

Summary

Subject and point of issue (chapter 1)

This thesis is about an act named the ‘WMCZ’. This act, which became law on 1 June 1996, contains co-determination rights for clients of collectively financed organizations in the fields of social care and health care. During its period as a bill as well as after it became law there was a lot of criticism of the WMCZ. This gave cause to examine if the realization of the WMCZ has been in agreement with the Dutch criteria for the quality of regulation and if so, to what extent.

The parliamentary history of the WMCZ (chapter 2)

In order to try to address this question, the thesis starts with a survey of the parliamentary history of the WMCZ. The achievement of legal co-determination rights for clients of social and health care organizations appeared to have been a long and hard struggle, during which several attempts to create a law on this subject failed. It was striking that during this legislation process, several ministers in succession each chose for a totally different approach. They were thereby (among other things) influenced by the social-political view on the role of legislation in society at the time.

For example, one of the previous bills on this subject, the ‘WDFI’, appeared to be strongly influenced by recommendations of the Commission-Van der Burg – which concluded in 1977 in its advisory report that clients of collectively financed nonprofit-organizations needed to obtain more influence on the decision- and policymaking within these organizations – and the way people thought about the role of legislation in society during the 1970’s. In that period of time legislation was mostly seen as an instrument to effect social changes. As a result, the scope of the WDFI was very broad. With the exception of schools and other educational institutions, this bill would have concerned all collectively financed nonprofit-organizations. Under the influence of a growing need of deregulation in the 1980’s, this bill was withdrawn in 1986 and replaced in 1988 by the ‘WDFZ’. This latter bill only concerned collectively financed social and health care organizations in which clients remain for a longer period of time, and it was therefore characterized by a very limited scope. Because of that durability

and the serious extent of the clients' dependence towards the organization, the contemporary minister of public health, welfare and sports ('VWS') thought that only for these clients the creation of legal co-determination rights was really necessary. The WDFZ, however, could not count on the support of a majority in parliament. Therefore this bill was also withdrawn.

The following minister of VWS, d'Ancona, and her Secretary of State Simons, decided in 1993 to take matters in a different direction. They created a new bill – the WMCZ – with a broader scope than the former WDFZ. The WMCZ would concern all collectively financed social and health care organizations. Minister d'Ancona gave two reasons for widening the scope. First of all, she thought that the fact that clients are always in some way dependent on these organizations was more important than the extent and the duration of their dependence. Secondly, she said that, because of the absence of the mechanism of the free market in the fields of social care and health care, the supply of care does not automatically match with the demand/requirements of the clients. According to her, this affected the quality of the care. By creating legal co-determination rights for these clients, d'Ancona wanted to enable them to influence the supply which, again according to her, would improve the quality of the care provided.

The contents of the WMCZ were striking as well in comparison with those of preceding bills. They appeared to be very summary. Under influence of the vision on the quality of legislation in the 1990's, the WMCZ was restricted to only 11 articles. Minister d'Ancona had chosen for the form of 'self-regulation conditioned by law'. In that case the law contains only the necessary conditions, and leaves the rest to self-regulation. By choosing for this form of legislation, the minister wanted to leave the providers of care enough room to give form to the co-determination by clients in a way that matches with the organization and the client-group. Any interference with forms of clients' participation that already existed in practice would, consequently, also remain limited. d'Ancona was hoping that this would stimulate the providers of care to give (further) form to the co-determination rights of clients.

Criticism of the WMCZ (chapter 3)

Although the minister of VWS at the time, d'Ancona, claimed that the WMCZ has been designed in conformity with the Dutch criteria for the quality of legislation, the extent of criticism levelled at the WMCZ makes one suspect the opposite. Already during its inception period as a bill, substantial criticism of the WMCZ was uttered in parliament, as well as in the literature. The criticism concerned in general:

- (a) the necessity of the WMCZ;
- (b) the scope of the WMCZ and
- (c) the contents of the WMCZ.

Because co-determination by clients or other forms of clients' participation had, over the years, already become common practice in many social and health care organizations, people asked themselves whether a law on co-determination

rights for these clients was still a necessity. In relation to that, they also pointed out the fact that since the 1970's much had changed regarding the legal position of these clients: their position had already been strengthened by other legislation on the rights of patients.

Furthermore, people questioned whether the scope of the WMCZ wasn't too broad. They doubted if the kind of clients' participation that is being prescribed by the WMCZ – that of co-determination by clients through a representative clients' council – was suitable for organizations as general hospitals and other social or health care organizations with which clients are only briefly in contact. According to the critics, the membership of such a council required a certain (durable) relationship with the social or health care organization concerned.

Regarding the contents of the WMCZ, opinions were divided. Some people thought that the WMCZ contained too many rules, which, according to them, would give rise to more bureaucracy. Others, on the contrary, were of the opinion that the WMCZ by regulating too little things had left too many things to self-regulation. This gave rise to the question whether the legislator had found the right balance between the things that need to be regulated by law, and the things that can be left to self-regulation. One could even ask whether 'self-regulation conditioned by law' is a suitable form of legislation for a law on co-determination rights. Given the inequality and the lack of balance of power between the provider of social care or health care on the one hand and the clients' council on the other hand, it is after all not certain that there is any room for self-regulation at all.

Frame of reference (chapter 4)

These questions formed reasons to examine if the WMCZ is, with regard to these critical elements, in conformity with the criteria for the quality of legislation as laid down in the governmental note 'View on legislation'. These criteria form the current standard for the quality of legislation in the Netherlands. That means that Dutch regulation still has to comply with them. Regarding the WMCZ consecutive ministers of PHWS at the time, d'Ancona and Borst, claimed that this was the case. If they were right, had yet to be seen. Before that examination could take place, the genesis and contents of these criteria first had to be described, as well as the requirements that flow from these criteria with respect to 'self-regulation conditioned by law'.

The criteria for the quality of regulation ensued from theories on the need for deregulation that arose strongly in the 1980's. Considering the importance of the policy of deregulation – the continuity of the constitutional state depends on it – one could say that the argument of the need for deregulation rightfully played an important role during the parliamentary history of the WMCZ. Especially in the fields of social care and health care there appeared to be a strong need for deregulation. In the early 1990's theories on the need of deregulation broadened to theories on the quality of legislation as a whole. Within that framework the minister of Justice at the time developed criteria for the quality of

legislation and included them in 1991 in the governmental note 'View on legislation'. In 1993 these quality requirements were further detailed in the governmental 'Recommendations for the legislation'. It concerns the quality demands of:

- (1) legitimacy and realization of principles of law
- (2) effectiveness and efficiency
- (3) subsidiarity and proportionality
- (4) simplicity, clarity and accessibility
- (5) mutual harmonization
- (6) feasibility and possibility of enforcement.

The legislator has to comply with these demands/criteria while ascertaining the necessity for legislation, as well as during the creation of a bill's contents. The criteria are of an obligatory nature. While describing those criteria it appeared to be possible to categorize the criticism of the WMCZ – as described in chapter 3 – under the selfsame criteria. This gave further growth to the suspicion that the WMCZ on several points is in conflict with these criteria.

In chapter 4 it also became clear that legislation in the form of 'self-regulation conditioned by law' goes well together with the demand of subsidiarity from the note 'View on legislation' as well as with the necessity of deregulation (namely as an alternative for the diminishing role of the legislator). It is striking how this form of legislation combines the advantages of legislation, such as the feasibility and possibility of enforcement, with the advantages of self-regulation such as room for flexibility and personal responsibility of individuals and organizations. While formulating self-regulation assignments, the legislator still has to be very careful. If the legislator is too demanding and forces the parties involved to create a regulation that is directly in conflict with their own interests, then that could be at the expense of their willingness to cooperate. Regarding to the question whether 'self-regulation conditioned by law' is a suitable form for a law on co-determination rights – a law that applies to situations characterized by conflicts of interests and inequality of power – the conclusion is that this could indeed be the case. The legislator does however have to create legal conditions that, in turn, create a balance of power between the decision-makers within the organization (for example the board of directors) on the one hand and the co-determination council on the other. This would stimulate the creation of balanced forms of self-regulation. So, in fact, much depends on the quality of the legal conditions.

The quality of the WMCZ as co-determination law (chapters 5, 6 and 7)

The WMCZ was assessed by the criteria for the quality of regulation in the chapters 5 and 6. Chapter 5 relates to the necessity and the scope of the WMCZ, and chapter 6 to its contents. The results of several evaluation researches regarding the WMCZ were used for this particular examination. The assessment led to the conclusion that a legal prescription for clients' participation is indeed necessary. However, the form of participation that was chosen by the legislator –

that of co-determination through a clients' council – did not in any case appeared to be an effective and efficient way to achieve the goals of the WMCZ, i.e. strengthening the legal position of the clients on a collective level and improving the match between the supply and the demand of care. Some organizations – for example hospitals and other organizations with which clients are only rarely and/or briefly in contact – are experiencing difficulties with installing a representative clients' council. The installation of such a clients' council appeared to require a certain durable relationship between the clients and the organization, as well as a certain feeling of involvement of the clients towards the policy and decision-making within the organization. The costs of such a clients' council also appeared to be relatively high compared with the costs of other forms of participation; much higher than was originally estimated by the legislator. By prescribing clients' participation by means of a clients' council for all social and health care organizations, the WMCZ comes into conflict with the quality demands of effectiveness and efficiency, subsidiarity and feasibility, and possibility of enforcement. This conflict can be resolved by creating the possibility to dissent from the WMCZ by means of a written agreement between the social or health care organization on the one hand and a representative clients' or patients' association on the other. In that agreement the two parties could then create a regulation on clients' participation that is more suitable for the organization.

In chapter 6 the question was examined whether the contents of the WMCZ are in conformity with the quality demands for legislation. Besides the results that were obtained by earlier evaluations of the WMCZ, use was made of the experiences that had already been acquired with two laws on co-determination rights that are much older than the WMCZ, namely the 'WOR', which creates co-determination rights for employees and their works councils, and the 'WMO', which creates co-determination rights for teachers, pupils and/or their parents. The results of the evaluations of the WMCZ were compared with the experiences with the WOR and the WMO. This led to the conclusion that the legislator did not succeed in finding the right balance in the WMCZ between the things that need to be regulated by law and the things that can be left to self-regulation. For example, the WMCZ fails to guarantee the independence of the clients' council towards the board of directors of the social or health care organization. Apart from that, the co-determination rights of employees in the WOR appears to give them more influence on the policy of the board of directors than the co-determination rights in the WMCZ give the clients. The WOR also provides the works council with better means to enforce the co-determination rights than the WMCZ does for the clients' council. Furthermore, the articles in the WMCZ are unclear on several points. The WMCZ for example does not answer the question how a representative clients' council should be put together, nor does it clarify the meaning of the word 'client'. Lastly, the WMCZ also causes bureaucratic situations by withholding the provider of social care or health care the possibility to install autonomously a joint clients' council or a (doming) group- or central clients' council with its

own legal co-determination rights for several of his social or health care organizations together. On all of these points the WMCZ appeared to be unnecessarily in conflict with the quality demands of subsidiarity, mutual harmonization, feasibility and possibility of enforcement, and of simplicity, clarity and accessibility.

The results from the examination in chapters 5 and 6 led to the conclusion in chapter 7 that most criticism of the WMCZ – as described in chapter 3 – was well-founded, which means that the quality of the WMCZ as a co-determination law is in need of improvement. But it is emphasized that ‘self-regulation conditioned by law’ in itself is not at all a bad choice for a co-determination law. It all depends on the quality of the legal conditions. If the WMCZ were to be improved in the places as just described it could even become an example and inspiration for other co-determination laws.