Judicial Review in Dutch Environmental Law: General Observations
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Chapter 6
Judicial Review in Dutch Environmental Law: General Observations

Tom Barkhuysen and Michiel van Emmerik

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Abstract 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 decisions, is an important aspect of the system of legal protection against the government. The chapter discusses the development of the doctrine in the Dutch context, the role of the European Court of Human Rights, and the impact of the General Administrative Law Act. It concludes with an outlook for the future, highlighting the importance of proportionality and the expertise of the administration.

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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. 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? It is concluded that the review of administrative acts by the judiciary has been intensified in several cases in recent years. There is, however, no uniform approach. The judiciary differentiates with a greater focus on proportionality. Clear limits for the judicial review can be found where specific expertise of the administration is at stake.

Keywords: judicial review - administrative actions - deference - proportionality - environmental law - fundamental rights

6.1 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 well 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.1 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

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1See in this regard Ussen et al. 2010.

6.2 The Dutch Context: The System of Legal Protection Against the Government

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 Strykzeen. In his classic essay ‘Administratie of rechtz?’ [Administration or Jurisdiction?], 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

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1See in this regard Ussen et al. 2010.

2Strykzeen 1910.
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 long-standing and still prevailing. 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 ‘contrariant 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 Bethlen case (to be discussed below in Sect. 6.3), 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 role 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,

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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 administratieve rechtspoor overheidsbeschikkingen) 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 cognizance of proceedings based on unlawful act in the absence of a judicial process under administrative law with sufficient safeguards. 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.²

For more than a decade now, administrative adjudication in the Netherlands has been increasingly focused on final dispute resolution.³ As a rule, the court can no longer limit itself to merely abandoning an administrative decision; it must use all

1 Cf. Supreme Court 31 December 1915, NJ 1916, p. 407 (Geldenlui-Stoomb/Kerkenhar).
²See further Ummen et al. 2010.
³See, in particular, Polak et al. 2014.
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 in and so far as its constitutional position and the available information permit this."28 Here too, then, in a sense it concerns an issue in the area of deference.

6.3 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 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 billing 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."29 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 1948.30 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 courts31 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.32

6.4 Intermezzo: The European Court of Human Rights Demands Judicial Legal Protection Against Government Decisions in Beithem

As stated, the Netherlands was firmly convinced that an appeal to the Crown referred to in Sect. 6.2 offered a unique and valuable form of legal protection. Mr. Beithem 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

29 Supreme Court 25 February 1949, NJ 1949/558 (Doetinchem housing requisition).
30 Associated Provincial Picture Ltd v Wednesbury Corp. [1948] 1 KB 223; Cf. Groenewegen 2014.
31 Council of State's Jurisdiction Division, 23 October 1979, AR 1980/98 (St. Bavo)
Human Rights found in favour of Bentheim in 1985. 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 an 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 Bentheim judgment profoundly changed legal protection to 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 in the Netherlands who opposed the juridification of public administration. 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. However, thanks to Bentheim, it is established that this control must be maintained and that solutions for any resulting problems must be sought within that framework. A committee that considered the future of legal protection against the government, commissioned by the Administrative Law Association (Vereeniging voor Bestuursrecht) fully endorsed this principle and made proposals for enhancing this legal protection within the Bentheim preconditions. They 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. 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

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14Reinier in poela (Judging the Administration), Hoxzen 1997.
17Administrative Law Association Committee on Legal Protection 2004.
freedoms, which applies to the imposition of a penalty such as the ones concerned here, entails that the court must review, without restraint, whether the penalty imposed by the Minister in the specific case is in accordance with the principle of proportionality. 20

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. 21

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 was encountered by the independent court did not apply. Even after the abolition of this appeal to the Crown as a result of the Reform 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. 22 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 in question (in the event of specific supervisory failures), or as regards control and supervision (in the event of general supervisory failures). According to the Supreme Court, courts must conduct a limited review of

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21 By Dujardin and Schreuder-Vlasblom 2000, pp. 214-221.
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 case 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 requesting asylum will be more intensive than before the entry into force of Article 46(3) of the Procedure Directive.27

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 bestuursrechtpraak’ [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 Orthinum 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 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 dispute. In this way, an important boost is given to the quality of administrative legitimacy. As for the intensity of review, a tailored approach will be required, become more prominent. Depending on the circumstances of the case, a proper administrative 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.28

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 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 unbalanced, 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

The recent advisory opinion of Advocate General Wadhahov shown in the so called Dzunorera-case (that also deals with liquefied petroleum gas) is a further step in this direction. This opinion argues that a more intensive review of generally binding regulations is necessary to provide effective legal protection. According to this conclusion the intensity of the review should depend on the (personal) impact of the application of the regulation at hand. Especially when fundamental rights are at stake there is less room for deference.31 Also within the area of the EU free movement of services based on the Services Directive, recent case law has led to a stricter review.32 A higher level of scrutiny is thus required when restricting the free movement of services. Important to consider is the broad interpretation of the


31 ECLI:NL:UB:2017:3557; a request for a preliminary ruling from the CJEU has been made by the Administrative Jurisdiction Division of the Council of State Cf. De Pooter and Cibakst 2017.

concept of "services" used by the CJEU when determining the scope of the Directive, also extending to, for example, the restriction of retail trade through the Administrative Municipal Zoning Plans. This case law has been elicited by the Administrative Judicial Division of the Council of State with a request for a preliminary ruling concerning the Appingedam case. Any such restrictions have to be non-discriminatory, necessary (meaning justifiable on the ground of an overriding reason relating to the public interest) and proportionate (meaning the measures are suitable for securing the attainment of the objective pursued, they do not go beyond what is necessary to attain that objective and that this objective cannot be attained through other, less restrictive measures with the same result). These conditions go beyond what was previously required under Dutch law and this ruling is expected to also have a consequential effect outside of environmental and planning law.

6.6.2 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 tensions 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 professionalism within government, and is becoming more and more difficult for the judiciary to keep abreast of these developments. 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 an ‘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. The court must be able to form its own opinion on both issues, and the 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 Woning case, the European Court of Human Rights held that the fact that the

35 See, for example, European Court of Human Rights 23 June 1981, NJ 1982/202 (Le Comptoir Van Lessen & De Meere v Belgique, para 51. The following passages are partially extracted from Barkhuyzen and Van Enserink 2016.

the crucial facts for the resolution of the dispute.44 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.45 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.

References


Chapter 7
Judicial Review in Dutch Environmental Law; from the Judge’s Perspective

Bart Jan van Ettekoven

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Abstract
In this chapter the traditional constitutional framework for judicial review, which is based on the assumption that the exercise of administrative powers must be seen as a way of implementing the legislature’s decisions, is criticized. The model for judicial review has been reanalysed as part of the Administrative Jurisdiction Division of the Council of State (AJD)’s project on a more comprehensive form of judicial review. The reason for this is the fact that performing a limited judicial review of decisions taken by administrative authorities can no longer be justified, especially if it concerns decisions which have far-reaching consequences for citizens. The development in the direction of considering fuller judicial review is therefore one of the developments in the field of judicial review within the administrative courts in the Netherlands, which this chapter discusses.

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