DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW: THE CASE OF THE NETHERLANDS

Tom Barkhuysen & Michiel L. van Emmerik[1]

1. INTRODUCTION

In the Netherlands as elsewhere, the topic of deference to the administration is an important doctrine that continues to provoke much debate. This doctrine, which is also referred to as the limited judicial review of administrative actions, is the subject of dynamic developments. The exact role that the court should play in the review of administrative actions remains a contentious issue. If the court engages in an in-depth, intensive review, it may be accused of wrongly encroaching on the administration's territory and thus failing to observe the division of duties desired under constitutional law - in doing so, it would usurp the function of the administration. On the other hand, if it acts with restraint, it may be accused of offering inadequate legal protection. Thus, the development of this doctrine reflects a continuous search for a proper balance. In the Netherlands, additional factors include the structure of the system of legal protection, the influence of the European Convention on Human Rights (ECHR) and the law of the European Union (EU law), as will become clear in this contribution.

The focus of this contribution is the relationship between the judiciary and the administration. How has this relationship developed and what are the expectations for the future? Consequently, another important aspect of the judiciary's role – its relationship with the legislature and legislation – will not be addressed.[2] Still, the legislature does have a key role in determining the judiciary's position in relation to the administration. After all, when powers are being conferred to administrative bodies, it is often the legislature that defines the scope those bodies have to exercise the powers in question. For example, the legislature may confer policy-making discretion on an administrative body, meaning that this body itself may, in principle, decide whether or not to make use of a particular power. Or, it may confer assessment discretion, enabling the administrative body itself to determine whether a jurisdiction requirement has been met,[3] for instance in cases where the existence of a 'threat to public order' is a prerequisite for the use of a certain power.

---

1 Prof.dr. T. Barkhuysen is professor of constitutional and administrative law at Leiden University, the Netherlands and partner at Stibbe (t.barkhuysen@law.leidenuniv.nl). Dr. M.L. van Emmerik is associate professor of constitutional and administrative law at Leiden University and deputy judge at the District Court Midden-Nederland (administrative cases; m.l.vanemmerik@law.leidenuniv.nl).

2 See in this regard J. Uzman, T. Barkhuysen & M.L. van Emmerik, The Dutch Supreme Court: A Reluctant Positive Legislator?, in: J.H.M. van Erp & L.P.W. van Vliet (eds.), Netherlands Reports to the Eighteenth International Congress of Comparative Law, Antwerpen-Oxford-Portland: Intersentia 2010, pp. 423-468.

3 Cf. J.R. Angeren, F. Groenewegen and A. Klap, *Toetsingaanwagenormen in het Nederlandse, Duitse, Engelse en Franse recht (preadviezenNVvR)* [Review against vague standards in Dutch, English and French law (preliminary advice Netherlands Association for the Judiciary)], Oisterwijk: Wolf 2014. Klap 2014 draws a distinction between various vague standards: those that entail a weighing of interests, those that demand an evaluation of future events,

For our discussion of 'deference', we have opted for a chronological approach that is preceded by a brief outline of the development of the system of legal protection against the government in the Netherlands. The following topics will be addressed in sequence: an introduction to the Dutch system of legal protection against the government (Section 2), the development of the doctrine on the basis of the 1949 Supreme Court judgment in *Doetinchem*(Section 3), the requirements for judicial legal protection against government decisions set in 1985 by the European Court of Human Rights in *Benthem* (Section 4), the General Administrative Law Act as the green light for further development of the doctrine with harmonising effect on various subareas of administrative law (Section 5), and the conclusion, with an outlook for the future (Section 6). It should be noted at the outset that this is an outline discussion.

2. THE DUTCH CONTEXT: THE SYSTEM OF LEGAL PROTECTION AGAINST THE GOVERNMENT[4]

In the Netherlands, the early twentieth century was marked by debate on the issue of who could best offer legal protection: the administration or the judiciary. In 1905, Minister of Justice Loeff submitted legislative proposals aimed at introducing a general administrative law Act. These proposals met with fierce opposition, notably from the famous constitutional law scholar Struycken. In his classic essay '*Administratie of rechter?*' [Administration or Judiciary?][5], he argued that the control of administrative actions by an independent judiciary was fairly pointless. In this 'modern' time of parliamentary democracy, primary control of the administration had to be exercised by Parliament, not by a judge appointed for life. Moreover, he was of the opinion that the judiciary could not control administrative actions in an in-depth manner, asserting that the court lacked the expertise to do so. Due to the many, broad discretionary powers at the administration's disposal, a review based 'on the law' would have little significance. After all, the law attached few specific requirements to those discretionary powers which decisions had to satisfy. If the court were to review beyond the law, it would encroach on the duties of the administration and disrupt the separation of powers. 'The court may not usurp the function of the administration.' In Struycken's view, society would be better off if the actions of administrative bodies were to be reviewed by the administration itself, in the form of an administrative appeal. Such an appeal involves the dispute being resolved by the administration itself, often by a higher administrative body. Conversely, Loeff took the view that the administration should not be responsible for approving its own actions. Rather, in a state under the rule of law, the administration had to be subject to control by an independent judiciary. In order to strengthen that independence, he proposed increasing judges' salaries and bringing jurisdiction under the ordinary court (and not a separate administrative court).

To date, this discussion has not resulted in the Netherlands making a choice of principle between an administrative appeal and an independent judiciary. This means that the debate regarding the division of duties between the administration and the judiciary is

those that require specific expertise and those with a supranational character, as well as combinations thereof.

4 Parts of this section have been extracted from T. Barkhuysen et al., *Bestuursrecht in het Awb-tijdperk* [Administrative Law in the Era of the General Administrative Law Act], Deventer: Kluwer 2014.

5 A.A.H. Struycken, *Administratie of rechter* [Administration or Judiciary], Arnhem: Gouda Quint 1910.

long-standing and still ongoing, and that general administrative adjudication did not get off the ground until a relatively late stage. As regards individual Acts, Parliament did venture to take the step of appointing a special administrative court as the competent adjudicating body as regards certain types of decision, but the step towards an administrative court that could rule on all administrative decisions was only taken at a late stage (and has still not been taken completely). Although a few special administrative law tribunals were established as from around 1900, administrative appeal (legal protection within the administrative pillar) remained an important form of legal protection.

Appeal to the Crown was a special form of administrative appeal, which ultimately involved the dispute being resolved by Royal Decree (signed by the King and countersigned by a Minister). Appeal to the Crown was applied in many different types of dispute, including environmental disputes. The Council of State played a key role in appeals to the Crown, because the entire process took place before the Administrative Dispute Department of the Council of State. While the Crown had the power to depart from the Council of State's advice, it did so only sporadically. Furthermore, there were additional conditions attached to this so-called 'contrarian approach'. These matters were regulated in legislation such as the Administrative Decisions Appeal Act (*Wet Beroep administratieve beschikkingen*).

Compared with other European countries, the appeal to the Crown formed an exceptional remedy. The Netherlands was firmly convinced that an appeal to the Crown offered a unique and valuable form of legal protection. However, as evident from the *Benthem* case (to be discussed below in Section 3), the Netherlands was ultimately corrected on this point by the European Court of Human Rights.

And so, the Dutch system of administrative adjudication developed step by step. In the beginning, the main rule was legal protection by the administration. However, over the course of time it became increasingly common to set up and appoint adjudicating tribunals that were competent to adjudicate on particular legislation, resulting in a system of numerous special adjudicating tribunals. A few tribunals were allocated so many duties that they became large, guiding courts. The Appeals Tribunals adjudicated on many areas of social security law. Subsequently, citizens could appeal to the Central Appeal Tribunal, a tribunal that also acquired public service jurisdiction and that has now existed for over a century. After the Second World War, the Trade and Industry Appeals Tribunal was established to deal with economic administrative law. In due course, this tribunal also acquired an important function as appeal court. In tax disputes, the competent court is traditionally the ordinary court (the tax divisions at the District Courts, Courts of Appeal and the Supreme Court). With the implementation of the Administrative Decisions (Appeals) Act (*Wet administrative rechtspraak overheids-beschikkingen*) in 1976, the Council of State was designated as the 'general' administrative court. As a result, in addition to the appeal to the Crown, the Council of State also acquired a process in which it was to act as a court, and thus did have jurisdiction to render the final judgment in a dispute. If a citizen could not submit his *decision* to a special administrative court, the Council of State's Jurisdiction Division heard the appeal as the general administrative court. This court was thus presented with all manner of disputes, regarding decisions by, for instance, the Municipal Executive, Provincial Executive and the Minister.

The civil court has continued to play a supplemental role in this fragmented system. In the early twentieth century, the Supreme Court held that the State, provinces, municipalities, water authorities, etc., as (public law) legal entities, could act unlawfully

(Article 6:162 of the Dutch Civil Code). The civil court has jurisdiction to take cognisance of proceedings based on unlawful act *in the absence of a judicial process under administrative law with sufficient safeguards.*[6] If there was a judicial process under administrative law in which the citizen could present his complaint regarding unlawful act, the civil court acknowledged that it had no role to play and declared the citizen's claim inadmissible. If the citizen could not avail himself of the administrative court (because, for example, his litigation did not concern a 'decision'), the civil court took on the case. In this way, the civil court began to provide supplementary legal protection, and case law emerged on the division of duties between the civil and administrative courts. And, with all the different judicial processes and case law on the allocation of jurisdiction, a varied patchwork of forms of legal protection against the government arose.

Notably, in light of all of the above, the Netherlands does not have any constitutional court. Indeed, the courts are prohibited from assessing primary legislation against the Constitution. However, this is largely compensated by the fact that the courts – more specifically, all courts regardless of their position in the judicial structure – can and must assess against convention provisions such as those from the ECHR and EU law.[7]

For more than a decade now, administrative adjudication in the Netherlands has been increasingly focused on final dispute resolution.[8] As a rule, the court can no longer limit itself to merely annulling an administrative decision; it must use all available means to resolve the dispute as definitively as possible. For example, administrative courts are increasingly inclined to consider whether a new decision by the administration is still necessary. If that *is* the case, the courts attempt to elaborate on what the parties will have to do after the judgment, before the administration renders a new decision replacing the annulled decision. This, too, means looking for a proper balance between definitive judicial dispute resolution on the one hand and respecting administrative discretion (in terms of policy-making and assessment) on the other. In the Explanatory Memorandum to the article in the General Administrative Law Act that urges the court to resolve the dispute before it as definitively as possible (Article 8:41a of that Act), consideration is also given to the limits of constitutional law in this regard. It states that the court will settle the case and does not have to confine itself to annulment and referral to the administrative body: "if and in so far as its constitutional position and the available information permit this."[9] Here too, then, in a sense it concerns an issue in the area of deference.

3. THE DEVELOPMENT OF THE DOCTRINE ON THE BASIS OF THE SUPREME COURT JUDGMENT IN *DOETINCHEM*

Having sketched the context of the Dutch system of legal protection against the government, we can now focus in more detail on the development of the doctrine of deference. Before 1949, there was no clarity in Dutch case law regarding the issue of

6 Cf. Supreme Court 31 December 1915, *NJ* 1916, p. 407 (*Guldemond-Noordwijkerhout*).
7 See further Uzman, Barkhuysen & Van Emmerik 2010.
8 See, in particular, *VAR-Commissie rechtsbescherming, De toekomst van de rechtsbescherming tegen de overheid, Van toetsing naar geschilbeslechting*, [Administrative Law Association Committee on Legal Protection, The Future of Legal Protection against the Government], The Hague 2014.
9 *Kamerstukken* [Parliamentary Documents] II 2009/10, 32450, no. 3, p. 55.

whether, and if so to what extent, a court is entitled to review the administration's policy choices. Some argued that courts should not be permitted to concern themselves with this area at all due to their respective constitutional positions and that legal protection in this respect would only be possible within the administrative pillar (administrative appeal). Others took the view that the court – being independent from the administration – should indeed be able to play a role. This in fact echoes the old discussion between Loeff and Struycken as described above.

In a case prompted by a housing requisition by a municipality based on an emergency law designed to solve the most acute housing shortage after the Second World War, the Supreme Court got the opportunity to clarify the matter. A mentally ill married couple was confronted with such a requisition for the billeting of their house. They lodged an objection to this before the court, based on their mental vulnerability. The municipality defended itself with the argument that the legislature had given it full discretion to requisition a house and that such a decision was deemed to be efficient. The couple argued that in their case, partly in view of their special position, the decision would have entirely disproportionate effects. The lower courts found for the couple and accepted that there had been abuse of the law in the case in hand. The municipality appealed to the Supreme Court, taking the position that, in making such a finding, the lower courts had wrongly encroached on its discretionary policy-making powers. The Supreme Court overruled the judgments of the lower courts and introduced the arbitrariness formula. This means that the court must respect the administration's discretionary powers in terms of its policy-making and assessment, and permits the court to intervene only if there is an "arbitrary act". According to the Supreme Court, this is the case if "the requisitioning authority, when weighing the relevant interests, could not reasonably have arrived at a requisition, and no weighing of those interests must therefore be deemed to have been made."[10] Thus, loosely translated, the Supreme Court held that the court is not permitted to intervene if it *itself* is of the opinion that a decision is not reasonable or is disproportionate, but may only do so if a reasonable man could never have reached the decision in question. The background to this approach is the relationship between the judiciary, the legislature and the administration, in which the judiciary is considered to have the least democratic legitimacy. Incidentally, the Supreme Court ultimately decided in this case that the prohibition against arbitrariness had not been infringed and thus found for the municipality.

The origin of this approach is not absolutely certain. However, it is assumed that the Supreme Court partly drew its inspiration from the English *Wednesbury* case law that began in 1948.[11] In *Wednesbury*, the English court introduced a test of reasonableness with regard to administrative decisions.

Based on the *Doetinchem*-judgment, it subsequently became established case law of the civil courts and the administrative courts[12] that courts must perform a limited review of government decisions if the issue at hand is whether the administration made a policy choice that is legally acceptable when weighing the relevant interests, or has correctly interpreted vague standards.[13]

10 Supreme Court 25 February 1949, *NJ* 1949/558 (Doetinchem housing requisition).
11 Associated Provincial Picture Ltd. v Wednesbury Corp. [1948] 1 K.B. 223. Cf. Groenwegen 2014.
12 Council of State's Jurisdiction Division, 23 October 1979, AB 1980/198 (St. Bavo).
13 Cf. Van Wijk, Konijnenbelt & Van Male, *Hoofdstukken van bestuursrecht* [Chapters on Administrative Law],

4. INTERMEZZO: THE EUROPEAN COURT OF HUMAN RIGHTS DEMANDS JUDICIAL LEGAL PROTECTION AGAINST GOVERNMENT DECISIONS IN *BENTHEM*

As stated, the Netherlands was firmly convinced that an appeal to the Crown referred to in Section 2 offered a unique and valuable form of legal protection. Mr *Benthem* contested this and lodged a complaint with the European Court of Human Rights to the effect that the Crown was not an independent and impartial tribunal established by law within the meaning of Article 6 ECHR. The European Court of Human Rights found in favour of *Benthem* in 1985.[14] That was a remarkable judgment in two respects. Firstly, it transpired that a dispute regarding an environmental permit (in those days a 'Nuisance Act Licence', fell within the concept of 'civil rights and obligations' from Article 6 ECHR. Whether the national system qualifies a certain act as coming under 'administrative law' or 'private law' is thus not decisive. The European Court of Human Rights gave its own interpretation to the concept 'civil rights and obligations', resulting in administrative law largely falling under the safeguard of Article 6 ECHR. Consequently, a form of independent and impartial administration of justice in accordance with Article 6 ECHR had to be introduced to deal with the acts of administrative bodies. Secondly, it emerged that the Dutch appeal to the Crown did not meet the European requirements for independent and impartial administration of justice, because the Crown is part of the administration. Following this judgment, the appeal to the Crown was abolished and appeal to the independent (administrative) court was ultimately made available in all cases.

It may be concluded that the *Benthem* judgment profoundly changed legal protection against the government in the Netherlands. This judgment also offers a safeguard against the judicial control of administrative actions being abolished or restricted once again. The fact that this is necessary became evident, for example, from the proposals made by a working group of administrators who opposed the juridification of public administration.[15] Since then, there have been increasing calls for restriction of judicial control, in particular with regard to infrastructural projects that are said to suffer too much delay as a result of this control. [16] However, thanks to *Benthem*, it is established that this control must be maintained and that solutions for any resulting problems must be sought within that framework.[17] A committee that considered the future of legal protection against the government, commissioned by the Administrative Law Association (*Vereniging voor Bestuursrecht*) fully endorsed this principle and made proposals for enhancing this legal protection within the Benthem preconditions. They

Deventer: Kluwer 2014, pp. 332-337; De Waard 2016; Schlössels & Zijlstra, *Bestuursrecht in de sociale rechtsstaat* [Administrative Law in the Social State under the Rule of Law], Deventer: Kluwer 2017, pp. 374-375.

14 European Court of Human Rights 23 October 1985, *AB* 1986/1, annotated by E.M.H. Hirsch Ballin, *NJ* 1986, 102, annotated by EAA (*Benthem t. Nederland*); see also T. Barkhuysen & M.L. van Emmerik, *AB-Klassiek* [Classic Judgments in Administrative Law] 2016/8 (Deventer: Kluwer 2016).

15 *Bestuur in geding* [Judging the Administration], Haarlem 1997.

16 Cf. N.S.J. Koeman, '*Versnelling in het bestuursprocesrecht*' [Acceleration in Administrative Procedural Law], *M en R* [Environment and Law] 2008, no. 4.

17 Cf. J.A.M. van Angeren, '*Mensenrechten en onafhankelijke bestuursrechtspraak*' [Human Rights and Independent Administrative Adjudication], in: Barkhuysen, Van Emmerik and Loof (eds.), *Geschakeld recht* [LinkedLaw], Alphen a/d Rijn: Kluwer 2009, p. 1-11.

paid a great deal of attention in this regard to improving the dispute resolution capacity of administrative procedural law and argued that the court itself should more often resolve the matter, whether or not after the administration has been given the opportunity via a so-called administrative loop to rectify any shortcomings in a decision. [18] This report formed the prelude to the amendments to administrative procedural law that have meanwhile been implemented. As the appeal to the Crown in fact performed outstandingly in terms of its dispute resolution capacity, it proved a source of inspiration for the report and the amendments. However, it must be avoided that the administrative court is in fact increasingly forced to usurp the administration's function. However, the Strasbourg case law also offers a safeguard in this respect, with Albert Benthem as a 'standard bearer'.

5. THE GENERAL ADMINISTRATIVE LAW ACT AS THE GREEN LIGHT FOR FURTHER DEVELOPMENT OF THE DOCTRINE WITH HARMONISING EFFECT ON VARIOUS SUBAREAS OF ADMINISTRATIVE LAW

With the implementation of the General Administrative Law Act in 1994, the Supreme Court's adoption of limited judicial review in *Doetinchem* came briefly under scrutiny once again. That was triggered by the codification of the principle of proportionality in Article 3:4(2) of the General Administrative Law Act, which provides that "the adverse consequences of a decision for one or more interested parties may not be disproportionate to the objects to be served by the decision".

The District Court of Roermond construed this to mean a standard directed to the court whereby it had to review itself the proportionality of the decision placed before it, for the grant of consent for the construction of a store. According to the District Court, the new Article 3:4(2) of the General Administrative Law Act was intended to break with the established case law on limited review. However, the Administrative Jurisdiction Division immediately corrected this on appeal in 1996: "this provision, directed to the administration, was not intended by the legislature to intensify judicial review (...)" and "(...) the aim was to prompt restraint by the court when reviewing the weighing of interests by the administration". And furthermore: "the District Court should have limited itself to the question of whether the weighing of the relevant interests was so disproportionate that it must be concluded that the appellants (...) could not reasonably have come to the decision to grant the exemption requested."[19]

In other words, a return to *Doetinchem*, albeit with an exception, by reason of Article 6 ECHR, for punitive administrative sanctions on which the court itself *is* required to rule without restraint on proportionality. [20] As regards punitive administrative sanctions, the Administrative Jurisdiction Division held as follows: "Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which applies to the imposition of a penalty such as the once concerned here, entails that the court must

18 Administrative Law Association Committee on Legal Protection 2004.

19 Administrative Jurisdiction Division of the Council of State, *AB* [Judgments in Administrative Law] 1997/93, *AB-Klassiek* [Classic Judgments in Administrative Law] 2016/22, annotated by B.W.N. de Waard (Deventer: Kluwer 2016) (*Maxis and Praxis*).

20 Administrative Jurisdiction Division of the Council of State, 4 June 1996, JB 1997/172, (*Huisman/APK*). See further M.L. van Emmerik & C.M. Saris, *Evenredige bestuurlijke boetes* [Proportionate administrative penalties] (Preliminary advice VAR, Den Haag: Boom 2014.

review, without restraint, whether the penalty imposed by the Minister in the specific case is in accordance with the principle of proportionality."[21]

Another period then commenced in which this line of case law encountered relatively little resistance and in which the administrative court made particular efforts not to encroach on the administration's territory in situations involving discretionary powers with regard to policy-making and assessment. This approach even gained an additional (theoretical) basis in the literature.[22]

Remarkably, in environmental-law matters the Administrative Jurisdiction Division of the Council of State still performed a full review up to 1998. This was a legacy from the time of the appeal to the Crown, a form of administrative appeal to a higher administrative body where the problem with constitutional relationships that was encountered by the independent court did not apply. Even after the abolition of this appeal to the Crown as a result of the *Benthem* judgment discussed above, and appeal to the administrative court was made available in environmental disputes, the practice of intensive review remained guiding for quite some time. Until that time the Administrative Jurisdiction Division effectively determined what was in the interest of a good living environment, which was at odds with the practice in other legal areas such as planning and zoning law. The Administrative Jurisdiction Division finally put an end to this untenable special position in a judgment that was dubbed *Die Wende* by analogy with the developments in Germany around the fall of the Berlin Wall.[23] The Division held: "The respondent has a certain assessment discretion, which is limited, inter alia, by what ensues from the most recent generally accepted environmental insights".

The judicial review of the acts or omissions of supervisory authorities under administrative law is restrained in accordance with the points outlined above as well. According to the Supreme Court, bearing in mind the extensive discretionary powers in terms of its policy-making and assessment that are vested in those supervisory authorities, and given the risk in question and the circumstances of which the supervisory authority was aware, the question to be answered by the court is whether the supervisory authority could reasonably have adopted the policy as regards control and supervision (in the event of general supervisory failures), or could have arrived at the acts in question (in the event of specific supervisory failures). According to the Supreme Court, courts must conduct a limited review of such matters, with due observance of all interests, the circumstances at the time in question and the knowledge at that time. In other words, it is not about determining in hindsight whether a different decision would have been better.[24]

21 Administrative Jurisdiction Division 27 January 2010, *AB* [Judgments in Administrative Law] 2010/48, annotated by O.J.D.M.L. Jansen.

22 By E.J. Daalder & M. Schreuder-Vlasblom, *Balanceren boven nul* [Balancing above Zero], *NTB* [Dutch Journal for Administrative Law] 2000, pp. 214-221.

23 Administrative Jurisdiction Division of the Council of State, 21 April 1998, *AB* [Judgments in Administrative Law] 1998/199, annotated by G. Jurgens (*Die Wende*). See on this topic T.C. Leemans, *De toetsing door de bestuursrechter in milieugeschillen* [Review by the Administrative Court in Environmental Disputes] (diss. Leiden), The Hague: Boom 2008.

24 Cf. Supreme Court 13 October 2006, ECLI:NL:HR:2006:AW2077 (*Vie d'Or*); Supreme Court 21 November 2014, ECLI:NL:HR:2014:3349 (*AFM-DSB*); Supreme Court 2 June 2017, ECLI:NL:HR:2017:987 (*Zalco*).

6. CONCLUSION, WITH AN OUTLOOK FOR THE FUTURE: AFTER HARMONISATION, MOVING TOWARDS DIFFERENTIATION AND A GREATER FOCUS ON PROPORTIONALITY, BUT WITH LIMITS DUE TO THE SPECIFIC EXPERTISE OF THE ADMINISTRATION

6.1 Moving towards differentiation and a focus on proportionality

It is only in recent years that this established case law has been seriously called into question once again, but this time the arguments seem to resonate more than before. It has been argued that, based on the requirement of effective legal protection, it is necessary for the administrative court to conduct a more intensive review, certainly when fundamental rights are at issue.[25] A court that exercises too much restraint would also create the risk of an administration devoid of responsibility and lax in its exercise of due care in the knowledge that the court allows much leeway.

These signals have been cautiously picked up in the case law, but only as regards non-punitive administrative sanctions with a major impact, such as in the context of integrity screening that could lead to the refusal and/or withdrawal of permits.[26] In addition, reference may be made to a judgment of the Administrative Jurisdiction Division regarding a decision on the maximum amount of natural gas to be extracted in Noord-Nederland, which decision was taken by the Minister on the basis of a discretionary power. In view of the possible earthquake risks and the associated dangers for residents, the Division intensified its review in comparison with previous judgments. It did so primarily by giving additional focus to the proportionality and proper substantiation of the decision.[27] Under the influence of the ECHR and EU law (the Procedure Directive), immigration law has seen review intensify as well. The Administrative Jurisdiction Division held as follows: "It follows from the above that the administrative review of the State Secretary's position regarding the credibility of an account of the reasons for requesting asylum has a mixed character if a foreign national's account of the reasons for requesting asylum rests partly on statements and suppositions that are not substantiated with evidence. Most aspects and elements of a decision can be reviewed by the administrative court in terms of whether the State Secretary correctly took the position he adopted. If the State Secretary has decision-making discretion on aspects and elements of a decision, specifically when assessing the credibility of a foreign national's statements and suppositions that are not substantiated with evidence, the administrative court will have to review whether the State Secretary did not wrongly take the position that the account of the reasons for requesting asylum lacked credibility, albeit that in that case too the administrative court must review the care taken in and reasons given for the decision-making of the State Secretary when exercising that decision-making discretion. Consequently, the judicial review of a position of the State Secretary regarding the credibility of an account of the reasons for

25 T. Barkhuysen et al, *Adequate rechtsbescherming bij grondrechten beperkend overheidsingrijpen* [Adequate Legal Protection regarding Government Intervention Restricting Fundamental Rights], Deventer: Kluwer 2014.

26 Administrative Jurisdiction Division of the Council of State, 25 April 2012, *AB* [Judgments in Administrative Law] 2012/207 (Public Administration (Probity Screening) Act [*Wet bevordering integriteits beoordelingen door het openbaar bestuur*].

27 Administrative Jurisdiction Division of the Council of State, 18 November 2015, *AB* [Judgments in Administrative Law] 2016/82, annotated by Bröring & Brouwer.

requesting asylum will be more intensive than before the entry into force of Article 46(3) of the Procedure Directive."[28]

However, for the time being there has not been a fundamental change of course across the full spectrum of administrative law. Such change may be at hand, though: Hirsch Ballin – former President of the Administrative Jurisdiction Division – received much support for his preliminary advice, issued as a publication of the Administrative Law Association, entitled '*Dynamiek in de bestuursrechtspraak*' [Dynamics in Administrative Adjudication], which he defended in 2015 and in which he pleaded for a more active role for the administrative court in a broad sense. Hirsch Ballin advocated abandoning the *Doetinchem* approach whereby discretionary powers conferred in terms of its policy-making and assessment automatically imply limited discretion by the court. Instead, he propounded a more balanced approach in which the intensity of the review is determined by considering the nature of the legal relationship and the weight of the relevant interests (including fundamental rights) of the parties involved. In his view, contemporary changes in constitutional relationships – particularly the insufficient democratic legitimacy of the administration as a result of the reticent, sometimes careless legislature, as well as the need for an administrative court that solves those disputes and keeps the legislature on its toes – require the judicial attitude to be adjusted accordingly. Otherwise, the administration actually operates too much within a 'legal lacuna', according to Hirsch Ballin. In the debate with Hirsch Ballin, Polak (the then President of the Administrative Jurisdiction Division) stated that the present formulation of limited discretion may require amendment in light of these points.

Hirsch Ballin's oral arguments, which were revolutionary in a sense, deserve to be followed-up. In so far as possible, administrative courts should have to render their own ruling on the question of whether a decision is reasonable and proportionate. Furthermore, it is important to ensure that this does not only take place in a semantic sense. The administrative court will have to actually understand the substance of a dispute before rendering its own ruling and definitively resolving the dispute. In this way, an important boost is given to the quality of administrative adjudication in terms of workmanship, justice and effectiveness, thus increasing its legitimacy. As for the intensity of review, a tailored approach will be required, depending on the interests involved, and the assessment of proportionality will become more prominent. Depending on the circumstances of the case, a proper balance must thus be found between the respect that the court should have for the administration's discretionary powers in terms of policy and assessment on the one hand, and the interest of the interested parties in not having their interests affected to a disproportionate degree on the other.

Inspiration may be drawn in this respect from EU law, in which there has been a differentiated approach regarding the intensity of review for quite some time. Determining intensity is not a matter of 'all or nothing' (full review or limited review) but entails a tailored approach depending on the nature of the legal relationship and the weight of the relevant interests of the parties involved.[29]

28 Administrative Jurisdiction Division of the Council of State, 13 April 2016, *AB* [Judgments in Administrative Law] 2016/195, annotated by M. Reneman.

29 Cf. J.H. Gerards, *Het evenredigheidsbeginsel van art. 3:4 lid 2 Awb en het Europeserecht* [The Principle of Proportionality from Article 3:4(2) of the General Administrative Law Act and European Law], in: T. Barkhuysen et al. (ed.), *Europees recht effectueren* [Effectuating European law], Alphen a/d Rijn: Kluwer 2007, pp. 73-113; R. Ortlep & W. Zorg,

Reference may be made once more at this point to a new issue in the area of deference, namely where the limits lie as regards the administrative court's power, once a decision has been annulled, to settle the dispute itself without referring the matter back to the administration. In this respect, too, the limits relate to the constitutional position of the administration and the judiciary. But here, too, it is noticeable that in recent years the judiciary has become more inclined to deem itself able to do so.[30]

6.2 But with limits, due to the necessary expertise

At the same time, there is another reason why – apart from the constitutional position of the judiciary and its tenuous democratic legitimacy – it may be necessary to exercise restraint in judicial review: namely, where the court lacks sufficient expertise. The ever-increasing complexity of the administration's duties is reflected in growing professionalisation within government, and it is becoming more and more difficult for the judiciary to keep abreast of these developments.[31] These matters also have implications for the extensive case law of the European Court of Human Rights on 'full jurisdiction', which is also highly relevant for Dutch legal practice in this respect. Based on this right of 'full jurisdiction' acknowledged in the case law of the European Court of Human Rights (referred to as 'organe judiciaire de pleine juridiction' in the judgments (also) rendered in French), the national court must have jurisdiction to examine all issues of fact and of law that are relevant to the dispute. In this respect, expressly no distinction is drawn between questions of law and questions of fact, both of which may be equally crucial to the outcome of the dispute. [32] The court must be able to form its own opinion on both issues, and must not automatically rely on their valuation by other authorities (in particular the administration), let alone be bound by such. For example, in the Dutch *Terra Woningen* case, the European Court of Human Rights held that the fact that the subdistrict court in the case in hand had not formed an opinion of its own regarding possible soil pollution but had relied solely on the decision of the Provincial Executive in this regard was contrary to this aspect of the law on

Marginale rechterlijke toetsing onder druk: een voortgaande tred vooruit? [Limited Review under Pressure: Continuous Steps Forward?], in: R. Ortlep et al. (ed.), *De rechter onder vuur* [The Court under Fire], Oisterwijk: Wolf 2016, pp. 1-18. See further, in the vein of comparative law, S. Ranchordás & B. de Waard (eds.), The Judge and the Proportionate Use of Discretion, A Comparative Study, Abingdon, Oxon/New York 2016.

30 Cf. N. Verheij, *Van grensrechter naar geschilbeslechter, Een evolutie in de Nederlandse bestuursrechtspraak (preadvies voor de Vereniging voor de Vergelijkende Studie van het recht van België en Nederland)* [From Linesman to Dispute Adjudicator, An Evolution in Dutch Administrative Jurisdiction (preliminary advice for the Association for the Comparative Study of the Law of Belgium and the Netherlands], The Hague 2013: Boom.

31 M. Scheltma, *De Hoge Raad en het algemeen belang* [The Supreme Court and the Public Interest], in: R.J.N. Schlössels et al. (ed.), *De burgerlijke rechter in het publiekrecht* [The Civil Court in Public Law], Deventer: Kluwer 2015, pp. 803-818.

32 See, for example, European Court of Human Rights 23 June 1981, *NJ* 1982/602 (*Le Compte, Van Leuven & De Meyere v Belgium*), par. 51. The following passages are partially extracted from T. Barkhuysen & M.L. van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht. De betekenis van het EVRM en het EU-Grondrechtenhandvest* [Fundamental European Rights and Dutch AdministrativeLaw. The Significance of the ECHR and the EU Charter of Fundamental Rights], Deventer: Kluwer 2017.

access to a tribunal from Article 6 ECHR.[33] According to the case law of the European Court of Human Rights, this right to 'full jurisdiction' forms an essential characteristic of the right of access to a tribunal from Article 6(1) ECHR and applies to *all* proceedings falling within the scope of Article 6 ECHR, in other words to all proceedings that entail the determination of civil rights and obligations or of any criminal charge.

While the court is thus not permitted to blindly follow the administrative decision, in the case law the question often concerns *the extent to which* the court may rely on the decision of the administration. Although restrictions on judicial control of the administrative finding of fact may be at odds with Article 6 ECHR[34], they are not automatically impermissible.[35] There does have to be a convincing ground that justifies such restrictions, such as the nature of the substantive area of law and the administrative discretion associated with it, and the specialised nature of the finding of fact. It is important in this respect that the administrative finding of fact took place in – quasi-judicial – specialist administrative preparatory proceedings with sufficient safeguards.[36] Therefore, the restrictions on judicial control of the administrative finding of fact must in any case never be so far-reaching that the court relies entirely on the decision of the administration. After all, that would mean in fact that the interested party would have no access to the court on that point. In the context of the judicial proceedings, it must be possible to conduct a debate regarding the correctness of the administrative finding of fact and the manner in which it was reached. As evident from the case law of the European Court of Human Rights, the complete exclusion of such is unacceptable.[37]

Pursuant to the right to a fair trial protected by Article 6 ECHR, the court will have to take an active approach as regards calling witnesses who can shed light on the crucial

33 European Court of Human Rights 17 December 1996, *NJCM-Bulletin* 1997, p. 617 et seq., annotated by M.L.W.M. Viering (*Terra Woningen BV v the Netherlands*). See also, for example, European Court of Human Rights 13 February 2003, *AB* [Judgments in Administrative Law] 2004/52, annotated by B.W.N. de Waard (*Chevrol v France*).

34 R.J.G.M. Widdershovenet al., *Algemeen bestuursrecht 2001: hoger beroep* [General Administrative Law 2001: Appeal], The Hague: BJu 2001, p. 37. Cf. T. Barkhuysen, L.J.A. Damen et al., *Feitenvaststelling in beroep, (derde evaluatie van de Awb)* [Fact Finding on Appeal (Third Evaluation of the General Administrative Law Act)], The Hague: BJu 2007, p. 104 and the case law there cited.

35 See, in particular, European Court of Human Rights 22 November 1995, Series A. vol. 335A (*Bryan v United Kingdom*), and for confirmation of the Bryan line: European Court of Human Rights 7 November 2000, *AB* [Judgments in Administrative Law] 2003/25, annotated by L.F.M. Verhey (*Kingsley v United Kingdom*), confirmed in European Court of Human Rights 28 May 2002 (judgment of the Grand Chamber).

36 European Court of Human Rights 22 November 1995, Series A vol. 335-A (*Bryan v United Kingdom*); Widdershoven et al. 2001, pp. 34-38.

37 Cf. Y.E. Schuurmans, *Bewijslastverdeling in het bestuursrecht, Zorgvuldigheid en bewijsvoering bij beschikkingen* [Division of the Burden of Proof in Administrative Law, Due Care and the Provision of Evidence in respect of Decisions] (diss. VU), Deventer: Kluwer 2005, pp. 290-292 and A.J. Kuipers, *Het recht op 'full jurisdiction'* [The Right to Full Jurisdiction], in: R.L. Vucsán (ed.), *De Awb-mens: boeman of underdog?* [The General Administrative Law Act Man: Bogeyman or Underdog?] (Damen bundle), Nijmegen: Ars Aequi Libri 1996, pp. 97-112. See the judgments European Court of Human Rights 17 December 1996, *NJCM-Bulletin* 1997, p. 617 et seq., annotated by M.L.W.M. Viering (*Terra Woningen BV v the Netherlands*) and European Court of Human Rights 13 February 2003, *AB* [Judgments in Administrative Law] 2004/52, annotated by B.W.N. de Waard (*Chevrol v France*).

facts for the resolution of the dispute.[38] In addition, the court cannot automatically rely on an expert engaged by the administrative body. It must attempt to restore the balance (in the context of the 'equality of arms') between the parties in some other way, for example by enabling the interested party to enter expert evidence to the contrary, or, if that is not possible for financial or other reasons, by engaging an expert itself.[39] In this way, the court can keep a 'finger in the pie' as regards the specialised finding of fact by the administration and safeguard the principle of equality of arms between the parties as required by Article 6 ECHR.

Thus, the division of duties between the administration and the court as regards findings of fact for which a certain expertise is required also involves the search for a good balance and an approach that is tailored to the situation. Here, too, there seems to be a growing inclination amongst the judiciary to take a more active role than in the past, particularly under the influence of EU law and the ECHR. In view of all these dynamics, it may be concluded that, for the Netherlands in any event, the decision to put the doctrine of deference on the agenda was a fortunate one.

38 European Court of Human Rights 15 March 2016, *AB* [Judgments in Administrative Law] 2016/132, annotated by T. Barkhuysen & M.L. van Emmerik (*Gillissen v the Netherlands*).

39 European Court of Human Rights 8 October 2015, *AB* [Judgments in Administrative Law] 2016/167, annotated by T. Barkhuysen & M.L. van Emmerik (*Korosec v Slovenia*).