

ACADEMIC NEWS

Towards an equilibrium between citizens' rights and civic duties in relation to government

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An English summary of the speech by Professor J.B.J.M. ten Berge on the occasion of his retirement as full-time professor, delivered on 6 December 2006 in the University Hall of Utrecht University.*

1. Introduction

Traditionally, constitutional and administrative law have been dominated by the ideology that rights for citizens have to be created and guaranteed in order to counterbalance the power of state bodies. The fundamental human rights of citizens (a) and the democratic rights (b) which should be granted are major parts of constitutional law. Moreover, one can perceive the development of (a) administrative jurisdiction, (b) principles of due administration and © protection by ombudsmen institutions as major counterbalancing sectors of administrative law. Constitutional law and administrative law have their *raison d'être* in the concept of democracy and the rule of law. In this legal climate civic duties are neglected because they weaken the position of the citizen and strengthen the power of government. Contrary to these doctrines, recent political and social developments seem to have changed this paradigm of the creation of exclusive rights and the necessity of an effective and responsible welfare state. They are now compelling the government, in the eyes of some politicians, to completely rethink the balance between the rights and duties of citizens in relation to the government and to start a process of looking for civic duties, thereby abandoning the exclusive priority in constitutional and administrative law in favour of certain rights and to add to this field also serious attention to the duties of citizens.

It is necessary to start this article with a clear definition. Civic duties as referred to here are duties by government authorities and government officials. I exclude from the concept of civic duties the more general human, social and ethical duties towards other human beings, towards the environment, nature and so on. However, I do include public community services organised by the government such as, for example, military service.

The key question is the following: Can civic duties be combined with the basic values of the democratic state which is subject to the rule of law? To answer the question I will analyse

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public legal history, international developments, civic duties in modern Dutch written and unwritten law, and will finally pay attention to modern theories concerning the position of the citizen. Finally, I will argue that civic duties are normal because they are strongly connected with participation in communities. Every individual living in a community has to participate in that community by contributing to common efforts and common objectives. Principally accepting the existence of civic duties, an additional question is whether the creation of civic duties has to be restricted by certain criteria and limiting preconditions. If so, the question is what criteria and limiting preconditions has to restrict the competence of government to shape civic duties.

2. Historical notes

There is a link between the concept of the citizen and the emergence of cities. The phenomenon of the responsible citizen grew in city republics. In ancient Rome there lived citizens (*cives romani*) and slaves (*servi*). The latter had no rights at all. The *cives*, on the contrary, had rights, but they also had responsibilities. In the 17th century there were no citizens of a nation state, only citizens of an urban community, in other words the population inside the city walls. The French Revolution introduced the '*citoyen*'. The king and the nobility were expelled from the public domain and their position was taken over by '*les citoyen*' who not only received rights but also had to bear more public responsibilities. The influence of the French Revolution and the importance of citizenship in the larger cities in the Netherlands came together during the French occupation until 1813 and left their marks in the constitutional literature. Important manuals on constitutional and administrative law in the 19th century paid attention to the existence of civic duties. They describe unwritten duties with deliberations of an ethical character, and, on the other hand, written duties which are formulated in the constitution and some other important laws. These duties concerned the defence of the territory (assisting the armed forces and taking up arms themselves), paying taxes, and democratic duties such as, for example, participating in elections and elected public bodies. Gradually, the duties under constitutional law were abolished, resulting in attention no longer being given to them in the literature on constitutional and administrative law. Nowadays, no important manuals in these fields give any attention to civic duties. In recent constitutional publications constitutionalists advocate the creation of new duties to participate in democratic procedures, accentuating the individual responsibility for the functioning of a democratic society. The conclusion of this historical perspective is that there has been a tradition of civic duties, originally coming into existence in urban communities. The cities are the places where the citizens live and the necessity for cooperation and common objectives results in individual responsibilities. During the emergence of cities in Western civilisation individual duties were historically necessary to survive as a community of 'men'. The rise of the nation state with its well-equipped and strong government gave rise to a lesser awareness of citizens' own responsibilities because they are simply less needed when the 'mother' state fulfils all the needs which citizens may have. In older legal manuals there is the concept of civic duties while, gradually in modern times, this concept has disappeared.

3. Looking abroad

The African (Banjul) Charter of human rights of 1981 contains a summary of human duties. These duties can be mainly characterised as general human ethical rights with responsibilities towards the family and society. Among them are civic duties in a strict sense as I have described above: the payment of taxes, support for government in defending the country. However, one has

to be aware that general ethical and more vague duties are not totally irrelevant, because they can form the moral foundations of civic duties since the values which are summed up in this declaration are often the special responsibility of government authorities and the fulfilment of these tasks can result in legislation with more detailed civic duties of a formal legal character.

The Bogota Declaration of human rights and human duties is also the result of a conference between states. The duties also described in this declaration are mainly general human and ethical responsibilities.

Article 29 of the Universal Declaration of human rights from 1948 states: 'everybody has duties towards the community in which the free and full development of one's personality is made possible'. The United Nations Committee, which had to determine ethical responsibilities, did not succeed in obtaining consensus because ironing out the details is much more difficult than speaking in vague general formulas.¹

A summary of vague general ethical duties is the Universal Declaration of human responsibilities, compiled by the so-called Inter Action Council. This is a group of former statesmen chaired by the former German Chancellor Helmut Schmidt. Also in this document there are only a few civic duties in the strict sense. It is mainly a summing up of ethical human responsibilities. The reasoning for this is that there has to be an equilibrium between human rights and human duties. De Blois of Utrecht University² has warned against abuse by dictators and totalitarian regimes. The development of human rights was necessary after a terrible period of war and abuses of government power. Declarations in the form of duties do not suggest that the development of human rights can be seen as an overkill, which can provide arguments for government authorities to violate human rights.

Another method of looking for civic duties abroad is by analysing constitutions. One of the oldest examples of a constitution with a summary of human duties is the Constitution of the Weimar Republic from 1919. The duties in this constitution are used to restrict rights. A computerized study of written constitutions by Henc van Maarseveen and Ger van der Tang (New York: Oceana Publications 1978) shows a great variety of civic duties. Their observations are also confirmed in contemporary constitutions if one embarks on a sightseeing tour on the internet. When added all together, the civic duties everywhere are not surprising: the payment of taxes, defending the integrity of one's country, the duty to take part in education, school attendance, protecting public property. Almost all constitutions contain vague formulations of general human responsibilities, leaving it to the legislators and other authorities to crystallise such responsibilities.

The conclusion of this globally wide survey shows that in the international community there exists a large degree of consciousness stressing the necessity and desirability of explicit duties for individuals. However, the result of this consciousness is often no more than a list of general human ethical statements with less concrete legal substance. Nevertheless, the attention devoted to responsibilities is an indication that there is a worldwide moral conviction that individuals have responsibilities towards the community in which they live.

1 Johannes Morsink, *Universal Declaration of human rights, art. 29*, 1999.

2 Mathijs de Blois, 'De Universele Verklaring van de Verantwoordelijkheden van de Mens: enige kanttekeningen', 1998 *NJCM-bulletin*, pp. 1037 *et seq.*

4. Statute law

Throughout many decades laws, by-laws and ordinances by lower government have created written civic duties. In civil law one can find the duty to register some legal acts in public registers (the register of last wills and testaments, enterprises having to register at the Chamber of Commerce, the land registry). In criminal law we have to obey certain civil servants who have powers of inspection. Finally, we could point to the fact that it is obligatory to notify the authorities when a serious crime has been committed. But it is in administrative law where the majority of civic duties are created. I shall discuss two categories of duties in administrative law: personal activities and information and cooperation duties.

The most far-reaching are duties to carry out personal physical activities. A classical example is military service. In waterboard regulations there are duties to clean waterways and ditches. Local government ordinances oblige owners to clear snow from public footpaths besides their properties. The creation of these personal physical duties can in some circumstances conflict with the prohibition of slavery contained in article 4 of the Human Rights Treaty. In the case law of the European Court of Human Rights normal civic duties (participating in juries, for example) cannot be interpreted as slavery, but there is no clear definition of normal civic duties. In the Netherlands there is currently a serious discussion on the competence of the government to force juveniles to participate in youth camps as a so-called social service or as a prolonged duty of education or school attendance. The acceptability of these duties can depend on the extent and the substance of the duties and the objectives sought.

The most common civic duties are obligations to inform and to cooperate with government authorities. One has to discern information duties within the legal relationship between a specific citizen and the government in special situations. A citizen who applies for a licence or a subsidy has to inform the government about the background to and the extent of his intended activities. He is obliged to complete application forms and so on. There also exist information duties in enduring relations. A person who receives a social security payment has to inform the social security authorities about any change in his/her income. There is also an information duty towards the tax authorities concerning income and tax-related activities or circumstances. Sometimes we can even see a duty to give information and to complete tax returns electronically. A totally different duty to provide information is the obligation to give information about other persons. An example is the canine tax in the city of Rotterdam where vets are obliged to report dog owners to the tax office. In this situation one sees a variant of squealing or 'narking'. There is wide opposition against these duties, because squealing is not morally acceptable as far as public opinion is concerned. These duties will not be effective and will not be obeyed. If they are obeyed it will result in tensions in society and undermining the legitimacy of the government.

We can conclude that written civic duties often occur in the form of regulations. The legal and moral acceptability thereof differs from duty to duty. This results in the conclusion that every newly created duty has to be subject to a thorough legal study and social discussion.

5. Case law of the courts and the ombudsman

Researchers at Groningen University and the University of Antwerp have highlighted the phenomenon that administrative judges implicitly create unwritten civic duties. The reasoning is that in certain cases the administrative authority cannot be blamed because the citizen in question has not acted reasonably. The Belgian authors refer to this as the mitigating reflex of the applicability of principles of due administration under the influence of unwritten principles

of due citizenship. In many cases one can conclude that the invented principle is not per se unreasonable. The problem, however, is the somewhat underhand creation of such a principle subsequent to the situation which has given rise to the conflict situation and not before. Citizens find this difficult to swallow. Judge-made civic rights can consider the decision-making process by the administrative authorities and also the actions of citizens as part of the judicial process. The resulting decisions are not as such published and can only be discovered after an in-depth analysis of a great deal of jurisprudence by specialist legal researchers. Sometimes civic procedural responsibilities are uncertain because the development of case law is not balanced. If the legislation is not sufficiently clear, the different courts have to find their own way through the quagmire. They do so hesitatingly and often also in a contradictory fashion.

Also in the decisions of ombudsmen excuses for administrative authorities and civic duties can be found. Examples of jurisprudence containing civic rights are the following:

1. In some cases there is a civic duty to instigate interlocutory proceedings to limit damages by means of a speedy decision by a provisional judge. In some cases appealing to a higher court is necessary, because in later procedures statements which have not been explicitly rejected are held to be legally valid if they are not challenged.
2. Generally there exists a civic duty to read government announcements. If one does not do so, one cannot subsequently argue that one had no knowledge of the damaging decisions of government authorities.
3. The necessity of a due, effective and expeditious procedural order requires that the parties do not delay the procedure. They have the responsibility to cooperate with the presiding judge and not to wait too long in adducing new evidence and arguments. Introducing such material for the first time when the case is heard, instead of introducing them at the pre-trial stage, can harm effective progress in the procedure and the interests of the other party.
4. The National Ombudsman has decided that in situations where there is a long territorial distance between the interested citizen and the administrative authority an usual hearing by telephone in the objection procedure is not obligatory if it could be reasonably expected that the objecting citizen should travel to the location of the administrative authority. One can see here an implicit duty for citizens who instigate an objection procedure or other legal procedure to accept the inconvenience of travelling to the administrative authority to attend the hearing.

Generally, one can conclude that citizens, who themselves become involved in an interaction with the government by requesting a licence or a subsidy, initiating an objection procedure or a judicial procedure, are automatically subject to responsibilities to be alert and cooperative in order to assist administrative or judicial authorities in the decision-making process. Even if the citizen does not take the first step, some authors are of the opinion that citizens generally have to support public authorities in decision-making processes.

6. Ideological concepts

Debates about civic duties often take place against the background of more general ideological concepts. The two most important concepts are: the theory of the reciprocity of the legal relationship between the government and the citizen in administrative law; and, secondly, the theory of citizenship.

In the parliamentary papers concerning the General Administrative Law Act the government introduced the theory of reciprocity in legal relations between the government and citizens. This theory is typical of contractual relations in civil law. However, there was immediate opposition to this theory. The reason for this is the vertical relationship between the government and citizens, which is typical of administrative law. The government exercises one-sided authority towards citizens and it imposes binding obligations upon them. In doing so the government has to respect the rule of law and the principles of due administration. In contrast, citizens have duties which weaken the effectiveness of written and unwritten obligations of government authorities. Lying at the heart of the criticism is the notion that administrative law relations are not dominated by the principles of exchange duties. Government authorities have to fulfil their public duties as laid down by written and unwritten law and must not engage in a process of negotiating and contracting with dependent and powerless citizens.

Theoretically related to this is the theory of citizenship, which in the field of public officials can count on increasing popularity. It is a vague complex of moral responsibilities imposed on citizens by politicians. Citizenship seems to be the justification for imposing legal duties on citizens. The theory of citizenship originated in the official policy of integrating immigrants from other cultures. Gradually, the policy has been extended to the indigenous population as an expression of the discontent felt by especially the Christian democratic political parties so as to reignite moral norms and values, which in their eyes seem to have disappeared in Western societies. After the idea of citizenship was politically launched researchers in social and political sciences attempted to undermine this concept of citizenship with scientific reasoning. Politicians apparently tried to find a place in the policy of modernising the functioning of government for the idea that also citizens have to modernize in their relations with the government. In a policy paper on the modernization of government the Dutch government has transformed the principle of due administration into the principle of due citizenship and citizens are also obliged to respect the principles of due care, providing due reasons, and honouring raised expectations.

The conclusion is that the theory of citizenship is a revitalization of the theory of reciprocity. Both are mainly utilized by politicians and administrators to facilitate the governing process by shaping new responsibilities for citizens. For administrative lawyers it seems to be a strange step to subject the crown jewels of administrative law to an about-turn in that binding the government to the rule of law and the principle of due administration has been transformed in order to bind citizens so as to protect and facilitate government authorities.

7. Conclusions, evaluation and theory

At the end of this exploration of civic duties it is necessary to draw some conclusions so as to make an evaluation and also to present my personal professional opinions. I do this for the sake of stimulating prolonged discussion and research concerning this theme. For too long civic duties have been neglected in administrative law and constitutional literature. The increasing social and political attention to civic duties has to be followed by serious legal discussion.

There is a rising tendency in legislation and case law to create civic duties both explicitly as well as implicitly. Internationally one can also discover often vague civic responsibilities in certain declarations. In constitutions all over the world, different civic duties are phenomena which can often be found. Historically, there existed in Western civilisation a long tradition of the theory and practice of civic responsibilities. Civic duties have been shaped for three main reasons:

1. In legislation, jurisprudence and international documents duties are a method for limiting civic rights.
2. In constitutions and basic regulations duties have the classical character of participation in a national society: the payment of taxes, defending the state's territory, the development of society, such as, for example, educational duties and the duty to perform certain tasks.
3. Modern civic duties tend to guarantee assistance to government bureaucracies in the process of law making and law enforcement by providing information, cooperation and openness.

From these three main functions we can derive that the basic philosophy of civic duties is to make participation in society both visible and concrete. Every individual who participates in a community has benefits but also obligations to help maintain that community. Viewed from this perspective, civic duties are a normal instrumentalization and visualisation of obligations to uphold the general interests of a community. Because the government is the organisation which, on behalf of the community, looks after and promotes the general interests of society, it is obvious that civic community responsibilities are instrumentalized as duties for government authorities.

At this point we have to issue a severe warning. Duties are created by government authorities and this competence is not without limits in our democratic state which is subject to the rule of law. A theory has to be developed concerning the legal and moral acceptability of and the preconditions for the creation of duties. In doing so, we first need a typology of duties:

Passive duties

1. Abiding by instructions which have been correctly issued by authorities and civil servants.
 - 1a. The correct treatment of civil servants and officials.
 - 1b. Tolerating government measures which have been applied in the general interest.
 - 1c. Abstaining from subversive activities.

My estimation is that passive duties will not be seriously opposed in society. Active duties, however, are another problem altogether.

Active duties

1. The most radical duties are duties to perform personal activities and to do certain tasks. Under discussion here is personal freedom and the prohibition of slavery. The discussed compulsory social service is the subject of serious public debate. Is it a form of slavery or an acceptable form of the duty to undergo education? The answer will depend on the kind of obligatory activities.
2. Financial obligations. Taxes are always the object of fierce debate, because there are also financial (fiscal) obligations which are not only relevant for the money in people's pockets, but can also harm other values of the rule of law. The registration fee by the administrative courts determines admittance to these courts. Since the end of the 1990s these fees have been constantly increased in an attempt to reduce the number of appeals. The other side of the coin is that people with limited financial means have less possibility to have access to the administrative judiciary.

3. Modern civic duties in the bureaucratic state are the duties to inform the government authorities and civil servants and to cooperate with them. The acceptability of these duties depends partially on the question whether the duties to inform and to cooperate are a part of the bipolar relationship between the government and a particular citizen. General obligations to provide information concerning other people are in my mind morally abject and the government is ill-advised to go down this road. 'Squealing' or 'grassing' is morally not acceptable in society.
4. Another civic duty is the duty to gather information, to inform oneself about government policy and government decisions. This category of duties raises the question whether every citizen has a sufficient level of education and skills, as well as the necessary equipment (in order to access the internet sites of government agencies and so on).

Above I have provided a small-scale typology of duties and have illustrated that every category has its own problems as well as the legal and moral acceptability thereof. Moreover, constitutional and administrative law have to develop legal guidelines for each category of duties. Furthermore, a few general limitations for the creation of duties can be developed:

1. The duty has to be necessary and must serve a reasonable objective. The government's task of fulfilling the general interest cannot adequately be fulfilled without the duty for citizens to participate.
2. The duty has to be proportional compared to the planned objective and it must be possible for every citizen to adhere to this duty. Every duty must relate to the possibility for every citizen to rectify his/her omission after a warning has been issued.
3. The creation of duties must meet the requirements of the rule of law. The basis of a particular duty has to be found in written law and a written decision by an administrative authority. The final decision as to whether a particular duty has been followed must be made by a judge or ombudsman and not by an administrative authority.

Finally, there are a few preconditions for the creation of duties:

1. If there is an expectation that some citizens will not have the necessary skills and know-how to fulfil a particular duty, the government authorities have the responsibility to provide adequate information and assistance, without additional costs for the citizen.
2. In judicial procedures without obligatory legal representation, the judge has the responsibility to point the parties in the right direction. The complexity of procedural law and procedural case law has given rise to many duties which bind the parties and these duties are not instantly recognizable. In these situations the judge has to point out these duties and this obviously has to be done without losing his impartiality and independence.