

JUDICIAL DEFERENCE OR JUDICIAL ACTIVISM:

An exploration of Dutch Administrative Law

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I. INTRODUCTION

This paper seeks to examine to what extent and in which ways the Dutch administrative law allows for mechanisms that promote deference to the interpretation of facts and law by the executive branch. A particular focus is placed on two elements: the objection procedure and the general principles of good administration.

II. JUDICIAL DEFERENCE OR JUDICIAL ACTIVISM:

A theoretical assessment from a Dutch Administrative Law perspective

Important is that the court is only open for those that have followed an objection procedure, which takes place within the administrative body that took the primary decision.¹ It is always the decision that is taken after the objection procedure, which can then be appealed. The review of decision in an objection procedure is described as full, both the law and policy that led to the decision can be reviewed in full by the administrative decision-maker that can

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¹ Article 7:1 General Administrative Law Act.

substitute any decision it wishes for the original one.² This objection procedure filters out around 90% of all contested decisions.³

The Administrative Law Act provides the courts with a range of procedural tools to challenge decision-making, for example the requirement to carefully establish the facts. The court through the prism of “uncertainty about the facts” can steer the decision-making in a certain direction and restrict the discretion of the executive by finding the “uncertainty about the facts” unlawful.

Extensive empirical research into the use of the objection procedure and the use of appeal to the courts will be evaluated with an eye to establishing whether there is a correlation between the amount of judicial deference (or activism) and willingness to litigate.⁴ The reasons people litigate do not only correlate with the procedural quality of the decision but also rely on notions of fairness and procedural justice.⁵ Rather, it seems plausible, that increase or decrease of the accessibility of the courts, through increase or decrease of court fees has a much greater effect on the amount of litigation.⁶

III. AN OVERVIEW OF THE SCRUTINY OF DECISIONS OF THE EXECUTIVE WITHIN DUTCH ADMINISTRATIVE LAW

The administrative law courts operate within a framework of rules that determine to what extent they are able to scrutinize the decisions of the executive. Under the Dutch General Administrative Law Act decisions of the executive have to conform to the general principles of

² A.T. MARSEILLE et al., *BESTUURSRECHT* 2, 173 (6th ed. 2016).

³ J.G. van Erp & C.M. Klein Haarhuis, *DE FILTERWERKING VAN BUITENGERECHTELIJKE PROCEDURES* (Cahier 2006-6, WODC 2006).

⁴ Among many: A.T. Marseille & I.M. Boekema, *Administrative decision-making in reaction to a Court judgment can the administrative judge guide the decision-making process?*, 9 *UTRECHT LAW REVIEW* (3) 51 (2013); Bert Marseille et al., *Hoger beroep in het bestuursrecht: massaal gebruik, ontevreden gebruikers*, 38 *RECHT DER WERKELIJKHEID* (2) 76 (2017); Marc Wever & Albert T. Marseille, *Neutrality and the Dutch objection procedure*, 15 *INTERNATIONAL PUBLIC ADMINISTRATION REVIEW* 107 (2018); Kars J. de Graaf & Albert T. Marseille, *On administrative adjudication, administrative justice and public trust. Analyzing developments on access to justice in Dutch Administrative law and its application in practice*, in *ON LAWMaking AND PUBLIC TRUST* (S. Comtois & K. J. de Graaf 2016); K.J. de Graaf et al., *Administrative decision-making and legal quality: An introduction*, in *QUALITY OF DECISION-MAKING IN PUBLIC LAW* 11 (K.J. de Graaf; J.H. Jans; A.T. Marseille; J. de Ridder 2007); I.M. BOEKEMA, *DE STAP NAAR HOGER BEROEP* (2015).

⁵ Tom R. Tyler, *WHY PEOPLE OBEY THE LAW* (2006); I.M. Boekema, *DE STAP NAAR HOGER BEROEP* (2015).

⁶ Which is a point that will be further developed in the chapter.

good administration. These principles include the duty to give reasons the duty of a balanced and reasonable weighing of interests the duty to gather the relevant facts.⁷ In addition, the executive has to varying degrees room to control the meaning of the law and the interpretation of fact which can be described on a scale using the concepts of decision space which is the overarching concept describing the room the executive has in determining the meaning of the law, establishing the facts, interpreting the facts and weighing of all the relevant interests.⁸ This concept is often broken down into “evaluative freedom” which is the freedom for the executive to determine whether the requirements for the exercise of a given power have been met and “policy freedom” which is the power of the executive to weigh various interests and to choose whether to exercise the power or not.⁹ Where the courts control the meaning of the law and the establishment of facts, when it comes to interpreting these facts and weighing of interests the courts show deference to the executive. The operationalization of these concepts and its use within Dutch Administrative Law will be discussed using a recent controversial decisions to provide a good illustration of the increasing intensity (and less deference) with which decisions of the executive are scrutinized by the court.

IV. GAS EXTRACTION AND EARTHQUAKES IN GRONINGEN

This case concerns the extraction of gas for use by industry and consumers from the Slochterenveld, one of the largest gas reservoir in Europe, in Groningen which is a province in the North of the Netherlands. The case concerned the decision by the Minister for Economic Affairs to allow the NAM, the Dutch Petroleum Company who has a licence to extract the gas, to extract 21.6 billion m³ of Gas during the period of 1 year.¹⁰ The Dutch Council of State decided to quash this decision but maintain gas extraction at 21.6 billion m³ for a year so that the Minister for Economic Affairs could take a new decision.

⁷ H.E. Bröring et al., *BESTUURSRECHT* 1, at 280 (5th ed. 2016).

⁸ *Id.* at 289.

⁹ *Id.* at 289

¹⁰ Administrative Jurisdiction Division of the Council of State, *ECLI:NL:RVS:2017:3156* (Nov. 15, 2017).

It is interesting to examine in detail how the Council of State evaluated the scientific reports used to justify the decision by the minister to permit a certain level of extraction of Gas. The Council of State performs a detailed scrutiny of these reports. The court motivates this intensive level of scrutiny by referring to the potential infringement of the right to life as a result of the earthquakes that are caused by the extraction of the gas.¹¹ The court then orders that the current level will be maintained until a new decision has been taken.¹² This fits in with a wider trend within Administrative Law for courts, in line with the wishes of the legislator, to promote finality of decision-making. Recently the minister decided to stop extracting gas completely from 2030, a seismic shift in Dutch energy policy.¹³

V. URGENDA AND THE PROBLEM OF CLIMATE CHANGE

This case, which was based on a private law action based on an unlawful act considered the obligations under the various climate treaties the Dutch state is party to and resulted in an order for the Dutch state to reduce Carbon Emissions by 25% based on the level of 1999.¹⁴ The main legal device the court used was a duty of care.¹⁵ This duty of care was established by the court with reference to a large body of international treaties and reports from the IPCC. The novel use of the long existing concept of duty of care to mandate the state to reduce greenhouse gas emission to protect its population against the harmful effects of climate change deserves scrutiny as this has the potential to be employed in a wider context and in many different countries. The principle was first fully articulated in the ‘basement-hatch judgement’¹⁶ and the court uses the most recent climate science to articulate an unwritten duty of care that needs to be satisfied as to not commit an unlawful act.¹⁷ The Urgenda case is noteworthy for its extensive discussion and justification provided by the court for giving this order, where the court argued it was not overreaching its powers and encroaching on the domain of the legislature. The court

¹¹ *Id.* at Par. 14 and 20-23.

¹² Administrative Jurisdiction Division of the Council of State, ECLI:NL:RVS:2017:3156, Par. 32 (Nov. 15, 2017).

¹³ *Kabinet: einde aan gaswinning in Groningen*, RIJKSOVERHEID (Mar. 29, 2018).

¹⁴ Court of The Hague, ECLI:NL:RBDHA:7196 (english translation) (June 24, 2015).

¹⁵ *Id.* at Par. 4.64-4.92.

¹⁶ Supreme Court, ECLI:NL:HR:1965:AB7079 (Nov. 05, 1965).

¹⁷ Court of The Hague, ECLI:NL:RBDHA:7196 (english translation), Par. 4.73 (June 24, 2015).

carefully constructs a reasoning where it reiterates that it is required to enforce the law, and that legal norms drove the court to make the order to protect Urgenda against unlawful acts by the State.¹⁸ The effects of this order on the State is acceptable in the view of the court, as it does not tell the State which measures to take to achieve the goal of 25% reduction of greenhouse gas emissions, this is left to the State to decide.¹⁹

The state immediately lodged an appeal against the judgment, and the reasoning of the court of appeal is interesting because it scrutinises the decision-making of the executive in a different fashion.²⁰ The court does not employ an (extensive) interpretation of national law but anchors its reasoning directly to the risk of the violation of articles 2 and 8 of the European Convention of Human Rights.²¹ The dangers of climate change are such that there is a real chance of loss of life which forces the state to act to protect its citizens from the harmful effects of climate change.²² This use of international law means that the court does not have to show deference to an administrative interpretation but can independently assess the effectiveness of the actions of the executive. The use of this mechanism might be specific to this case or herald a wider shift towards a more litigious society and activist judiciary. The state has lodged a final appeal on points of law which is yet to be determined.

VI. CONCLUSION

Through the exploration of a landmark case this chapter has shown how the Dutch Administrative Law courts try to solve the tension between protecting the rights of citizens and the deference due to the (political) decisions of the executive. The more intense scrutiny of the powers of the executive follows a wider trend in Dutch Administrative law. This does as yet not correlate with a decrease or increase in request for judicial review rather the use of an

¹⁸ *Id.* at Par. 4.99-4.102.

¹⁹ *Id.* at Par. 4.99-4.101.

²⁰ Court of Appeal The Hague, ECLI:NL:GHDHA:2018:2610 (english translation), (Oct. 09, 2018).

²¹ The right to life and the right to private and family life respectively.

²² See ECLI:NL:GHDHA:2018:2610 *supra* note 20, at Par. 43-45.

objection procedure and the increase or decrease of cost of procedures present important mechanisms in that respect.

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