

Summaries

Justitiële verkenningen (Judicial explorations) is published nine times a year by the Research and Documentation Centre of the Dutch Ministry of Justice in cooperation with Boom Juridische uitgevers. Each issue focuses on a central theme related to judicial policy. The section Summaries contains abstracts of the internationally most relevant articles of each issue. The central theme of this issue (nr. 8, 2007) is *Liberty, equality and fraternity*.

Modern societies; individual rights, collective rights

T. Ramadan

The influx of immigrants in Western Europe has led to the questioning of identity and also to uncertainty about the future of their societies. Departing point of discussions on the prerequisites for a peaceful co-existence is, according to the author, legislation and the law, although they are not sufficient to solve problems of integration. Each individual citizen should acknowledge the rule of law and those professing their faith should do so within this framework. The author points out that most muslims in Europe respect the law and do not ask for a unique position when it comes to religion, the practice thereof or religious customs. They only ask for equality before the law. The arrival of these 'strangers' challenges the European societies to keep on giving meaning to the fundamental values of liberty, equality and fraternity.

Freedom above all; the constitutional state put on the slip

A.J. Kwak

Safety is dominating the political agenda in the Netherlands. This is not just safety in the concrete sense of not being the victim of crime and terrorism, but also safety in the more existential sense of belonging to a larger community which guarantees both a distinct social identity and a home. The need for such safety is fuelled by the growing uncertainty accompanying the cultural developments of late modernity in which the speed of social and cultural change, the growing mobility and the tough competition in a globalizing economy makes people feel that they loose their moorings in a community. The need or desire for safety legitimizes democratic translation into policy and recently several Dutch municipalities

have presented plans to redevelop socially weak neighbourhoods by interventions, not just in public areas, but also in the privacy of people's homes. Translated to a canonical discussion in social and political philosophy, the resulting conflict can be seen as a clash between the idea that rights take priority with the idea that peoples needs and desires to happiness or welfare take precedence. In this contribution this clash is examined in some detail tracing the most influential philosophical sources of the modern liberal democratic culture and institutions. Even if they mean well, Dutch municipalities are advised to be careful not to trump the rights of their subjects since the *European Convention of Human Rights and Fundamental Freedoms* adopted the axiom that the right takes precedence over the good (in Rawls's sense).

Differences and inequality; a song of praise

P.H.A. Frissen

The value of equality as it is constitutionally institutionalised must be interpreted as a right to differ and to difference. The classical freedom rights support this right to differ(ence) as well, both in their nature of freedom of conscience as in their nature of political rights. The social rights that form the core of the welfare state are a material interpretation of the value of equality. We are entitled to a complete catalogue of happiness – housing, health, income, social security, personal deployment, sustainability. The values of the rule of law that formalize the relations between state and citizen have been combined with the material aspiration for equality of the welfare state. As a consequence an ever growing system of bureaucratic control is necessary. However, this system encounters the pluralisation and fragmentation of post-modern society. This society is a society of inequality and difference. That is the crisis of the welfare state. Therefore a critique of the value of equality is needed. The autonomy and responsibility of citizens must be founded in their differences. The philosophical perspective of difference may support a necessary politics of difference.

Democracy and punishment after the 'makeable' society

G. van Oenen

Democracy is much praised and has become omnipresent. This article argues that democratization has changed fundamentally in the transition from a 'makeable' society to a 'risk' society, in

which security is the pre-eminent concern. A collective concern with social good is replaced by individual discontent with the perceived burden of collective life. Democratic engagement is now ever more an expression of distrust, of a desire to democratically 'supervise' political and juridical practices of social control. From this perspective, several possible arrangements for democratic participation in criminal procedure are discussed, either as victim, or out of a more general concern with the functioning of criminal law as an instrument for social control. It is concluded that, in a distrustful neoliberal society, democratization cannot solve the problems of criminal law, just as criminal law is unable to solve the problems of democracy

On the gap between the elites and the masses

C. Rutenfrans

The elites – the part of the population which defines the problems and the way they should be solved – have lost touch with the people in at least two respects. First, they have silently tolerated the immigration of two million non-western immigrants in less than forty years, which was clearly against the will of a large part of the Dutch population. Second, the former justification of penal sanctions in the crime itself was replaced by the justification of penal sanctions in goals outside the crime, of which the most important was the resocialization of the criminal. This has created a very lenient penal climate for the criminal offender, while the victims of criminal behaviour were left to themselves. If the gap between the opinions of the elites and the ordinary people in both domains will not be closed, populist political parties will remain strong, and victims of crime will tend to take revenge on criminal offenders.

Against 'active citizenship'

W. Schinkel

In this article, the current hausse of literature on citizenship is critically scrutinized with respect to the effects of the distinction between 'active' and 'passive' citizens, starting from a distinction between the formal and the moral aspects of citizenship. Whereas citizenship in the formal sense is a mechanism of in- and exclusion of the state, today, with the conflation of 'integration' and citizenship, citizenship in the moral sense is fitted to facilitate

societal in- and exclusion. In doing so, it reproduces a difference between society and those 'non-integrated', who are citizens in the formal sense yet reside 'outside society'. The production of the French ideal of 'fraternité' through a moralization of citizenship – theoretically present in both Rawls and Walzer – thus has the effect of stabilizing two opposed anthropological types of man: the active and the passive citizen, the member of society and the person not a part thereof.