

Directe democratie in Nederland : een onderzoek naar de mogelijkheden van openbaarheid van bestuur, inspraak, referendum en volksinitiatief in onze rechtsorde

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Summary

1. Improving Democracy

Thinkers such as Schumpeter and Dahl have portrayed democracy as a free political market. In that market, the electorate vote for the politician they think will defend their spiritual and material interests best. In this way, a government is chosen or a parliament, which in turn produces a government.

According to these authors, in a democracy political decisions are not taken by a majority or a minority, but by *minorities*. These must reach agreement among themselves in order to make majority decisions. Minorities are valuable inasmuch as they constitute each other's potential allies. They must therefore take each other's interests into account. In practice, this may offer them even better protection than any well-drafted constitution. However, constitutional rules are important as well. They are the expression of a *consensus* on a number of basic values, the framework within which politics is conducted.

This is a fairly optimistic portrayal of democracy: in a society a number of rules are established, which safeguard a free political market of supply and demand. As a result, the well-known free-market *invisible hand* can optimally realize the political desires and preferences of its citizens.

During the nineteen-seventies, Dahl established that in Western democracies it was not only the invisible hand that remained invisible, but also the optimum realization of these political desires and preferences. A small number of persons in society grew richer and richer, whereas the minority became poorer and poorer. Dahl looked for an explanation and felt to have found it in the *economic* inequality of citizens. This inequality is brought about by private enterprise, which in the Western world has degenerated into "corporate capitalism." This form of entrepreneurship creates major differences between citizens as to affluence, status, knowledge, control over information and propaganda, and access to political leaders, which does not make for very fair trading in the political marketplace either. Strong customers jostle the other customers in front of the stalls and demand the best merchandise. Dahl proposes a radical remedy to make an end to these economic and political iniquities. A "right to democracy

within firms" must be established. Businesses must be democratically managed from within. This can be best achieved, in Dahl's view, by converting them into *cooperatives*, in which the workers have become voting members. The *economic* and therefore also the *political* inequalities between citizens will automatically decrease.

Not all democratic problems are solved by making enterprises more democratic. Carole Pateman, Wolfgang Beck and others have pointed out that democracy is a learning process. Only through actual participation and campaigning will people become politically emancipated citizens. Combined with Robert Dahl's proposals, this could lead to a society of politically assertive people of equal standing. Customers in the free political marketplace would ensure that other customers did not jump the queue. In front of the stalls affairs would be conducted fairly. But that is not all. What happens *behind* the counters? The traders, that is the politicians and the officials, have their own interests in public administration, such as enforcement, good relations with their colleagues and their careers. In order to serve these interests, it is often more advantageous for them to be on good terms with their superiors, colleagues and subordinates than to compete for the favour of the electorate or public approval. This may easily lead to deals behind the counters that substantially restrict the options of the customers in front of these.

Efforts to improve our democracy must therefore be made on three fronts: economic inequality between citizens must be pushed back, which at the same time will enhance political equality. In addition, the disparity in knowledge and skills between (groups of) citizens must be reduced. And thirdly: public administration itself whose administrative and bureaucratic organization should afford a fair chance of realizing the desires and ideas of the citizens. This dissertation deals with the third front. It contains an investigation into the accessibility of government documents, the views on administrative loyalty and the citizen's opportunities to be heard through participation, referenda and people's initiatives, followed by the author's proposals to grant the population more control, more *direct* influence on public administration and more means of redressing it. Hence more *direct* democracy.

2. Public Information

Since the second half of the nineteenth century, public administration has gained in importance. This does not mean publicity of administration, however. As late as the sixties of this century, a global review movement

prompted a debate in the Netherlands in which the principle of publicity of government was advocated. The 1970 publication of the report "*Openbaarheid openheid*" (Publicity openness) by the Biesheuvel Commission is a milestone. In this report, it was proposed that the legislator, for the sake of enhancing democracy, adopt the principle of public information. The Commission developed the idea into a Bill. All information available to the central authorities should be public, with some express exceptions. Also for the provincial and municipal authorities, the Commission wanted publicity of government, which was to be governed by the Provinces Act and the Municipalities Act. The report by the Biesheuvel Commission met with much resistance, especially from the government and the Council of State.

In 1975, the government introduced a Bill to Parliament for a *Wet Openbaarheid Bestuur* (Public Information Act). This Bill features, apart from a number of mandatory grounds for denying access to information, also discretionary grounds for refusal, which are to be further regulated by Administrative Order. The Bill imposes a duty on the authorities to provide information of their own motion "whenever this is in the interest of proper and democratic administration."

Documents for Internal Consultation

The government presents the Lower Chamber with a draft Administrative Order to further regulate the discretionary grounds for refusal. Requests for information contained in documents that have been drawn up for *internal consultation* will be granted, pursuant to a provision in this draft, "with the exception of information which deals with:

- a. data being processed or, although complete, presenting an inaccurate picture without being complemented by additional data;
- b. personal policy opinions of ministers, administrators or officials, providing that information on the policy alternatives contained in these documents be disclosed."

The Dutch Lower Chamber felt that the provision was sufficiently important to be incorporated in the Act itself. It was therefore lifted from the Administrative Order and placed in the Public Information Act.

Commercial and Industrial Data

The government felt that the confidentiality of commercial and industrial data was adequately safeguarded. But the parties on the right in the Lower Chamber wanted *absolute* assurance for commerce and industry. They submitted an amendment, in which a new ground for secrecy was added to the Bill. This ground implied that commercial and industrial data confiden-

tially communicated must remain confidential in all cases. The government fiercely fought the amendment during the parliamentary debate. But the industrial lobby proved too powerful and the amendment was adopted. Under the new Act, entrepreneurs were given the right to veto disclosure.

The Courts and Publicity of Government

The Public Information Act came into effect on 1 May 1980. The principle that all administrative information is secret, apart from disclosure, is then exchanged for the principle that all administrative information is public domain, subject to non-disclosure. At first sight, this seemed a major change. But in practice it turned out differently. Advisory opinions expressed by officials, administrative memos and commercial and industrial data provided by entrepreneurs to the administration remained confidential to the public. This meant virtually all data that could be interesting from the point of policy influencing or policy control. The justices on the Council of State, whose duty it is to watch over the application of the Public Information Act, went even further than that by extensively interpreting the grounds for secrecy.

The New Public Information Act

During the eighties, the legislator decided to integrate the Administrative Order on the publicity of government into the Public Information Act. This was intended to offer *more legal certainty* to the citizens. Furthermore, the Act's ease of reference was to improve by a rearrangement of its articles. Thus, a new Public Information Act was created, which came into effect on 1 May 1992.

This new Act, however, reversed the right to access public documents considerably. 'Internal consultation' no longer meant just consultation *within* the administrative agency, but was extended to consultation *between* administrative agencies. And whereas under the former Act the personal policy opinions of ministers, administrators and officials were exempt from disclosure, under the new Act, all opinions have been exempted. By virtue of the new Act, even the opinions of corporations ('*rechtspersonen*') are "personal" policy opinions. There are hardly any documents left to which the grounds for non-disclosure in the new Public Information Act do *not* apply. For access to administrative documents in the Netherlands one has to fall back on the provisions in sectorial administrative statutes.

3. Administrative Loyalty

During the creation of the Public Information Act there was much concern for the position of officials. If officials had a right, indeed perhaps even a duty, to disclose information which did not square with the views of their (political) superiors, internal relations would come under pressure. Moreover, many politicians argued, our whole democratic system, with the inclusion of its principle of political responsibility, would be thus undermined, since ministers and other figures of political authority could only be accountable for those statements by their officials they controlled. This point of view, which is perhaps the greatest impediment to publicity of government, must be opposed.

The Classical Theory

In the nineteenth century, in general the attitude towards officials who spoke their mind was fairly tolerant. This changed in the course of the first decades of this century. The change is probably related to the significant increase in the size of public administration between 1900 and 1920. This increase, caused by new administrative duties, made many apprehensive. They became fearful of *bureaucracy*, which had to be restrained at all costs. When by 1920 in almost all Western European countries universal suffrage had been introduced, there seemed to be an obvious solution, particularly since the industrial revolutions had been responsible for a rather mechanical picture of mankind. People could be introduced into the production process as inanimate cogs. This also held true for officials. They were not to think for themselves, but were to do what their (political) superiors told them to. The latter in turn were accountable to a parliament that had been elected in general elections based on universal suffrage. True democracy seemed feasible, even in a complex industrialized society.

The new views on administrative loyalty, formulated by the German jurist and sociologist Max Weber, eventually became the classical theory. Also in the Netherlands, this view received much support from the twenties onward.

As early as 1883, a Dutch professor of constitutional law, Buys, had argued that the freedom of opinion of officials could be curtailed. At that time, politicians and scholars rejected this view. In 1915, a renewed effort was made to weaken the freedom of opinion to which officials were entitled. Another Dutch scholar in constitutional law, Struycken, argued at that time that citizens could relinquish their enjoyment of certain fundamental rights by contract and that "as a result of a special legal status" the

exercise of one or more fundamental rights could be curtailed or prohibited.

In 1922, the Lower Chamber learned and accepted that the government had taken over Struycken's ideas. In the years following, this view was also adopted by most constitutional scholars. It was reflected in the case law of the administrative courts. The view legitimized a new style of governing. It became possible to keep matters 'indoors' by declaring them "internal administrative matters."

Towards a New Concept

The classical theory of administrative loyalty was already criticized before the Second World War by a German jurist and political scientist, Carl Friedrich, who had emigrated to the United States. In his judgment, officials are employees with minds of their own, who can spot society's problems and communicate these to the political powers that be. For these problems, and for those put on the table by the political leaders themselves, they must find creative solutions. That is their duty, which must be fulfilled with a *sense of obligation*, that is to say: skilfully, by observing professional ethics and with a view to serve *society*. Solutions must be worked out in consultation with the political bodies responsible and should only be realized upon the consent of these bodies. However, according to Friedrich, such consent does not solely depend on the odd (political) superior. If the superior obstructs the matter, the official, out of the same sense of obligation, but also because he enjoys the same freedom of expression as everyone else, may try to win the public's and the politicians' support for his views. This is equally important for democracy and for the quality of government *per se*.

Since the Second World War, the views on administrative loyalty have evolved considerably in political theory. Also as a result of the extreme obedience of officials in Germany, first the humanistic conception of loyalty and subsequently the concept of institutional citizenship emerged. Both theories reflected a renewed attention for fundamental rights, especially as regards the freedom of conscience and the freedom of expression. In particular the concept of institutional citizenship closely relates to Carl Friedrich's conception of administrative responsibility.

In the second half of the fifties, the Dutch government acknowledged that, in principle, fundamental rights also apply to officials. Jurists felt uneasy about the idea, but from the eighties onward, most legal scholars acknowledged that, in principle, fundamental rights are also applicable to officials. However, both government and legal scholars were just going

through the motions. They could not envision or barely realized that the recognition that fundamental rights also applied to officials would have an impact on administrative law as such. The possibility to curtail fundamental rights was incorporated into the Constitution in 1983. The restriction itself was laid down in 1988 in Article 125a of the *Ambtenarenwet* (Government Officials Act). Pursuant to this article, officials may not express their thoughts or feelings, if "the proper fulfilment of their duties or the proper functioning of public service cannot be reasonably ensured." In the spirit of the article, on several occasions the Dutch administrative courts have curtailed the freedom of expression of officials, although recent case law does seem to offer officials a little more room for expression. This should not be construed as a breakthrough, however.

In reality, the legal relationship between the official and the administration has hardly changed in the Netherlands since the twenties. In fact, the "classical" theory no longer adhered to by political and public administration scientists since the Second World War, has been matter-of-factly incorporated into Dutch administrative law governing officials.

The Meaning of 'Loyal Official'

In this dissertation, a loyal official is first and foremost an *honest* official. Both his superiors and the general public must be sure that he does not play tricks on them. Officials are constantly faced with conflicting interests and opposite opinions. In consequence, it will not be possible for a loyal official to avoid forming an opinion in his service on what *he personally*, in view of his skills and social responsibility, feels is the most desirable way for the administration to act, and on the way in which he can best make a contribution. This opinion he is free to express to the public. He must, however, take into account specific statutory requirements of non-disclosure and the interests defined in Article 10 of the Public Information Act. His superiors will also have to accept that, in the end, the official's loyalty is owed to *society*.

Public Disclosure

Such attitude will improve access to public information. Officials will have their own responsibility for what they may, and may not, express in public. This will not imply, however, that officials will now bring any dispute with their superiors into the open. As any other employee, the majority of officials appreciate good working relations with their bosses. Only in exceptional cases will an official conclude that he must share his concerns or views with the general public.

There is another effect, however, which is more important than a greater opportunity for officials to express their opinions. The new definition of 'administrative loyalty' entails that opinions of officials *may* be publicly disclosed. This means that *the public* can request access to documents. In that case, a request for disclosure of an administrative opinion can no longer be denied on the grounds of it being a "personal policy opinion." Those having a direct interest, and others, are entitled, if they so wish, to be informed. The opinions of officials are not the exclusive property of those political office holders that happen to be in power at the time, but belong to society as a whole.

This also holds true for the documented opinions of the administrators themselves. The public has a right to know the direction in which office holders are steering the decision-making. Only if these conditions are met, can there be true democratic control and direction. The author argues that Article 11 of the Public Information Act, which employs the term "personal policy opinions" as a ground for denying requests for information, should therefore be repealed. Access to information should only be denied if this were to constitute a violation of specific legal rules, or where the provisions on confidentiality in Article 10 of the Public Information Act apply.

4. Participation

There is a typical Dutch form of participation which is called '*inspraak*'. In this dissertation, the author "promotes" '*inspraak*' to mean '*consultation*' between the authorities and their citizens. But not all consultation constitutes '*inspraak*'. A person negotiating the terms of an agreement with the authorities cannot be qualified as an '*inspreker*'. The authorities may not enter into the agreement without the consent of that person. In the case of *inspraak*, citizens possess no or hardly any bargaining power. The authorities can take decisions without their consent. That is why, when testing the quality of *inspraak*, it is advisable to investigate whether the authorities have wanted to hold genuine consultations.

Consultation is not just an exchange of views. An exchange of views is an orderly confrontation of the opinions and ideas of the various participants. Consultation only exists where participants have the intention to reach as much a consensus on the issues as possible.

Consultation is not deserving of its name if it is not conducted in earnest. The authorities in particular may be held accountable for affording the various (groups of) *insprekers* a fair and therefore a more or less equal

chance of persuading them. It is after all the authorities who, following the *inspraak*, must take the decision.

'*Inspraak*' is about consulting citizens and residents (*Nederlanders* and *ingezetenen*). For the purposes of this dissertation, *inspraak* is viewed as a political right. Each citizen or resident who feels himself involved in a particular action by the authorities, is entitled to *inspraak*. From the authorities, a willingness and the initiative to consult with them may be expected. They are the *parties involved*, which does not necessarily mean they are the 'interested party' ("*belanghebbende*"). A sufficient condition to be a "party involved" ("*betrokkene*") is that the party has an emotional interest in or feels responsible for society. This does not mean that the whole country, the entire province or city needs to be invited to exercise *inspraak*. It is sufficient for the authorities to obtain the suggestions of those who may reasonably feel involved in a particular issue and to subsequently opt for a considered approach. If other involved parties report to the authorities for *inspraak*, they may also participate, unless there are good reasons to exclude them.

Models of Consultation and External Experts

Granting fair and equal opportunities may entail that certain parties involved need to be given support. Two types of support need to be distinguished in this respect: support enabling the party involved to organize as a group and support in developing an alternative scheme. The need for an alternative scheme may depend according to the consultation model opted for by the authorities. In administrative practice, three different consultation models are used. They are referred to as: the agency model, the mixed model, the occupants model.

The *agency model* is the most traditional. In this model, the policy proposal which is to be presented to the administration, is drafted by an official or a group of officials with the possible collaboration of external experts. In the various preparatory stages of policy-making, *inspraak* is granted to involved citizens and residents. These *insprekers* do not bear any responsibility for the eventual policy proposal submitted to the administration. If they request funding from the authorities in order to stage an alternative investigation or to formulate an alternative proposal, they are in principle entitled to such.

The *mixed model* is a true model of cooperation. Agreements are made with the parties involved about the composition of a working party or project group. Apart from officials, such party or group consists of the

representatives of the organizations involved. It prepares, if needed with the support of experts, the policy proposal to be presented to the administration through the agency. Also in this model, *inspraak* is granted to citizens and residents involved in the various stages of preparation. The organizations of involved parties share the responsibility for the proposals of the group. There is no reason, therefore, to provide these organizations with separate funding to prepare alternative proposals. In case of dispute, the group may agree to develop two or more alternatives. This, of course, increases costs.

The *occupants model* is a much more rare phenomenon. It can only function if the occupants share similar interests. In the occupants model, the occupants, together with external experts, prepare a draft-decision. The authorities may have given them certain points of reference, but it is conceivable that the work is done on the basis of premises formulated by the occupants themselves, premises that are not *prima facie* unacceptable to the authorities. The agency may have *inspraak* during the preparations. Inasmuch as a single decision is prepared, the total costs for the project will not exceed those of the other procedures.

Statutory Rules for *Inspraak*?

Rather than regulating *inspraak* by law, we should remove the legal obstacles that are now hampering *inspraak* procedures. By abolishing Article 11 of the Public Information Act and Article 125a of the Government Officials Act, the way will be cleared for open and frank consultations between the administration and its citizens, in which the latter are given real and equal opportunities to influence public policy.

Should we desire to enact a general *right to inspraak*, we must convert the petition right laid down in Article 5 of the Dutch Constitution into a provision granting Dutch citizens and residents a right of consultation with the authorities. The Constitution should also list the exceptions. In that case, the obligation prescribed in the *Gemeentewet* (Municipalities Act), the *Provinciewet* (Provinces Act) and the *Waterschapswet* (Water Board Act) to establish an Ordinance regulating *inspraak* could be abolished.

5. Referendum and People's Initiative

The proposals referred to so far all relate to exercising influence during the preparatory phases of the decision-making by public authorities. These

proposals are intended to stimulate these public bodies to take decisions that observe the wishes of the citizens. But there are no guarantees. If a public body in a specific case fails to take into account the wishes or objections of citizens, the latter have no means of interfering directly; only indirectly through national, provincial and municipal elections may they attempt to correct public policy. A different means of redress is hardly conceivable in a society in which it is impossible for all members to convene, to jointly decide in each individual case on how the authorities should act or refrain from acting. In general, legislation and administration must be entrusted to people's representatives and democratically appointed administrators.

Nevertheless, there is a great deal to say for direct *control*, where relevant, over administrative decisions and a direct power of redress with regard to the actions of administrative agencies. A direct say, exercised in this way, could be the tail end of the democratic system. In literature and in the political order of a number of other Western countries, this method of direct control come in two forms: *referendum* and *people's initiative*.

The concept of *referendum* may be defined as a general poll on a decision taken or being considered by a state organ on a particular matter. In the case of a *corrective* referendum, the decision is formally taken by means of a popular vote. In the case of a *consultative* referendum, the popular vote is in the form of plebiscite upon which the administrative organ decides its course of action. The author rejects the consultative referendum. In his view, a referendum should always be corrective.

In the case of a people's initiative, part of the population puts forward a proposal for an administrative decision. In some cases, the proposal merely needs to be processed by the executive and parliament. However, if it is rejected, a popular vote must take place.

The Debate on Referenda and People's Initiatives

For the past ninety years, the desirability of *referenda* and *people's initiatives* has been debated. After an upsurge in 1921, the year in which both the government and the conservatives proposed the introduction of referenda, interest fizzled out. After the Second World War it flared up again. In its final report in 1971, the State Advisory Commission on the Constitution and the Elections Act (*Kieswet*) advised against a people's initiative, although almost half of the Commission's members wished to introduce the possibility of a referendum into the Constitution. The Cabinet and parliament ducked the issue. In 1975, only a few minor parties and a few parliamentarians of a major party voted in favour of the introduction of the possibility of referendum.

After a parliamentary debate on the proposals for the 1983 general review of the Constitution had come to a close, the referendum idea received fresh impetus. Particularly when a new Biesheuvel Commission in its advisory report to the government advocated the introduction of referenda and people's initiatives, the number of proponents in parliament rose. In 1988, a motion intended to remove any constitutional obstacles against the introduction of the referendum, also won the vote of the Social-Democrats. A second motion intended to clear the way for the introduction of a people's initiative, received the support of the socialists, but not that of the liberals. Some five years later, however, those same liberals seconded a motion inviting the government to introduce a Bill which includes the possibility of people's initiative. In August 1994, the government stated its willingness to look into the desirability of a *referendum*.

Concrete Proposals for Introduction

In its 1985 report, the Biesheuvel Commission put forward a number of concrete proposals to amend the Constitution so as to include rules governing referenda and people's initiatives, offering some basic components for statutory regulation. In general it can be said that the rules suggested by the Commission had been well thought-out. They could be incorporated into the Constitution without much difficulty and be further defined in a statute. Nevertheless, this dissertation includes a few critical notes by the author.

Referendum Issues

The Biesheuvel Commission proposed conclusive referenda on parliamentary Bills, with the exception of Bills on legislation relating to the monarchy or the Royal Family, to obligations under international law and to financial provisions for office holders and their surviving relatives.

The author finds the first exception too general and fails to see any objection against a referendum to decide whether, in the absence of a legitimate successor to the throne, the constitutional monarchy should be preserved.

An exception as to financial provisions for office holders and their surviving relatives is undesirable. In the past decades, government and parliament have not shown great wisdom in the matter. There is no reason to exclude the possibility of a referendum on such cases.

Required Majority for Referenda

In the opinion of the Biesheuvel Commission, a Bill passed by the States-General could be rejected by referendum if this was done by a majority of

not less than *thirty per cent* of the electorate. A decision taken by the Provincial Council or the Municipal Council could be rejected by a majority consisting of not less than *fifty per cent* of the actual voters in the last Provincial or Municipal election. If an administrative decision were to be voted down by so few constituents, it would raise serious doubts as to the function of a referendum as a democratic *means of redress*. The author argues that a proposal adopted by the States-General, the Provincial Council or the Municipal Council should only be voted down in a referendum by a majority of not less than *forty-five per cent* of the electorate.

People's Initiative Issues

In most cases, issues that may be subjected to a referendum, can also be the subject of a people's initiative. Exceptions are general budget Bills. Under the Constitution, these must be introduced "by or in the name of the King." For similar reasons, provincial and municipal budget proposals should also be exempt from being subjected to people's initiatives.

Required Majority for People's Initiatives

The Biesheuvel Commission's norms for accepting people's initiatives are *grosso modo* the same as those set by the same Commission in relation to voting down administrative decisions by corrective referenda. The author proposes to increase the norm at all three electoral levels to a majority of not less than *forty-five per cent* of the electorate. In the case of a people's initiative to amend the Constitution, the norm should be a majority of not less than *fifty-one percent* of the *electorate*.

Testing against the Constitution

If people's initiatives are introduced, it is quite likely that legislative products are created that contravene the Netherlands Constitution, which is the more reason to grant Dutch courts the power to test Acts of Parliament against the Constitution.

Translated by Louise Rayar