

Summaries

Justitiële verkenningen (Judicial explorations) is published six times a year by the Research and Documentation Centre of the Dutch Ministry of Security and Justice in cooperation with Boom juridisch. 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 (no. 4, 2018) is *The marginalization of the Judiciary*.

Out of court sanctioning and the diminishing role of the judiciary

Frank van Tulder and Saskia Sicking

The Dutch Judiciary has only a very limited role in the imposition of sanctions with traffic offenses. With other minor offenses its role is rather limited and has decreased. There has been a striking shift from the imposition of penal sanctions to sanctions based on administrative law in this area. With major offenses (crimes) the role of the judiciary is still significant and has not diminished over the last 20 years. This despite policy efforts to boost out of court sanctioning.

The Judiciary is a fundamental pillar of the rule of law. It offers legal protection, by judging and, if necessary, penalizing violations of norms in a fair trial. In this way not only justice is done with individual cases. Case law has wider implications: confirmation and development of norms and thus general prevention. To fulfil this aim a certain volume of cases and openness of the judgment process is necessary.

The trend in the number of administrative sanctions for minor offences

Debora Moolenaar

This paper looks at the number of administrative sanctions for minor offences since 2005. Administrative sanction can be divided into two categories: restorative sanctions and punitive sanctions. Information is limited and dispersed. The number of offences handled by welfare agencies has decreased with 21% in the period 2005-2016. In the same period the number of administrative sanctions for traffic offences imposed by the police/public prosecutor have decreased with 14% (mainly originating from automated traffic cameras). Also administrative sanctions imposed by supervisory financial agencies have

decreased with 58%. For some organisations the observation period is a shorter. In the period 2011-2016 the number of administrative sanctions for traffic offences imposed by municipalities has increased with 41% and the number of administrative sanctions imposed by supervisory non-financial agencies have decreased with 47%. There is no information available on administrative sanctions for tax fraud.

On the harmonisation of the Dutch administrative and penal system of sanctions

Arnt Mein and Benny van der Vorm

Recently the Dutch Government has responded to an advise from the advisory body *Raad van State* concerning the relationship between the administrative and the penal system of sanctions.

Nowadays administrative sanctions are imposed in the Netherlands for serious offenses, whereas the original intention was to only use these procedures for minor felonies. It is unclear why some offenses are subject to a judicial judgment, while others are dealt with in administrative proceedings. Moreover, it appears that the administrative fines are often significantly higher than fines imposed by a judge. The government feels that harmonisation between the maximum of the administrative and penal fine should be realized. With regard to the choice between administrative and penal law, the government hasn't found a criterion for deciding which offenses should be subject to a judicial judgment and which can be dealt with in administrative proceedings. The authors argue that the government could have offered more clarity by using the criterion of 'serious criminal conduct' as defined in criminal law. Criminal law has to be chosen when there is serious criminal conduct. In other cases it is possible to choose the administrative procedure.

The diminishing role of the Judiciary: is replacement of the judge possible and desirable?

Marijke Malsch

The last decades have shown a tendency in which tasks are transferred from the judge to other authorities, such as the police and public prosecutor, administrative bodies, administrative procedures, or private parties. The central question in this article is whether these authorities can really replace the court. A comparison is made between legal proceedings and procedures for other authorities on the following

aspects: truth finding, openness and legal protection of the (vulnerable) citizen. The author also discusses a recent legislative proposal for an own budget for the Judiciary, which aims to strengthen the independence of the judge towards the two other state powers. It is argued that the courts should be also accessible in the case of relatively small offenses and for vulnerable citizens.

Damocles law: On the punitive nature of an administrative measure in the Netherlands

Maartje Schaap

Under Article 13b (1) of the Dutch Opium Act, the mayor is authorized to impose an order under administrative coercion when drugs are sold, delivered, supplied or present in houses or premises. This much-discussed article, also cited as the 'Damocles Law', gives the mayor the power to close drug shelters even before the suspect's guilt has been established in legal proceedings. It is not necessary to show that the interests of public policy are at stake. Moreover, the means of defense against the closure are very limited. The author argues that the current application of Article 13b is exclusively punitive in nature, whereby in case of criminal prosecution, there is also a violation of the *ne bis in idem* principle.

Youth courts in the Netherlands

Gert Jan Slump and Jessica Asscher

This article describes the backgrounds, the development and first findings on youth courts in the Netherlands. A Dutch version of the USA youth courts was developed and piloted in 4 Amsterdam schools. Cases referred are small (partly illegal) incidents committed in the school environment. The Dutch youth court practice is described against the background of transformational change in society and the development of restorative justice and (peer oriented) development of citizenship. Although the model is still in development and schools are somewhat reluctant to deliver and refer cases, practice is growing.