Justitiële verkenningen

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Between administrative accomplishments and juridical reason

Summaries

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Legal protection in The Netherlands; too much or too little?
N. Verheij

Van Kemenade has recently re-launched the debate on the alleged `juridification' of public administration. He argues that the Dutch courts are on the verge of threatening the democratic nature of the political process by taking essentially political decisions under the guise of offering legal protection against the administration. However, his claim that the number of cases against the administration has tripled since the advent of the General Administrative Law Act of 1994 cannot be substantiated. Nor is it true that the courts claim the power to review the reasonableness of administrative decisions. It is true, however, that in the past twenty years the courts have moved towards a stricter scrutiny of administrative decisions, especially by requiring a high degree of consistency in the way government policy is applied and by requiring detailed reasons to be given for administrative decisions. Also, it cannot be denied that public interest groups do sometimes seek legal action solely to try and reverse the outcome of the political process. On top of this, in the past twenty years almost all administrative decisions have become reviewable, a strict liability for unlawful decisions has been imposed upon the administration by the courts and suits for damages have been made considerably easier to bring by transferring them from the civil to the administrative courts. Finally, review procedures still cause considerable delays, even though their average length has recently been considerably reduced. However, the problems caused by this `juridification' are essentially limited to the fields of spatial planning and environmental law. These are fields where judicial review was not possible twenty years ago. In those twenty years a formerly backward system of judicial review has done no more than finally meeting the standards required by the rule of law. On the other hand it is also true that the very rapid development of Dutch administrative law in those twenty years may have resulted in some minor imbalances. A new debate on the limits of judicial review is therefore warranted, but it cannot be maintained that judicial review as we now know it is a threat to the democratic nature of the political process.

Juridification
P.C. Ippel

Traditionally, Dutch legal culture can be characterized as relatively informal and conflict-avoiding. If we look at indicators for `juridification' we can conclude that there is a growth in the production of legal rules and in the mobilization of legal procedures. This growth is a modest one. There are, however, reasons to expect more juridification in the years to come. International tendencies and global developments impinge upon the Dutch legal system and culture. For example, it is plausible that the number of medical malpractice claims will rise in the future. This trend can possibly threaten the informal communicative framework that is essential for a decent society. It is necessary to initiate a more informed public debate about the specific features and problems of juridification, before deciding to restrict legal protection.

Working on relations between judges/courts and administrators/administration
P.M. Langbroek

Administrators complain about the thoroughness of judicial protection in The Netherlands and judges blocking democratic decision-making. Judges react on these allegations by posing that administrators fail to prepare decisions with enough care. The question is how judges/courts and administrators/administration cope with this disturbance of their relationship. The opposition between courts and administration may be related to differences between juridical rationality and political rationality. Judicial rationality relates to judicial independence. Judicial independence, as an institutional setting and as a mentality of judges may cause a social isolation of courts. Judicial rationality relates to negative sanctions on violations of the law as well. It is a misconception of lawyers that juridical relations (mainly) constitute social relations and human conduct. From this point of view the enhanced juridical liability of the public administration, developed by the courts, can be criticized. Furthermore, judges and courts can be criticized for the different ways in which they judge public decisions and decision making. This may be caused by briefly formulated judgements in administrative cases and by a lack of co-operation between courts and judges as well. This results in legal uncertainty of the public administrations. Administrative or political rationality relates to making effective and efficient decisions. A difference can be made between the vast amounts of routinized decisions made by specialized services on the one hand and more unique decisions concerning larger projects with a major societal impact on the other (e.g. projects concerning physical infrastructure). Especially concerning these more or less unique decisions politicians need some free space to react on new societal developments. Here, the first concern for administrators is to create political support and social acceptability for their intended decisions, not the juridical liability of the administration. This relates to the sometimes isolated position of lawyers in public services. Therefore, administrators may be surprised with negative and costly judicial judgements. An answer to the question posed may be found in the development of quality-management in courts as well as in public services. This implies not only checks on decisions and judgements as a matter of content, but a regular attention to the societal surroundings of the courts and administrations as organisations as well. Such quality management may only be successful if courts and judges, administrators and public services are willing to learn and adapt their ways to societal developments - developments in law included.

Prevention of judicial interference; how to get rid of administrative shortcomings?
E. Helder

The author discusses the question of what the public administration can do to prevent judicial interference. According to the author the public administration is not so much a victim of substantial judicial judgements, but, much more, it provokes this interference. He discusses the bottlenecks in three successive phases: the primary decision process, the petition procedure and the appeal with the administrative judge. The author concludes that divergent administrative shortcomings (for example careless preparation of decisions, unclear policies, deceleration of procedures) make citizens decide to start a judicial procedure or file a petition. Furthermore, a low priority is given to the accurate settlement of petitions.