

Ius Commune Conference 2021

Workshop: Administrative Law

Friday, 26 November (9.00 – 12.00)

Theme: Proportionality Assessment: Courts versus Legislator?

The workshop will be devoted to the role of the administrative courts, in particular vis-à-vis the legislator.

The recent so-called Dutch Childcare Allowance Scandal (Toeslagenaffaire) drew much attention. Not only attention of lawyers, societal and political debates ran high too, with many controversies. Besides the legislator, the harsh policy of the Tax Authorities as the executive body with regard to the applicable legal provisions was heavily criticised, as well as were the administrative courts, especially the Judicial Division of the Council of State.

- 1) Although the Childcare Allowance Scandal might have functioned as a catalyst, there already was an on-going debate on the intensity of judicial review of administrative courts, in relation with the proportionality principle. The workshop aims to explore this testing by administrative courts. More precisely, it aims to further analyze the intensity/scrutiny of judicial review, in particular the impact of the proportionality principle with regard to administrative sanctions and measures, other than criminal charges.
The intensity of judicial scrutiny/review of governmental acts is an evergreen in administrative law. As regards the issue, the European Court for Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) provide for some but still little guidance. Compare, amongst other judgments, ECtHR 19 November 2020, Project-Trade vs. Croatia, ECLI:CE:ECHR:2020:1119JUD000192014 and CJEU 2 September 2021, Foods Standards Agency, ECLI:EU:C: 2021:665.
One may wonder whether the 'closer scrutiny approach' as applied by administrative courts strictly with regard to administrative fines should be extended to other administrative sanctions or even to administrative decisions other than sanctions that may affect the exercise of fundamental rights. An Opinion of two Dutch Advocates General earlier this year (ECLI:NL:RVS:2021:1468) advocated to leave behind the delineation between criminal charges such as administrative fines on the one hand (closer scrutiny) and other administrative sanctions and decisions on the other as regards judicial review. Recent court decisions seem to demonstrate the influence of the Opinion (compare Council of State 6 October 2021, ECLI:NL:RVS:2021:2243).
- 2) Further, the workshop aims to explore how the reluctance of administrative courts to scrutinize the executive and blow the whistle relates to the so-called 'contra legem' doctrine. In the 'Childcare Allowance Scandal' administrative courts, or that is to say, the Judicial Division of the Council of State, felt until October 2019 they were bound by the strict words of the applicable legislation. Hence, the workshop may also concentrate on the potential influence of a contra legem approach, with an emphasis on contra legem in relation to the proportionality principle and the concept of reasonableness and fairness.

To sum up, administrative courts are faced with challenges, and a quest for improvements or even radical change might be necessary according to some, to avoid future Allowance Scandals. True, the scandal took place in the Netherlands. The question arises, however, whether similar developments are brewing in other jurisdictions in Europe as well. In this respect it is observed that the scandal itself and its major consequences for the parents involved have everything to do with the increasing digitalisation of decision-making, which requires (too) hard and fast rules and tends to eliminate human correction possibilities although decisions may be clearly unreasonable. These developments seem not to be exclusive for the Netherlands. And it goes without saying that the scientific and societal relevance of the position of the courts towards the executive and the legislator is not restricted to Dutch administrative law.

These and related questions will be discussed in the seminar, from different perspectives. Some contributions will mainly focus on topic 1, others on topic 2 as well, and some on both.

Chair: Sander Jansen (Maastricht University)

- 09.00 – 09.10 *Opening and Introduction by the chair*
- 09.10 – 09.35 **Pieter Gillaerts** (KU Leuven)
From Rights to Interests? Lessons to be Learned from the Civil Judge
- 09.35 – 09.40 **Discussion**
- 09.40 – 10.05 **Melanie van Zanten** (Utrecht University)
Proportionality Review of General Applicable Acts in Administrative Courts Proceedings
- 10.05 – 10.30 **Sofie Oosterhuis** (Utrecht University)
EU Boards of Appeal
- 10.30 – 10.40 **Discussion/Coffee break**
- 10.40 – 11.05 **Simon Vanhove** (KU Leuven)
The Belgian Constitutional Court on Digital Meters: Is Smart Always Safe?
- 11.05 – 11.10 **Discussion**
- 11.10 – 11.30 **Lynn Hillary** (Open University/University of Amsterdam)
Mutual Trust in Asylum Cases: A Balancing Act for National Administrative Courts
- 11.30 – 11.50 **Rob Widdershoven** (Utrecht University)
Lessons from the Childcare Allowance Scandal: Towards a More Intensive Judicial Proportionality Assessment of Non-Punitive Sanctions
- 11.50 – 12.00 **Steven Lierman** (KU Leuven)
Winding Up