Judicial Review of Administrative Discretion in the Administrative State

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For a long time, the *trias politica* model – under which the state mechanism is divided into three separate branches (the legislature, the executive, and the judiciary) – has provided the core foundation for the government of democracies. In theory, this model of constitutional design prescribes as follows: that the legislature makes legislative policy choices as the democratically accountable institution; that the executive which is politically controlled by the legislature implements these choices; and that the judiciary is confined to overseeing administrative action, albeit in a restrained manner, intervening only in instances of unreasonableness or manifest errors. However, the emergence of the administrate state and the growing presence of administrative agencies with considerable autonomy and powers have challenged the effectiveness of the *trias politica* theoretical framework. The rather simplistic depiction of the administration as mere executor of the legislature's policy decisions indeed fails to capture the reality of the situation. In several spheres, the former is often entrusted with the implementation of so-called 'framework laws' (*lois cadres*) – laws which merely sketch out the general rules and governing principles – as well as with the case-specific application of otherwise vague legislative provisions. Therefore, in practice the executive enjoys significant leeway – far greater than what is envisioned and possibly authorised by the separation of powers doctrine.

This prevailing reality has called into question the constitutional role of the judiciary and the function of judicial review. This is indeed the topic that *Judicial Review of Administrative Discretion in the Administrative State* explores,[1] as the title indicates. The book, edited by Professors Jurgen de Poorter, Ernst Hirsch Ballin and Saskia Lavrijssen, provides a collection of contributions that essentially address one or more of the following three questions: first, whether a restrained judicial review along the lines mandated by the *trias politica* model is still justifiable in light of the emergence of the administrative state; second – if the first question is answered in the negative – what is the proper constitutional role for courts in this new context, and what should be the content of judicial review; and third, how courts actually review administrative action in different jurisdictions and domains, such as economic regulation and environmental law. These overarching questions were debated in a conference hosted at Tilburg Law School in January 2018 (where most of the contributions were presented) and are considered throughout the three parts into which the volume has been organised. In particular, Part I examines judicial review from a constitutional and comparative perspective. Part II takes a closer look into the opera-

[1] J de Poorter, E Hirsch Ballin and S Lavrijseen (eds), *Judicial Review of Administrative Discretion in the Administrative State* (TMC Asser Press 2019).

tion of judicial review in the Netherlands and its impact on Dutch administrative law. Part III concludes by offering some final observations.

First of all, Part I consists of four chapters, beginning with an insightful contribution by Professor Paul Craig on the role of judicial review in the administrative state. Professor Craig remarks that contemporary public administration performs different tasks: (i) it implements decided policy; (ii) it provides services to safeguard public health and welfare, whether directly or indirectly by outsourcing their delivery to third party suppliers; (iii) it oversees a wide range of economic activities; and (iv) it facilitates the formulation of policy, for example through consultations and other feedback processes. Furthermore, accountability itself may be secured through a range of mechanisms and may be grounded in different paradigms, including the principal-agent model, the representative-elector model, and the trust model. In this light, judicial review is but one form of accountability through which the administration is asked to explain its decisions. Given its focus on the existence of authority to make decisions and on the process of decision-making, rather than the substance of the decisions, judicial review is better suited to having a foundation in the principal-agent model, and it has two 'special tasks': to ensure participation before decisions are taken and to confirm the transparency of justifications. Given the parallel existence of multiple forms of accountability, however, it is important to ensure their coherent operation. To this end, Professor Craig employs the concept of 'braiding' to illustrate how formal and non-formal standards become interwoven to form a strong constraint on administrative action. He further identifies two core conditions for such braiding to work: the distance between the institutions and the opportunities for informal interaction underpinned through a sense of common enterprise.

The subsequent Chapter 2 is penned by Professor Ernst Hirsch Ballin – former chair of the Administrative Jurisdiction Division of the Council of State (AJD) – who delineates the constitutional genealogy of judicial review in the administrative state and underscores the significance of procedural law. Professor Hirsch Ballin observes, first of all, that administrative law has generally rested on two linked assumptions: on the one hand, that 'discretionary powers constitute executive *freedom*', and, on the other hand, that 'executive freedom is subject to political oversight'.[2] However, as the author explains, none of these assumptions are defensible anymore. For one, the emergence of the administrative state has forcefully debunked the somewhat naive image of public administration as merely applying the instructions of the legislature. Furthermore, the principle of legality – which lies at the heart of modern constitutions – demands that state interferences with the freedom of action of individuals must be legally justified. In this light, an overly deferential judicial review of admin-

[2] ibid, 30.

istrative action is hardly justifiable by the doctrine of powers separation. This is the case especially insofar as it extends to the assessment of the facts, traditionally seen as the administrator's domain, but which courts themselves are competent to conduct. On this basis, Professor Hirsch Ballin identifies three directions for strengthening and improving administrative procedural law: first, a more thorough review of the evidence; second, a better use of the proportionality test with respect to the exercise of discretion by the administrator; and third, recourse to fundamental rights as a basis for judicial review as necessary. He further recommends the creation of a 'general' chamber within the AJD to hear cases referred to by the other chambers.

Shifting the attention to the European Union, in Chapter 3 Professor Rob Widdershoven examines the standards of judicial scrutiny developed by the European Court of Justice (ECJ) and makes several interesting remarks. Notably, the assessment is not confined to the standards of review that govern the control of Union acts by the ECJ but extends to those that national courts are to apply when reviewing decisions within the scope of Union law. Professor Widdershoven indeed recalls that, in accordance with the principle of national procedural autonomy and in the absence of harmonising EU law, the intensity with which national courts scrutinise acts implementing Union law is for Member States to determine as a matter of procedure. For a long time, the position seems to have been that national standards of judicial scrutiny could be both more relaxed and stricter than the EU equivalent, subject to the principles of effectiveness and equivalence. The analysis then provides an overview of the standards of review that the ECJ applies when scrutinising EU acts and/or that it imposes on national courts in their control of acts within the scope of EU law in four types of cases: (i) those calling for unlimited jurisdiction; (ii) those concerning interferences with fundamental rights; (iii) those involving Article 47 of the Charter of Fundamental Rights (CFR) of the EU; and (iv) those entailing the exercise of a margin of appreciation/discretion. This synopsis supports Professor Widdershoven's conclusion that national procedural autonomy with respect to national standards of review has been vanishing, and that the standard of control the ECJ demands may vary – from a substantive to a process-oriented review, to a semi-procedural type of scrutiny involving a strict examination of the facts, of compliance with the rights of defence, and of the statement of reasons.

In the last chapter of Part I, Dr Despoina Mantzari explores the operation of judicial review in the field of regulation, particularly the judicial control of regulatory decisions by the Competition Appeal Tribunal (CAT) in the United Kingdom (UK). Dr Mantzari demonstrates that the intensity of the scrutiny exercised by the CAT is informed by two relationships: the *specialist/specialist* relationship between the specialised CAT and the expert regulators and the *specialist/generalist* relationship between the CAT and the general Court of Appeal (which may hear challenges against the former's judgments). The author helpfully sets out the institutional landscape of regulatory appeals in the UK in a clear and concise manner. With this in mind, she points out CAT's unique

institutional features – including its nature as a hyper-specialised tribunal – and considers their impact on the intensity of the scrutiny to which it subjects regulatory decisions. Dr Mantzari shows how the CAT has been both able and inclined to exercise a very thorough and in-depth review of regulators' discretionary economic assessments. Nevertheless, as the chapter explains, the CAT is itself constrained by the Court of Appeal. Despite its generalist nature, the Court of Appeal has employed institutional competence arguments to curtail the CAT's intrusiveness in cases where a number of different approaches were reasonable in the absence of a legal error, highlighting the regulators' superior legitimacy and expertise.

Marking the beginning of Part II is Chapter 5, where Professor Jurgen de Poorter considers the impact of judicial review on Dutch administrative law. In particular, Professor de Poorter moves away from the conventional understanding of judicial review as a means of ensuring the democratic accountability of the administrative decision-making process and conceives its constitutional function from a different perspective – that of safeguarding the non-disproportional exercise of administrative power. On this basis, he seeks to operationalise proportionality as the standard of review of secondary legislation by Dutch administrative courts. The author posits himself in favour of greater scrutiny of the facts and evidence on which regulatory decisions have been based and proposes the introduction of a 'notice and comment' procedure in Dutch administrative law that would set conduct expectations on the administration. Perhaps more importantly, Professor de Poorter also recommends the adoption of a substantive rather than process-oriented proportionality test, under which courts would review the plausibility of the evidence base of generally binding regulations. In fleshing out this test, he proposes that judges could develop two types of criteria to be applied cumulatively: on the one hand, the criteria to be satisfied by the expert person or institution whose research regulatory authorities have relied upon; on the other hand, the criteria for assessing the validity and reliability of the evidence itself – such as a set of criteria similar to the US *Daubert* test for expert testimony.

Chapters 6 and 7 are dedicated to judicial review in Dutch environmental law, from a general and from a judicial perspective respectively. In Chapter 6, written by Professor Barkhuysen and Dr van Emmerik, the authors successfully walk readers through the evolution and particularities of the Dutch system of administrative adjudication with a focus on the operation of judicial review in environmental law cases. As their exposition demonstrates, the Dutch system has been the result of incremental and gradual developments rather than of a conscious institutional design choice. Although up until about 20 years ago the AJD exceptionally performed a full review in cases involving environmental law matters, generally Dutch courts have resisted abandoning their traditional deferential approach to the scrutiny of administrative decision-making.[3] Looking

to the future, Professor Barkhuysen and Dr van Emmerik emphasise the need for a more intensive proportionality-based judicial scrutiny of administrative decision-making as mandated by the principle of effective judicial protection – as well as, to some extent, considerations about its quality and legitimacy. Their argument is, however, subject to two qualifications. First, the authors clarify that such a standard of judicial control allows for differentiation in its intensity and may accommodate a 'tailored approach depending on the nature of the legal relationship and the weight of the relevant interests of the parties involved'.[4] Second, they note that the administrator's expertise might justify the exercise of a measured degree of judicial restraint, thus drawing attention to institutional competence considerations.

Chapter 7 is authored by Professor van Ettekoven – chair of the AJD – and discusses recent developments towards the intensification of judicial review of administrative decision-making in the Netherlands, especially in the field of environmental law. In this chapter, the author endorses the early call by Professor Hirsch Ballin for a more in-depth scrutiny of the decisions of administrative authorities, especially where they have far-reaching consequences for the affected parties. Professor van Ettekoven thus joins the chorus of voices questioning the traditional conception of judicial review as grounded in the erroneous assumption that the executive merely implements the legislature's choices. The aforementioned traditional conception not only contradicts the reality of the modern administrative state but may also take issue with the rule of law. On this basis, the author traces the AJD's move towards a more comprehensive form of judicial control – as manifested in a number of recent most interesting cases. The trigger for this progressive shift was the recognition that administrative disputes involving punitive sanctions call for a more thorough review of, on the one hand, the reasonableness of the rule on the basis of which they have been imposed, and, on the other hand, of the proportionality of the sanction itself in light of the case circumstances. However, as Professor van Ettekoven illustrates, this trend was soon expanded into other areas: the AJD has indeed also tightened its review of the proportionality of agency decisions based on administrative policy rules by having regard to the specific circumstances at hand. At the same time, it has not shied away from reviewing the proportionality of secondary legislation, taking into account their far-reaching and/or differentiated effects on affected parties. Furthermore, another string of cases reveals that the AJD has been pursuing a more active role in scrutinising the facts which form the basis of the adoption of administrative authority decisions, notwithstanding the latter's expertise on the matter. In this context,

3 In this regard, until about 20 years ago the AJD performed – exceptionally – a full review in cases involving environmental law matters

4 J de Poorter, E Hirsch Ballin and S Lavrijseen (eds), *Judicial Review of Administrative Discretion in the Administrative State* (TMC Asser Press 2019) 115.

judicial review entails ascertaining the compatibility of administrative decision-making with the law, the sufficiency of evidence and reasoning, and the proportionality of any adverse consequences on individuals. Lastly, the AJD has taken a strict approach to the judicial review of partially automated administrative decision-making which often relies on big data and algorithms. Because this type of decision-making lacks transparency and verifiability, it is imperative to ensure that interested parties will not be deprived of effective judicial protection. Overall, these developments provide ample support for Professor van Ettekoven's argument that AJD's review has been recalibrated towards a more thorough control of the administration.

The last chapter of Part II is Chapter 8, in which co-authors Professor Lavrijssen and PhD candidate Çapkurt shed light on the oversight exercised by the Appeals Tribunal for Trade and Industry (*College van Beroep voor het bedrijfsleven* – CBB) over the generally binding energy regulations of the Dutch Consumer and Markets Authority (*Autoriteit Consument en Market* – ACM). As explained in the chapter, the ACM is a specialised independent agency with significant expertise and experience in the energy sector (among others) and has been entrusted with the implementation of EU Energy Regulations and Directives. Its energy regulatory decisions can be challenged before the CBB at first and last instance. Drawing on a range of cases, the authors illustrate that for quite a long time the CBB had been reluctant to thoroughly scrutinise the ACM's decisions, confining itself to an unreasonableness review. The CBB's deferential approach might be linked to the traditional Dutch understanding of the constitutional role of the courts in the *trias politica* model, as is suggested in the chapter. However, in the absence of political oversight, it might have created a lacuna in the control of the ACM's decisions in energy regulation. Having said that, the authors still caution against an overly intrusive review that would encroach on the ACM's discretion, given the latter's superiority in terms of institutional competence. They thus propose that judicial review by the CBB should be based on a procedural-proportionality test, which would demand the ACM to justify its energy regulatory decisions in a transparent and substantive manner, and they further observe that recent cases between 2015 and 2018 seem to indicate a shift towards such a test.

Finally, the volume concludes with Part III, consisting of Chapters 9 and 10. In Chapter 9, Professor Lindseth sketches out the elements of a theoretical framework for the comparative analysis of judicial review in administrative governance. In paving the way for this endeavour, the author first lays the theoretical background, drawing attention to three important aspects thereof: (a) the parallel and complementary function of judicial review and political oversight by the legislature and the executive as mechanisms of 'mediated legitimacy';[5]

5 ibid, 177.

(b) the importance of combining the principal-agent theory with a constructivist, historical and genealogical approach in order to understand how core concepts have been employed and understood over time and across different places and systems; and (c) the challenge of reconciling tensions between democracy, technocracy and juristocracy, which are to some extent present in all systems of administrative governance. On this basis, Professor Lindseth identifies five basic questions that one needs to answer to understand and compare how judicial review operates in different systems:

(1) *which* judge should be charged with the task of legal control of administrative governance; (2) *whether* there are any matters categorically beyond the legal cognizance of the judge (...); (3) *when* it is appropriate for the judge to intervene in the administrative process in response to a litigant's complaint (admissibility/timing); (4) *who* may properly invoke the power of the judge to exercise legal control (standing); and (5) *what* types of questions (fact/law/policy) may the judge properly address and in what depth when exercising the power of legal control.[6]

These five questions are complemented with a sixth overarching 'why' question: what is judicial review for?

The last chapter is a short yet thought-provoking essay penned by Professor Hirsch Ballin and offers some final observations on the constitutional status of judicial review in democracies based on the rule of law. As the author emphasises, judicial review is not a substitute, but rather a complement to the political legitimation of the administration's decisions. Our understanding of its exact role hinges on one's primary conception of democracy as representation or as dialogue. The latter understanding does not eliminate the possibility of judicial deference to the authority. However, it brings the significance of the principle of proportionality – based on a consideration of different views and interests – to the fore. The author rightly points out that the ability of the courts to perform a meaningful judicial review inevitably rests in part on their institutional features and procedural organisation. Professor Hirsch Ballin concludes the chapter by emphasising the intrinsic link between judicial review and the protection of fundamental freedoms and rights in a democracy founded on the rule of law.

Taking a step back, there is no doubt that *Judicial Review of Administrative Discretion in the Administrative State* is true to its title and fully delivers its promise: it offers an excellent collection of intriguing contributions by prominent experts on the theoretical and empirical foundations of the judicial scrutiny of administrative decision-making. The editors should be highly praised for taking the initiative and bringing together such an impressive list of contributors to

6 ibid, 184.

further explore such a complicated yet highly important and topical subject, as well as for their careful selection and organisation of the various topics. Recalling the three questions identified at the beginning of this review, a few remarks may be worth sharing. First of all, two consensus positions arguably emerge from the contributions. On the one hand, the *trias politica* model – at least as traditionally understood – may no longer provide an adequate justification for the exercise of a restrained judicial control of administrative action. Indeed, it is quite clear that this ship has already sailed, and an updated theoretical framework for the constitutional role of courts is necessary in a rising administrative state. At the same time – albeit with some resistance, delay and hesitation – the judiciary has been slowly but steadily revisiting its own role in this shifting context. In this regard, the multiple examples discussed in the contributions throughout the volume indicate a clear move towards a more thorough control of administrative decision-making.

Having said that, the exact and optimal form and shape of such review, as well as the factors that inform or should inform its content (e.g., institutional design and competence considerations or fundamental rights) remain less clear. To some extent, this is naturally due to variations in the understanding and use of core concepts across jurisdictions and regulatory domains – such as 'deference' or 'discretion' or 'reasonableness' or 'proportionality review' – as well as due to pending debates about the proper role of judicial review and the interplay among institutions in administrative governance. In this light, further comparative analysis along the lines of the one presented in Professor Lindseth's contribution would help us to overcome some of these barriers, and to better understand and debate judicial review in the administrative state. This edited collection makes a valuable contribution to this joint and ongoing effort. It is thus warmly recommended to all interested in administrative law and the role of the courts – be it in academia, public service, the judiciary, practice and beyond.

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