Het specialiteitsbeginsel : over de structuur van bestuursbevoegdheden, wetmatigheid van bestuur en beleidsvrijheid

Summary

This dissertation deals with the purpose-specific principle *(specialiteitsbeginsel)* in Dutch constitutional and administrative law. Practitioners of Dutch public law are familiar with this principle. In short, the purpose-specific principle implies that a rule of administrative law may only be applied within its own well-defined scope and, as a result, may not be used to achieve objectives outside that scope (mixed motives). In addition, the administrative authority laid down in the legislative instrument in question may not be exercised for a purpose other than that which the legislature envisaged when attributing the authority (improper purposes). This is known as the prohibition against *détournement de pouvoir*. Furthermore, the general constitutional purpose-specific principle requires of the legislature that it sufficiently specify the authority conferred on the administration by providing substantive norms. In this context, the purpose-specific principle ties administrative authority to the, democratically legitimized, legislature's prerogative to legislate. This aspect of the Dutch purpose-specific principle relates to the German constitutional *Bestimmtheitsgebot*.

In contemporary Dutch administrative law, the Dutch purpose-specific principle is a controversial notion. First of all, it has led to a divided or compartmentalized administration. One single activity may in some instances require several licenses, which is most inconvenient first of all to the public, but also to the administration. There are conflicting views in the literature and case law as to the extent to which the purpose-specific principle limits the administration's discretionary freedom in weighing the interests involved, in cases where such freedom has been granted. The on-going disagreements between the various authors have resulted in a clash between two schools of thought. There is a 'liberal' and a 'strict' school. Those adhering to the liberal view prefer to render the purpose-specific principle and legality of administration in a less absolute form: the administration must be able to act effectively. For this reason, they favour a broad weighing of the interests involved. The followers of the strict school, however, emphasize the purpose-specific nature of administrative authority. In their view, the administration may only promote those interests for which the legislature has granted it authority, whereas other interests will be at best taken into consideration. The differences of opinion in the literature and case law have been the major reason for writing this dissertation. The research on which this dissertation reports will provide answers to the following two questions:

1. What importance must be attached to the Dutch purpose-specific principle as a fundamental principle of public law?
2. What limits are set by this principle to the administration's weighing of the interests in cases where it has been granted discretionary freedom?

The subject of Chapter 2 is the concept of 'administrative authority', since administrative authority is based on the purpose-specific principle. It is logical therefore to first analyze the features of administrative authority. By virtue of their authority, administrative bodies are able unilaterally to alter or establish the legal position of the party/ies involved. Essential features of administrative authority are limitedness and specificity. Authority arising from public law, and consequently administrative authority, must be strictly distinguished from powers granted under private law. It must be kept in mind that public-law and private-law powers have disparate substantive roots. Public-law authority stems from the special character of the public-law system. Such authority must always be exercised in the public interest (*res publica*), whereas, in substantive terms, private-law powers serve to protect the interests of the parties proper. It is worth noting that private-law powers are not governed by the purpose-specific principle. Administrative authority, not to be confused with *administrative duties*, is attributed to administrative bodies that are specifically created under a legal system. In *legal relations* governed by administrative law, administrative bodies are the 'opposite number' of the party involved. The central component of this administrative-law relationship is the authority vested in the administrative body, and consequently the purpose-specific principle. For this reason, administrative bodies and the interested parties can in no instance shape these legal relations of their own accord. Nor are these relations reciprocal; the unilateral exercise of administrative authority takes precedence. The interested party's specific permission is not required. Naturally, the relationship between the administration and the party in question is fully governed by law.

Chapter 3 places the purpose-specific principle in a broader historico-theoretical perspective. The author investigates the development of the system of purpose-specific administrative authority in Western democratic states under the rule of law (*rechtsstaat*). This development resulted in a fundamental separation between the public state, which promotes public interest, and private civil society, which enjoys party autonomy under contract law. In such a society, private parties pursue their own interests within the constraints imposed by public law. The author subsequently discusses the process of the formation of law within the state, i.e. the public legal community. This process of the formation of law is placed against the backdrop of general principles of public law. It shows that the area of tension between the administration's *promotion* of public-law interests and that same administration's *respect* for private-law interests is at the core of that process of law formation. The Chapter ends with a study of the relation between the legal purpose-specific principle and other public-law principles, with special emphasis on the democratic postulate and the principle of legality. The author concludes that the purpose-specific principle must not be identified with the principle of legality (of administration), since the former, together with the democratic postulate, constitutes the foundation of the legality principle, where administrative authority is concerned. Consequently, the purpose-specific principle sets requirements of a qualitative nature for the legal basis of administrative authority.

The legal basis of administrative authority is the subject of Chapter 4. On the basis of research in the literature, the author determines the extent to which, under Dutch

constitutional law, administrative authority must have a basis in statutory law. Since the Dutch Constitution of 1887, it has been generally accepted that in particular administrative authority which imposes obligations on the party, should have a basis in statutory law. This is expressed by the German concept of *Eingriffsverwaltung* (administrative infringement upon people's rights and freedoms). After the Second World War, partly as a result of theoretical development in Germany, the idea gained ground that the legality requirement could not automatically be made contingent on the distinction between authority to impose obligations and authority to confer rights. During the 1980s, one of the doctrines advocated in the Netherlands was the German *Wesentlichkeitstheorie* (the doctrine of the essential). The basic assumption of this theory is that the legislature, in view of its democratically legitimized prerogative to legislate, should take all far-reaching, essential administrative decisions. For this reason, according to the *Wesentlichkeitstheorie,* the legality requirement derives directly from the separation of powers (*Trias Politica*). Partly as a result of this theory, the author argues that *all* administrative powers resulting in infringement, restriction or determination of the (constitutional) legal position of a party should be governed by statute. This requirement of a statutory basis particularly enhances legal certainty. In the second part of Chapter 4, the author investigates the extent to which administrative authority should be subject to substantive norms set by the legislature. To answer this question, the case law of the German Constitutional Court (*Bundesverfassungsgericht*) on the *Bestimmtheitsgebot* (specificity requirement) (Art. 80 (1) German Constitution [*Grundgesetz*]) as well as the ECHR case law on the 'rule of law' are analyzed. On the basis of this analysis, the author concludes that the legislature should formulate precise substantive norms as to content and purpose of administrative authority. Parties involved should be able to get an idea, from such substantive law, of the possible scope of the administrative authority (foreseeability). Chapter 4 concludes with an inventory of the arguments which may be put forward to underpin the necessity of the purpose-specificity of administrative authority. Purpose-specificity serves the legislature's prerogative to legislate, legitimizes administrative authority and provides a guideline to the judiciary when testing the legality of administrative action. In addition, it enhances the transparency of administrative organization and the effectiveness of the decision-making process; thus each administrative body knows which public-law interests it must protect and which not.

Chapter 5 centres on the prohibition against *détournement de pouvoir* (improper purposes). Within democratic states under the rule of law, it is a generally accepted principle that administrative bodies may not exercise their administrative authority for purposes other than for which the legislature envisaged that authority when attributing it. This principle has been codified and laid down in Article 3:3 of the Dutch General Administrative Code (Awb). The doctrine of *détournement de pouvoir* was developed in the nineteenth century by the French Council of State (*Conseil d'Etat*). In the beginning of this century, it was received into Dutch administrative law. Although administrative tribunals seldom quash an administrative decision on the grounds of *détournement de pouvoir*, the author concludes that the prohibition still constitutes a *fundamental* constitu-

tional rule of conduct for public authorities in today's democratic states under the rule of law.

The 'problem of purpose-specificity' only comes into full view, where a specific administrative authority allows for discretionary freedom. This relates to the second question: what interests must the administrative body take into account in this process of discretionary law-forming? To answer this question, the legal character of *discretionary freedom* is analyzed in Chapter 6. The general assumption is that discretionary freedom imposes a duty on the administrative body to weigh the interests involved. The author concludes that the *weighing of interests* must be construed as the administrative body's duty to promote specific public-law interests, while at the same time taking into account the interests of the party/ies involved. The public-law interests exclusively direct the process of administrative law-forming. The main reason why the interests of the party/ies involved can be taken into account in case of discretionary freedom, is that the administrative body is in a position to take a number of *different*, legally correct, decisions. Discretionary freedom implies therefore a freedom of choice for the administrative body as to the legal effects of their action. Such 'freedom' is in all cases limited, however, by the purpose for which the authority was granted. Thus, the purpose-specific principle delimits the process of interests weighing by the administration. (cf. Article 3:4, s. 1 in conjunction with Article 3:3 Awb).

In Chapters 7 and 8 the author studies the limits imposed by the purpose-specific principle on the administrative body's duty to weigh all interests involved on the basis of a detailed analysis of Dutch scholarly writing on administrative law and relevant case law. This analysis confirms that there are different schools of thought on the subject: a 'liberal' and a 'strict' school. In particular there is no consensus on the extent to which the administrative body must take the interests of third parties into account with regard to the administration's power of decision, for instance, in granting licenses. There is a movement for the application of the *Schutznorm* theory (theory of relevant interests), application of which would entail the administration's only taking into account third-party interests, if those interests enjoy protection within the scope of the administrative authority in question. The other school of thought is that the administration should take into account those interests of the party/ies involved, which will be affected by the decision. In Dutch case law this is expressed in particular by the doctrine of administrative compensation (*bestuurscompensatie*). The courts have ruled that the interests affected need not enjoy the protection of the specific administrative authority in order to assume an administrative duty to compensate the party affected.

In the final Chapter, the author presents his own view on the 'specificity problem', based on the preceding chapters. The point of departure here is an analysis of the exercise of administrative authority from the perspective of the administration creating intended legal effects and the perspective of legal effects ensuing by operation of law. The author investigates the way in which the exercise of administrative authority affects the sphere of interest of the party/parties involved. In the author's view, these interests include in particular individual property rights, contractual and extracontractual rights and constitu-

tional and human rights. Against the backdrop of the set of principles underlying public law, the author subsequently establishes the way in which administrative bodies should take into account the various interests of the party/ies involved. On the basis of the author's analysis of recent theory formation in Germany about the *Schutznorm* as applied in administrative law and of Article 6 ECHR (determination of civil rights), the author concludes that, without exception, the administration must take all interests of the party/ies in question into account. This premise does not in the least imply that such interests legitimize unilateral law-forming by the administration, since such law-forming is always contingent on the specific purpose for which the authority has been granted. This entails, among other things, that administrative bodies can never by virtue of their *public-law* authority bind parties in their legal relations under private law; this is prevented by the division between public and private law. It also entails that *only* such specific public-law interest which is the legal basis for the administrative authority, can, for instance, legitimize the administration's law-making with regard to the issuing of licences. In conclusion, the administrative body may only refuse to exercise a specific authority on the grounds of public-law interest. The purpose-specific principle does not impose limits on the doctrine of administrative compensation, however. If a party's interest is disproportionately adversely affected by the lawful exercise of administrative authority, the administration in question is obliged, in principle, to offer that party (financial) compensation. Generally speaking, the administrative body is to exercise a discretionary administrative power in a manner which has the least adverse effect on the party/ies involved. This follows from the principle of proportionality (cf. Article 3:4, s. 2 Awb).

In conclusion, Chapter 9 contains a number of comments aimed at putting the purpose-specific principle somewhat in perspective: *the* interpretation of the purpose-specific principle will not be found in this book. It is impossible to define it conclusively. The author agrees with Vranken that legal principles are 'confrontational' by definition.[1] The meaning one wishes to attach to the purpose-specific principle depends on how one views the general principles of administrative law in democratic states under the rule of law, the phenomenon of discretionary freedom and the division between the public and private legal sphere. Interpretation of this concept also very much depends on how much weight is attached to the theory of legality of administrative action in present-day administrative law. In other words, is the presence of an administration in societal structures viewed as a matter of course on grounds of policy effectiveness, or is a prior specific *statutory* basis in the form of a democratic and purpose-specific administrative authority required? The author answers this question involving the politics of law in the latter sense.

1. Asser-Vranken, Algemeen deel (Asser serie), Zwolle (1995), at 92.