Judicial Review of Administrative Discretion in the Administrative State

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Preface

Rethinking the Constitutional Design of Administrative Law: Judicial Review in the Administrative State

Constitutional Design of Administrative Law and the Rise of the Administrative State

In the traditional constitutional framework, administration is strongly identified with the executive branch. In other words, the constitutional design of administrative law must be understood in light of the concept of the *trias politica*, in which the executive power is seen as implementing what has been decided by the legislator, subject to that latter's permanent political control and democratic political accountability. It is in the initial legislative policy choice, subject to this subsequent political control and accountability, that the executive branch finds its legitimacy. This constitutional design also affects how we customarily perceive the interrelationship between the executive branch and the judiciary. The role of legal oversight, whether by judicial or administrative courts, must also be understood from the perspective of separation of powers. The courts are supposed to review administrative action in a restrained way, for example, by applying the standard of unreasonableness or manifest error. The rational underpinning of this restrained form of judicial review is found in the presumed democratic legitimacy that administrative decision-making derives ultimately from the initial legislative policy choice and subsequent political control and accountability of the executive.

The question arises, however, as to the extent this traditional constitutional framework corresponds to the actual relationship between the different actors in what is called "the administrative state". If we look to the field of comparative constitutional law, we see special emphasis placed on the independent role of agencies as a fourth branch within the overall scheme of government.[1] We can also

[1] McLean J and Tushnet M (2015) Administrative bureaucracy. In: Tushnet M, Fleiner T, Saunders C (eds) Routledge Handbook of Constitutional Law. Routledge, London/New York, pp. 121–130.

see this development in the Netherlands as well, with the proliferation of "authorities", i.e., agencies that are expected to be to some extent independent from politics.[2] Take, for example, the Consumer and Markets Authority, which has, since its inception, developed both stronger political independence in combination with broader discretionary powers. But even as to bureaucracies with less formal independence, i.e., working under full political accountability, similar observations could be made. Consider, for example, the so-called IND (Immigration and Naturalisation Service). Outside the field of asylum law, where either the Minister of Justice or his Secretary of State take the key decisions, the large majority of the administrative action escapes direct political control. This means that those who are politically responsible may only set the broader policy goals but administrative actors otherwise operate free from direct instructions. In this sense, in the modern administrative, including the many independent agencies, administrative actors necessarily play an ordering and correcting role. This role cannot be solely understood as the application of rules that have been developed by the legislator or even those at the political summit of the executive branch. Rather, often the operative rules are by the administration itself—the regulating agencies—or they operate pursuant to rules that give the administration substantial discretion.

The reality of administrative autonomy and discretion makes an approach to administrative law grounded in the classic *trias politica*, in which democratic legitimacy is derived ultimately from the legislature, problematic in a certain way. From this perspective, it is inapt to qualify "bureaucrats" as the executors of the political will, or as "alter egos of the political actors." Whether by law or simply, in fact, administrative actors operate with some degree of independence from political control.[3] Therefore, over time, this fourth branch has been subjected to special forms of accountability, not solely based on (often limited) political oversight—legislative and executive—but also on an indirect democratic legitimacy by means of external transparency, which serves as an essential support to judicial review. As Lindseth has argued: "this sort of mediated legitimacy provided for a workable reconciliation of historical notions of representative government (which continued to regard the elected legislature as the cornerstone of self-rule) with the executive-technocratic reality of the administrative state after 1945."[4]

The Constitutional Role of the Courts: Rethinking the Tripartite Approach to the Separation of Institutional Power

The traditional concern of judicial review is democratic accountability. It is reflected in the vestigial attachment to the old *transmission belt theory*, in which the role of the administration is understood to consist of faithfully applying the instructions set by the legislature. This attachment is further reflected in the

[2] It should be noted that in this context the term independency is used in a sense that must not be confused with the term independency usually used in relation to the judiciary.

[3] McLean and Tushnet (2015, p. 122).

[4] Lindseth P (2010) Power and Legitimacy: Reconciling Europe and the Nation-State. Oxford University Press, Oxford, p. 90.

insistence of judges, in reviewing administrative action, that there be an identifiable statutory basis for any claimed delegated administrative power. This legal basis provides an essential link between the administrative action and the consent-based legitimacy of the elected organ, while also ensuring that the powers ultimately exercised operate within the scope of clear statutory instructions or policy choices.

It is often difficult, however, to locate such instructions and choices in many pieces of legislation, particularly those which merely provide a framework (*lois-cadres*) but otherwise delegate or even subdelegate significant normative power. It seems remarkable that, in Dutch administrative law, the judiciary has responded to these legislative developments not with greater scrutiny but with increasing judicial restraint. The rationale seems to be that, to the extent the legislator does not set instructions, it implicitly intends the administrative sphere to enjoy greater discretion, thus justifying a diminished judicial role. But is this what is really to be expected of the judiciary in the modern administrative state? Can we build a theory of judicial review on this model of democratic accountability or should the model of judicial review evolve, seeking to do justice in the face of new forms of administration and governance at the national, European, and international levels?

A different approach seems possible if we understand the aim of judicial review from a different constitutional point of view. The core function of judicial review should be, from this perspective, to ensure the nonarbitrary character of all exercises of administrative power, rather than simply ensuring the democratic accountability of the administrative decision-making process. The potential of a doctrine focused on preventing nonarbitrary exercises of administrative power, however, is hampered by a deeply fundamental and conceptually flawed reliance on separation of power anachronisms.[5] The separation of powers, with its *a priori* insistence on legislative primacy (and, indeed, exclusivity) in particular affairs, thus can represent a debilitating force in the prevailing institutional structure if it leads to excessive judicial restraint. The tripartite theory reinforces the judicial reluctance to scrutinize the exercise of administrative discretion in a way that is normatively unjustifiable. "Administrative law doctrine … goes astray when it assumes (or pretends) that judicial deference is equivalent to political neutrality… Broad deference to the agency amounts to an alliance by the judiciary with the executive, which disservices the system of checks and balances; it abdicates any direct judicial responsibility for the quality of governmental actions."[6] Carolan has argued in this respect that the traditional tripartite approach to the separation of institutional power is both descriptively and normatively inadequate, and that the question arises as to whether it ought to be replaced by a new separation of powers system that shows due regard for both the realities of contemporary governance and the normative notions of nonarbitrariness.[7] Instead of focusing on a strict separation of powers, the

[5] Edley Jr J (1991) The Governance Crisis, Legal Theory and Political Ideology, Duke Law Journal 41:561–606, p. 562.

[6] Ibid.

[7] Carolan E (2009) The New Separation of Powers: A Theory for the Modern State. Oxford University Press, Oxford, p. 106.

alternative should be to seek sufficient checks and balances to hold accountable an administrative power that is coming to enjoy ever greater discretionary powers and autonomy in its decision-making processes.

The Interrelationship Between Courts and Administration: Modalities of Judicial Review of Administrative Power

In our ongoing research project of which this book is a part, we seek to understand developments in Dutch administrative law against a broader comparative, European, and transnational backdrop. The focus is on how courts review administrative decisions in various regulatory domains, such as competition law, energy law, environmental law, and asylum law, comparing the emerging modalities of judicial review as well as the changes that have been visible in the case-law of supreme administrative courts. From a normative point of view, we ask whether these modalities meet the needs of a changing system of administrative governance noted in Section 0.2 above. To this end, we include comparative analysis with German, UK, and US administrative law as well as with the modalities of judicial review applied by the European Court of Justice.

One of the rationales behind administrative discretion is what we would call "discretion as policy". This form of administrative discretion arises precisely because the legislature, in adopting the statute, cannot foresee the characteristics of every single case. Therefore, it leaves leeway to the administration to balance interests and take a decision that suits best the particular situation. Here, judicial review is traditionally hampered by the dichotomy that exists between law and policy. Traditionally, courts were supposed to limit their review to matters regarded as judicial (or, subsequently, quasi-judicial) in nature. This meant that the review of arbitrary action in areas formally defined as nonjudicial was understood to be beyond the presumed parameters of legitimate judicial action. This lack of judicial oversight meant that the administrative bodies came to enjoy, in some corners of their work, an effectively rule-free environment. From our perspective, normatively, this raises the question whether the traditional distinction between law and policy is still adequate in the context of the administrative state. Courts cannot take responsibility for the policy choices made by the administration, but they can assess whether the decision-making process used by the administration has been reasonable in the light of the principles of subsidiarity, proportionality, transparency, and precaution, along with human rights.

An interesting question in this respect is what factors should determine the modality of judicial review, including the actual existence of political control, as well as its nature and extent. Another factor would be the court's relative institutional capacity, notably its lack of expertise as compared to the administration. This could give rise to another basis to justify judicial deference to administrative discretion, i.e., "discretion as expertise", grounded in the professional expertise of administrative bodies. Deference here would accept the place of administrative discretion within the state's governing structures, but that deference cannot be so absolute as to ignore the possibility of (normatively objectionable) arbitrary

outcomes. Claims of expertise sometimes posit the idea that there exists an objectively correct conclusion, to which the specialist administrator will reflexively come without having to balance conflicting interests. Courts should be on guard against claims of expertise that are in fact a guise for political trade-offs, thus undertaking a sufficiently searching review of delegated powers to ensure that they are "be exercised in the coldest neutrality."

The question arises, however, whether the judicial concern to prevent arbitrary exercises of administrative power may lead courts to do more and enter directly into this domain of purported expertise. One response could be that judicial deference in relation to "substantive outcomes" will be counterbalanced by a strict process review. Courts could do this by assessing more intensively the way the administration has established the facts and distributed the burden of proof. On the other hand, we could also in principle question whether it is an oversimplification to assume administrative bodies are always better equipped to consider broad questions of (scientific) expertise. Courts must indeed be conscious of their constitutional role but this does not alter the fact that they could develop standards regarding, say, who should be regarded as an "expert" or what guiding principles might be adopted to improve the quality of the expertise-base of the administrative decision-making process. In this respect, it seems to be interesting to question what could be learned from the evidentiary standard announced in *Daubert v. Merrell Dow Pharmaceuticals*, which governs the admissibility of expert testimony in federal courts and many state courts in the U.S.[8] In its *Daubert* judgment, the U.S. Supreme Court made clear that courts are to ensure that expert testimony is both relevant and reliable, with the reliability inquiry focusing on: a. testability or falsifiability; b. peer review and publication; c. the known or potential rate of error; and d. the degree of acceptance in the field's community. At its core, *Daubert* is aimed at ensuring that scientific evidence meets the same standards of reliability that the relevant scientific field itself would require.

Another interesting question to be addressed in this project is to what extent it is still justifiable that, in principle, Dutch administrative courts are not allowed to review generally binding regulations.[9] Article 8:3 of the Dutch General Administrative Law Act (GALA) says that no appeal lies against a decision laying down a generally binding regulation or policy rule.[10] Some specific acts, like the Electricity Act and the Gas Act, provide exceptions to this general rule, making direct appeal against generally binding regulations possible. The dichotomy between law and policy underlies the prohibition of Article 8:3 GALA for the courts. However, we must admit that there is also an exception to this in case

[8] 509 U.S. 579 (1993).

[9] Article 8:2 of the General Administrative Law Act.

[10] Initially, this prohibition ought to be temporary. Later, it was turned into a permanent exemption of administrative appeal.

litigants question the legality of an administrative order on the basis of the unlawfulness of the underlying statutory provision on which the order is based.[11] Besides this, so-called "residual legal protection" is provided by the civil courts.[12] But for this type of review, the Dutch Supreme Court set a standard in its landmark *Landbouwvliegers* case in 1986,[13] that there is no rule prohibiting secondary legislation to be declared void because of an arbitrary use of regulatory powers. Nevertheless, the court also ruled that the nature of the legislative power as well as the constitutional position of the judiciary calls for judicial restraint when it comes to regulatory decisions that imply policy choices.

Among legal scholars there seem to be some debate about whether the prohibition laid down in Article 8:3 still suits the realities of contemporary government. Legal scholars have added, as well, that if we consider lifting this prohibition, the judicial review of these generally binding regulations should have more substance than this *Landbouwvliegers* standard. But what does that mean? Here, we could possibly learn from the way US courts assess the legitimacy of regulations set by regulatory agencies. Regulation still seems to be a blind spot in Dutch administrative law. So, the question arises if and to what extent the administrative courts can play a role in the development of principles of administrative regulation.

Conference on Judicial Review in the Administrative State at Tilburg Law School

With these considerations in mind, Tilburg Law School hosted a conference on judicial review of administrative decision-making on January 18–19, 2018. We would very much like to express our gratitude to the Royal Dutch Academy of Sciences (KNAW) as well as to the board of Tilburg Law School for making this conference possible. This conference sought to raise questions about the traditional assumptions regarding judicial review of administrative discretion in light of changes in the constitutional framework. Particular focus was given to whether other models of review are more appropriate considering the changing political and legal landscape in which administrative authorities and courts operate. Different perspectives were brought to bear on the role of the courts and the developments in different EU Member States, the EU, and the US across different social sectors and legal domains. The aim of the conference was to build a bridge between academic research and the realities of administrative law and judicial review of administrative decision-making on a daily basis.

[11] Bok A (1991) Rechterlijke toetsing van regelgeving (Dissertatie Groningen University). Kluwer, Deventer, pp. 4–5.

[12] See recently HR 22 May 2015, ECLI:NL:HR:2015:1296, JB 2015/125 (Privacy First). This residual protection is only possible in case of a lack of sufficient legal protection in the proceedings before the administrative courts. In practice, this means that as long as there is a possibility to lodge an appeal against an administrative decision before an administrative court requesting a test on the legality of the underlying regulation, the civil court will declare a complaint on the lawfulness of this regulation inadmissible because of the existence of sufficient legal protection before the administrative court.

[13] HR 16 May 1986, Landbouwvliegers arrest.

The conference consisted of four different parts. The first part addressed the changes in the constitutional framework and dealt with the changing role of the judge in the evolving administrative state, going beyond the traditional borders of the *trias politica*. The keynote speech was delivered by John Bell (Cambridge University) and dealt with the topic of judicial review in the administrative state. Joanna Mendes (University of Luxembourg) gave a critical account of the judicial paradigm of administrative discretion and Peter Lindseth (UConn School of Law) talked about the development of the modern administrative state. In the second part, we approached the topic from a comparative perspective, comparing different models of judicial review across different jurisdictions. Ittai Bar Siman Tov (Bar-Ilan University) talked about models of judicial review from a constitutional point of view, Anna Gerbrandy (Utrecht University) elaborated on challenges for judicial review in the supervision of markets and Deni Mantzari (University of Reading) spoke about the institutional dimension of judicial review of administrative decisions in the UK regulatory state.

In the third part, starting on the second day of the conference, the results of the first conference day were related to Dutch constitutional and administrative law. Ernst Hirsch Ballin (Tilburg University) reflected on the Genealogy of constitutional law: judicial review in the administrative state. Rob Widdershoven (Utrecht University) discussed the evolution of the standard of review applied by the European Court of Justice and judicial review in the administrative state 2.0. Jurgen de Poorter (Tilburg University) reflected on developments in the standard of review of generally binding regulations applied by the Administrative Jurisdiction Division of the Council of State. The final part of the conference tried to bridge the gap between academic discourse and the practice of the Supreme Administrative Courts in the Netherlands with contributions of Saskia Lavrijssen (Tilburg University) on energy regulation reviewed by the Trade and Industry Appeals Tribunal, Heiko Kerkmeester (Trade and Industry Appeals Tribunal) on Dutch competition law seen from a judge's perspective, Tom Barkhuysen and Michiel Van Emmerik (Leiden University) on judicial review in Dutch environmental law and Bart Jan van Ettekoven (President of the Administrative Jurisdiction Division of the Council of State) on judicial review in Dutch environmental law seen from a judge's perspective.

We are happy to present this book with the edited versions of the papers presented during the exciting and successful conference. It is a unique collection that links state-of-the-art academic research on the role of the courts in the administrative state with the daily practice of the higher and lower administrative courts struggling with their role in the evolving administrative state. We have noticed that with the changing role and forms of the administrative state, courts across the world and across sectors are in the process of reconsidering their roles and the appropriate models of judicial review. Learning from the experiences in different sectors and jurisdictions, the conference and the book provide theoretical and empirical foundations for reflecting on the advantages and disadvantages of different models of review, the constitutional consequences, and the main questions that deserve further research and debate.

We are grateful to our student assistants Camille Colard and Ron de Martines and to our secretary Yvonne Sminia for their help in bringing this book to its present form.

Tilburg, The Netherlands

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