

Cover Page



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Title: Lokale democratische innovatie: Een juridische analyse

Issue date: 2021-01-14

Summary

Local democratic innovation

Lokale democratische innovatie

For a number of years now, the state of local democracy in the Netherlands has been a matter of concern for policy makers, researchers, politicians and others who are professionally or personally involved with the workings of local government. Countless reports and papers have been published and countless conferences have been held on the subject, with many of these painting a gloomy picture. Most hold the view that the problems facing local democracy are practical in nature. Therefore, they tend to recommend practical solutions, such as more funding, more training and more time for the people involved to do their job properly. Recently, however, some have argued that the biggest problem facing local democracy is not so much practical in nature as it is institutional. They point to a (perceived) one-sidedness of the (legal) framework that structures Dutch local democracy as a solely representative type of democracy. In the modern age, with decreasing voter turnout, decreasing membership of political parties and an increase in education levels among the general public, the emphasis on representative institutions, according to this view, may well lead to dissatisfaction with democratic institutions and democracy in general. People who adhere to this view do not seek improvement primarily through more resources, but through institutional changes. In order to revitalize local democracy, they consider it essential that the institutionalized representative form of local democracy be complemented by other, more participative forms of democracy.

In recent years, many who are sympathetic to this view have started experimenting with local initiatives specifically designed to complement the existing form of local democracy by implementing alternative forms of democracy and democratic decision-making. Furthermore, these initiatives not only wish to implement alternative forms of democracy, but they want to do so in a way that gives ordinary citizens a real say in the decisions that are made in the public interest. Often times, this means that they need some form of legal decision-making power. This of course raises certain legal questions. The way local democracy functions and is meant to function is not only a matter of political culture, but also a matter of rules and regulations. In a democracy that abides by the rule of law, the power to make (binding) decisions that influence the lives of citizens cannot be wielded arbitrarily and citizens must be able to influence the way public power is used in some way. Local democracy in the

Netherlands is no exception to that, and over the years a vast and complicated framework has grown regulating the way local authorities are able to use public power and the way citizens are able to influence decisions. This, then, raises the question what room this legal framework leaves for initiatives that want to complement the institutionalized local democracy with alternative forms of democracy. The main question of this research therefore reads:

To what extent can the legally institutionalized form of local democracy be complemented with initiatives that seek to implement alternative forms of democracy and democratic decision-making?

In order to tackle this question, it was necessary to classify what kind of local democracy is embedded in the legal framework. This classification had to allow for a comparison between the institutionalized local democracy and the kind of democracy that initiatives strived to implement. Otherwise it would be impossible to determine whether these initiatives could complement the existing local democracy. Chapter two describes the classification that was eventually chosen, why it was chosen and how it was used in the following chapters to compare local initiatives to the institutionalized democracy. The chosen approach is known as the model approach. It uses models that are derived from existing democratic structures and institutions to classify democracies along two axes. The first is formed around the question of how democratic decisions are reached. On the one end of the axis are democracies that reach decisions through integrative decision-making, on the other end are democracies that reach decisions through majoritarian decision-making. The second axis is formed around the question of who has the legal power to make decisions. On the one end of the axis are democracies that place decision-making power in the hands of representatives, on the other end are democracies that let citizens participate directly in the decision-making process. The categorization of democracies on these axes leads to four main types of model democracies, namely (1) consensus, (2) pendulum, (3) voter and (4) participatory democracy. These models can be recognized as such in existing structures and institutions. They can also be recognized in the blueprints of the democratic initiatives that are the subject of this research. This allows for a comparison between the institutionalized local democracy and democratic initiatives.

The model approach, however, also has its limitations. It is, by nature, a generalization of certain democratic systems. The question whether a specific initiative can legally complement a specific system of institutionalized local democracy cannot be answered based on the types of model both belong to alone. In order to do that, the legal framework itself needs to be analyzed in detail. When performing this analysis, the model-approach provides a focus on what to look for in the legal framework and the local initiatives. Through the lens of the characteristics of the models, it is possible to determine what model (or models) is institutionalized in our local democracy and how this is expressed in the legal framework. This exercise allows for the transformation of a purely legal positivistic statement that a certain legal provision obstructs

a certain initiative into a broader but legally sound statement on why the initiative clashes with the legal provision from a democratic point of view.

Having established that the model-approach is useful for the purpose of this research but only after it is tailored specifically to the Dutch legal framework, the remainder of chapter two focuses on determining what model is expressed in that framework and how. This is done by examining the historical development of the legal aspects of local democracy in the Netherlands, specifically its institutional aspects. Many of the central provisions in the Municipality Act and the provisions in the Constitution that deal with local democracy are much older than their most recent revision, making it necessary to go back in time in order to determine their meaning. This need is even more pressing since especially the Municipality Act has been adapted to changing circumstances numerous times. New provisions have been added alongside older and somewhat consistent provisions. In other words, the Municipality Act is a prime example of an organically grown system that needs to be studied from a legal historical perspective in order to be understood properly. Using the model approach in chapter two as a lens through which to view the legal framework, the legal historical analysis in the end unearths several legal principles that are fundamental to the type of democracy that is embedded in the legal framework. They are:

- 1) The municipal council as the most inclusive institution of local government has political primacy.
- 2) The municipal form of government is dualized in a sense that there is a separation between a politicized municipal council and a professionalized board of mayor and aldermen.
- 3) The municipality as a layer of government is characterized by subsidiarity in a sense that the values of public ownership and public power are directly connected.

The principle of political primacy is first and foremost expressed by the way that the municipal council is elected, namely directly by all eligible citizens using a system of proportional representation. It is also expressed by its decision-making procedures enshrined in the Municipality Act. The principle of political primacy holds that the municipal council must be able to determine the main aspects of local governmental policy. The second principle of a dualized form of government is expressed by the separation between the municipal council and the board of mayor and aldermen formalized with the change of the Municipality Act in 2002. It holds that there must be a separation between an organ that is politicized and another organ that is professionalized. These two organs should not mix, nor in personnel nor in function. The third principle is closely connected to the legal principle of decentralization and subsidiarity. It holds that the institutionalized public power in the form of the municipal council or the board of mayor and aldermen must be as closely connected as possible to what the citizens of a municipality consider their public ownership. These three principles might not be the only principles present in the Dutch legal framework on local democracy, but they are fundamental to the way it functions. This, then, gives a frame of reference to answer the

question whether local initiatives that want to revitalize local democracy are an addition to the institutionalized local democracy or are a departure from that democracy. In short: if realizing an initiative results in an infringement of one or more of the three legal principles underpinning local democracy, then it is not an addition but a change. If it does not result in an infringement of the principles, it might be an addition.

For this research, four initiatives were selected as case studies. These four all covered different institutional aspects of local democracy and were representative for similar initiatives in other municipalities. Chapters three and four deal with the Cooperative Neighborhood Council (CNC) in the municipality of Groningen, which raises questions surrounding the principle of a dualized system of government and the principle of subsidiarity. The aim of the CNC was to let the citizens living in the Oosterparkwijk in Groningen decide for themselves on matters that concern the neighborhood. One of the questions was whether it is possible to delegate certain powers to decide on public matters from the central organs of the municipal government to decentralized bodies such as the CNC. Using the committee system embedded in the Municipality Act (art. 82-86), this is possible but it would also inevitably result in the CNC becoming part of the structure of local government. Public power cannot be wielded without being accompanied by public accountability through rules and regulations. Also, when initiatives such as the CNC are bestowed with public power, this must be done in such a way as to respect the principle of dualism. This principle does not only apply to the central level of municipal government, but also for levels below that. This means that powers that belong with a politicized organ cannot be bestowed on an initiative that also wishes to wield depoliticized executive powers. Furthermore, when endowed with public powers, initiatives such as the CNC will become an administrative organ through provisions enshrined in the General Administrative Law Act (art. 1:1). They can even become administrative organs without any public powers, namely when they are created by an administrative organ of the central municipal government. The CNC also raised the question whether these types of initiatives could be classified as general representative organs in the sense of art. 4 of the Constitution. Being classified as such would mean that there would have to be elections for the seats in the council and members could not be appointed by lot, as was intended. Fortunately for these initiatives, the threshold to be classified as general representative organs is high. As a matter of fact, since 2015 it is no longer possible to create these organs on the level below that of the central municipal government. In short, initiatives like the CNC do not infringe per se on any of the three legal principle mentioned above. They would contribute positively to the third principle of subsidiarity, and therefore complement the institutionalized local democracy, but the second principle places limits on the way these initiatives can be organized.

Chapters five and six deal with the Social Council in the municipality of Peel en Maas. This initiative aimed to be an alternative council of citizens in addition to the institutionalized municipal council already in place. Also, it aimed for the proposals formed in the Social Council to be approved by

the municipal council. These aims raise questions concerning the nature of representation enshrined in the Constitution and the Municipality Act and the nature of the political primacy of the municipal council enshrined in art. 125, sub 1, of the Constitution. The representative nature of the institutionalized local democracy follows from article 129, sub 1, of the Constitution and article 7 of the Municipality Act. Together with article 129, sub 6, of the Constitution and article 27 of the Municipality Act, these articles express the classical liberal ideas on representation where representatives act as trustees for the common good. The introduction in 1917 of proportional representation and the establishment of political parties added different aspects to the nature of representation. Representatives could ultimately still act as trustees, but were from 1917 onwards also expected to represent the interests of their parties as delegates. Recently, the contours of yet another idea on representation can be observed with the continued interest in the binding referendum as the most clear sign of it. In this idea of representation, the representatives are expected to act on the combined preferences of unorganized individuals. The first two ideas on representation are firmly enshrined in the legal framework, whereas the third is slowly emerging. These ideas can compete with one another, which is apparently not an issue. It is therefore possible to institutionalize a fourth idea on representation based on lot or any other selection mechanism without this being a problem per se. However, if the ideas on representation clash on a certain subject, the members of the municipal council must be free to choose between them. Furthermore, formal and material decision-making powers on certain subjects must remain with the municipal council given article 125, sub 1, of the Constitution. In short, initiatives such as the Social Council can complement the institutionalized local democracy in terms of representation, but cannot be awarded the same status as a representative body next to the municipal council. The first legal principle of political primacy prevents this.

Chapters seven and eight deal with the Citizen Jury in the municipality of Rotterdam. This initiative, made up of ordinary citizens, was started by the board of mayor and aldermen as a way to organize feedback on policy decisions and, more importantly, as a check on the board itself. In that respect, it bordered on the task of the municipal council to supervise the board of mayor and aldermen. The initiative raised questions regarding the relationship between the municipal council, the Citizens Jury and the board of mayor and aldermen and their competences. As it turned out, it is possible to create a new check on the board, even if this is created by the board itself. This might present problems on the efficacy of the check, but legally speaking it is unproblematic. This mostly has to do with the fact that checks are not scarce competences. If the Citizen Jury performs a check on the board, this leaves the competences of the municipal council unharmed. They are simply parallel processes. However, as it stands initiatives such as the Citizen Jury cannot be delegated existing competences because there is no legal basis for the delegation. Furthermore, if there was a legal basis, delegation of the competences of the municipal council would infringe on the first legal principle of political primacy and the second legal principle of dualism. This is due to the fact that the check competences are essential for the municipal council to be able to have the upper hand in any

potential conflict with the board of mayor and aldermen and to be a politicized body. However, new competences could be created for initiatives such as the Citizen Jury. These could even overlap those of the municipal council, with one noteworthy exception. Given the first legal principle of political primacy, the Citizen Jury could not have the competence to relieve an aldermen for political reasons. The principle implies that there is one body ultimately in charge of policy, and having two bodies with the competence to relieve aldermen for political reasons would infringe on this legal principle. In short, initiatives such as the Citizen Jury can certainly complement the institutionalized local democracy. Only in specific circumstances would they infringe on the legal principles mentioned above.

The ninth and tenth chapters deal with the participatory Citizens Budget in the municipality of Breda. This initiative aimed to give ordinary citizens of several neighborhoods in Breda a direct say in the allocation of the budget for their respective neighborhoods. Both the municipal council and the board of mayor and aldermen have responsibilities and competences when it comes to the allocation of resources. The Citizens Budget, therefore, raised questions regarding the relationship between the initiative on the one hand and the municipal council and the board of mayor and aldermen and their competences on the other. At the moment it is not possible to delegate legal competences of the municipal council to the Citizens Budget in order to let them decide on their own where public funds should be allocated. The authorization of the budget is the sole competence of the municipal council (art. 189 Municipality Act) because it guarantees that it has the final say on the direction of municipal policy. It is an expression of the first legal principle and is as such fundamental. However, the second legal principle entails a division of labor between the municipal council and the board of mayor and aldermen when it comes to the level on which resources are allocated. Although the municipal council may allocate resources on a very detailed level, it should focus on more abstract allocations that express political choices. The board should then translate these choices into actual policy by allocating resources. Initiatives such as the Citizens Budget can act with the board on its level in an informal way. The board cannot delegate its competences to the initiative, but can involve the initiative when making decisions. This leaves the position of the municipal council intact, since it does not involve political choices that are the competence of the council. The council can even facilitate initiatives by arranging the choices in the budget in such a way that leaves more room for initiatives to allocate resources. This would undoubtedly present the board of mayor and aldermen with organizational challenges, but it would also be in line with the third legal principle of subsidiarity. One thing that initiatives cannot do, is act on both the level of the municipal council and that of the board. This would be an infringement on the second legal principle of a dualized local government. In short, initiatives such as the Citizens Budget can complement the third legal principle of the institutionalized local democracy but must do so in a way that respects the division between the politicized council and professionalized board.

Local initiatives that want to implement different forms of democracy and democratic decision-making can, under circumstances, complement the institutionalized local democracy. It fits into a trend that, for some time now, local government is opening up to external influences when it comes to making policy-decisions. However, the flipside of this trend is that where space is created for external influences, the fields of influence and competences that remain the exclusive territory of the municipal council become more important to that council. The type of democracy that is institutionalized, in that sense, is stretched thin. Changing the legal framework in such a way that initiatives would be able to exercise these remaining competences would represent a fundamental change in the type of local democracy that is institutionalized. The choice to do so, must be made very carefully.

