative organs". These powers are thus exercised autonomously from central government. Other powers are exercised 'in cooperation with' central government; as the second paragraph of Article 124 states, "provincial and municipal administrative organs may be required by or pursuant to Act of Parliament to provide regulation and administration."

This distinction between autonomy and – what could be described as – co-governance *(medebewind)* is important when it comes to ministerial supervision of subnational authorities if they do not comply with Union/ Community obligations. Article 132(5) of the Constitution allows the central government to intervene when powers are exercised under co-

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[2] Case 103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR 1839. See also Case C-431/92, *Commission v. Germany* [1995], ECR I-2189.

[3] Article III- 265 of (the most recent version of) the Treaty establishing a Constitution for Europe (CIG 86/04, 25 June 2004).

[4] See *e.g.* Case 199/85, *Commission v. Italy* [1987] ECR 1039.

[5] Case 77/69, *Commission v. Belgium* [1970] ECR 237.

governance, but when powers are exercised autonomously, intervention is only possible "in cases of gross neglect of duty". Instances of such intervention have, of course, been extremely rare.

In a way, this problematic relationship between subnational entities and European law is not new, and results from the "orthodox positivist doctrine … that only states are subjects of international law"[6]; only they have legal personality, not their component units. There have, however, been some important exceptions to this doctrine, especially in federal states. Article 56 of the Constitution of Switzerland, for instance, allows cantons to conclude treaties with foreign states, hence to have legal personality. And although the United States Constitution expressly stipulates that "No State shall enter into any Treaty"[7], certain states have concluded compacts with foreign states and foreign subnational authorities, *e.g.* on international highways and bridges. In their study, BESSELINK *et al* propose changing the Dutch Constitution to provide a legal basis for cross-border cooperation between municipalities, as is currently already occurring under the 1986 Benelux agreement on cross-border cooperation and the 1991 Anholt Treaty between Germany and The Netherlands[8].

The more difficult questions, however, seem to be how to resolve the problem of what to do when a Member State is held liable for a breach of Union/Community obligations by one of its subnational authorities and how central government can effectively supervise this. An interesting solution was proposed in 1998 by Gil Ibáñez, who suggested the introduction of a "decentralization of liability", by which he means that

> "Member States [sh]ould be, in principle, responsible for resolving all breaches of Community law which have occurred on their territory. However, if the violation continues after a reasonable period of time, and the Commission considers resolution of the problem to be important for the uniform application of Community law, the Commission could act directly against the local or regional authority responsible for the violation, provided the Member State concerned agrees (or specifically asks for its intervention)."[9]

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[6] H. LAUTERPACHT, *International Law, Collected Papers*, Cambridge, 1975, Vol II, p. 489.

[7] Article I, Section 10, Clause 1.

[8] Hence currently without a constitutional basis for such cross-border cooperation.

[9] A.J. GIL IBÁÑEZ, A Deeper Insight into Article 169, *Jean Monnet Working paper* 11/98, at 57 (accessible at www.jeanmonnetprogram.org/papers/98/98-

One of the advantages of this proposal is that it respects the vertical division of powers within Member States; one of the main disadvantages however is that this 'European' solution "would require the amendment of Articles 169 and 171 EC"[10]. Although the problem outlined above was indeed raised during the European Convention[11], no amendments – at least none which are meant to solve this particular issue – were made to these provisions. Since amending the European Constitution thus seems unrealisable at this point in time, the question – which then emerges, of course, is whether it would be necessary to amend the Constitution of The Netherlands instead.

BESSELINK *et al* argue that when a 'manifest and serious breach'[12] of Union/Community obligations by a subnational entity would be regarded as a 'gross neglect of duty' in the sense of Article 132(5) of the Dutch Constitution, the current constitutional regime suffices, as it would allow ministerial intervention even when autonomous powers of subnational authorities are concerned. BESSELINK *et al* do not imply that all breaches should be classified as a gross neglect of duty, but propose a somewhat similar construction as used in British case law in the event of 'misfeasance in public office', which requires 'bad faith' by the authority concerned[13].

BROEKSTEEG submits that this would be far too wide an interpretation of Article 132(5). He argues that this Constitutional provision, according to its legislative history, only allows the central government to intervene in the exercise of autonomous powers by subnational governments when they neglect fundamental constitutional principles. He also argues that the solution proposed by BESSELINK *et al* does not really solve the problem – what if breaches of Union/Community obligations are not considered to be 'manifest and serious'? BROEKSTEEG proposes instead to change the Dutch Constitution so that all Union/Community obligations would be regarded as forms of co-governance. This would allow central government to intervene even when there is no 'gross neglect of duty'.

An alternative solution BROEKSTEEG discusses is to introduce a mechanism similar to that described in the Belgian Constitution, which allows

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[10] *Ibid.* Now Articles 226 and 228 EC.

[11] See *e.g.* Conv 518/03, at 9. Also see: Conv. 548/03, at 11 (accessible at http://european-convention.eu.int/)

[12] The terminology is borrowed from *Dillenkorfer* (Joined cases C-178, 179 and 188/94, [1996] ECR 4845) and subsequent case law.

[13] *Three Rivers District Council* v. *Bank of England*, [2000] 2 *Weekly Law Reports*, pp. 1220-1276.

the federal government temporarily to substitute the subnational authorities "*[a]fin de garantir le respect des obligations internationales ou supranationales*"[14]. The federal government subsequently has the right of recourse against the subnational authorities when the state is held liable[15]. The Dutch government already has such a right when the state is held liable for wrongful or inefficient spending of EC Subsidies by provincial and municipal governments[16]. BROEKSTEEG proposes to introduce in the Constitution a *general* right to have recourse against subnational governments. Similar to the Belgian construction this should only be possible, however, when the Court of Justice has held the state liable under Article 226 EC. Otherwise, it would be too easy for central government to interfere in the autonomy of its subnational entities. Although, according to BROEKSTEEG, this would not necessarily require amending the Dutch Constitution, it would be recommendable, as it would significantly change the financial relationship between the central and subnational levels.

A completely different solution to this problem could also be thought of. For instance, would a more British – soft law – approach not be more suitable? In the United Kingdom the relationship, as regards European Union issues, between central government and Scotland, Wales and Northern Ireland, has been cast in a non-statutory agreement or concordat. When financial penalties are imposed on the UK due to a failure of implementation or enforcement by a devolved administration on a matter falling within its responsibility, or any damages or costs arising as a result, the responsibility for paying these penalties will, according to this concordat,

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[14] Article 169. A similar construction can be found in Article 117(5) of the Italian Constitution, which states that "[t]he regions and autonomous provinces … provide for the implementation and execution of international obligations and of the acts of the European Union in observance of procedures set by state law. State law establishes procedures for the state to act in substitution of the regions whenever those should fail to fulfil their responsibilities in this respect." And see Article 23d (5) of the Austrian Constitution, which provides: "*Die Länder sind verpflichtet, Maßnahmen zu treffen, die in ihrem selbständigen Wirkungsbereich zur Durchführung von Rechtsakten im Rahmen der europäischen Integration erforderlich werden; kommt ein Land dieser Verpflichtung nicht rechtzeitig nach und wird dies von einem Gericht im Rahmen der Europäischen Union gegenüber Österreich festgestellt, so geht die Zuständigkeit zu solchen Maßnahmen, insbesondere zur Erlassung der notwendigen Gesetze, auf den Bund über*."

[15] Article 16 (3), Special Law on Institutional Reform (*Bijzondere wet tot hervorming der instellingen*).

[16] Article 4, Law on the Supervision of European Subsidies (*Wet Toezicht Europese Subsidies*).

be borne by the subnational government(s) responsible for the failure[17]. This approach – *i.e*. using a concordat – has, according to Craig, the "obvious advantages of soft law, in terms of flexibility, responsiveness to change and the like."[18]

HESSEL indeed stresses that a 'solely legal solution' would have its disadvantages. An administrative way to resolve this issue should exist next to a legal one, but could never be substitutive thereto. HESSEL signals several developments within the European Union which have led to wider ministerial responsibility for the actions of subnational governments. National governments are, for instance, increasingly obliged to provide the Commission with information – for example on the transformation of environmental directives – or to require the Commission's approval – for example on state aid. Against the background of the problem outlined above, this widening of ministerial responsibility, according to HESSEL, calls for stricter supervisory instruments, which should allow central government to intervene even when the autonomous powers of subnational governments are concerned.

Such a (legal) regime should not be used too quickly, but should serve as *ultimum remedium*, hence it should only be used when an administrative resolution fails, for example when a municipal government refuses to remedy its violation of Union/Community obligations. The Belgian constitutional regime outlined above, for instance, has actually never been used, but has had a significant influence as a 'big stick which could be wielded' to solve problems in administrative ways. A regime of stricter ministerial supervision would have an important symbolic function. According to HESSEL, it will have a 'warning effect' on subnational governments that they should be serious about complying with Union/Community obligations. Furthermore, such a regime will also have a legitimising effect on subnational governments which demand that they should have more say in the national implementation of Community law.

However, what about the autonomous position of subnational governments? HESSEL stresses that precisely because central government should only resort to intervention as *ultimum remedium*, those provincial and municipal governments that are really serious about complying with their Union/Community obligations have, of course, nothing to fear. But perhaps more importantly (and more interestingly), HESSEL submits that

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[17] Article 3.25 of Annex B of the Memorandum of Understanding between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee.

[18] P.P. CRAIG, *Administrative Law*, 5th ed., London 2003, at 195.

when one really realises the full impact of European integration on the – what have traditionally been – autonomous powers of the provinces and municipalities, one should admit that several of these powers have already been significantly eroded. Stricter supervisory instruments are necessary precisely because the autonomy of provinces and municipalities over the years has already been considerably limited. HESSEL finds the proposal by BESSELINK *et al* to be interesting and fruitful, but regrets that they fail to consider that European integration has already diluted much of the distinction between co-governance and autonomy.

The Dutch government has only recently adopted a specific stance on this issue. According to a very recent press release issued on 25 June 2004[19], the government has adopted a plan which will introduce stricter forms of ministerial supervision of subnational governments, including a right of recourse. Whether this will lead to Constitutional amendments or whether alternative approaches will be explored remains unclear for now, since, at the time of writing, the official cabinet document has not yet been released. What is clear, however, is that HESSEL's and BROEKSTEEG's proposals must have been music to the ears of the Balkenende Cabinet.

[19] This review was written at the beginning of July 2004.