

The Covid-19 emergency in the Netherlands: a constitutional law perspective

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Abstract: L'emergenza Covid-19 nei Paesi Bassi: una prospettiva di diritto costituzionale - With the Covid-19 (the Coronavirus) outbreak in Europe, starting at the beginning of February 2020, the Dutch government was forced to take drastic measures to control it. These measures impacted the social and economic life of the people living the Netherlands as well as their businesses in a severe way. These measures limited inter alia some of the fundamental rights as protected by the Dutch Constitution. This article describes the juridical framework in which the measures to combat Covid-19 are taken. More specifically, it focuses on the way in which the Dutch state is organised and the division of power between the higher and lower authorities and the legal instruments these various authorities have. In addition, a brief overview is given of the various measures taken by the authorities.

Keywords: Covid-19, emergency law, The Netherlands, fundamental rights, Dutch Constitutional Law.

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1. The Covid-19 emergency in the Netherlands: introductory remarks

On 5 January 2020 the World Health Organisation (WHO) made known that on 31 December 2019 its China Country Office was informed of cases of pneumonia of an unfamiliar nature detected in the city of Wuhan¹. At that point in time there were around 40 reported cases of hospitalized patients of which a significant part was severely ill. The probable source of infection, the Huanan Seafood Wholesale Market, was closed by the Chinese authorities for sanitation and disinfection on 1 January 2020². On 12 January 2020 the WHO reported that the Chinese authorities had identified a novel type of Coronavirus (Covid-19) on 7 January 2020³. The clinical sign and symptoms reported were mainly fever, sometimes combined with having difficulty breathing and invasive pneumonic infiltrates in both lungs⁴.

On 22 January 2020 the Minister of Medical Care and Sport (Minister)

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¹ www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/.

² www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/.

³ www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/.

⁴ www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/.

informed the Dutch parliament about the outbreak of the Coronavirus in China⁵. The Minister indicated that it seemed that the virus was not easy to transmit from person to person and that the European Centre for Disease Prevention and Control (ECDC) estimated that the virus was unlikely to come to Europe. However, the National Institute for Public Health and the Environment (RIVM) saw reason to put together a Management Outbreak Team (OMT) with experts to advise the Department on any measures to be taken.

On 31 January 2020 the Parliament was informed that the WHO declared the outbreak a “Public Health Emergency of International Concern” (PHEIC), but that there were no direct consequences for the Netherlands and that the country was well prepared for possible infections⁶. On 25 February 2020 the Minister informed the Parliament about the spread of the virus in Europe and more in particular about the corona outbreak in the Italian regions Veneto and Lombardy and the measures that were taken there to control the spread of the virus such as a travel ban, the closure of public institutes and the cancellation of public events⁷. At that point according to the ECDC the threat for the Netherlands was still estimated as small⁸.

The Coronavirus outbreak in the Netherlands started at the end of February 2020 when a man who just visited the Lombardy region in Italy, a region which was heavily struck by the virus, was tested positive for the Coronavirus⁹. On 6 March 2020 the first death due to the virus was reported¹⁰. After this the virus spread over the Netherlands. Mainly in the southern province of Noord-Brabant.

This may be due to the assembly of a large group of people because of the celebration of Carnival¹¹. It is now also suspected that the lower air quality in the province Noord-Brabant as a result of the intensive livestock farming located there is related to it¹². With a letter to the Parliament dated 12 March 2020 the Minister for Medical Care announced the first measures which were mainly aimed to control the virus in the province of Noord-Brabant¹³. Soon afterwards more measures were taken by the Cabinet to control the virus. These measures taken by the Cabinet and the legal instruments on which they are based will be set out

⁵ Letter from the Minister of Medical Care and Sport of 22 January 2020, characteristic: 1640695-201211-PG.

⁶ Letter from the Minister of Medical Care and Sport of 31 January 2020, characteristic: 1644215-201572-PG.

⁷ Letter from the Minister of Medical Care and Sport of 25 February 2020, characteristic: 1654921-202569-PG.

⁸ Letter from the Minister of Medical Care and Sport of 25 February 2020, characteristic: 1654921-202569-PG.

⁹ www.rivm.nl/node/152811; Letter from the Minister of Medical Care and Sport of 27 February 2020, characteristic: 1656241-202702-PG.

¹⁰ www.trouw.nl/buitenland/de-belangrijkste-coronacijfers-op-een-rij~bcd4d8cd/.

¹¹ www.trouw.nl/binnenland/60-nieuwe-coronabesmettingen-de-meeste-in-brabant-wat-is-daar-aan-de-hand~b2d911ff/.

¹² www.trouw.nl/binnenland/zorgt-de-veehouderij-voor-meer-coronadoden-in-oost-brabant~b2b5487d/; nos.nl/nieuwsuur/artikel/2332460-gebieden-met-veel-luchtverontreiniging-zwaarder-getroffen-door-corona.html; www.ad.nl/binnenland/corona-blijkt-stukharder-toe-te-slaan-in-gebieden-met-intensieve-veehouderij~a21d0df6/.

¹³ Kamerstukken II 2019/20, 25 295, nr. 124.

below in this article. The article will also show the decentral way in which the tasks and power of the government is structured in the Netherlands.

As per 2 May 2020 the RIVM reported that 40,236 people tested positive for the Coronavirus in the Netherlands¹⁴. According to the RIVM however, the actual number of people infected with the Coronavirus is higher because not everyone infected with the virus is tested. At the aforementioned date the total number of 10,951 people who were admitted to the hospital due to the virus and the total number of reported deaths from the virus was 4,987¹⁵. Below are a number of RIVM charts which show the course of the Coronavirus in the Netherlands from the start of the outbreak at the end of February 2020 up to 2 May 2020¹⁶. For the current state of affairs, the RIVM website can be consulted¹⁷. The first charts shows the number of infected patients per day that have been reported to the Municipal health service (GGD) until the first of May 2020¹⁸.

Bij de GGD gemelde patiënten

Bron: RIVM



The second chart shows the number patients that are admitted to the hospital per day, until the first of May 2020.

¹⁴ www.rivm.nl/en/novel-Coronavirus-covid-19/current-information-about-novel-coronavirus-covid-19.

¹⁵ www.rivm.nl/en/novel-coronavirus-covid-19/current-information-about-novel-coronavirus-covid-19.

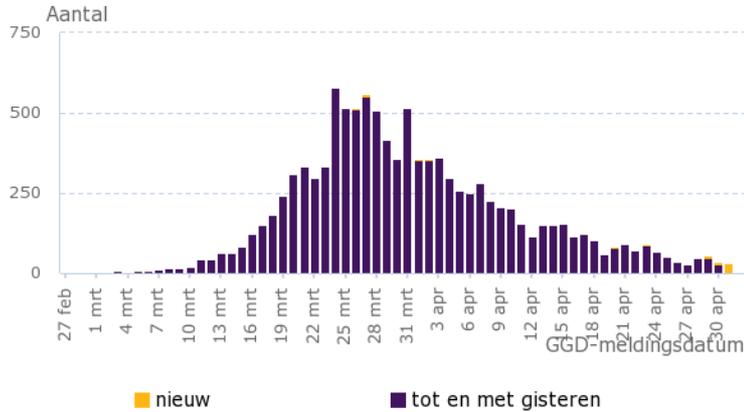
¹⁶ The charts can be accessed at www.rivm.nl/coronavirus-covid-19/grafieken.

¹⁷ www.rivm.nl/. Please note that the website is in the Dutch language. Some parts however can be viewed in English.

¹⁸ Note: 'nieuw' means new, and 'tot en met gisteren' means up to and including yesterday.

In ziekenhuis opgenomen patiënten

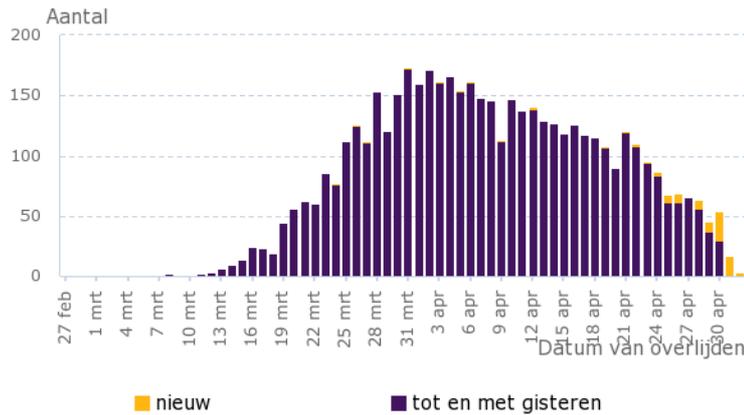
Bron: RIVM



The third chart shows the number deceased patients per day, until the first of May 2020.

Overledenen per dag

Bron: RIVM

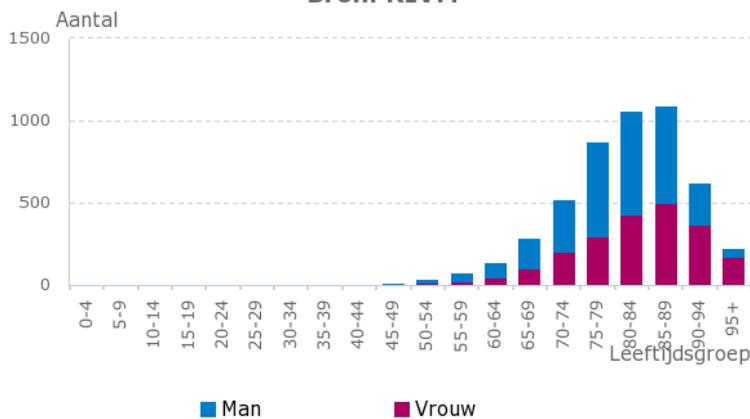


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The fourth chart shows the age and gender of the deceased patients.

Leeftijd en geslacht overledenen

Bron: RIVM



In response to this declared emergency and in response to appeals from the international community, the Dutch Government has taken several measures which have become progressively more stringent.

In order to understand the legal nature of those measures and their effects on the legal system, some references to the system of government which characterises the Netherlands appear to be preliminarily necessary

2. The Dutch legal system: government, separation of powers, administrative and functional decentralisation

The constitutional monarchy of the Netherlands is characterised by a form of parliamentary government, with an executive consisting of the King and his Ministers. Although the King is an integral part of the government¹⁹, it is the Ministers who effectively exercise executive power and dictate the political line of the country, for which, unlike the King, they are politically and legally responsible given the relationship of confidence between the Government and the Parliamentary Assembly²⁰.

At present time there are thirteen ministers whom in their capacity as head of a Department take a share of government responsibility upon himself or herself and exercise a number of powers accordingly. Sometimes they act by ministerial decree, sometimes they operate within the framework of government²¹. As has been stated, in their role as heads of ministries, each ministers take on a share of the responsibility for governing the country. However, this does not mean that they work in total isolation from each other, developing the policies in their own areas according to their own wishes. On the contrary, the division of work along departmental lines does not detract from the fact that they are obliged to cooperate with each other. The Council of Ministers (*ministerraad*) is important in this context.

Since the reform of 1983, the Constitution has included a separate provision on the Council of Ministers. Article 45 now provides that the Council of Ministers is composed of the ministers, under the chairmanship of the Prime Minister, and that it has a particular function and specific powers: the Council of Ministers shall consider and decide upon general government policy and promote its coherence²².

¹⁹ M. Orru', *Dutch Constitutional Law and the evolution of the Monarchy*, in G.F Ferrari, R. Passchier, W. Voermans, *The Dutch Constitution beyond 200 years: Tradition and Innovation in a Multilevel Legal Order*, Den Haag, 2018, 29 ff.

²⁰ Dutch Constitution, artt. 42-49.

²¹ Dutch Constitution, art. 42.

²² «According to the Explanatory Notes, the government held the view that the Council of Ministers is a fundamental element in our system of government'. Moreover, this provision in the Constitution expresses the notion that the Council of Ministers is an independent government institution, with collective external responsibility, and with powers of its own in relation to individual ministers. This last excerpt from the explanatory notes requires some qualification. First and foremost, insofar as the Council of Ministers can be said to be independent, this means that it does not stand in a hierarchical relationship with other State

The Council of Minister's power to discuss and decide on matters of general government policy is not an exclusive power. During the preparation of the new Constitution of 1983 it was emphasized that State institutions, such as the States General, are also involved in policy-making. So you cannot say that the Council of Ministers determines the overall government policy²³.

Moreover, in terms of constitutional law, the Council of Ministers really only has a part to play with respect to internal relationships, that is: between individual ministers. In external relationships, for example with the States General or the citizens, it is not the Council of Ministers that acts, but individual Ministers or the Government. Ministers are held responsible for their policy and are required to inform the Parliament (*Tweede Kamer*) and the Senate (*Eerste Kamer*). Orders binding upon citizens come from the legislature, the government or an individual minister, not from the Council of Ministers. Also in the context of the Covid-19 emergency it is important to underline that it is the individual authority and responsibility of Ministers which is of primary importance within the government.

The Dutch constitutional system is also characterised by the rule of law and the principle of separation of powers. The rule of law, *rechtsstaat*, implies in the first place that the Government is only authorised to act if its action is based on a rule of general application. In practice this means that all government action must be based upon a provision of an Act of Parliament.

The Constitution of the Netherlands does not provide for an article dedicated to the separation of powers, which is implicitly guaranteed by a series of limits designed to prevent the same person holding different offices in different branches of the State²⁴. The separation of powers is an intrinsic trait of the Dutch constitutional order but, at the same time, it is not very strict²⁵. Many Dutch authors, therefore, prefer to talk about the balance between the three State powers and about a constitutional system of checks and balances²⁶. This is confirmed by the fact that the legislative power is not strictly separated from the executive power with which it shares certain legislative competence²⁷. In turn, the executive

institutions such as the King, the government composed of King and Ministers (Article 42 of the Constitution) or the States General. However, the question arises whether the Council of Ministers is independent in the sense that it possesses exclusive decision-making powers in relation to other State institutions or in relation to citizens. For the reasons given below, it is likely that such a question would be answered in the negative», P.Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 91.

²³ P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 91.

²⁴ Dutch Constitution, art. 57.

²⁵ M.T. Oosterhagen, *Machtenscheiding. Een onderzoek naar de rol van machtenscheidingstheorieën in oudere Nederlandse constituties (1798 – 1848)*, Deventer, 2000 p. 359.

²⁶ M.T.Oosterhagen, *Machtenscheiding. Een onderzoek naar de rol van machtenscheidingstheorieën in oudere Nederlandse constituties (1798 – 1848)*, Deventer, 2000, p. 362; M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen, R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat*, Deventer, 2017; Somewhat differently: P.P.T. Bovend'Eert, *Het rechtsbeginsel van de machtenscheiding*, in R.J.N. Schlössels (ed), *In beginsel. Over aard, inhoud en samenhang van rechtsbeginselen in het bestuursrecht*, Deventer, 2004, 243.

²⁷ Dutch Constitution, art. 81.

power is subject to the control of the States General and the Council of State (*Raad van State*) chaired by the King, that issues opinions on proposed legislation which can strongly influence the legislative process²⁸.

The type of state laid down in the Constitution resembles at first sight a federation or a federal state.

The federation of the Kingdom functions over and above the four separate countries: The Netherlands, Curaçao, Aruba, St. Maarten²⁹. The Charter of the Kingdom of the Netherlands of 1954 sets out the political relationship between the four countries that constitute the Kingdom and lists the institutions of the Kingdom. These include the Crown of the Kingdom, the Government of the Kingdom and the executive power³⁰, the legislative bodies of the Kingdom and their legislative power³¹, the Council of Ministers of the Kingdom³². In addition the Charter sets out various federal affairs of the Kingdom³³.

The four participating countries possess the principal features of State: they all have their own Constitutions, called *Grondwet* in The Netherlands and *Staatsregeling* in the Caribbean part of the Kingdom, they have their own governmental organizations, full legislative, executive and judicial powers and governmental functions.

Despite the fact that it has these federal traits it would not be correct to classify the Kingdom as a common Federal State because when the institutions were constituted in 1954 no federal government was created³⁴.

The legal system in the Netherlands is still a model of a unitary state, albeit with a significant degree of decentralisation³⁵, so that it can be defined un

²⁸ Dutch Constitution, art. 73.

²⁹ Charter of the Kingdom of the Netherlands 1954, art. 1.

³⁰ Charter of the Kingdom of the Netherlands 1954, artt. 2-4.

³¹ Charter of the Kingdom of the Netherlands 1954, art. 4.

³² Charter of the Kingdom of the Netherlands 1954, art. 8.

³³ Charter of the Kingdom of the Netherlands 1954, art. 3. The article of the Charter specifies which areas are considered 'Kingdom affairs'. These areas include foreign relations, defence and Dutch nationality. Consequently, there is one Minister of Foreign Affairs who has ultimate responsibility for the foreign relations of the Kingdom as a whole and for incorporating the interests of all four autonomous countries in the Kingdom's foreign policy to the best extent possible. The Ministry of Foreign Affairs and the embassies, consulates and missions abroad work for the Kingdom as a whole and all its constituent parts. Aruba, Curaçao and St Maarten maintain their own international contacts in the areas in which they have autonomous responsibilities. However, when pursuing these international contacts they must operate within the framework of the Kingdom's foreign policy, since foreign affairs are a competence of the Kingdom. Diplomatic communications are transmitted through the Ministry of Foreign Affairs or one of the Kingdom's embassies abroad. Each of the autonomous countries has the obligation to promote the realisation of fundamental human rights and freedoms, legal certainty and good governance; this is primarily their own, autonomous responsibility. However the safeguarding of such rights and freedoms, legal certainty and good governance is deemed a 'Kingdom affair'. As a consequence, the Kingdom can respond if an autonomous country fails to fulfil its duty adequately in this field. Whether this is the case is primarily to be assessed by the Council of Ministers of the Kingdom.

³⁴ P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 31.

³⁵ G. Poggeschi, *Belgio e Olanda, così vicini così diversi: anche nel ruolo degli enti locali?*, in G. Pavani, L. Pegoraro (eds.), *Municipi d'Occidente. Il governo locale in Europa e nelle Americhe*,

decentralized unitary State³⁶ which is characterized by the existence of several layers of government in addition to the central authority.

The organization of these various layers is regulated in the Constitution that also assigns them legislative and executive powers. The administration of justice remains exclusive power of the central government judicial authorities.

The relation between central government and the decentralized authorities is not hierarchical: decentralized authorities are autonomous public institutions with their own legal personality³⁷. Their function is however subject to different form of control by the central government and the legal instruments at their disposal are of a lower order than national legislation.

At the basis of the Dutch administrative decentralisation system are the municipalities, *Gemeenten*.

At an intermediate level between the municipalities and the central government are located the Provinces, *Provincies*, whose powers can't be assimilated to the regional autonomy in a non unitary State or to the members of a Federal State³⁸. Rather, these are local authorities that citizens rarely turn to in comparison to municipalities, which are the most important local authorities in Dutch constitutional law in terms of functions and powers.

The Constitution does not provide for the limits of the area of operation of decentralized authorities. It does however state that certain subjects which are matters of central government concern, with the consequence that they fall outside the competence of the decentralized authorities. The Constitution declares, in particular, that central power is solely competent on matters of defence, foreign affairs, monetary system, administration of justice, regulation of civil and criminal law, civil and criminal procedures. In addition fundamental rights can only be restricted by an Act of Parliament³⁹.

With respect to the competence of decentralized government authorities, Dutch Constitutional law distinguishes between autonomous powers, *autonomie*, and shared powers, *medebewind*.

With regards to the autonomous powers the art. 124 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». At the same time, the article provides that « Provincial and municipal administrative organs may be required by or pursuant to Act of Parliament to provide regulation and administration». This means that in areas where it has autonomous powers, the decentralized authority conducts its own policies deciding itself, at the same time it cooperates in the implementation of

Roma, 2006, 31.

³⁶ P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 37.

³⁷ P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 37.

³⁸ M. Mazza, *The Local Government in the Dutch Constitutional System: A Comparative and European Perspective*, in G.F Ferrari, R. Passchier, W. Voermans, *The Dutch Constitution beyond 200 years: Tradition and Innovation in a Multilevel Legal Order*, Den Haag, 2018, 187 ff.

³⁹ Dutch Constitution, artt. 1-23.

policy which has been decided by central government institutions⁴⁰. However the designation of matters to be defined as their own is not fixed with a consequent prominent power from the central government.

In addition to this territorial decentralization⁴¹, within the Dutch constitutional system exist a form of functional decentralization. This term refers to the possibility that decentralized offices are authorized to represent particular interests with attribution of rule making and administrative powers connected with particular matters⁴². Examples of this are Water Authorities, *Waterschappen*, and the Social economic Council, *Social Economische Raad*⁴³.

In the context of this functional decentralization are recognised 25 Security regions, governed by the Security Region Act of 2013. The Act seeks to achieve an efficient and high quality organisation of the emergency services and crisis management under one regional management board. To this aim the law divides the Dutch territory into 25 Security Regions according to a subdivision that does not coincide with the territorial one of the Provinces and that groups together the territories of different municipalities.

Normally the management of the services covered by the Act (fire service, medical assistance, crisis management) is attributed to the executive bodies of the municipalities.

However, when an emergency involves the territories of several municipalities or takes on a national character, these powers are attributed by law to the Security Regions, represented by their Chairman⁴⁴.

The Security Regions have been set up as extended local government to perform tasks on behalf of and for the municipalities with joint regulations as their legal basis. The Chairman of Security Region is primarily responsible for the regional disaster and crisis management and provides information to the central government about the way in which the Region is performing its tasks. A report on implementation of national goals must be presented every year.

It is precisely through this system of functional decentralisation and cooperation between local authorities that the Dutch Government has tackled the health crisis triggered by the spread of the Covid-19 virus in the country.

3. The Covid-19 emergency: juridical framework

Responding to the advice of national and international experts, including the World Health Organisation and the National Institute of Public Health, the Dutch Government has taken several measures necessary to counter the spread of the virus epidemic. The actions taken so far by the Netherlands, although milder than

⁴⁰ P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018,38.

⁴¹ Dutch Constitution, artt. 123-136

⁴² P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 38.

⁴³ Dutch Constitution, art. 134

⁴⁴ De Wet Veiligheidsregio's, 2013, art.3.

those taken by other countries such as Italy, Belgium, France and Spain, have nevertheless led to numerous restrictions on citizens' personal freedoms.

these measures were adopted under the powers established by the combined application of three different normative sources:

- a) the Public Health Act, *Wet publieke gezondheid*;
- b) the Municipalities Act, *Gemeentwet*;
- c) the Security Regions Act, *Wet veiligheidsregio's*.

As is easy to see, these powers are attributed to different administrative bodies at different levels of government, which makes it essential for there to be excellent cooperation and constructive communication between the various elements of the territorial and functional decentralisation that characterises the Dutch system.

To these normative sources must also be added Article 103 of Constitution, which contains the possibility to declare the state of emergency to which, however, the Dutch Government and Parliament did not consider it necessary to resort.

A) the Public Health Act-Wet publieke gezondheid

In Dutch law, the task of controlling infectious diseases has traditionally been entrusted to the government⁴⁵. This is a task directly attributed to him by Article 22 of the Constitution⁴⁶ as well as by the Health Act of 1865 and the Contagious Diseases Act of 1872, which included an obligation for doctors to report infectious diseases and the direct intervention of the Government.

Currently, public health regulations are entirely contained in the Public Health Act⁴⁷, WPG, which entered into force on 1 December 2008 and identifies the legal instruments necessary for the control of infectious diseases in the country⁴⁸. The law was promulgated in implementation of the International Health Regulations, IHR, adopted by the World Health Organization in 2005 and entered into force in 2007.

The WPG provides for a clear division of tasks between local and central government. The Mayors, or the Chairmen of the Security Regions where they are competent, are responsible for implementing the provisions of the law and imposing administrative sanctions in case of violation. The law also provides for a form of control by the central government and more specifically by the Department of Health, which in certain cases may take over the direction of activities and the decision of measures taken to combat an infectious disease,

⁴⁵ A. Hendriks, *Nood breekt wet in Tijden van Corona*, NJB, n. 880, 2020, 1.

⁴⁶ Dutch Constitution, art. 22: «The authorities shall take steps to promote the health of the population».

⁴⁷ Wet Publieke Gezondheid, 3/2008.

⁴⁸ Until the end of 2008 the instruments provided for in the Public Health Act were provided for by three separate laws: the Public Health Prevention Act, *Wet collectieve preventie volksgezondheid*; the Infectious Diseases Act, *Infectieziektenwet*; the Quarantine Act, *Quarantainewet*. With the Public Health Act, all provisions on the control of infectious diseases have been brought together in a single regulatory source in order to meet the need for consistency and cooperation in the fight against infections.

sending instructions to the Mayors or the Chairmen of the Security Regions⁴⁹. In this task the Minister is assisted by the National Institut for Public Health and the Environment, RIVM.

The distribution of powers under the WPG between local and central government depends essentially on the context and severity of the infectious disease and the extent of the infection. In this regard, the law distinguishes diseases in different classes: A, B1, B2 and C⁵⁰. The most far-reaching measures are taken for class A diseases⁵¹. The key principle for the application of these measures is proportionality, so it has to be considered whether the desired effect can be achieved in less restrictive way of citizens' freedoms⁵².

In the event that the Minister of Health declares an infectious disease as belonging to class A, the law attributes to the Chairmen of the Security Regions, under the direction of the Minister of Health, the exercise of powers normally entrusted to the Mayors⁵³.

With a regulation adopted on the basis of Article 20 WPG, on 28 January 2020, the Minister of Health declared the Covid-19 virus an infectious disease virus class A. This qualification had two fundamental effects:

- a) the power to control the outbreak is attributed to the Chairmen of Security Region instead of the Mayors⁵⁴;
- b) the Minister assumes the task of instructing the Chairman of the Security Regions on the implementation of the measures necessary to combat the epidemic⁵⁵.

Before deciding on the instructions to be given, with a sense of cooperation between the central and local levels that inspires the whole law, the Minister shall consult the Minister for Infrastructure and the Environment, the Mayors and the Chairmen of the Security Regions, in order to understand the particular needs of each territory and give instructions as uniformly as possible⁵⁶. The Minister of Health must also keep the Minister of the Interior and the Minister of Justice informed on all activities undertaken⁵⁷. In addition, Mayors and Chairmen of Security Region are required to provide the Minister of Health with all the information useful and necessary for the adoption of measures to combat and control the epidemic⁵⁸.

⁴⁹ Wet Publieke Gezondheid, 3/2008, art.7.

⁵⁰ Wet Publieke Gezondheid, 3/2008, art.6.

⁵¹ A person suffering from a class A infectious disease may also be quarantined against his or her will and be forced to suspend his or her professional or business activities. Doctors who identify or suspect one of the infectious diseases covered by the WPG are obliged to notify the public authorities (Art. 22).

⁵² A. Hendriks, *Nood breekt wet in Tijden van Corona*, NJB, n. 880, 2020.

⁵³ Wet Publieke Gezondheid, 3/2008, artt.6-8.

⁵⁴ Wet Publieke Gezondheid, 3/2008, art. 6.4.

⁵⁵ Regeling 2019, nCov, StcRt 2020, 6800. The Minister of Health had previously classified Mexican flue and the EHS virus as a group A infectious disease. (Regeling Mexicansee griep, STcRt 2009, 82; Regeling Mers-Cov, StcRt 2013, 18082.

⁵⁶ Wet Publieke Gezondheid, 3/2008, art. 7.4.

⁵⁷ Wet Publieke Gezondheid, 3/2008, art. 7.5.

⁵⁸ Wet Publieke Gezondheid, 3/2008, art. 7.5.

Chapter V of the law, under the title «special provisions for the control of infectious diseases», provides for various coercive measures aimed at preventing the spread of the disease and whose application is entrusted to the Chairmen of the Security Regions⁵⁹.

The use of those rules was taken over by the Netherlands Government only to the extent strictly necessary, having relied on the cooperation of its citizens. The criterion which guides the application of those measures is, in fact, always that of proportionality, so that these measures apply only if the danger cannot be avoided effectively in any other way.

B) *The Municipalities Act-De Gemeentewet*

The Municipalities Act, GEMW, regulates the powers of the Mayor in matters of public order. Unlike the WPG, this law does not have the specific purpose of protecting public health but provides for a number of powers that can be exercised by the Mayor in emergency situations such as the spread of a virus. In particular, the Mayor is allowed to issue the necessary measures to maintain public order⁶⁰, monitor places and events open to the public, as well as take any measures necessary to deal with serious threats or disasters, even in derogation of ordinary law⁶¹ with the only limitation of the constitutional provisions⁶². In this case, however, the measures adopted by the Mayor must be ratified by the City Council and promptly communicated to the King's Commissioner and the Head of the District Attorney's Office⁶³.

Among the legal instruments available to the Mayor in emergency situations are emergency orders, *noodbevelen*, and emergency ordinances, *noodverordeningen*. Between the two instruments there is a subtle but substantial difference⁶⁴.

The Administrative Jurisdiction Division of the Council of State (*de Afdeling Bestuursrechtspraak van de Raad van State*) recently described this difference as follows: «The emergency orders have an ad hoc, rather than a general character and are aimed at a direct factual result in a specific case. Emergency ordinances have a different character. They lay down general rules and change the legal situation of citizens for some time. Furthermore, emergency ordinances are by their nature subject to repeated application and may impose a complex of standards for a certain period of time. The circumstances of specific case are relevant when it comes to the choice of issuing an emergency order or adopting an emergency ordinance»⁶⁵.

There are other differences that can be considered fundamental. An

⁵⁹ Wet Publieke Gezondheid, 3/2008, artt. 31-48.

⁶⁰ Gemeentewet, 1992, art. 172.

⁶¹ ABRvS, 20.04.2016, ECLI:NL:RVS:2016:1044.

⁶² Gemeentewet, 1992, art. 175.

⁶³ L.D. Ruigrok, *Onmiddellijke handhaving van de openbare orde of bestuursdwang?*, BJU, 2012, Den Haag.

⁶⁴ B. Roozendaal, S. Van de Sande, *Covid-19 in het Publiekrecht. Een Overzicht*, NJB, 879, 2020.

⁶⁵ ABRvS, 18.12.2019, ECLI: NL: RVS:2019: 4275

emergency order, *noodbevel*, is an administrative law instrument while an emergency ordinance, *noodverordening*, contains general provisions. This has several consequences for the legal system, the most important of which is that an emergency ordinance cannot be challenged under administrative law⁶⁶. An emergency ordinance may be challenged only by ordinary civil procedure and, in that case, the Court may set aside the ordinance only if it is contrary to hierarchically superior norms or fundamental principles of the legal system⁶⁷.

In particular, this was the juridical instrument used implementig the measures to control the Covid-19 outbreak.

C) *The Security Regions Act- De Wet Veiligheidsregio's*

In the event that an emergency situation and possible problems of public order transcend municipal boundaries, as in the case of the spread of the corona virus throughout the national territory, the application of the Security Regions Act, WVR, determines a shift of the powers attributed to the Mayor by the Municipalities Act, in the hands of the Chairman of the corresponding Security Region. More specifically, the Chairman is given the power to adopt the emergency measures provided for in article 39 of the Act, which correspond exactly to those attributed to Mayors by articles 172-177 of the Municipality Act.

These powers include the maintenance of public order, control of gatherings of persons, prohibition of events, closure of places open to the public by the adoption of emergency ordinances and emergency order⁶⁸.

The normal procedure for the ratification of emergency ordinances, which provides for the involvement of municipal bodies and possible recourse to the King's Commissioner in the event of non-ratification, does not apply.

D) *The State of Emergency- Het Noodrecht*

The Dutch emergency law is laid down in Article 103 of the Dutch Constitution⁶⁹. The Article stipulates that an Act of Parliament defines the cases in which a state of emergency may be declared by Royal Decree in order to maintain internal or external security in the Kingdom. The consequences of the declaration of the state of emergency are governed by the Act of Parliament. Directly after the state of emergency is declared and whenever it considers it necessary, until the state of emergency is terminated by Royal Decree, the States General shall decide the duration of the state of emergency. The two Houses of the States General shall consider and decide upon the matter in joint session.

⁶⁶ AWB, art. 8:3.

⁶⁷ Rb Rotterdam 19.03.2020 ECLI:NL:RBROT:2020:2496; HR 3.06.2006 ECLI:NL:RBDHA:2019:8808; HR 11.10.1996, ECLI:NL:HR:1996:ZC2169, NJ 1997/165; Rb Den Haag 26.10.2019, ECLI:NL:RBDHA:2019:8808.

⁶⁸ De Wet Veiligheidsregio's, 2013, art. 39.

⁶⁹The text of the Dutch Constitution and translations thereof into English, German, French and Spanish can be accessed the website of the Dutch government at the following address: www.rijksoverheid.nl/onderwerpen/grondwet-en-statuut/documenten/rapporten/2019/02/28/grondwet-voor-het-koninkrijk-der-nederlanden-2018.

If the state of emergency is declared, it is allowed to deviate from the provisions of the Constitution relating to the powers of the executive bodies of the provinces, municipalities, public bodies and water authorities. Furthermore it is allowed to depart from certain fundamental rights that are mentioned in the Articles 6 (the freedom of religion), 7 (the freedom of speech), 8 (the freedom of association), 9 (the freedom of assembly), 12 paragraphs 2 and 3 (the right to home) and Article 113, paragraphs 1 and 3 (which attributes the trial of criminal offences to the judiciary) of the Constitution. The fundamental freedoms mentioned in the Article 10 paragraph 1 and 11 Constitution, which are the right to privacy and the right of inviolability of the human body, are not explicitly mentioned in Article 103 Constitution, because it follows from the Articles themselves that it is permitted to deviate from them by law⁷⁰.

By way of implementation of Article 103 Constitution four laws have been enacted in which several aspects of the state of emergency are further detailed⁷¹. The Coordination Act for exceptional circumstances (*Coördinatiewet uitzonderingstoestanden*)⁷², is most relevant to mention here. This Act details the way the state of emergency is declared on the proposal of the Prime Minister, the manner in which the existence of the state of emergency is announced and the way how to end it. Furthermore it stipulates that a limited state of emergency or the general state of emergency can be declared. The limited and general state of emergency cannot coexist. If one enters into force it automatically excludes the operation of the other. If the state of emergency is declared separate emergency legislation, which is specified in the Annexes A (for the partial state of emergency) and B (for the general state of emergency) to the Act, can be put into effect by Royal Decree which relates to parts of, among other things, the Extraordinary Powers Act for Civil Authorities (*Wet buitengewone bevoegdheden burgerlijk gezag*), the War Act for the Netherlands (*Oorlogswet voor Nederland*), the Protection of State Secrets Act (*Wet bescherming staatsgeheimen*), the Justice Service Emergency Act (*Noodwet rechtspleging*), the Disaster Act (*Rampenwet*), and the Financial Transactions Emergency Act (*Noodwet financieel verkeer*).

Until now, the Dutch Government has not deemed it necessary to declare a state of emergency.

Given the legal framework of reference, excluding the State of Emergency, it is possible to understand the system of cooperation between the different levels of government, which is used in Dutch legal system:

a) the Minister of Health takes control of the action to combat the spread of the virus by adopting, after consulting the experts, the other competent Ministers, including in particular the Minister of the Interior and the Minister of Justice, the Chairmen of the Security Regions and the mayors, the necessary instructions to adopt emergency measures. The Minister of Health shall also report these instructions to Parliament;

⁷⁰ C.W. van der Pot, *Handboek van het Nederlandse Staatsrecht*, Deventer, Kluwer 2014, 771.

⁷¹ The laws of 3 April 1996, Stb. (The Dutch Bulletin of Acts and Decrees) 365-368.

⁷² Coordination Act for exceptional circumstances of 3 April 1996, Stb. 365.

b) After implementing the instructions of the Minister of Health, the Chairmen of the security regions take the necessary measures in the form of emergency ordinances.

4. The adopted measures

Following this scheme of action, by letter to the Parliament of 28 February 2020⁷³, the Minister of Health, in application of art. 6 WPG, declared Covid-19 a class A infectious disease, thus determining the competence of the Chairmen of the Security Regions and the application of art. 7 WPG. Under this rule, the Minister of Health has assumed the power to instruct the Chairmen on the measures to be taken and their application as uniformly as possible throughout the country.

In order to ensure this uniform application of the instructions, the Chairmen of the Security Regions have adopted a model of emergency ordinances to which reference should be made, subject to a certain margin of manoeuvre for each Chairman to adapt the ordinance to specific territorial needs. However, the possibility remains for the Minister of Health to prevent the Chairman from adopting a specific measure.

At a press conference on 12 March 2020, Dutch Prime Minister Mark Rutte announced the adoption of the first package of emergency measures, which included a ban on events with more than 100 people, as set out in the letter from the Minister of Health communicated to the General States of Parliament and the Chairmen of the Presidents of the Security Regions on the same day and published on 13 March 2020⁷⁴. As a result, the Chairmen of the security regions have issued 25 emergency ordinances under article 39 WVR and article 176 GEMW.

These orders have taken on different content: some have merely reproduced literally the text of the instruction of the Minister for Health, others, referring to article 174 GEMW, have broadened the scope of the measures by also prohibiting meetings of a private nature.⁷⁵

The initial difference, albeit only partial, in the content of the ordinances led to the adoption of a model ordinance in order to give uniformity to the measures adopted throughout the national territory and which was subsequently adopted by all the Security Regions. The Model Ordinance has adopted the extensive interpretation of the instructions given by the Minister, providing for the application of Article 174 GEMW, which prohibits the organization and participation in meetings of a private nature, thus giving a certain margin of action to the Chairmen of the Security Regions⁷⁶.

Within a short period of time, the Minister of Health adopted further instructions for the adoption of restrictive emergency measures:

a) by letter of 17 March 2020, the Minister adopted measures concerning

⁷³ Kamerstukken, 2019/2020, 25295, n.100.

⁷⁴ Kamerstukken, 2019/2020, 25295, n.124.

⁷⁵ B. Roozendaal, S. Van de Sande, *Covid-19 in het Publiekrecht. Een Overzicht*, NJB, 879, 2020.

⁷⁶ B. Roozendaal, S. Van de Sande, *Covid-19 in het Publiekrecht. Een Overzicht*, NJB, 879, 2020.

the closure of universities and schools, the suspension of childcare services, the closure of restaurants, gyms, saunas and coffee shops⁷⁷. These measures became binding with the publication of the relevant emergency ordinances of the Chairmen of the Security Regions between 16 and 17 March 2020. The ordinances provided for an exception for the sale of food and beverages at home⁷⁸;

b) by letter dated 25 March 2020, the Minister of Health extended the measures already adopted by providing for a ban on the organization and participation in any type of public event regardless of the number of participants with the exception of meetings of the City Council, the States General, meetings necessary to ensure the continuation of the work of public institutions, funerals and marriages with a maximum limit of 30 people, meetings of an ideological and religious nature provided that the measures of social distancing are respected, provided that all participants wear masks⁷⁹;

c) Further measures have provided for the closure of casinos, shops with direct contact with customers such as hairdressers and beauty salons. In addition to these bans, social distancing has been imposed, although the movement of persons has not been prevented.

Within the margin of action available to the Chairmen of the Security Regions, in some of them where there is normally an intense flow of tourists, it has also been forbidden to offer accommodation for the night, keep open services for recreational purposes and build or use beach cottages⁸⁰.

With regard to sanctions for infringements of the measures taken, the Minister's instructions essentially provided for financial sanctions.

The power to impose administrative sanctions in an emergency situation would normally be attributed to the Mayors on the basis of Article 125 GEMW, if this is necessary to ensure compliance with the measures taken⁸¹.

It is not, however, equally clear whether this competence also falls to the Chairmen of the Security Regions. In fact the Article 39 WVR transfers to the Chairmen the Mayors power provided for in article 176 GEMW but not those provided for in Article 125 GEMW, or at least not expressly. This circumstance was, however, considered a mere oversight by the legislator: in response to a parliamentary question of 1 April 2020, concerning the possibility of administrative sanctions being applied by the Chairmen of the Security Regions, the Minister of Justice stated that in his view this kind of power should also be considered transferred in the context of a class "A" emergency situation together with all other powers as provided for in Article 39 WVR⁸².

Finally, in a letter dated 6 May 2020, the Minister of Health announced to the Parliament the gradual withdrawal of the pandemic and the consequent

⁷⁷ Kammerstukken II, 2019/2020, 25295, n.175; Kamerstukken II, 2019/2020, 31289, n.416.

⁷⁸ Among others, art. 2 § 3 noodverordening COVID-19, Veiligheidsregio Brabant-Noord, 17 March 2020.

⁷⁹ Kamerstukken II, 2019/2020, 25295, n.199

⁸⁰ For example noodverordening COVID-19, Veiligheidsregio Zeeland, 27 March 2020.

⁸¹ Kamerstukken II, 1985/1986, 19403, n. 3.

⁸² Handelingen 2019/20, 2307.

possibility of moving to a second phase of the fight against the virus. The strategy for the second phase of the fight against the pandemic envisages a gradual but slow return to normality and is based on cooperation with the population.

In fact, the population is required to maintain the safety measures of social distancing and all previously recommended hygiene measures, including the use of masks and frequent hygiene of hands. In addition to cooperation with the population, there will be a gradual reopening of businesses and production activities, provided that all safety measures are complied with, according to a four-stage programme that provides for a gradual return to normal by the end of June.

5. The impact on fundamental rights

In Dutch Constitutional law the fundamental rights and liberties are usually referred to as fundamental rights. A distinction is made between the classical fundamental rights and social and economic rights. The classical fundamental rights can be invoked before the courts and in most cases establish a duty on the government to abstain. The majority of the social fundamental rights cannot be invoked in court and are to be considered as instructions addressed to the public authorities to take certain action to promote the social, economic and cultural well being of individuals⁸³.

The first source of fundamental rights is of course the Constitution⁸⁴. A second source of fundamental rights is primary and secondary EU law and rulings of European Court of Justice to which are added international treaties and in particular the European Convention on Human Rights⁸⁵.

The Netherlands adheres to a monist system for the relationship between international law and national law. Under this system international law is incorporated into national law without transformation and without any national order. Insofar as international law contains provisions which can be binding on all person they can be invoked in court⁸⁶.

The limitation of certain fundamental rights is lawful if it conforms to a constitutional limitation clause or criteria developed by the courts⁸⁷. Only the legislature is competent to impose limitation, but an Act of Parliament may also delegate the power to do so to other central or decentralized power⁸⁸. Whether

⁸³ G. F. Ferrari, *Rights and Liberties in the Dutch Context*, in G.F Ferrari, R. Passchier, W. Voermans, *The Dutch Constitution beyond 200 years: Tradition and Innovation in a Multilevel Legal Order*, Den Haag, 2018, 139 ff.

⁸⁴ Dutch Constitution artt. 1-23.

⁸⁵ G.Rando, *The relationship between European Union and National Law in The Netherlands in a Comparative Perspective*, in G.F Ferrari, R. Passchier, W. Voermans, *The Dutch Constitution beyond 200 years: Tradition and Innovation in a Multilevel Legal Order*, Den Haag, 2018, 69 ff.

⁸⁶ E. Bertolini, G. Romeo, *The Dutch System and the Supranational Law: the application of ECHR in a comparative perspective*, in G.F Ferrari, R. Passchier, W. Voermans, *The Dutch Constitution beyond 200 years: Tradition and Innovation in a Multilevel Legal Order*, Den Haag, 2018, 83 ff.

⁸⁷ P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 124.

⁸⁸ P. Boovend Eert, M. Kortmann, *Constitutional Law of the Netherlands*, Alphen aan den Rijn, 2018, 124.

delegation is possible or not can be determined on the basis of the delegation terminology in the Constitution.

To counteract the spread of Covid 19, the Dutch government has asked the population to radically change their habits by preventing access to public places, limiting access to religious places and imposing social distancing. The measures adopted have therefore had an impact on many fundamental freedoms such as freedom of assembly and association, freedom of demonstration, religious freedom, access to justice and education. However, all these freedoms are, of course, subject to restriction under the restrictive clauses of the Constitution following an assessment resulting from the balancing of the interests at stake with the need to protect the right to health under Article 22 of the Constitution.

The relevance of the right to health in the Dutch constitutional system is reflected in the letter of the Constitution itself. For example, Article 6 of the Constitution states in matters of religious freedom that «Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by Act of Parliament for the protection of health». And again Article 9 on the subject of freedom of assembly and demonstration establishes in its second paragraph that «Rules to protect health in the interest of traffic and to combat or prevent disorders may be laid down by Act of Parliament».

Article 22 of the Constitution also requires the State to take action to prevent and combat the spread of an epidemic, as well as guaranteeing everyone the social right of access to treatment.

In order to achieve these goals, the Netherlands works with the 193 other World Health Organization member States and has adhered to the International Health Regulations of 2005, which led to the adoption of the above-mentioned Public Health Act in 2008. The law, as already pointed out, includes the possibility of restricting certain freedoms of citizens in the face of an emergency health situation for the safety of public health. Such restrictions must not only be provided for by law but must also be applied in accordance with the principle of proportionality.

The WPG and the WVR therefore constitute the constitutionally legitimate legal basis for the adoption of measures restricting certain fundamental freedoms currently in force.

It is probably still too early to assess whether these restrictions on fundamental freedoms are actually proportionate, although it is clear that the risk to the health of Dutch citizens is particularly high and has therefore required some necessary restrictions in order to avoid overburdening hospital facilities with a high risk of loss of life.

In addition, in the opinion of the Dutch Human Rights Council, the State has correctly guaranteed access to medical care to everyone, in accordance with the principle of equality, even to a well-organised health service that has proved to be ready to deal with the emergency⁸⁹.

⁸⁹ mensenrechten.nl/nl.

The Government's proposal to use data and apps to monitor the circulation of the virus in the near future has aroused greater concern, especially from public opinion. This would involve, however, a mapping of data and movements of citizens with a consequent compromise of the right to privacy.

The competent independent authority, however, considered it still too early to express an opinion on the matter, as it was still being studied by government technicians, to whom it recommended particular attention to the use and quality of the data, the capacity of the National Health Service to administer tests to the population and the possibility for all social groups to access this technology without discrimination⁹⁰.

6. Concluding remarks

The measures taken against the spread of Covid-19 are having a huge impact not only on people's lives and fundamental freedoms, but also on the legal systems and forms of State in all the countries involved. Despite the dramatic nature of the situation, this may also provide an opportunity for reflection on the rights system and the management of crises of this magnitude.

Months after the beginning of the contagion, some countries can draw conclusions regarding their model of government, the relationship between central and local power and the capacity for cooperation and readiness to ensure a response, not only immediate, but also long-term, regarding the protection not only of the right to health but also of civil, economic and social rights, learning to turn difficulties into an opportunity.

The Dutch Government maybe could have taken the containment measures more immediately in the face of the announcement of the first outbreaks and the situation in other neighbouring countries. Nevertheless, the Government was ready to effectively combat the epidemic thanks to a system that had already been tested and regulated in an analytical manner.

Having a well-structured emergency control system, based on laws drawn up and approved by Parliament in collaboration with the Government, has contributed to the implementation of measures that have not posed problems of compatibility with the constitutional order, also with regard to the personal freedoms of citizens, which have been proportionally limited through a defined system of intelligent isolation, essentially based on cooperation between authorities and citizens.

This system also highlights the strong cooperation between all levels of government, with a clear division of tasks between central government and local authorities.

The system outlined by the Dutch system has, however, had an impact on the form of the State, leading to a centralisation of powers, normally entrusted to local governments, in the hands of the central government. This has resulted in the almost total annulment of the autonomy of local authorities, thus undermining

⁹⁰ mensenrechten.nl/nl.

the particular characteristics of the Dutch system of decentralisation, although the constant dialogue between local and central government and between government and parliament has been maintained.

The action against Covid-19 in the Netherlands has therefore been characterized by an effective organization and planning of actions, thanks to an already proven system of distribution of expertise in cases of emergency dating back to 2008, and an effective response by the National Health System, which shows that the protection of civil rights can not do without an effective long-term investment in the protection of social rights.

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