JUDGING THE RIGHT BALANCE

JURIDIFICATION IN THE LIVING ENVIRONMENT

JUNE 2024

Council
for the Environment
and Infrastructure

About the Council for the Environment and Infrastructure

The Council for the Environment and Infrastructure (*Raad voor de leefomgeving en infrastructuur, Rli*) advises the Dutch government and Parliament on strategic issues concerning the sustainable development of the living and working environment. The Council is independent, and offers solicited and unsolicited advice on long-term issues of strategic importance to the Netherlands. Through its integrated approach and strategic advice, the Council strives to provide greater depth and breadth to the political and social debate, and to improve the quality of decision-making processes.

Council for the Environment and Infrastructure (Rli)

Bezuidenhoutseweg 30

P.O. Box 20906

2500 EX The Hague

The Netherlands

info@rli.nl

www.rli.nl

Members of the Council

Jan Jaap de Graeff, Chair

Pallas Agterberg

Jeanet van Antwerpen

Prof. Niels Koeman

Jantine Kriens

Emmy Meijers

Jeroen Niemans

Krijn Poppe

Karin Sluis

Prof. Hanna Tolsma

Prof. Erik Verhoef

Em. Prof. André van der Zande

Junior Council members

Joris van den Boom

Yourai Mol

General secretary

Ron Hillebrand PhD

CONTENTS

SUMMARY 5

PART 1 | ADVISORY REPORT 11

1 INTRODUCTION 12
1.1 Rationale and nature of this advisory report 12
1.2 Structure of this report 14

2 THE ROLE OF THE LAW IN OUR DEMOCRATIC STATE SUBJECT TO THE RULE OF LAW 15

3 THE CHANGING ROLE OF THE LAW IN THE LIVING ENVIRONMENT 20
3.1 Scan of cases 20
3.2 Observations on developments in living environment law 22
3.3 Societal trends 23

4 WHAT ASPECTS OF JURIDIFICATION ARE PROBLEMATIC? 25
4.1 Imbalance within the *trias politica* 26
4.2 Inadequate quality of legislation and policy 27
4.3 The right case before the right court 28
4.4 Licensing, monitoring, and enforcement 28
4.5 Overestimating civic engagement and participation as a panacea for combatting juridification 29

5 CONCLUSIONS AND RECOMMENDATIONS 30
5.1 Aspects that are not problematic 30
5.2 Aspects that are problematic 31
5.3 Recommendations 32

PART 2 | BACKGROUND 35

1 THE CONCEPT OF JURIDIFICATION 35

2 LEGAL FRAMEWORK 38
2.1 Administrative law 38
2.2 Civil law 38
2.3 Criminal Law 39
2.4 Constitution 39

3 OBSERVATIONS REGARDING DEVELOPMENTS IN LIVING ENVIRONMENT LAW 40
3.1 Increased importance of EU regulations and international conventions 40
3.2 New legal questions as a result of the Environment and Planning Act 43
3.3 Special-interest organisations more likely to go to court 43
3.4 Nature as a legal entity 43
3.5 Shift in the nature of court cases 44
3.6 Inadequate licensing, monitoring, and enforcement 46
3.7 Increased concern for harm to health 46
3.8 Review of underlying regulations 46
3.9 Stringent proportionality test 47
3.10 Civic engagement and public's perspective 47
3.11 Greater focus on solution-oriented dispute resolution 49

4 OPTIONS FOR ENHANCING THE QUALITY OF LEGISLATION 50

REFERENCES 53

COURT RULINGS 56

APPENDICES 59

RESPONSIBILITY AND ACKNOWLEDGEMENT 59

OVERVIEW OF PUBLICATIONS 61

SUMMARY

In recent years, court cases about what should and should not be permitted in our living environment have attracted increasing attention. Such cases are often initiated by members of the public, companies, public authorities, and special-interest organisations such as Urgenda, who are concerned, for example, about the consequences of emissions and discharges from industrial and agricultural enterprises. They turn to the courts to ensure better enforcement of rules to protect nature and the environment. Taking the matter to court may also be a response to poor enforcement of environmental permits by the authorities or failure to update them in good time.

Not everyone welcomes this trend. Some sections of society – and also of the Dutch Parliament – believe that the government is subject to so many rules imposed by the courts that it can no longer decide for itself what is in the best interests of the country, for example in the context of spatial planning, dealing with the issue of nitrogen deposition, or tackling the housing shortage. Living environment law, and the role the courts have in it, is then seen mainly as an obstacle: it leads to government policies that hamper people's enjoyment of their property and it curtails the earning power of businesses.

How should we interpret ‘juridification’ as regards the living environment? Which aspects are genuinely problematic and which are not? And what is needed in order to address the problematic aspects? These questions are the subject of this advisory report.

What exactly is ‘juridification’ and to what extent is it a problem?
In everyday parlance, the word ‘juridification’ has negative connotations. Many people associate it with an overabundance of rules, rules that are also becoming increasingly detailed and that sometimes conflict with one another. In addition, there is the idea that judges are increasingly assuming for themselves the role that rightly belongs to politicians.

In the present advisory report, we look at juridification – specifically the juridification of issues concerning the living environment – from a more neutral perspective. Juridification can then be seen as the mechanism whereby the law plays an increasingly important role in society. To a certain extent, there is nothing at all wrong with that. In our state subject to the rule of law, legislation and regulations are the tools with which government achieves its policy aims. They also provide a guarantee for the public, businesses, and special-interest organisations that the authorities will abide by the rules, and that third parties whose interests are impaired can find protection.

Preventing judicial disputes: the role of politicians
As regards preventing judicial disputes about government rules or their implementation, we believe that politicians bear a heavy responsibility – especially in the case of rules arising from EU legislation or international conventions, against which the courts review Dutch policy on the living environment. When such policy comes under fire (for example rules to protect nature and combat climate change), debate regularly involves pointing an accusatory finger at ‘Brussels’. Politicians would do well to make it clear, however, that they are in fact among those responsible for drawing up those EU rules.

Moreover, politicians would be wise not to limit the Netherlands’ interpretation of EU and international legislation and regulations to merely complying with the minimum required. That, after all, increases the risk that individuals or special-interest organisations will take the matter to court to demand that government comply more closely with the relevant EU and/or international rules. In such cases, it is highly likely that the court will rule that the government’s interpretation is indeed too feeble. This happened, for example, when the Dutch government wished to exempt the construction sector from the EU rules on reducing nitrogen deposition. After reviewing the proposed exemption in the light of the existing rules, the court ruled that it was not permissible. As a result, a large number of new construction projects in the Netherlands came to a standstill.

Importance of better legislation and regulations for the living environment
The above example highlights the importance of administrators and politicians taking EU and international conventions into account when proposing legislation and regulations. Doing so reduces the risk of a judicial review turning out to be unfavourable.

We believe that the quality of legislation and regulations will be improved if greater attention is paid to the law 'at the front end' of the legislative process. We therefore consider it advisable to enhance the judicial function within the ministerial departments that draft legislation. Enhancing judicial review in this way will make legislation and regulations more resistant to the risk of unlawful action on the part of the government.

Another option is to strengthen the Advisory Division of the Council of State. An Adviser General could be added to that department, with the task of indicating whether a parliamentary bill is in line with the Constitution, with EU law, and with the European Convention on Human Rights (ECHR).

Judicial means for balancing up interests

A government that listens to input from the public does not then always do what the public actually want. That's unavoidable; when deciding on environmental plans and permits, government must promote the public interest, for example protecting nature, the environment or water quality, or, conversely, protecting jobs and business activity. People's wishes sometimes conflict with this general interest, and their wishes may well differ and clash with one another. Government must then balance up the various interests.

Members of the public who participate become disappointed and frustrated if their input is not acted upon. This is a problem, certainly given the declining trust in government and politicians that has become increasingly apparent in recent years. It is therefore important for such people to be listened to *somewhere* – if not by the government, then by the courts. The judiciary have for some time been looking for ways to make court rulings more responsive to the interests and wishes of those seeking justice. In this context, it is worth mentioning the current pilot projects for the 'socially effective administration of justice'. The administration of justice is socially effective if time and attention are devoted to underlying social problems during the handling of a case, if access to the courts is low-threshold, and if the court does not merely act as a 'rubber stamp machine' when adjudicating a case. The task of the courts in this form of justice thus extends beyond quickly severing legal knots.

Ways to achieve faster and more efficient handling of cases concerning the living environment

Juridification can lead to judicial bottlenecks, for example legal uncertainty if a ruling is long in coming or delays in the energy transition if rulings are challenged. Against this background, we consider it important for there to be an increase in the efficiency with which cases are handled. In our view, judicial capacity should be designed to allow the courts to arrive at a judgment more quickly – without that of course affecting the legal protection enjoyed by members of the public.

We believe consideration should be given to arranging for members of the public and special-interest organisations to be able to litigate against certain categories of government decisions before only a single judicial body.

Conclusions

Which aspects of juridification regarding the living environment are currently problematic and which are not? The prominent role that the law plays in our democratic state subject to the rule of law is not, in our view, problematic. Particularly in the case of environmental issues, where interests regularly clash with one another, the law is of great significance. Important transitions are at stake here, linked to global climate challenges.

Aspects of juridification that are not problematic:

- the prominent role of the law in our democratic state subject to the rule of law;
- ample access to the courts for all.

An aspect of juridification that is, however, problematic:

- the imbalance between the judicial, legislative, and executive powers.

We also do not consider the ample access that members of the public and special-interest organisations have to the Dutch courts to be problematic. On the contrary, the freedom that the country's inhabitants have to take their grievances against the government to court is an essential part of the legal protection that the Dutch state guarantees its people.

One aspect of juridification regarding the living environment that we do indeed find problematic is the imbalance that has arisen in the relationship between the judicial, legislative, and executive powers.

This concerns in particular the roles involved in safeguarding the rule of law and the resulting impact on government policy. Safeguarding the rule of law has become too one-sidedly the purview of the courts. For the judiciary, that role has increased in recent decades. The reason for this lies with the other two powers, Parliament and government. After all, it is just as much *their* duty to safeguard the rule of law and to respect the legal rules, or if necessary to in fact amend those rules within a democratic process.

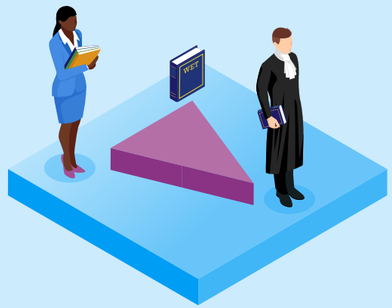
Recommendations

What can government do to address the problematic aspects of juridification regarding the living environment? Briefly, our recommendations to the Dutch government are as follows:

- Enhance the judicial function within the ministerial departments that draft legislation.
- Ensure better review of national policy on the living environment against the Constitution, EU directives, and international conventions. For this purpose, an Adviser General should be appointed to the Advisory Division of the Council of State.
- When transposing EU directives into national legislation and regulations, adopt a robust interpretation that is not limited to merely complying with the minimum required.
- Give greater priority to timely updating of permits and to enforcing them.
- Determine which disputes regarding living environment issues can be adjudicated by a single court, without the option of appeal.

Figure 1: Main conclusions of this advisory report

Juridification is inherent to the rule of law



Imbalance within the *trias politica*

Inadequate quality of legislation and policy

Judicial capacity must be utilised efficiently

Inadequate enforcement will increase juridification

Overestimating civic engagement and participation as a panacea

Figure 2: Recommendations of this advisory report

Enhance judicial function

Enhance the judicial function within the ministerial departments that draft legislation and make ministerial advice public.

Adviser General

Have an Adviser General who reviews legislative proposals against the Constitution, EU and international law, and general legal principles.

EU directives and national legislation

Opt for robust implementation when transposing EU directives into national legislation.

Licensing, monitoring, and enforcement (VTH process)

Enhance licensing, monitoring, and enforcement. Actively implement the updating requirement for permits and general rules.

Appeal to higher instance and direct appeal

Investigate when cases can be adjudicated without the possibility of appeal to a higher instance or, conversely, when direct appeal to the Division should be available.

PART 1 |
ADVISORY REPORT

1 INTRODUCTION

1.1 Rationale and nature of this advisory report

Court cases and the role of legislation and regulations in the living environment are increasingly in the news, for example, when members of the public and organisations take a matter to court because they feel insufficiently protected by the authorities' policy on the living environment or because they feel their interests are impaired by the activities of companies. Because numerous major changes are underway in the Dutch living environment – for example in the energy system, the agricultural sector, and housing construction – people and businesses are also increasingly confronted directly with policy decisions on the living environment, or the lack of such decisions. Partly because of this, concerns about such matters as environmental quality, health, and biodiversity are a recurring issue.

At the same time, there is much national and EU environmental legislation and regulations that can be invoked. It is striking how often members of the public and organisations, as well as companies, find the law (both national and EU law) and the courts on their side in cases concerning the living environment. Various high-profile cases have put a strain on the relationship between the courts and politicians.

Statements in the media and debates in the House of Representatives exacerbate that tension. The impression frequently arises of a government that has all kinds of rules imposed on it by international conventions and thus no longer has the freedom to decide for itself what is good for the country. Lawsuits regularly give rise to questions in Parliament, for example those regarding juridification that were recently raised by Dutch MPs in the light of the Nature Restoration Regulation.[1] There had previously been a parliamentary motion (enjoying broad Parliamentary support) calling on the government to investigate how a more stringent test for the representativeness of special-interest organisations – as referred to in the current Section 3:305a of the Dutch Civil Code (BW) – could be implemented (Tweede Kamer der Staten-Generaal, 2023b). The recent ruling by the European Court of Human Rights (ECtHR), in which the Court ruled that Article 8 of the European Convention on Human Rights (ECHR) requires governments to take measures to meet climate targets[2], led to MPs responding that the courts are assuming for themselves the role that rightly belongs to politicians.[3]

There is debate regarding the role of the courts within the *trias politica* – i.e. how the judiciary relates to the legislature and the executive.

1 The Standing Committee on Agriculture, Nature and Food Quality submitted a number of questions and comments to the Minister for Nature and Nitrogen Policy regarding the memorandum of 8 December 2023 on Amendments to the Nature Restoration Regulation (LNV, 2023b) and the memorandum of 24 November 2023 on negotiations on that regulation and the proposed decision (LNV, 2023a).
2 See ECtHR 9 April 2024, Application no. 53600/20.
3 Plenary Report, House of Representatives, 63rd Session (Tweede Kamer der Staten-Generaal, 2024).

Recent discussions in the Dutch House of Representatives on the question of review against the Constitution also involve this issue.

In general, a picture emerges that the public, organisations, and businesses feel, on the one hand, that the rules are there to protect them but, on the other, perceive legislation and regulations as restricting their freedom, as hampering their enjoyment of their property, or affecting the country's earning capacity.[4]

The questions to be answered in this report

We have taken indications of these trends regarding the law on the living environment law as our point of departure for this advisory report. These legal trends are also referred to as 'juridification'. In this report, we adopt a more general definition of juridification, namely:

Definition of juridification

'In societal relationships, the trend whereby the judicial aspect becomes increasingly important or even dominant' (Schlössels & Zijlstra, 2017).

Within this definition, juridification is in itself a neutral concept. In the Netherlands, careful preparation of decision-making and access to legal

4 A random sample from reports by the Dutch Broadcasting Foundation (NOS): 'Many planned flex homes remain unbuilt; neighbourhood often objects' (NOS, 2023b), 'Is the law interfering in politics with climate ruling? Urgenda lawyer thinks not' (NOS, 2019); "House of Representatives wants investigation: on whose behalf do environmental organisations speak in court?" (NOS 2023a); "Judge blows the whistle on Cabinet: Schiphol won't need to shrink this year' (NOS, 2023c).

protection are safeguarded by legislation and regulations. There is therefore legislation intended to regulate the physical living environment and to achieve goals in that environment. Policy on the living environment is thus by definition juridified, and juridification of such policy is consequently a given. As such, the concept of juridification offers little to hold on to. Public debate on juridification focuses on various aspects of the law, such as the complexity of the rules, the increasing number of issues taken to court, and the role of the courts.

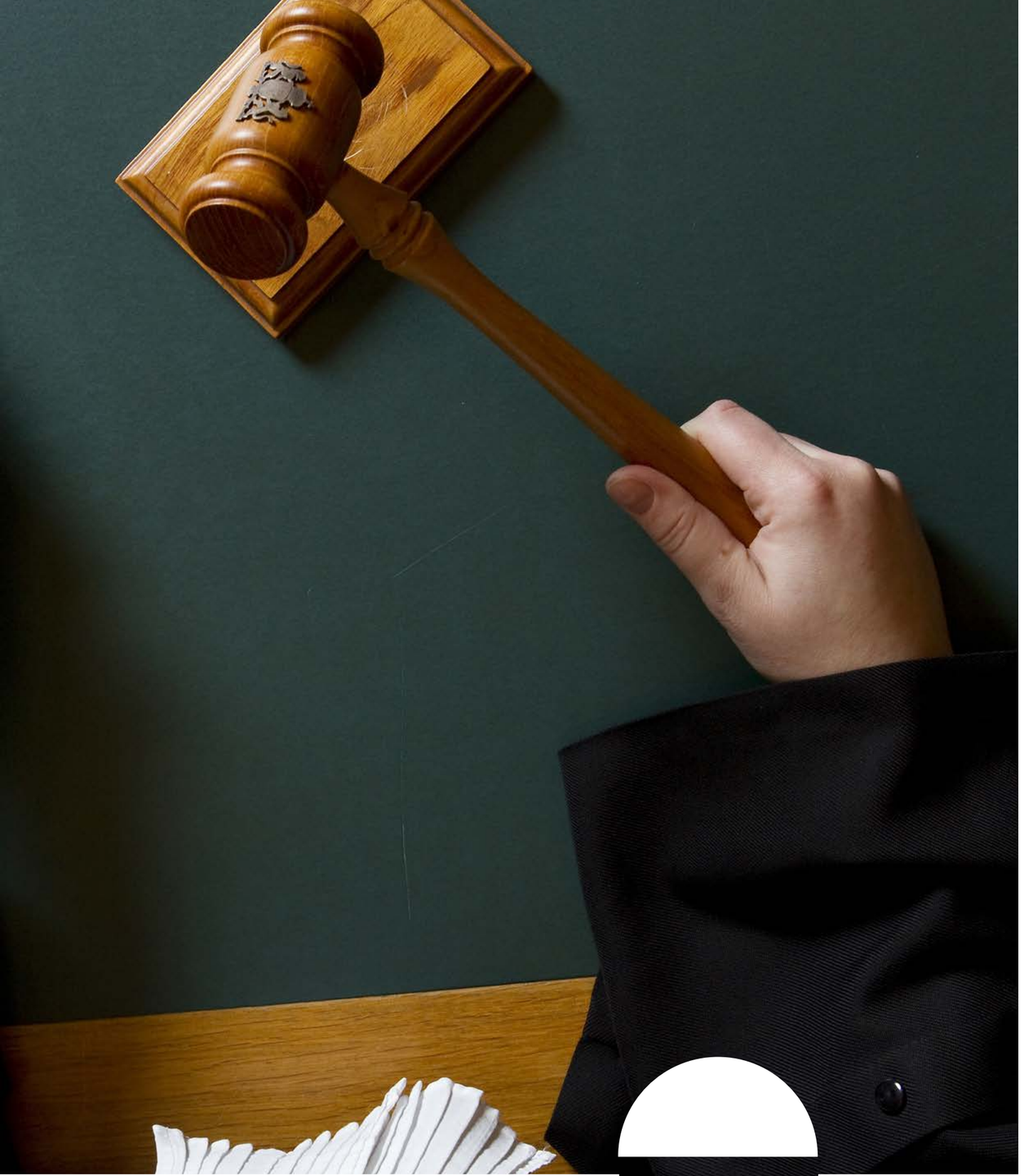
In this advisory report, we consider the developments in the law on the living environment in greater detail, going on to explain the extent to which they are problematic and why that is so. In doing so, we begin from the following question:

Which aspects of juridification are problematic? And why is that?

As the Council for the Environment and Infrastructure, we focus in this report primarily on the living environment, with the examples discussed being taken from that broad field. We fully realise that the debate about juridification and the relationship between the legislature and the courts also plays out in other fields. Many of our observations in this report may also be relevant to other policy areas. Some of our conclusions with recommendations also appear applicable outside the area of policy for the living environment.

1.2 Structure of this report

This advisory report consists of two parts. In Section 2 of Part 1, we first consider the functioning of the Dutch legal system and the role of the law in our democratic state subject to the rule of law. In Section 3, we describe the changes that we have observed in the role played by the law as regards the living environment. We respond to the afore-mentioned request for advice in Section 4 by addressing some problematic aspects of juridification in the living environment. In Section 5, we draw some conclusions and make recommendations for eliminating the problematic aspects that we have identified. Part 2 provides background to our observations and conclusions.



2 THE ROLE OF THE LAW IN OUR DEMOCRATIC STATE SUBJECT TO THE RULE OF LAW

In public debate on the role of the law in the context of the Dutch living environment, it is not always clear how responsibilities are allocated to different players in our democratic state subject to the rule of law. In the course of that debate, the various procedures and areas of the law also tend to get mixed up. This section provides a brief explanation of the legal framework within which developments in the living environment take place, and how they become juridified.

The *trias politica*

The Netherlands is a democratic state subject to the rule of law, with a separation of the different forms of state power – the *trias politica* – being both essential and indispensable. In the Netherlands, there is no strict separation of powers; rather, there is a distribution of powers. By distributing legislative, executive and judicial power, a balance of power is thus sought. The three powers can control and correct one another if needed.

In a democratic state subject to the rule of law, interventions are the result of decisions made within the system of the *trias politica*. For that system to work, at least three elements are needed, all of which are of equal importance. First, as part of the legislative power, elected representatives of the people (in Parliament, provincial councils, municipal councils, and the boards of the water authorities) must arrive at political decisions about the future of the country. Second, the executive power (ministers, provincial executives, mayors and executive councillors, and the executive boards of water authorities) must implement those decisions and check whether the rules are complied with by companies and by the general public. And finally, Parliament (or its equivalents within the various local authorities) and the judicial power (in the event of a dispute) must check whether the action taken has complied with the legal rules.

What this means specifically is that the legislature – at national level meaning central government and Parliament – enacts legislation that is then applied and implemented by the executive power, at national level meaning the ministers. The executive power is overseen by Parliament and, in the event of an appeal or dispute, by the courts. The judicial power checks whether the legislature and the executive power have acted within the limits of national and international law and with due respect for general legal principles. The courts are independent and do not form part of the legislative and executive powers.

Areas of the law

Dutch law – i.e. the legislation and regulations formulated by the legislature – can be divided into three areas: administrative law, civil (or private) law, and criminal law (see Figure 3). The judiciary is also organised according to these three areas of the law. Section 2 of Part 2 explains these three areas in greater detail. The box provides some examples of court cases within the three different areas.

Examples of cases in the various areas of the law

Administrative law

PAS ruling

On 29 May 2019, the Administrative Jurisdiction Division of the Council of State ruled that the Integrated Approach to Nitrogen [*Programma Aanpak Stikstof*] (PAS) cannot be utilised as a basis for permitting activities. It fails to meet the conditions set by the EU Habitats Directive. The Division thus cancelled the permits for livestock farms concerned in the ruling. The ruling has consequences for many other project permits and decisions (ECLI:NL:RVS:2019:1603).

Ruling on the exemption for the construction sector

On 2 November 2022, the Administrative Jurisdiction Division issued an interlocutory ruling to the effect that the exemption for nitrogen emissions in the construction sector does not comply with EU nature

protection law. The Division found that this exemption for that sector cannot be applied to construction projects. Although this does away with that exemption, it does not mean that there is now a blanket ban on construction. It does mean, however, that the potential impact of nitrogen emissions must be investigated for each individual project (ECLI:NL:RVS:2022:3159).

Environmental assessment for wind turbine standards
In an interlocutory ruling on 30 June 2021, the Administrative Jurisdiction Division ruled that public authorities cannot apply the wind turbine standards in the Activities Decree and the (old) Activities Regulation to wind farms until an environmental assessment has been drawn up. Under EU law, the general standards for noise, safety, and shadow cast that apply to the construction and use of wind turbines in the Netherlands require an environmental impact assessment. The government will now need to draw up such an assessment. Until it has done so, the general standards set out in the Activities Decree and the Activities Regulation cannot be applied to wind farms. This ruling also had implications for similar decisions on Dutch wind farms (ECLI:NL:RVS:2021:1395).

Civil law

DuPont/Chemours
The municipalities of Dordrecht, Papendrecht, Sliedrecht, and Molenlanden claimed compensation from Chemours and its legal predecessor DuPont. They argued that they had sustained harm due to emissions into the atmosphere of PFOA and GenX substances (types of PFAS) from Chemours' plant in Dordrecht. The Rotterdam District Court found in an interlocutory judgment in 2023 that during a certain period the emissions had been unlawful. Chemours was liable in respect of the harm sustained by the municipalities as a result (ECLI:NL:RBROT:2023:8987).

Criminal Law

Tata Steel and Harsco Metals
In 2022, the Public Prosecution Service decided to open a criminal investigation of the steel producer Tata Steel and the residue processor Harsco Metals for deliberately and wrongfully releasing hazardous substances into the soil, air or surface water, resulting in a potential danger to public health. Charges were brought on behalf of some 800 individuals and a number of organisations (OM.nl, 2022). In February 2023, the criminal court convicted Tata of environmental offences (ECLI:NL:RBAMS:2023:568).

Chemelot companies
Five chemical companies on the Chemelot industrial estate faced criminal charges in late 2023 before the East Brabant District Court in 's-Hertogenbosch for serious safety incidents, in one of which an employee had died (OM.nl, 2023). In 2018, the Dutch Safety Board

had found shortcomings in process safety control (OVV, 2018). The criminal cases hinged on whether those shortcomings involved criminal culpability. On 30 January 2024, one of the companies was fined ten million euros and two were fined three hundred and sixty thousand euros. It was the companies that were charged and not the individuals responsible. The prosecution linked the criminal cases against the companies together because their sites are interconnected and the environmental permits were issued to a central licence organisation (ECLI:NL:RBOBR:2024:299, ECLI:NL:RBOBR:2024:300, ECLI:NL:RBOBR:2024:301, ECLI:NL:RBOBR:2024:303, ECLI:NL:RBOBR:2024:306).

The Constitution occupies a special position under Dutch law. It lays down both the structure of the Dutch state and the fundamental rights of individuals: fundamental constitutional rights and fundamental social rights. Under Section 120 in the Constitution, the courts are prohibited from reviewing legislation enacted by the Senate and House of Representatives against the Constitution. Section 1 of Part 2, explains the position of the Constitution in greater detail.

Two functions of the law: instrument and guarantee

In the context of the living environment, public law has long played an important role. It has two functions: it is an instrument for government to implement policy objectives, and it guarantees individuals, companies, and special-interest organisations that government will comply with the national and international rules in force at the time. Access to the courts ensures that individuals can if necessary enforce compliance with those rules in court.

This safeguarding function of the law concerns not only the courts. It is also, after all, the responsibility of the legislature to ensure that the guarantees offered by (constitutional) EU and international law are observed when it enacts legislation. The administration must not only implement its own policy objectives but also has the task of observing and implementing the guarantees offered to individuals by the law.

Figure 3: Three areas of the law: administrative law, civil (or private) law, and criminal law

Criminal Law

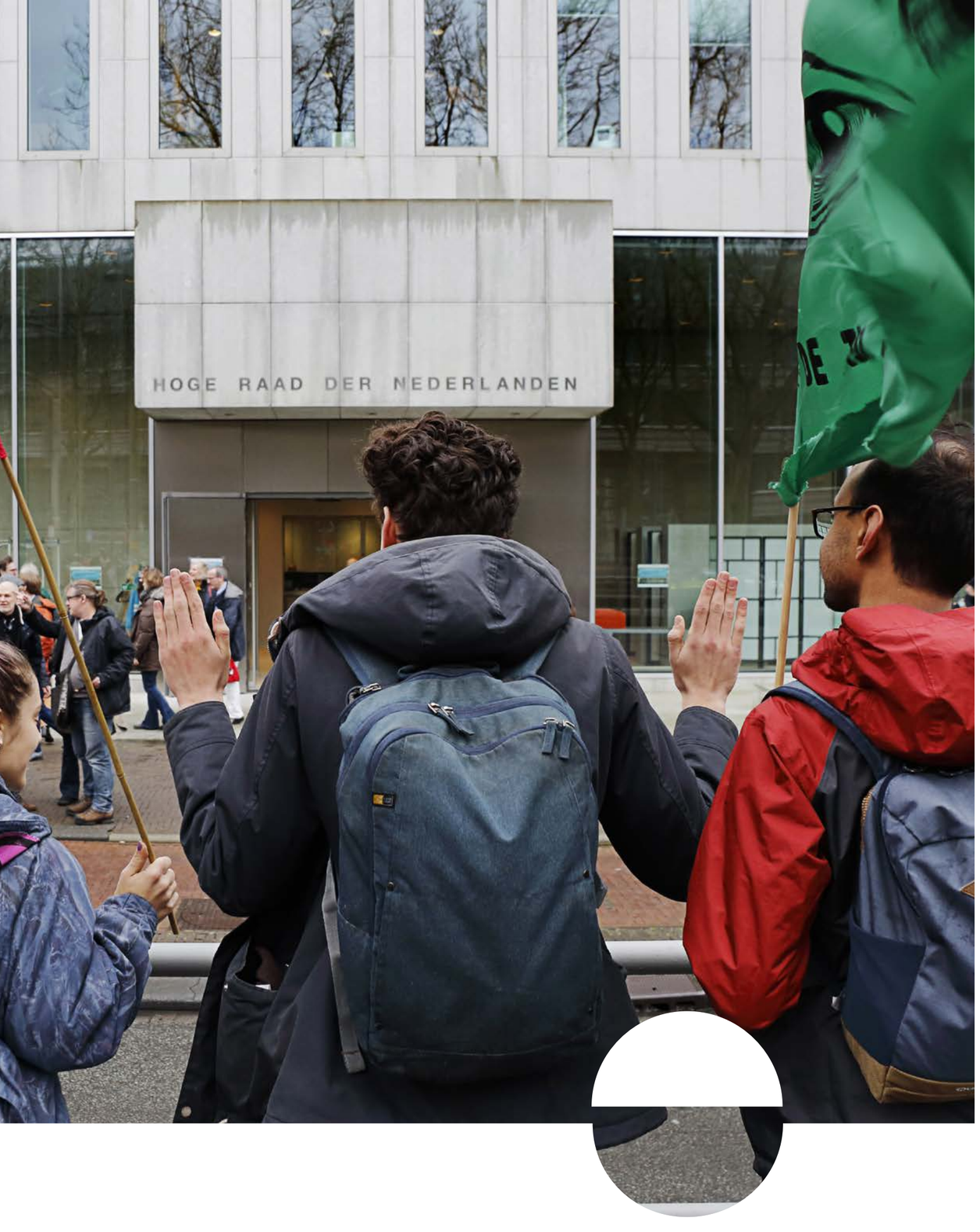
determines what behaviour is punishable and the applicable penalties

Administrative law

regulates the powers of the authorities to make decisions that bind individuals unilaterally

Civil law

regulates relations between legal persons among themselves (individuals and/or companies)



3 THE CHANGING ROLE OF THE LAW IN THE LIVING ENVIRONMENT

This advisory report is a response to the changes, perceived or otherwise, in application of the law within the living environment, i.e. juridification. To get a better idea of the relevant developments in the living environment as regards the law and juridification, we conducted a media scan of cases, held expert meetings, and interviewed numerous individuals.

In the present section, we discuss our observations on the changing role of the law in general and more specifically in policy on the living environment. We view that role in the context of general trends within Dutch society.

3.1 Scan of cases

This advisory report is not just about when issues are taken to court in cases concerning the living environment, although that is an important element of juridification. We have been unable to determine for certain whether people are taking living environment issues to court more frequently than in the past. There is not enough reliable quantitative data available for quantitative analysis specifically of such cases. Wolf et al.

(2022) note that not all rulings and cases can be found in databases; it is unclear how cases were categorised and also whether that was done unambiguously. Moreover, the number of cases that end up in court could not be compared with the number of environmental decisions, given that neither of these numbers is known.

Nevertheless, to get an idea of public debate, and to substantiate and illustrate the trends with cases, we conducted an exhaustive media scan. Its aim was to determine which living environment lawsuits appear frequently in the national print media. The result is an overview of cases referred to most frequently in (part of) the print media over the course of the past decade.[5] Observations derived from the media scan include the following:

- The PAS rulings and their societal impact came in for a relatively large amount of attention. The media devote attention to (construction) projects that have failed to go ahead and to permits that have been cancelled.
- After a court ruling, it may take a considerable time for the authorities to come up with a solution, for example in the case of the PAS ruling or the ruling on wind turbines.
- In addition to their traditional campaign activities, environmental organisations are increasingly seeking and finding their way to the courtroom. Examples include Urgenda's climate case and the cases brought against Shell, Schiphol, or agricultural undertakings with regard to nitrogen.
- In various cases, members of the public and local authorities (municipalities, water authorities, and provinces) take legal action jointly against companies or against the State. Cases have also been brought by companies against public authorities. Moreover, some of the cases in our selection directly concern compliance with established standards, and are therefore court cases in the traditional sense.
- Many cases concern a three-party dispute, involving the government, an initiator – who applies for a permit or submits a plan, for example, – and a third party such as a neighbour, a neighbourhood committee, or an environmental organisation that objects to the relevant initiative.

From our analysis, the media scan, sessions with experts and interviews, a picture emerges that in recent years the legislature and administration have regularly failed to take difficult decisions on the environment and scarce space. In response, special-interest organisations and members of the public have increasingly taken matters to court. In the present advisory report on juridification, it is therefore important to look not only at the role of the law and the courts as an autonomous aspect but to understand the role played by the law in the precarious balance of the *trias politica*, within which the legislature and the executive powers also play a central role.

5 The media scan was conducted using the Nexis database on the basis of a search focusing on court cases and living environment issues. From this set of more than 17,000 articles from the past 10 years, articles in the *Trouw* and *NRC* daily newspapers were examined in greater detail. A total of 164 cases were selected out of more than 1,000 articles, examined in greater detail, and arranged according to the year of the ruling, the parties to the proceedings, the legal grounds, and the case law.

3.2 Observations on developments in living environment law

In addition to the above observations based on the media scan, our discussions with experts and a review of the literature also led to a number of observations; these are briefly set out below. Section 3 of Part 2 explains those observations in greater detail.

Internationalisation

For a considerable time, the living environment has been regulated by EU directives and regulations.[6] New EU law is also constantly being prepared, with recent examples being the Nature Restoration Regulation and the Directive on Corporate Sustainability Reporting (2022/2464).

Besides EU law, the significance of directly effective international conventions has increased within Dutch law, especially because the provisions of the European Convention on Human Rights (ECHR) are being invoked in an increasing number of cases. In interpreting those provisions, courts will follow the case law of the European Court of Human Rights (ECtHR). In recent years, that case law has provided increasingly emphatic guidance on application of the fundamental rights protected by the Convention in cases of harm (or threatened harm) to the living environment. The recent ECtHR ruling in the case brought by Swiss KlimaSeniorinnen provides a good example.[7]

6 See, for example, the earlier Rli advisory report Room for the regions in European policy ['Ruimte voor de regio in Europees beleid'], 2015.
7 See ECtHR 9 April 2024, Application no. 53600/20.

In addition, there is a development that may lead to the provisions of international conventions or EU law acquiring significance not only in vertical relationships (individuals/businesses and government, as in the Urgenda case), but also, via open standards, in civil law, in horizontal relationships (individuals/businesses among themselves, as in the Milieudefensie/Shell case).

The significance of European rules and international conventions has thus become increasingly important in national environmental policy, and this is reflected in the substance of court cases involving the living environment.

Role of special-interest organisations

Special-interest organisations are playing an increasing role and are coordinating their strategic litigation. By making strategic use of legal proceedings, these organisations seek to bring about social, political, or legal change. It is all about the impact of the case, impact that can sometimes be achieved even without winning (Van der Veen, 2018; Pilpnjcm.nl, 2023). Special-interest organisations are becoming increasingly professional. Some of them, for example, have made litigating (and supporting litigation) in environmental and climate cases into their core task. Climate cases are also coordinated through international forums (Stolk, 2023).

Shift in the nature of court cases

In recent years, there has been a shift in the nature of court cases. In high-profile cases, it is the civil courts (rather than the administrative courts)

that are called upon to adjudicate whether there has been a failure to properly regulate threats to the physical living environment and to enforce regulations. Companies are also being called to account for not doing enough to meet climate targets.

Increasing focus on health
We note an increasing focus on the importance of health, with an appeal to the precautionary principle and human rights. This includes, for example, invoking the European Convention on Human Rights and the Water Framework Directive.

Developments in review by the administrative courts
We note developments in the way the administrative courts review government decisions. In adjudicating appeals against individual administrative decisions, the administrative courts increasingly review the underlying generally binding provisions (exceptive review). This means that decisions by the administrative courts on individual decisions can also have more than just individual consequences, resulting in a single ruling having societal effects.

Besides exceptive review, the principle of proportionality is also important. Review by the administrative courts in the light of that principle has been allotted a more important role. A more stringent proportionality review requires government to arrive at well-reasoned decisions on the basis of careful examination of the relevant facts and interests and sound reasoning.

Licensing, monitoring, and enforcement
In the cases studied, we see that issues are frequently taken to court due to deficient licensing, supervision, and enforcement on the part of the competent authorities. Permits and general rules must be updated regularly, but in practice that obligation is not properly complied with. The same applies to monitoring and enforcement. Having recourse to the courts in such cases is the result of inadequate enforcement of powers under administrative law.

The cases we studied include ones in which parties seek to enforce the updating of permits or enforcement by taking the matter to court. Failure to update or tighten up permits and the lack of monitoring and enforcement also has to do with the capacity available to public authorities for licensing, supervision, and enforcement; that capacity is limited both financially and qualitatively. There may also be a lack of political will to undertake enforcement (Adviescommissie VTH, 2021; Oostdijk et al., 2020).

3.3 Societal trends

Trust
Juridification trends are partly driven by social forces. People are more aware of the options as regards legal protection. Trust between people has also become less of a matter of course, leading them to fall back on the law.

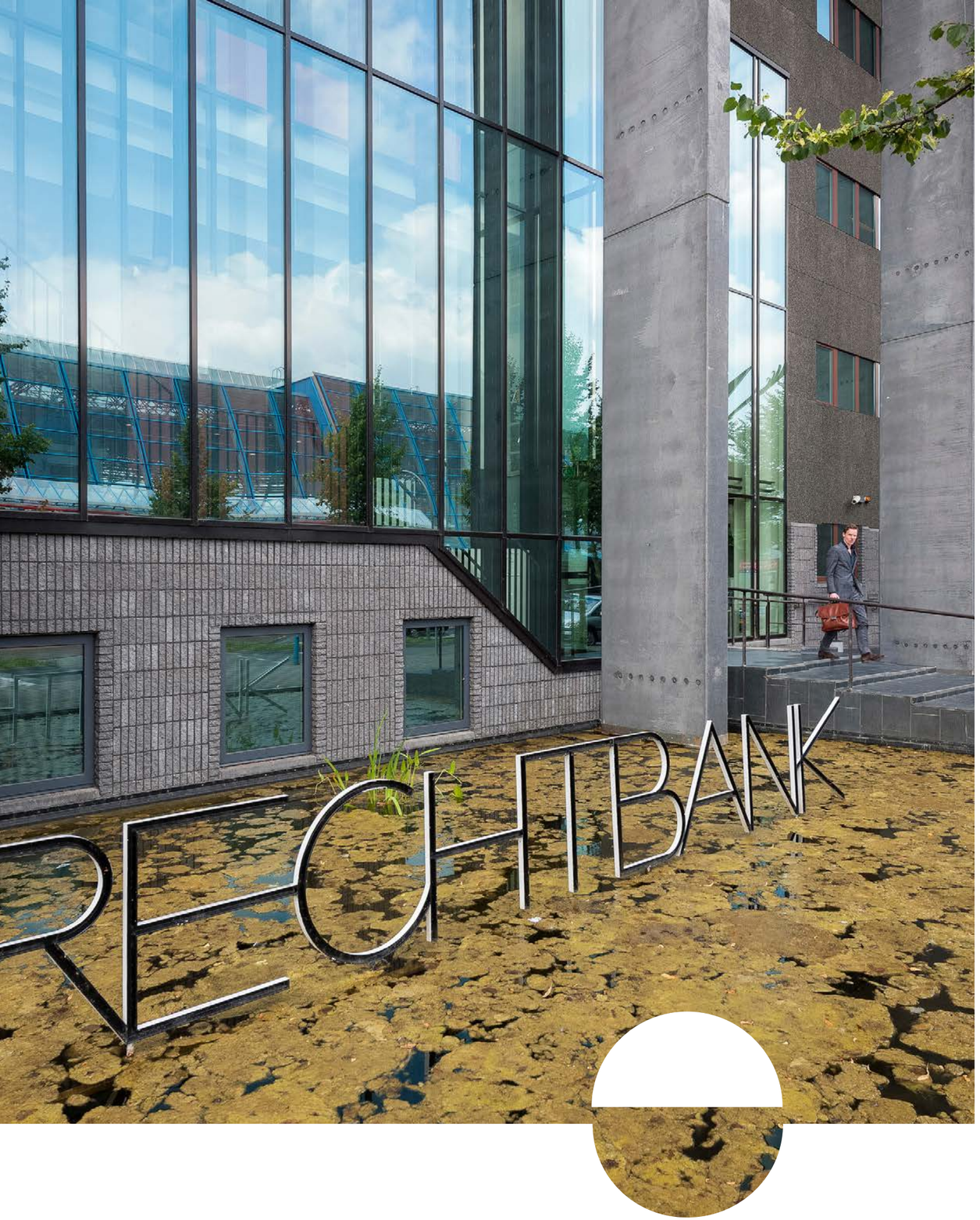
In addition, the *Continu Onderzoek Burgerperspectieven* study (Den Ridder et al., 2023) by the Netherlands Institute for Social Research (SCP) found that there had been a major reduction in trust in politicians and the authorities. The Dutch are concerned about the applicability, effectiveness, and transparency of policy (Miltenburg & Hoekstra, 2023: 223). Figures show, nevertheless, that they have undiminished trust in the rule of law as such (I&O research, 2023). Trust in judges and the rule of law is stable and high (72%) compared to trust in politicians and the authorities. However, research by the Ministry of Justice and Security's knowledge centre (WODC) does show that individuals come up against psychological barriers as regards access to the courts, and that this is especially so in the case of specific problems relating to the living environment, tenancy, and discrimination (Hoekstra & Teeuwen, 2023).

Greater focus on early participation

Challenges in the living environment and competition for scarce space demand a great deal from public authorities, members of the public, and businesses. In many planning procedures in the domain of the physical living environment, the public are asked to participate 'at the front end'. This is a good thing, given that the interests involved in a decision are then in the picture at an early stage, and getting stakeholders involved can potentially contribute to acceptance and support. Nevertheless, early participation and public input cannot always prevent legal proceedings.

Greater focus on solution-oriented dispute resolution

We note an increased focus on solution-oriented dispute resolution by the authorities and by the courts. There is also a focus on the 'socially effective administration of justice'. This means that when dealing with a dispute, the court also devotes time and attention to any underlying issues and societal problems. Pilot projects have been launched to increase the accessibility and social effectiveness of justice (JenV, 2023).



4 WHAT ASPECTS OF JURIDIFICATION ARE PROBLEMATIC?

Legislation and regulations contain guarantees and protect individuals, businesses, and special-interest organisations. They are an essential component of our democratic state subject to the rule of law. An independent judiciary is a prerequisite, including as regards appointment policy and funding. The fact that, in the event of a dispute, a court is asked to render judgment on the application of legislation and regulations is not in itself problematic; it is even desirable. After all, the court is an indispensable component of the *trias politica*, and its judgment helps to clarify the application of rules. Taking a matter to an independent court is, however, the final link in a chain, and many environmental issues can be dealt with in a more socially efficient manner if we manage to avoid recourse to the courts. Policy aims can then be achieved faster and more effectively.

Many of the cases that we looked at involved traditional legal protection, for example with parties requesting that existing standards as laid down in permits be enforced. In addition, there are a number of high-profile cases in which courts have handed down far-reaching rulings arising from their review of the matter against the European Convention on Human

Rights (ECHR). The media scan also shows that that was so in only a small minority of cases (numerically). Such cases do attract a great deal of attention, however, because they involve asking the court to correct not only implementation but to some extent also the standards applied by the legislature and the administration.

We do, nevertheless, identify a number of problematic aspects of juridification in the living environment. We will explain these below.

4.1 Imbalance within the *trias politica*

The rulings that emerge from the media scan illustrate that in high-profile cases the task of reviewing whether the legislature and the administration are complying with the rules and the law then in force has to a great extent been allocated to the judiciary. In essence the court, even in such rulings, is still doing what the judiciary is supposed to do according to the *trias politica*: control the legislature and the executive.

Such judicial review is also apparent in enforcement cases before the administrative courts. The executive power does not control and enforce sufficiently, compelling the judiciary, in response to issues brought before it, to point out conflicts with EU law, national legislation, or legal principles.

A shift is currently apparent in the balance within the *trias politica*, with oversight of the safeguarding function as regards the physical living environment increasingly falling to the judiciary. However, the courts are not the sole protector of that function. The legislature and executive also have a responsibility to ensure that the legislation and regulations that they enact and the policies they implement are able to withstand judicial review.

Court rulings have major social effects if they determine that legislation or policies fail to comply with EU law, national legislation, or legal principles. The legislature will then need to amend the relevant regulations or policies, a step that will affect many individuals and businesses, with unclear consequences. One example of this is the PAS ruling, which affected hundreds of existing permits and construction projects and hundreds of agricultural enterprises.

This also means that the legislature and the executive must be self-critical in the event of judicial rulings being handed down that have a major societal impact. In a healthy democratic state subject to the rule of law, they must stress that EU regulations or international conventions have not been simply imposed on us, but that the Netherlands was itself involved in the relevant decision-making. If politicians feel that standards are too strict or that policy aims clash, they must speak out, perhaps at EU level, and central government, in consultation with both chambers of Parliament, must seek alternatives, propose legislative amendments, or establish policy differently. Until the relevant standards are altered, they must be respected and implemented, including by the legislature and the executive.

4.2 Inadequate quality of legislation and policy

When drawing up legislation and regulations, increasing account must be taken of the consequences of judicial review against EU and international conventions.[8] In the Netherlands, however, a desire is apparent on the part of the legislature – i.e. the government and Parliament – to minimise as far as possible the addition of stricter requirements [nationale koppen] to national legislation on top of what has been agreed internationally. Maximum use is made of the scope offered by EU law when it comes to transposing EU directives into national legislation, in order to minimise the need for making choices and to impose the fewest possible restrictions on economic activity. In this way, the limits of what is still possible within EU law is continually being explored.

Such restricted interpretation and implementation is leading to more frequent recourse to the courts, with this also increasing the risk of a court then ruling that the limit of what is permissible under EU law has been exceeded and that the requirements of EU law are not (or no longer) met. One example is the construction sector exemption included since 2021 in the Nitrogen Reduction and Nature Improvement Act and the Nature Protection Act; the Council of State found in late 2022 that that exemption fails to comply with EU nature protection law (ECLI:NL:RVS:2022:3159).

Better legislation and policy can contribute to reducing the number of court cases and to less frequent annulment by the courts. Quality can be improved if the limits set by law on the achievement of policy aims are allowed to play a more important role 'at the front end' of the legislative process. It will then be possible to amend a bill without serious harm to society and delay, so that policy aims can be achieved within the limits set by the law. The Council of State (2023) also noted in its annual report that decisive government action means that the EU and international legal context needs to be factored into policy in a timely manner. An active government does not wait for national court rulings but seeks dialogue or acts in the light of prior irrevocable rulings by the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (see for example the ruling in the Nevele case, ECLI:EU:C: 2020:503).[9] This applies not only to international rulings, but also to national ones.

In Section 4 of Part 2, we briefly consider some options for enhancing the quality of legislation, ranging from doing so within the ministries to the possibility of a constitutional court.

8 One example is the European Convention on Human Rights (ECHR). On the basis of the ECHR, the District Court in The Hague found in 2022, for example, that Dutch environmental regulations did not adequately protect the public from odour nuisance, with the State being required to pay compensation to the people affected (ECLI:NL:RBDHA:2022:9119).

9 In that ruling, the ECtHR found in a case concerning a Belgian wind farm that for a number of wind turbines standards an environmental impact assessment needed to be prepared pursuant to the European Strategic Environmental Assessment Directive and that that had wrongly not been done. In some proceedings before the Administrative Jurisdiction Division on wind farms, including this case on expansion of the Delfzijl wind farm, objectors have argued that the ECtHR ruling also has implications for the wind turbine standards in the *Dutch* Activities Decree and the *Dutch* Activities Regulation.

4.3 The right case before the right court

The Netherlands has a lack of human resources in many areas, and that includes the judiciary. In the course of public debate on juridification, court proceedings are often cited as a delaying factor. We wish to emphasise that the time that elapses between the start of planning and the implementation of a project is influenced by numerous factors. The time involved in court proceedings is often only a limited part of the total, and it can also be taken into account in the planning process. It is of course true, however, that for a future resident in a housing scheme, for example, – someone who is involved in only the final part of the project – any court proceedings at the end of such a process take up rather a lot of time.

Various changes have already been made in recent decades in how administrative court proceedings are organised, with the aim of speeding them up. In terms of human resources and finances, however, the judiciary are currently finding it increasingly difficult to cope with the large number of cases that come before them. This can unnecessarily delay progress as regards the transitions and challenges facing the Netherlands within the living environment. It also leads to lengthy (or more lengthy) legal uncertainty, something that is socially and legally undesirable. It can take years for appeal procedures to be completed and for necessary decisions to become irrevocable.

Given the major challenges facing the Netherlands, it is important to consider the more fundamental question of whether cases end up before the right court. For the sake of due care and the quality of the dispensation of justice, a fundamental choice has been made in the context of administrative law for there to be a two-tier system: the district court in the first instance followed by the option of appealing to a higher court. This basically applies to all administrative law issues, whether large or small. One consequence of this is that cases concerning environmental law that are crucial as regards major societal challenges are only finally adjudicated much later than would be possible with adjudication in only a single instance. This results in developments in the physical living environment coming to a standstill. Important exceptions do already apply, however, in environmental law. An environmental plan, a project decision, and environmental permits coordinated with an environmental plan can thus be contested immediately and in a single instance before the Administrative Jurisdiction Division.[10]

4.4 Licensing, monitoring, and enforcement

The application of a policy of tolerance, insufficient enforcement (Chemours and Tata Steel), outdated permits, and declining public tolerance for risks in the living environment, especially when it comes to health, often trigger campaigns against environmental problems. This trend is fuelled by the increase in scientific knowledge about the risks posed by certain substances – in ever-smaller concentrations – to humans, nature, and the environment. If this then leads to success in court in one particular location, it will soon be emulated in other locations (the precedent effect).

10 On the legislature's reasons for creating an exception to the basic principle of appeal in two instances, see Parliamentary Documents (Tweede Kamer der Staten-Generaal, 2014; BZK, 2019).

As long as the administration fails to properly monitor, update and enforce, juridification and increased recourse to the courts is a logical and unavoidable consequence. To a large extent, therefore, the administration can itself put a halt to the proliferation – often viewed as undesirable – of court proceedings, and reduce the number of lawsuits by undertaking its duties in performing the safeguarding function of the law in a more serious manner.

4.5 Overestimating civic engagement and participation as a panacea for combatting juridification

The challenges in the living environment and the competition for scarce space demand a great deal from public authorities and businesses, and certainly also from members of the public. It helps if these groups contribute ideas for making policies and planning a better fit with the local context. Increased engagement is therefore important but not easy to achieve. Research shows that only a restricted group take advantage of the opportunities for civic engagement (see, *inter alia*, De Graaf et al., 2015; Visser et al., 2021) and that greater engagement will not necessarily lead to less opposition. In this advisory report we do not therefore wish to portray civic engagement as a panacea for combatting juridification. However, involving a wider group of individuals and better implementation of their participation could lead to improvements in policy and planning 'at the front end' of policy and to an improved legislative process.

Participation must not be understood solely as a process involving only those who are invited to take part. Even when people are not actually invited, they can participate and may well wish to do so, for instance by means of protests or lobbying by special-interest organisations and environmental organisations. Opposition is a healthy element in a state subject to the rule of law. We must accept that people often only feel involved in decisions that impact the physical living environment if they disagree with the relevant plans or are directly harmed or hindered by them. At such times, special-interest organisations and members of the public decide to self-organise and engage in the participation process after all.

5 CONCLUSIONS AND RECOMMENDATIONS

We now return to the questions on which this advisory report focusses: *'Which aspects of juridification are problematic? And why is that?'*

5.1 Aspects that are not problematic

We start by identifying where juridification – perhaps contrary to how it is perceived during public debate – is not problematic.

Juridification is inherent to the rule of law

Juridification is not problematic in the sense that the law plays an important role in a state subject to the rule of law, even when that is inconvenient for politicians. That is particularly true in environmental policy, where different interests regularly clash with one another. The law is all the more important when major transitions are concerned, as is currently the case with the transitions associated with global and national climate challenges. Viewed in this way, juridification is inherent to a state subject to rule of law. Those who consider the rule of law to be important will welcome the fact that the law has its effect within it. That includes respect on the part of the other state powers for the independence of the courts.

Nor, in our view, is juridification problematic when it involves access to justice and to the courts the way in which such access exists for organisations in the Netherlands. Organisations representing a general or collective interest must meet certain requirements of both administrative and civil law before they can take legal action. Moreover, legal rules can only be invoked successfully to the extent that they serve to protect the interests of those who invoke them (the relativity requirement).

Overestimating civic engagement and participation as a panacea
The increased focus on civic engagement and early participation is in fact a positive development. It brings the relevant interests into the spotlight at an early stage of projects and policy-making, potentially contributing to acceptance and support. Nevertheless, early participation and public input cannot always prevent legal proceedings. Civic engagement and participation is not problematic but nor is it a panacea for preventing juridification.

5.2 Aspects that are problematic

We also identify a number of problematic aspects of juridification. These are explained below.

Imbalance within the *trias politica*
Safeguarding the law and following it through have become too one-sidedly the purview of the courts. Safeguarding the rule of law and respecting the legal rules are just as much a task for the legislature and the executive. An imbalance has arisen in the relationship between politicians, the legislature and the courts, because the legislature and the administration do not sufficiently recognise that it is not only the courts that are responsible for monitoring the legitimacy of legislation, policies and decision-making, but that the task of safeguarding the rule of law and the legitimacy of action on the part of public authorities and companies rests just as much with the legislature and the administration.

Inadequate quality of legislation and policy
The quality of legislation and policy is improved when the limits imposed by (EU) law on achieving policy aims play a more important role 'at the front end' of the legislative process.

Because the legislature and the administration fall short in safeguarding the rule of law, the law often only actually comes into play long after policy has been developed, legislation has been enacted, and decisions on implementation have been taken. If it then becomes apparent that this conflicts with the law, the harm – both financial and social – is much greater than if the law had had its effect at an earlier stage. The courts have been assigned too much the role of a 'rescuer of last resort'.

Conflicts with the law arise not only because incorrect decisions are made but sometimes also because no decisions are in fact made and choices are deferred. This applies to both public authorities and businesses: promises may not be kept, plans may not be implemented, or necessary alterations may be ignored.

Judicial capacity must be utilised efficiently

Even if the imbalance within the *trias politica* is rectified, the role of the courts in safeguarding the rule of law will remain essential. The presence of an independent judiciary with sufficient capacity to resolve disputes expeditiously and avoid unnecessary delays is essential in that respect. At present, insufficient account is taken of the nature of cases and the limited capacity of the courts when deciding which cases should be heard by which courts.

Inadequate enforcement and licensing will increase the extent of juridification

A relationship exists between recourse to the courts and licensing, supervision, and enforcement (in Dutch 'VTH'). Overdue action with regard to licensing and enforcement often provides grounds for taking a matter to court.

5.3 Recommendations

Based on the above conclusions, we wish to offer the following recommendations.

1. Enhance the judicial function within the ministerial departments that draft legislation. Make information on ministerial advice on the judicial quality of proposed policies and legislation basically accessible to Parliament and public. Explore whether such enhancement of the judicial function is also possible and necessary for provincial and municipal levels.

Explanation:

There is a clear relationship between the quality of policy and legislation and the role played by the law in policy on the living environment. In order to strengthen that relationship and thus restore the balance within the *trias politica*, it is important to also situate the role of the law – which currently comes into play only 'at the back end'; i.e. judicial review takes place after the fact – 'at the front end' of the preparation of policy and legislation. This can be done by paying closer attention and assigning greater importance to the applicable judicial preconditions during preparation of policies and regulations. To the extent such an official does not already exist, the relevant duties can be assigned to a 'Chief Legal Officer'. It was the Hoekstra committee that first introduced the term 'Chief Legal Officer' (CLO) in 2007 (Hoekstra, 2007). What the CLO – or alternatives such as the corporate lawyer, head of legal services, or the person with ultimate responsibility for legal affairs – might be and do is elaborated further in an essay by the Netherlands School of Public Administration (NSOB) (Van den Berg et al., 2021). If the advice and views of the CLO are also available for the public and people's representatives, that advice can also be expected to acquire greater importance.

2. Add an independent and authoritative Adviser General to the Advisory Division of the Council of State. Where appropriate, he or she will issue advice as to whether a proposed statutory regulation is in line with the Constitution, EU law and directives, international conventions, and general legal principles.

Explanation:

A second option for making the law play a more important role 'at the front end' can be found in enhancing the provision of judicial advice by the Advisory Division of the Council of State. The Division already takes account of the legitimacy issue when advising on proposed regulations, but legitimacy checking could be enhanced if, where appropriate, it were also to be carried out by an authoritative independent expert in the field of constitutional law and international law. The provision of advice by an Advocate General (AG) is common practice and has proved valuable in the administration of justice (Supreme Court, Administrative Jurisdiction Division, and the European Court of Justice). The provision of advice by an Adviser General can carry over the positive experience of advice from an AG regarding the administration of justice to legislative advice. An advisory opinion by the Adviser General could be requested by the Advisory Division of the Council of State, but perhaps also by the Prime Minister or the President of the House of Representatives or the Senate. If the Adviser General's opinion also deals with a potential conflict with the Constitution, then that will also quickly satisfy the desire that some have for the Constitution to play a greater role in social and political debate. After all, having an Adviser General who also examines the relationship with the Constitution in his or her opinion will not require an amendment to the Constitution, something that would require a great deal of time. Such an amendment will, however, be necessary if the intention is to remove the prohibition in Section 120 of the Constitution that prevents courts from reviewing legislation against the Constitution. A constitutional amendment will also be necessary in order to establish a constitutional court. Finally, an additional advantage would be that review against the Constitution by an Adviser General would allow experience to be gained with the phenomenon of constitutional review. This can be important in debate on future more far-reaching steps involving removing the prohibition on review in Section 120 of the Constitution, whether or not that is combined with the establishment of a constitutional court.

3. Opt for robust – rather than minimalist – transposition of EU directives.

Explanation:

The transposition of EU directives should not seek the limits of what is (probably) still just permissible under EU law. Minimising the regulatory burden when transposing and applying EU law must not result in merely minimalist transposition and application. Given robust transposition and application, the number of court cases regarding whether the requirements of EU law have been met can be expected to decrease, with the likelihood of courts later ruling that the national system is not in line with the relevant EU directive(s) also being reduced.

4. Enhance and invest in the process of licensing, supervision, and enforcement by competent authorities. Expand the options, and make them more flexible, as regards official updating of permits. Actively implement the updating requirement for permits and general rules.

Explanation:

A relationship exists between recourse to the courts and licensing, supervision, and enforcement (in Dutch 'VTH'). Overdue action with regard to licensing and enforcement often provides grounds for taking a matter to court. The VTH process needs to be improved and strengthened, and the obligation to update permits and general rules needs to be addressed seriously. The legislature should relax and broaden the options for competent authorities to update existing permits.

5. Examine whether administrative law cases can be resolved by the courts without the possibility of appeal to the Administrative Jurisdiction Division or whether there are cases with a major societal impact for which such direct appeal to the Division should be available.

Explanation:

Juridification is expected to increase rather than decrease. The scale of the various transition challenges is unprecedented. As a result, conflicts of interest are becoming more pronounced. The growth and influence of EU law and human rights continues, at the same time as societal trends such as increasing individualisation and declining trust in politicians and the authorities. Even if the legislature and the administration play a more important role in safeguarding the rule of law, the role of the courts will remain significant. The rule of law and legislation provide protection for individuals, businesses, and special-interest organisations. Because trust in the authorities has declined, it is important for the judiciary to continue to function effectively and independently. To prevent judicial backlogs and excessively lengthy proceedings, it is necessary to examine whether there are administrative law cases that can be resolved by the courts without the possibility of appeal to a higher instance. This could perhaps be linked to a system of leave to appeal, with appeal being permitted if that is necessary for legal uniformity. At the same time, consideration should be given to whether there are cases that are suitable for direct appeal to the Administrative Jurisdiction Division. The administration of justice involving two instances contributes to quality and to legal protection, and is the guiding principle underlying the General Administrative Law Act, but important exceptions to this principle already exist. The best-known example is that of direct appeal to the Division when environmental plans are concerned. However electoral law and financial regulatory law also involve the single-instance administration of justice and far shorter time limits than the usual ones. The current system therefore already allows for customisation. Consideration must be given to whether such customisation should also be introduced more broadly in the context of environmental law.

PART 2 | BACKGROUND

1 THE CONCEPT OF JURIDIFICATION

The reason for this advisory report is the feeling during public debate that policy on the living environment has been juridified. But juridification is not just a recent phenomenon (Wolf et al., 2022). The ‘Working Group on Reducing the Juridification of Public Administration’ already advised the House of Representatives on it back in 1997. What was concerned was the increasing flow of rules, the call for the creation of rules, the intensity with which rules were invoked, and the consequent spate of legal proceedings. All this, according to the working group, led to the judicial system becoming seriously clogged up (Van Kemenade, 1997).

In 2002, the Scientific Council for Government Policy (WRR) noted that the diminished sovereignty of the State and the increased empowerment of independent members of the public had implications for fulfilment of the ideal of a state subject to the rule of law. The WRR found that the regulatory system was becoming increasingly complex and bureaucratic and that the flood of applications, procedures, complaints, and defences was leading to capacity problems and failure to enforce (WRR, 2002).

Within these two approaches, juridification is mainly a matter of the complexity of the rules and its adverse consequences. In this advisory report, we adopt a more general definition of juridification:

Definition of juridification

'In societal relationships, the trend whereby the judicial aspect becomes increasingly important or even dominant' (Schlössels & Zijlstra, 2017).

Within this definition, juridification is in itself a neutral concept. In the Netherlands, careful preparation of decision-making and access to legal protection are safeguarded by legislation and regulations. There is therefore legislation intended to regulate the physical living environment and to achieve goals in that environment. Policy on the living environment is thus by definition juridified, and juridification of such policy is consequently a given. As such, the concept of juridification offers little to hold on to. Public debate on juridification focuses on various aspects of the law, such as the complexity of the rules, the increasing number of issues taken to court, and the role of the courts.

Complexity of rules

One aspect of juridification is the complexity of rules. In its 2017 annual report, the Council of State already drew attention to the growing complexity of regulations encountered by its Administrative Jurisdiction Division and Advisory Division in their day-to-day practice. We apply the Council of State's definition in this advisory report.

Complexity of rules

According to the Council of State (2023b), the complexity of rules has the following characteristic features:

- an increase in the number of rules that apply simultaneously to a specific case;
- more layers of rules applicable to a particular case;
- involvement of multiple administrative bodies in implementing rules;
- rapid changes to applicable rules;
- a high level of detail in the rules;
- interdependence: the application (or interpretation) of one rule depends on the application (or interpretation) of another rule (for example because rules refer to one another or because they utilise the same term);
- interference: the operation (i.e. the effect) of one rule is partly determined by the operation of another rule.

The report by the Council of State (2023b) investigated the complexity of rules in the context of spatial planning and data protection law. As one of the causes of increased complexity, it referred to the declining central role of national government due to ongoing decentralisation and digitalisation as regards implementation (Raad van State, 2023b). This has to do with the need to quickly reflect local situations, societal changes, and insights in new regulations. It leads, however, to an increasingly fine-meshed network of rules and standards, raising many – perhaps too many – questions among the public (Hasker et al., 2018).

Recourse to the courts

A definition of juridification that focusses more on the invocation of legal protection and recourse to the courts is 'the phenomenon that the law or legal protection is invoked by a party in the context of decision-making on the environment' (Wolf et al., 2022). Here, a link is made between the role or function of the law in the living environment, juridification, and recourse to the courts. Although the latter aspect is conspicuous, it is not the sole focus of the advisory report. Recourse to the courts is indeed a prominent aspect of public debate, but we believe it should be viewed in the broader perspective of the rule of law.

Role of the courts

The role of the courts in cases concerning the living environment is the subject of debate in the House of Representatives, in the media,[11] and among legal experts. The question is then the extent to which a court should remain aloof from political issues or the functioning (or disfunctioning) of politicians within the *trias politica*. It also concerns the extent to which it is permissible for a court when creating new law – for example by means of case law – to take account of legal-political or policy-related considerations (Bovend'Eert, 2021; Loth & van Gestel, 2022).

11 See for example 'Where does all that 'activism' by judges come from anyway?' (Mol, 2024) or 'Balance between judges and politicians at risk' (De Lange, 2022).

2 LEGAL FRAMEWORK

The Dutch legal system distinguishes between three areas of law, namely administrative, civil, and criminal law. We will briefly consider those three areas, and will also discuss the Constitution and the position it has.

2.1 Administrative law

Administrative law regulates the powers of the public authorities to make decisions that bind individuals unilaterally. These include, for example, issuing permits or enforcing rules and imposing sanctions.

Important rules regarding legal protection against decisions by the public authorities are enshrined in the General Administrative Law Act. Legal protection before the administrative courts is basically only possible in the Netherlands against specific individual decisions by the authorities [beschikkingen]. In proceedings on an individual decision, the legitimacy of the underlying regulations on which that decision is based can also be reviewed (exceptive review).

In cases concerning the living environment, an administrative court reviews the legitimacy of decisions by the authorities, i.e. whether those decisions are in line with national and EU law and international conventions entered into by the State. If that is not the case, then the court can annul the decision or render an interlocutory ruling giving the administrative body the opportunity to rectify any defects in the decision. It can do so, for example, by having the initiator of the project carry out more detailed research. The fact that an appeal is well-founded does not therefore mean that the project is definitively cancelled. Sometimes a project can go ahead after new or more extensive research has been carried out to determine the impact on the environment, nature, or human health.

2.2 Civil law

Civil law regulates relations between persons (including legal persons) among themselves (individuals and/or companies). The main rules of civil law are set out in the Dutch Civil Code [*Burgerlijk Wetboek, BW*]. In cases concerning the living environment, it is above all liability law that is relevant, providing the basis for claims before the civil courts to prevent, limit, or redress harm to people, nature, or the environment. Public authorities can also be sued under civil law, through legal action for a wrongful act. Among other things, the civil courts can impose a prohibition or injunction, or can order compensation for the harm sustained.

In the Netherlands, legal protection against the consequences of general rules – including general administrative measures [*AMvBs*], provincial and municipal by-laws) or against other action (or lack of action) on the part of the authorities – must therefore basically be sought through liability law in the civil courts.

The Urgenda case and the Milieudefensie/Shell case are examples of civil cases concerning the living environment in which the court imposed an injunction on a public authority – in this case, the State. The Rotterdam District Court's ruling in the Chemours case (see Part 1 Section 2) is an example of a civil case in which a company was ordered to pay compensation.

2.3 Criminal Law

Criminal law determines what behaviour is punishable and the penalty to which it is subject. This is regulated in the Dutch Criminal Code and – in particular for companies – in the Economic Offences Act [*Wet op de economische delicten*]. Whether or not to prosecute criminal behaviour is up to the Public Prosecution Service [*OM*]. In cases concerning the living environment, this mainly involves prosecuting companies that have committed serious breaches of environmental rules. Up to now, environmental criminal law has functioned mainly as a last resort and prosecutions are not quickly initiated. Members of the public can complain to the court of appeal about non-prosecution, and the court of appeal may then order the Public Prosecution Service to prosecute the offence after all. A civil case, but also an investigation by the Dutch Safety Board [*OvV*], can lead to the matter being officially reported or to an investigation and prosecution, or a complaint about it.

The cases against Tata Steel and the chemical companies at the Chemelot site are examples of criminal law cases (see Part 1 Section 2).

2.4 Constitution

The Dutch Constitution is currently the subject of renewed attention (see for example Omtzigt, 2021 or Leijten, 2023). It lays down both the structure of the Dutch state and the fundamental rights of individuals: fundamental constitutional rights and fundamental social rights. An example of the latter is Section 21, which stipulates that the government's concern is for the habitability of the land and the protection and improvement of the living environment.

Under Section 120 of the Constitution, the courts are prohibited from reviewing legislation enacted by the Senate and House of Representatives – i.e. legislation in the formal sense – against the Constitution. The background to that prohibition is that review against the Constitution is the sole preserve of the democratically elected Senate and House of Representatives and not of the courts. Underlying this is a particular interpretation of the distribution of power between – and reciprocal control of – the administration, the legislature, and the courts.

The review prohibition differs from what is usual internationally. Most countries do have some form of judicial review of legislation against their constitution. In some countries, such review is performed by a special constitutional court (concentrated review) while elsewhere it is possible for any court to examine possible violations of the constitution (diffuse review) if it is argued in proceedings that the country's constitution has been violated.

Dutch courts do have an obligation under the Constitution to also review legislation for possible conflict with human rights as set out in international conventions and EU law. In cases concerning the living environment, for example, national courts perform a review against the European Convention on Human Rights (ECHR). Although there is no reference in the ECHR to the concept of the 'environment' or 'sustainability', pursuant to case law of the European Court of Human Rights, some of the human rights enshrined therein also have significance, albeit indirectly, as regards the actions of public authorities where the environment and sustainability are concerned.

3 OBSERVATIONS REGARDING DEVELOPMENTS IN LIVING ENVIRONMENT LAW

3.1 Increased importance of EU regulations and international conventions

For some considerable time, EU directives and regulations have been extremely important as regards protecting the environment[12] – in addition to creating our prosperity, including through a single market. New EU regulations are always in the making. Recent examples include the EU's Nature Restoration Regulation and the Directive on Corporate Sustainability Reporting.

Ambitious, sometimes precisely specified and domain-specific targets follow from EU law that in certain cases must be achieved by a specific date, for example in climate policy.

The difference between regulations and directives is relevant as regards the scope a Member State has for making (political) choices in setting national policy to achieve these European goals.

12 See, for example, the Rli's advisory report *Room for the regions in European policy*, 2015

Regulations are applicable immediately after coming into force, but directives are not and must first be transposed into national legislation before they apply in the relevant Member State.

Directives usually leave room for Member States to determine, to a certain extent, how the objectives of the directive are to be transposed into national legislation and how the targets of the directive are to be achieved. Examples include working towards the good quality of Natura 2000 habitats and the reductions in nitrogen deposition necessary to achieve this, or the targets of the Water Framework Directive.

In addition to EU law, the significance of any binding provisions in international conventions has increased within Dutch law, especially given that provisions of the ECHR are being invoked in an increasing number of cases. In interpreting those provisions, courts will follow the case law of the European Court of Human Rights (ECtHR). In recent years, that case law has provided increasingly emphatic guidance on application of the fundamental rights protected by the ECHR in cases of harm (or threatened harm) to the living environment. In addition, there is a trend that may lead to the provisions of international conventions or EU law acquiring significance not only in vertical relationships (individuals/businesses and public authorities)[13], but also, via open standards, in civil law, in horizontal relationships (individuals/businesses among themselves)[14].

13 Vertical: between individuals and public authorities, cf. the Urgenda case
14 Horizontal: between individuals and/or businesses, cf. the Milieudefensie/Shell case

Under Article 288 of the Treaty on the Functioning of the European Union (TFEU), an EU directive is binding only with regard to the result specified in it, and Member States can decide for themselves how to achieve that result. Based on the margin-of-appreciation doctrine, the European Court of Human Rights (ECtHR) also allows national states the necessary leeway as regards the application of human rights and the balancing of interests that is often necessary in that context.[15] Both the Court of Justice in Luxembourg and the Human Rights Court in Strasbourg formulate judicial rulings that are then relevant when a Dutch court is requested to render judgment on provisions from directives or from the ECHR.

The significance of European regulations and international conventions has become increasingly important in national environmental policy (see box). Our media scan reveals, for example, a number of cases arising from the Water Framework Directive (WFD), the Corporate Sustainability Reporting Directive (CSRD), and regarding health that take the ECHR as their legal basis. In the administrative, civil, and criminal courts alike, EU law and international conventions play an increasingly important role.

15 An underlying idea is that national bodies are in a better position to assess issues than the ECtHR itself. The extent of this margin is subject to change, with an important factor being the presence or absence of a European consensus on a particular issue. If there is no such consensus, the ECHR allows national courts the scope for making their own assessment.

Examples of the significance of EU law and international conventions

Yoghurt manufacturer Fage

The Greek company Fage has plans for building a large dairy factory in Hoogeveen in the Dutch province of Drenthe (Daling, 2023). The province has granted a permit for its construction. The province has received a number of objections, including from the Mobilisation for the Environment organisation (MOB). MOB says it is concerned about the largescale extraction of fresh water, given that yoghurt production requires 2.5 million litres of water each day. It has invoked the Water Framework Directive.

Drinking water company Vitens

The Vitens drinking water company wishes to increase extraction of groundwater for fresh water near the town of Ommen. Currently, the company extracts 1.6 billion litres of groundwater annually in the area. The permit allows for the extraction of up to 5 billion litres of water. MOB, among others, has asked the province (Overijssel) to partially revoke Vitens' licence for this extraction site (Laconi, 2023). MOB invokes a 2021 ruling by the European Court of Justice in a Spanish groundwater case. In it, the European Court of Justice ruled that a body of groundwater that was already in poor condition must not be allowed to deteriorate even further due to the extraction of more water (ECLI:EU:C:2021:512).

Province of Friesland and the Wetterskip Fryslân water authority

According to MOB, the 24 bodies of water in Friesland that must comply with the EU's Water Framework Directive (WFD) are seriously polluted. The WFD stipulates that Member States must ensure that water quality is in order both ecologically and chemically by 2027. In a memorandum to the province and the water authority, MOB calls for immediate compliance with the applicable directives (AD, 2023). The environmental organisation also wants all previously granted permits to be updated within one year based on compliance with the surface water quality standards.

Lily cultivation in Boterveen

In 2023, the North Netherlands District Court ruled that a bulb grower in Boterveen must cease using pesticides (ECLI:NL:RBNNE:2023:2333). The case was brought by local residents who fear for their health. The court stated that it could not be ruled out that some pesticides and the mix of those pesticides may have an unacceptable harmful effect on humans. The widespread use of pesticides is causing increasing social outcry, with scientists warning of a possible link to brain disorders such as Parkinson's disease. The Arnhem-Leeuwarden Court of Appeal ruled on appeal that the lily grower could continue to use four substances for the time being. – Previously, it had used dozens of them (ECLI:NL:GHARL:2023:5742).

3.2 New legal questions as a result of the Environment and Planning Act

On 1 January 2024, the Environment and Planning Act came into force. It consolidates the various acts governing the living environment and is intended to ensure a coherent approach to that environment, scope for local customisation, and faster decision-making. In its latest annual report, the Council of State predicts that the entry into force of the Act will usher in a period of diminished legal certainty, because 'with this drastic overhaul of the system, new questions of law will arise over the course of the next five years. Those questions must be answered' (Raad van State, 2023a).

3.3 Special-interest organisations more likely to go to court

Special-interest organisations are playing an increasing role and are coordinating their strategic litigation. By making strategic use of legal proceedings, these organisations seek to bring about social, political, or legal change. Their concern is with the impact of the case, which can sometimes be achieved without winning (Van der Veen, 2018 and Pilpnjcm.nl, 2023). In the domain of the living environment, such special-interest organisations are becoming increasingly professional. Some of them, for example, have made litigating (and supporting litigation) in environmental and climate cases into their core task. Climate cases are also coordinated through international forums (Stolk, 2023).

3.4 Nature as a legal entity

There are calls for granting legal personality to nature itself, more specifically to the Wadden Sea or the River Meuse. The motion adopted by the Eijsden-Margraten municipal council attracted attention in the media. The council wants local nature itself to have the status of a legal entity, with its interests being represented by a guardian. The guardian – for example a nature or environmental organisation appointed as such – would ensure that account is taken of the interests of nature in decisions adopted by the council.

The idea of granting legal personality to nature goes beyond the possibilities offered by current law. The Netherlands has a closed system of legal entities, meaning that the law specifies which entities enjoy legal personality. All the various types of legal entity are set out in Book 2 of the Civil Code.

Under Dutch law, legal entities, such as foundations or associations, can represent the interests of nature and the environment. Nature – or rather part of it, such as a nature reserve – does not enjoy legal personality. Under administrative law, pursuant to Section 1:2(3) of the General Administrative Law Act (Awb), foundations or associations are able to promote the general interests that they have stated in their objectives and towards which their actual activities are directed. This enables nature and environmental organisations to litigate in the administrative courts against decisions by the authorities that affect the (natural or environmental) interests that they represent. Foundations or associations with full legal capacity can

do something similar under civil law pursuant to Section 3:305a of the Civil Code. There is recurrent discussion in the House of Representatives regarding the extent of review, or the possible absence thereof, of the representativeness requirements of that section.

The question is what added value this additional step would bring as regard access to the courts. Discussion of this matter is also encountered in the context of public debate. In the Netherlands, foundations and associations whose objective is to protect certain areas or objects have relatively broad and easy access to the courts. The cases we have described also show that nature and environmental organisations in the Netherlands have ample opportunity to defend the interests they represent in court. It is uncertain whether recognition of 'nature as a legal entity' offers any advantages over and above these legal protection options.

This advisory report does not address any other benefits that there may be of recognising nature as a legal entity, for example in the context of political and administrative decision-making.

3.5 Shift in the nature of court cases

We note that in recent years, the civil courts have increasingly been asked to determine whether there has been a failure to sufficiently regulate threats to the physical living environment (see also De Jong and Faure, 2022). This is also evident from court cases that emerged from the media scan. It is then no longer a matter of calling decisions into question, as happens primarily in the administrative courts, but of tightening up policy goals and calling environmental standards into question by invoking liability law or fundamental rights (the Urgenda ruling and the ruling on odour standards). De Jong and Faure also note that in practice criminal law options are also being explored (see box).

Odour standards

In 2022, The Hague District Court ruled on whether the State was acting wrongfully because of the current odour standards in the Odour Nuisance and Livestock Farming Act. In doing so, the court considered the relationship with Article 8 of the European Convention on Human Rights (ECHR). Application of that article means that if there is odour nuisance that has a direct and serious impact on the quality of life, people must be protected from it by the government. Odour nuisance may be involved that is caused by the government itself or that results from inadequate legislation.

Article 8 of the ECHR sets no limits regarding odour nuisance. The District Court in The Hague therefore considered what odour level was – in any case – no longer acceptable. The court started from the position that it is unacceptable to expose people more or less permanently to a residential environment with very poor environmental quality or insufficient environmental health quality. The court found that because the State makes the high odour level possible in legislation, to the detriment of people's health, it is acting wrongfully by doing so. The court therefore

ordered the State to pay compensation (ECLI:NL:RBDHA:2022:9119). In a memorandum to Parliament dated 8 November 2022, the State Secretary indicated that the State would appeal the ruling. The ruling also gives reason for tightening up odour standards.[16]

Schiphol

In a case between the Stichting Recht op Bescherming tegen Vliegtuighinder (Foundation for the Right to Protection Against Aircraft Nuisance (RBV)) and the State of the Netherlands, the core issue was whether the State, when drawing up and enforcing regulations, had taken account of the interests of people living near Schiphol Airport in accordance with the applicable rules (ECLI:NL:RBDHA:2024:3734). In this case, the court also addressed the role of the civil courts.

The court noted first of all that multiple, partly conflicting interests are involved in creation of the legislation, regulations, and policies regarding Schiphol. The State has broad freedom to weigh up all these interests and to make its own political choices in doing so. Within the context of constitutional relationships, it is up to the institutions of the State – including the government and the people's representatives as co-legislator and the monitoring power – and not the courts to weigh up and review the desirability of these political and policy choices.

In the view of the court, the task of the civil courts is therefore limited to assessing whether the State has acted wrongfully in drawing up and implementing legislation. A wrongful act may exist if legislation contravenes superior rules such as the ECHR, or if the State, in applying and enforcing legislation, contravenes legislation that it has itself enacted.

To summarise briefly, the District Court in The Hague came to the conclusion that the State was acting wrongfully by not enforcing the applicable legal framework for noise pollution around Schiphol for almost a decade and a half, and by basing the policy that has since in fact been drawn up and implemented on measurement locations which, since 2005, have clearly failed to provide a complete picture of the noise pollution (i.e. its distribution and severity). The lack of appropriate and actually enforced standards has also meant that people who experience nuisance from Schiphol have for years been deprived of effective legal protection.

The court found that the State has not carried out the balancing of interests required by Article 8 of the ECHR in the proper manner. The State had always prioritised the 'hub function' and growth of Schiphol. It had investigated first of all what was necessary to safeguard that 'hub function'. Only then had it considered how the interests of local residents and others could be allowed for – without assessing whether what was then still possible in that respect did in fact sufficiently accommodate those interests. This way of weighing up the interests involved fails to meet the requirements stipulated by the ECHR in cases of this kind.

16 See the memorandum to Parliament: 'Odour nuisance and livestock farming: principles for amending odour regulations'(IenW, 2023b).

3.6 Inadequate licensing, monitoring, and enforcement

In the cases we studied, we found that issues are regularly taken to court because of failures in licensing, supervision, and enforcement by the competent authorities. Permits and general rules must, for example, be updated regularly, but in practice that obligation is not properly complied with; the same is true of enforcement.[17] Having recourse to the courts in such cases is the result of inadequate enforcement of powers under administrative law.

The cases we studied include ones in which parties seek to compel overdue updating and enforcement through the courts. This also has to do with the limited capacity that public authorities have for the work of licensing, supervision, and enforcement. That capacity is limited in both financial and qualitative sense. There may also be a lack of political will to undertake enforcement (Adviescommissie VTH, 2021; Oostdijk et al., 2020).

3.7 Increased concern for harm to health

Chemical substances can be measured at ever-smaller concentrations. It then becomes necessary to repeatedly determine what is relevant and acceptable and what is not. This leads to recurring discussion and greater understanding of the potential harm to health. It also increases the likelihood that the viability of regulations and standards that fail to keep up with new scientific findings will be 'tested' in court.

17 See the memorandum to Parliament 'Response to questions in Parliament about the report 'Tata, Dow and Shell risk court cases with toxic emissions' (IenW, 2023a).

We note an increasing focus on the importance of health through invocation of the precautionary principle and human rights. This includes, for example, invoking the European Convention on Human Rights and the Water Framework Directive. Despite companies complying with permit provisions, it is possible to challenge an activity in the civil courts (for example odour cases) on grounds such as it causing damage to health or annoyance and nuisance.

Pursuant to civil case law dating back to the 1970s, holding a permit does not automatically grant indemnity against liability on the grounds of a wrongful act. That is particularly so if the standards in the permit are outdated compared to the scientific findings referred to above.

3.8 Review of underlying regulations

Individual administrative law decisions are being utilised more frequently as a means of challenging the underlying generally binding provisions through the administrative courts. A generally binding provision is, for example, an act of parliament, a ministerial regulation, a provincial by-law, or a general administrative measure (an *AMvB*). Because these are non-appealable decisions, one cannot approach the administrative courts directly for a review of their legitimacy. A review can take place, however, if a decision has been made in which the relevant generally binding provision has been applied. Such a decision is in fact then open to objection and appeal, and the legitimacy of the underlying generally binding provision can also be challenged via this means.

The administrative court will then review the generally binding provision against superior law, general principles of law, and general principles of proper administration. This is referred to as exceptive review. If the administrative court concludes that a generally binding provision is not legitimate, that provision will be declared non-binding or non-applicable. The decision based on the relevant generally binding provision will then be set aside.[18]

Rulings by administrative courts on individual decisions can thus have supra-individual consequences. The primary aim of an appeal against an individual decision may be as a means of challenging the underlying general standard. One example of this concerned the Integrated Approach to Nitrogen [*Programma Aanpak Stikstof*] (PAS). The appeal against the specific permit in the relevant cases was lodged primarily so as to challenge the PAS underlying those decisions. The declaration that the PAS was non-binding – in the context of the administrative court's ruling on an individual decision regarding a specific permit – had major repercussions for society, involving, for example, the legal status of all 'PAS notifiers'.

3.9 Stringent proportionality test

Partly in response to the scandal regarding serious failings in the childcare allowance system, the proportionality principle has taken on a more important role in the administrative courts. The principle of proportionality means that the adverse effects of a decision must not be disproportionate to the purpose of that decision.

The administrative courts review a decision by an authority more closely the more weighty the various interests are or the more serious any adverse consequences of that decision will be, or if the decision may infringe human rights. This demands that decisions taken by the authorities be properly substantiated and based on careful investigation of the relevant facts and interests and sound reasoning.

The parliamentary bill for an Act to Enhance the Safeguarding Function of the General Administrative Law Act contains a section giving greater scope to the proportionality principle in decision-making by administrative bodies and in judicial review.[19] The proposed amendment also allows for a review of proportionality in the case of 'restricted administrative competence' [*gebonden bestuursbevoegdheid*] in an act of Parliament in the formal sense.

3.10 Civic engagement and public's perspective

Challenges in the living environment and competition for scarce space demand a great deal from public authorities, members of the public, and businesses. Civic engagement is often proposed as a solution to delays caused by legal procedures. In many planning procedures in the domain

18 More information about exceptive review can be found in the opinion by Advocate General Widdershoven (ECLI:NL:RVS:2017:3557).

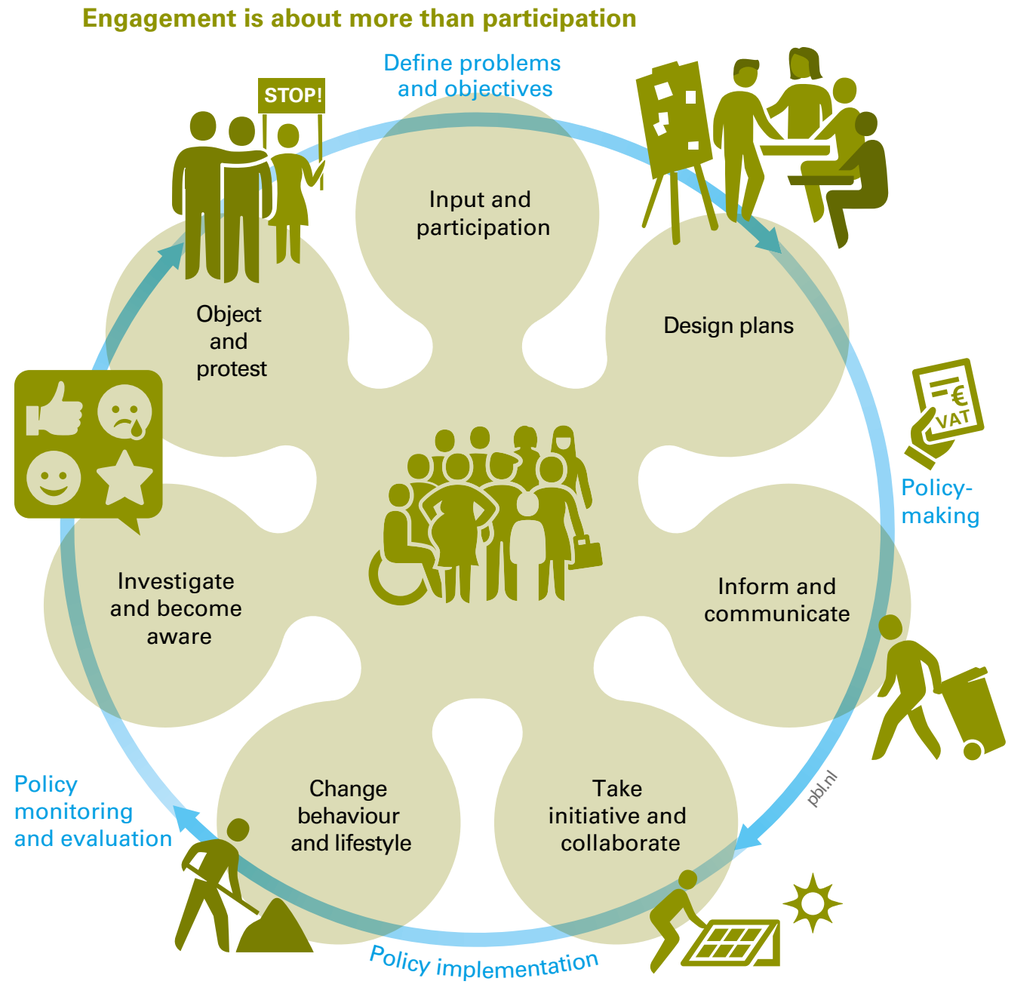
19 See the Explanatory Memorandum to the Act to Enhance the Safeguarding Function of the General Administrative Law Act (Tweede Kamer der Staten-Generaal, 2023a).

of the physical living environment, the public are asked to participate 'at the front end' of planning. It helps if these groups can see what the various considerations are and how they will affect their living environment, and if they can participate in the planning and decision-making process based on know-how they have gained through personal experience. At the same time, however, it is a common misconception that greater civic engagement will lead to fewer court cases.

We have identified a number of obstacles to organising effective civic engagement. First, research shows that participation often involves only a one-sided group taking part in the decision-making process (see, *inter alia*, De Graaf et al., 2015; Visser et al., 2021). Second, civic engagement often only comes into play at a late stage in the planning process, when a lot has already been decided. Third, 'participation' is defined relatively narrowly, namely as a process in which members of the public participate in a process set up by (local) government, whereas genuine participation is about much more than just such traditional processes (see Figure 4, PBL, 2023). Finally, various case studies show that civic engagement can also regularly lead to conflicts regarding spatial planning (Verloo, 2023; PBL, 2023).

One cannot therefore say that civic engagement will always lead to less juridification. It is important, however, to improve how civic engagement is implemented at the various different levels (local, provincial, and national), in such a way that decision-making regarding the physical living environment (policies, plans, permits) is as consistent as possible with the living environment of those involved.

Figure 4: Engagement is about more than participation



Source: (PBL, 2023)
Translation by RIi

Participation in the Environment and Planning Act

The Environment and Planning Act encourages early participation[20] in decision-making. This is a good thing because the interests involved in a decision are then in the picture at an early stage, and involving stakeholders can potentially promote acceptance and support. But early participation and public input do not mean that legal proceedings can always be avoided. If members of the public, businesses, environmental organisations, or other administrative bodies disagree with the decision, they can appeal to the administrative courts.

The final outcome of the decision-making process need not correspond to the wishes expressed by members of the public during the participation process or their input when making known their views. Decision-making on environmental plans and permits takes place within judicial assessment frameworks aimed at promoting a public interest (such as protecting nature, the environment, or water quality). Frequently, however, it is not only the wishes made known by members of the public that come into play but also other competing interests, with the authorities then having to weigh up the various interests. In our democratic state governed by the rule of law, taking the public seriously and listening to them as regards participation and input does not mean that the authorities must in fact do what such participants want, although members of the public do sometimes expect that.

20 In line with the Environment and Planning Act, we take 'early participation' to mean forms of participation in the decision-making process before a draft decision or application has been drawn up (which is then subject to public input through the regular or uniform public preparation procedure).

The way participation is organised may also give rise to an appeal, and inadequate participation is a very common ground for appealing. It will need to become clear from case law what judicial requirements can be imposed under the Environment and Planning Act with regard to various forms of early participation.

3.11 Greater focus on solution-oriented dispute resolution

We note an increased focus on solution-oriented dispute resolution by the authorities and by the courts. The parliamentary bill for an Act to Enhance the Safeguarding Function of the General Administrative Law Act contains a number of proposals for facilitating the low-threshold, solution-oriented processing of disputes by the authorities at the objection stage. There is also a focus on the 'socially effective administration of justice'. This means that when dealing with a dispute, the court also devotes time and attention to any underlying issues and societal problems. Pilot projects have been launched to increase the accessibility and social effectiveness of justice (JenV, 2023).

The ruling in a dispute about protecting bats and post-insulating cavity walls (ECLI:NL:RVS:2023:2969) is a good example of the socially effective administration of justice. The court gave all the parties the opportunity to have their say (amicus curiae procedure) because of the potentially conflicting interests in the dispute. On the one hand, there was the interest of protecting species; on the other, that of achieving climate targets and the financial-economic interests of homeowners and businesses engaged

in post-insulation. The responses offered an understanding of new developments and methods for ecological research. Those developments were communicated by the court to the parties to the proceedings, even if those developments did not form part of the court's ruling on the contested decision.

4 OPTIONS FOR ENHANCING THE QUALITY OF LEGISLATION

The following is a brief consideration of various options for enhancing the quality of legislation 'at the front-end'.

Enhance the quality of legislation within the ministries

Enhancing judicial review can make legislation and regulations more robust. In the first instance, it can involve more stringent judicial review *within the ministries*. Means should be sought for ensuring that such judicial review offers a greater counterweight to political intentions that interfere excessively with people's liberties or that conflict with EU law. This is in line with the subject of the parliamentary memorandum on enhancing the quality of policy and legislation.[21]

Such judicial review could be assigned, for example, to a newly appointed 'Chief Legal Officer' (CLO) (a term coined by the Hoekstra Committee) if such an official does not already exist (Hoekstra, 2007). What the CLO – or alternatives such as the corporate lawyer, head of legal services, or the

21 Memorandum to Parliament from Minister for Legal Protection: 'Memorandum on strengthening the quality of policy and legislation' (JenV, 2021).

person with ultimate responsibility for legal affairs – might be and do in this connection is elaborated further in an essay by the Netherlands School of Public Administration (NSOB) (Berg, C. van den, et al., 2021).

Enhancing the quality of legislation outside the ministries

Legislative and regulatory procedures can also be made more robust by means of more stringent scrutiny *outside the ministries*, by making proceedings at the Council of State's Advisory Division more onerous.

Adviser General

A more far-reaching possibility is the addition to *the Advisory Division*, on the basis of a non-political appointment, of a reserved position for an Adviser General (AG), who will play a special role in the provision of advice by the Division where that concerns review of the present draft legislation against the requirements of the Constitution, EU law, and the ECHR. An independent Adviser General can situate a draft bill in a broader framework and can draw conclusions and make recommendations based on in-depth independent judicial scrutiny.

The Advisory Division should be able to request such an opinion from an Adviser General so as to substantiate its own opinion in the same way that the Administrative Law Division can request an Advocate General to provide a more in-depth opinion on questions of law on which the Division, as a court, is required to decide. Consideration could also be given to allowing the Cabinet or the House of Representatives to request an opinion from the Adviser General. The same option should be open to the Senate, particularly when amendments are concerned that have been accepted by the House of Representatives.[22] This could support and strengthen the Senate's role as a *chambre de réflection*.[23]

A Constitutional Court

Even more far-reaching changes would require an amendment to the Constitution. In the first place, this could involve amending or deleting Section 120 of the Constitution, thus allowing the courts to review legislation against the Constitution or some of its provisions. A proposal along these lines was made by former member of the House Halsema, but was eventually declared to have lapsed due to the passage of time. In line with this, consideration could be given to deleting or amending Section 120 of the Constitution in combination with establishing a Constitutional Court that would be charged with reviewing legislation against the Constitution or certain of its sections.

22 Currently, the Senate can already ask the Advisory Division of the Council of State for guidance on such amendments, but little use is made of that right.
23 On discharge of the Senate's judicial function, see also Doornhof (2023).

Role of the Advocate General

An Advocate General is primarily charged with providing independent, reasoned, judicial observations in cases in which the highest court is required to rule. Such advice (an 'opinion' [*conclusie*]) contributes to development of the law. The need for such an opinion can arise when the answer to a judicial question goes beyond the importance of that specific question and fundamental observations on judicial concepts, principles, and doctrines are concerned. The court is not bound by the opinion provided, but the weight of such an opinion is highly significant and authoritative. At the Dutch Supreme Court, Advocates General are members of the Office of the Procurator General. The Administrative Jurisdiction Division of the Council of State also has a number of Advocates General, who provide the courts with advice (an 'opinion') in important cases.

REFERENCES

Adviescommissie Vergunningverlening, Toezicht en Handhaving (2021). *Om de leefomgeving. Omgevingsdiensten als gangmaker voor het bestuur.* Commissie van Aartsen. Amersfoort: Lysias Advies.

Berg, C. van den, Schröer, L., Wolff, C. de & Schulz, M (2021). *De Chief Legal Officer. Over het borgen van de juridische kwaliteit binnen het Rijk*. Den Haag: NSOB.

Bovend'Eert, P.P.T (2021). Machtenscheiding en rechtsstaat (of rechtersstaat?) na Urgenda, *RegelMaat*, *37* (3), p. 132-144.

BZK (2019). *Aanvulling en wijziging van de Omgevingswet, intrekking van enkele wetten over de fysieke leefomgeving, wijziging van andere wetten en regeling van overgangsrecht voor de invoering van de Omgevingswet (Invoeringswet Omgevingswet).* Eerste Kamer, vergaderjaar 2019-2020, 34 986, S, p. 126-129

Daling, T (2023). Verzet tegen bouw fabriek voor Griekse yoghurt in Hoogeveen. *Het Financieele Dagblad,* 5 mei 2023

Doornhof, H (2023). Politici als hoeders van het recht. Een blik vanuit de Eerste Kamer op de vervulling van zijn juridische functie. *Regelmaat, 38* (4), p. 322-333.

Graaf, L. de, Hulst, M. van & Michels, A (2015). Enhancing Participation in Disadvantaged Urban Neighbourhoods. *Local Government Studies, 41*(1), p. 44-62.

Hasker, I., Heijden, I. van der & Heinrich, J.P (2018). *Bestuursrecht anno 2017 volgens de Raad van State: de rechtszoekende centraal.* Te raadplegen via: Bestuursrecht anno 2017 volgens de Raad van State: de rechtzoekende centraal - Pels Rijcken

Het Algemeen Dagblad (2023). Milieuclub MOB eist verbetering Friesland voor ernstig vervuilde wateren. *Het Algemeen Dagblad*, 28 augustus 2023.

Hoekstra (2007). *Met recht verbonden. Verslag van de interdepartementale Visitatie Juridische functie en Wetgeving*. Visitatiecommissie Juridische functie en Wetgeving, 2007.

Hoekstra, M.S., & Teeuwen, G. (2023). *Drempels in de toegang tot het recht*. Den Haag: Wetenschappelijk Onderzoek- en Datacentrum.

I&O Research (2023). *De staat van het recht 2023*. Amsterdam: I&O Research.

IenW (2023a) *Beantwoording Kamervragen over het bericht 'Tata, Dow en Shell riskeren rechtszaken met giflozingen'* van de minister van Infrastructuur en Waterstaat aan de Tweede Kamer van 20 november 2023. Tweede Kamer, vergaderjaar 2023-2024, 426.

IenW (2023b). *Geurhinder en veehouderij: uitgangspunten aanpassing geurregelgeving.* Brief van de staatssecretaris van Infrastructuur en Waterstaat aan de Tweede Kamer van 7 juli 2023. Tweede Kamer, vergaderjaar 2022-2023, 28 973, nr. 405.

JenV (2021). *Brief versterking van de kwaliteit van beleid en wetgeving*. Brief van de minister voor Rechtsbescherming aan de Tweede Kamer van 25 juni 2021. Tweede Kamer, vergaderjaar 2020-2021, 35 570 VI, nr. 115.

JenV (2023). *Innovatie en maatschappelijk effectieve rechtspraak.* Brief van de minister voor Rechtsbescherming aan de Tweede Kamer van 28 juni 2023. Tweede Kamer, vergaderjaar 2022-2023, 29 279, nr. 801.

Jong, E. de & Faure, M (2022). De autonomie van het civiele recht en het strafrecht bij normstelling voor ernstige risico's voor de fysieke leefomgeving. *Nederlands juristenblad, 2022 (*14), p. 1028-1039.

Kemenade, J.A. van (1997). *Bestuur in geding: rapport van de Werkgroep inzake terugdringing van de juridisering van het openbaar bestuur.* Haarlem: Provinciehuis Noord-Holland.

Laconi, P (2023). 'Stikstofstrijder' Johan Vollenbroek gaat strijd aan met Vitens: 'Dit wordt een drama voor de natuur'. *De Stentor*, 22 mei 2023

Lange, R. de (2022). Balans tussen rechter en politicus loopt gevaar. *Het Financieele Dagblad*, 19 december 2022.

Leijten, A. (2023). Brief aan de Staatscommissie rechtsstaat van 28 juli 2023.

LNV (2023a). *Onderhandelingen Natuurherstelverordening en voorgenomen besluit*. Brief van de minister voor Natuur en Stikstof aan de Tweede Kamer van 24 november 2023. Tweede Kamer, vergaderjaar 2023-2024, 21 501-08, nr. 915.

LNV (2023b). *Wijzigingen Natuurherstelverordening.* Brief van de minister voor Natuur en Stikstof aan de Tweede Kamer van 8 december 2023. Tweede Kamer, vergaderjaar 2023-2024, 21 501-08, nr. 928.

Loth, M & Gestel, R. van (2022). Het beleid van de rechter in public interest zaken. *Rechtstreeks, 2022* (1), p. 16-32.

Miltenburg, E. & Hoekstra, M. (2023). Hoe kijken burgers naar maatschappij, politiek en rechtsstaat? *Beleid en Maatschappij, 50* (4), p. 220-230

Mol, J (2024). Waar komt al dat 'activisme' van rechters toch vandaan? *Het Financieele Dagblad*, 13 maart 2024

NOS (2019). Mengt recht zich in politiek met klimaatuitspraak? Urgenda-advocaat vindt van niet. Te raadplegen via: https://nos.nl/nieuwsuur/artikel/2315633-mengt-recht-zich-in-politiek-met-klimaatuitspraak-urgenda-advocaat-vindt-van-niet

NOS (2023a). Kamer wil onderzoek: namens wie spreken milieuclubs bij de rechter? Te raadplegen via: https://nos.nl/artikel/2464752-kamer-wil-onderzoek-namens-wie-spreken-milieuclubs-bij-de-rechter

NOS (2023b). Nog veel geplande flexwoningen ongebouwd, buurt maakt vaak bezwaar. Te raadplegen via: https://nos.nl/artikel/2474580-nog-veel-geplande-flexwoningen-ongebouwd-buurt-maakt-vaak-bezwaar

NOS (2023c). Rechter fluit kabinet terug: Schiphol hoeft dit jaar niet te krimpen. Te raadplegen via: Rechter fluit kabinet terug: Schiphol hoeft dit jaar niet te krimpen (nos.nl)

OM.nl (2023). OM eist boete van 25 miljoen euro tegen chemiebedrijf. Te raadplegen via*:* OM eist boete van 25 miljoen euro tegen chemiebedrijf | Nieuwsbericht | Openbaar Ministerie

OM.nl (2022). Openbaar Ministerie start strafrechtelijk onderzoek Tata Steel en Harsco Metals. Te raadplegen via: Openbaar Ministerie start strafrechtelijk onderzoek Tata Steel en Harsco Metals | Nieuwsbericht | Openbaar Ministerie

Omtzigt, P. (2021). *Een nieuw sociaal contract*. Amsterdam: Prometheus.

Oostdijk, A., Scholten, T., Werff, A. van der, Bijlsma, I. & Schreuders, R. (2020). De organisatie en uitvoering van de VTH-taken op het gebied van waterkwaliteit. Verkennend onderzoek. 62424 – Openbaar. Z.pl: Berenschot en Arcadis.

OVV (2018). Chemie in samenwerking. Veiligheid op het industriecomplex Chemelot. Z.pl: Onderzoeksraad voor Veiligheid.

PBL (2023). *Betrokken burgers: onmisbaar voor een toekomstbestendige leefomgeving.* Den Haag: Planbureau voor de leefomgeving.

Pilpnjcm.nl (2023). *Strategisch procederen*. Te raadplegen via: https://pilpnjcm.nl/strategisch-procederen/

Raadvanstate.nl (2017). Conclusie Widdershoven over exceptieve toetsing. ECLI:NL:RVS:2017:3557 Te raadplegen via: Uitspraak 201701963/3/R1 en 201705745/2/A1 - Raad van State

Raad van State (2017). *Jaarverslag 2017.* Den Haag: Raad van State.

Raad van State (2023a). *Jaarverslag 2022.* Den Haag: Raad van State.

Raad van State (2023b). *Regelcomplexiteit: een verkenning aan de hand van twee casestudy's.* Den Haag: Raad van State.

Ridder, J. den, Kunst, S., Hartman, C. & Miltenburg, E. (2023). *Burgerperspectieven 2023|2*. Den Haag: Sociaal en Cultureel Planbureau.

RIi (2015). *Ruimte voor de regio in Europees beleid*. Den Haag: Raad voor de leefomgeving en infrastructuur.

Schlössels, R.J.N., & Zijlstra, S.E (2017). *Bestuursrecht in de sociale rechtstaat.* Z.pl: Wolters Kluwer.

Stolk (2023). *Procederende belangenorganisaties in de polder*. Z.pl: Uitgeverij Paris.

Tweede Kamer der Staten-Generaal (2023a). *Memorie van toelichting wetsvoorstel Wet versterking waarborgfunctie Awb.* Versie pre-consultatie 18 januari 2023, paragraaf 2.4.

Tweede Kamer der Staten-Generaal (2023b). *Motie van het lid Stoffer c.s. over onderzoeken hoe een indringender toets op de representativiteit van belangenorganisaties binnen artikel 3:305a BW gerealiseerd kan worden.* Tweede Kamer, vergaderjaar 2022-2023, 36 169, nr 36.

Tweede Kamer der Staten-Generaal (2014). *Regels over het beschermen en benutten van de fysieke leefomgeving.* Tweede Kamer, vergaderjaar 2013-2014, 33 962, nr. 3, p. 295-302.

Tweede Kamer der Staten-Generaal (2024). *63e vergadering. Plenair verslag van woensdag 10 april 2024.* Te raadplegen via: Plenaire verslagen | Tweede Kamer der Staten-Generaal

Veen, G.A. van der (2018). Strategisch procederen in het milieurecht: bestuursrechter en civiele rechter. *Tijdschrift voor Omgevingsrecht, 2018* (4), p.155-159.

Verloo, N (2023). Ignoring people: The micro-politics of misrecognition in participatory governance. *Environment and Planning C: Politics and Space, 41* (7), p. 1474- 1491.

Visser, V., Koster, W. de & Waal, J. van der (2021). Understanding less-educated citizens' (non) participation in citizens' initiatives: Feelings of entitlement and a taste for politics. *Current Sociology, 71* (5), p.924-942.

Wolf, E., Zouridis, S & Herkes, F (2022). *Ontbindend besturen van de omgeving*. Z.pl: Boom Bestuurskunde.

WRR (2002). *De toekomst van de nationale rechtsstaat*. Den Haag: Wetenschappelijke Raad voor het Regeringsbeleid.

COURT RULINGS

European Court of Human Rights (2024). Application no. 53600/20. Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland. Judgement date September 9, 2024. Retrieved from: VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS v. SWITZERLAND (coe.int)

Gerechtshof Arnhem-Leeuwarden (2023). Zaak Nr. 200.329.063/01. Uitspraak d.d. 10 juli 2023. Gevraagd verbod op het gebruik van gewasbeschermingsmiddelen in het kader van de lelieteelt in de directe nabijheid van omwonenden. ECLI:NL:GHARL:2023:5742. Te raadplegen via: ECLI:NL:GHARL:2023:5742 Volledige tekst uitspraak (recht.nl)

Het Hof van Justitie van de Europese Unie (2020). Zaak Nr. C24/19. Uitspraak d.d. 25 juni 2020. ECLI:EU:C:2020:503. Te raadplegen via: EUR-Lex - 62019CJ0024 - EN - EUR-Lex (europa.eu)

Het Hof van Justitie van de Europese Unie (2021). Zaak Nr. C-559/19. Uitspraak d.d. 24 juni 2021. Beschermd natuurgebied Doñana (Spanje). ECLI:EU:C:2021:512. Te raadplegen via: EUR-Lex - 62019CJ0559 - EN - EUR-Lex (europa.eu)

Raad van State (2019). Zaak Nr. 201600614/3/R2, 201600617/3/R2, 201600618/3/R2, 201600620/3/R2, 201600622/4/R2 en 201600630/3/R2.

Uitspraak d.d. 29 mei 2019. Programma Aanpak Stikstof. ECLI:NL:RVS:2019:1603. Te raadplegen via: ECLI:NL:RVS:2019:1603, Raad van State, 201600614/3/R2, 201600617/3/R2, 201600618/3/R2, 201600620/3/R2, 201600622/4/R2 en 201600630/3/R2 (rechtspraak.nl)

Raad van State (2021). Zaak Nr. 202003882/1/R3. Uitspraak d.d. 30 juni 2021. Tussenuitspraak windturbinenormen. ECLI:NL:RVS:2021:1395. Te raadplegen via: ECLI:NL:RVS:2021:1395, Raad van State, 202003882/1/R3 (rechtspraak.nl)

Raad van State (2022). Zaak Nr. 202107079/1/R4. Uitspraak d.d. 2 november 2022. Oordeel over de partiële bouwvrijstelling. ECLI:NL:RVS:2022:3159. Te raadplegen via: ECLI:NL:RVS:2022:3159, Raad van State, 202107079/1/R4 (rechtspraak.nl)

Raad van State (2023). Zaak Nr. 202103977/1/R2. Uitspraak d.d. 2 augustus 2023. Dwangsom vleermuizen in spouwmuren. ECLI:NL:RVS:2023:2969. Te raadplegen via: ECLI:NL:RVS:2023:2969, Raad van State, 202103977/1/R2 (rechtspraak.nl)

Rechtbank Amsterdam (2023). Zaak Nr. 81/233625-20, 81/315065-20, 81/053483-21 en 81/166335-21. Uitspraak d.d. 8 februari 2023. Veroordeling Tata Steel voor milieumisdrijven. ECLI:NL:RBAMS:2023:568. Te raadplegen via: ECLI:NL:RBAMS:2023:568, Rechtbank Amsterdam, 81/233625-20, 81/315065-20, 81/053483-21 en 81/166335-21 (rechtspraak.nl)

Rechtbank Den Haag (2022). Zaak Nr. C-09-594148-HA ZA 20-547. Uitspraak d.d. 14 september 2022. Geurnormen. ECLI:NL:RBDHA:2022:9119. Te raadplegen via: ECLI:NL:RBDHA:2022:9119, Rechtbank Den Haag, C-09-594148-HA ZA 20-547 (rechtspraak.nl)

Rechtbank Den Haag (2024). Zaak NR C-09-632625-HA ZA 22-610. Uitspraak d.d. 20 maart 2024. Overheidsaansprakelijkheid; 8 EVRM; Wet luchtvaart. ECLI:NL:RBDHA:2024:3734. Te raadplegen via: ECLI:NL:RBDHA:2024:3734, Rechtbank Den Haag, C-09-632625-HA ZA 22-610 (rechtspraak.nl)

Rechtbank Noord-Nederland (2023). Zaak Nr. C/19/143817/KG ZA 23-48. Uitspraak d.d. 12 juni 2023. Gevraagde verbod op het gebruik van gewasbeschermingsmiddelen in het kader van de lelieteelt in de directe nabijheid van omwonenden. ECLI:NL:RBNNE:2023:2333. Te raadplegen via: ECLI:NL:RBNNE:2023:2333, Rechtbank Noord-Nederland, C/19/143817/KG ZA 23-48 (rechtspraak.nl)

Rechtbank Oost-Brabant (2024). Zaak Nr. 82.094589.22. Uitspraak d.d. 30 januari 2024. ECLI:NL:RBOBR:2024:299. Te raadplegen via: ECLI:NL:RBOBR:2024:299, Rechtbank Oost-Brabant, 82.094589.22 (rechtspraak.nl)

Rechtbank Oost-Brabant (2024). Zaak Nr. 82.094155.22. Uitspraak d.d. 30 januari 2024. ECLI:NL:RBOBR:2024:300. Te raadplegen via: ECLI:NL:RBOBR:2024:300, Rechtbank Oost-Brabant, 82.094155.22 (rechtspraak.nl)

Rechtbank Oost-Brabant (2024). Zaak Nr. 82.103203.22. Uitspraak d.d. 30 januari 2024. ECLI:NL:RBOBR:2024:301. Te raadplegen via: ECLI:NL:RBOBR:2024:301, Rechtbank Oost-Brabant, 82.103203.22 (rechtspraak.nl)

Rechtbank Oost-Brabant (2024). Zaak Nr. 82.095038.22. Uitspraak d.d. 30 januari 2024. ECLI:NL:RBOBR:2024:303. Te raadplegen via: ECLI:NL:RBOBR:2024:303, Rechtbank Oost-Brabant, 82.095038.22 (rechtspraak.nl)

Rechtbank Oost-Brabant (2024). Zaak Nr. 82.103931.22. Uitspraak d.d. 30 januari 2024. ECLI:NL:RBOBR:2024:306. Te raadplegen via: ECLI:NL:RBOBR:2024:306, Rechtbank Oost-Brabant, 82.103931.22 (rechtspraak.nl)

Rechtbank Rotterdam (2023). Zaak Nr. C/10/621356 / HA ZA 21-576. Uitspraak d.d. 27 september 2023. Tussenvonnis Chemours. ECLI:NL:RBROT:2023:8987. Te raadplegen via: ECLI:NL:RBROT:2023:8987, Rechtbank Rotterdam, C/10/621356 / HA ZA 21-576 (rechtspraak.nl)

APPENDICES

RESPONSIBILITY AND ACKNOWLEDGEMENT

Composition of the Council committee

Prof. N.S.J. (Niels) Koeman, Council member Rli and committee chair

Prof. C. (Chris) Backes, external committee member, Utrecht University

Prof. E. (Eddy) Bauw, external committee member, Utrecht University

Prof. H.D. (Hanna) Tolsma, Council member Rli

Dr N. (Nanke) Verloo, external committee member, University of Amsterdam

Composition of the project team

F.W. (Folmer) de Haan, project leader

S.L. (Sophie) Alkema, project staff member, until 1 September 2023

Dr G.M. (Berthy) van den Broek, external project staff member, Royal HaskoningDHV, from 8 January 2024

L.M.W. (Laura) van Moorsel, external project staff member, Royal HaskoningDHV until 22 December 2023

T. (Tuğçe) Tuğrul, project assistant

Consultees

Rachida Ahraoui, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties

Edwin Alblas, Wageningen University and Research

Esther Benschop – Stiger, Tweede Kamerfractie SGP

Maarten van Berckel, Ministerie van Justitie en Veiligheid
Jetske Bouma, Planbureau voor de leefomgeving
Anneke van Dijk, Ministerie van Justitie en Veiligheid
Kars de Graaf, Rijksuniversiteit Groningen
Sjeanne Haan-Kamphorst, Ministerie van Infrastructuur en Waterstaat
Gerry ter Huurne, Ministerie van Infrastructuur en Waterstaat
Marjolein Jansen, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Elbert de Jong, Universiteit Utrecht
Gijs Jurgens, Ministerie van Infrastructuur en Waterstaat
Geert Koskamp, Ministerie van Infrastructuur en Waterstaat
Ton de Lange, het Gerechtshof Den Haag
Hans Maljaars, Tweede Kamerfractie SGP
Jaap Polak, Raad van State
Anne Reitsma, Ministerie van Landbouw, Natuur en Voedselkwaliteit
Melchert Reudink, Planbureau voor de leefomgeving
Yvonne van Santen, Ministerie van Justitie en Veiligheid
Michiel Scheltema, voormalig regeringscommissaris algemene regels en bestuursrecht
Maarten van Schie, Planbureau voor de leefomgeving
Donné Slangen, Ministerie van Landbouw, Natuur en Voedselkwaliteit
Jaap Slootmaker, Ministerie van Infrastructuur en Waterstaat
Frank Stevens van Abbe, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Rowie Stolk, Universiteit Leiden
Gerrit van der Veen, AKD
Kees Vendrik, Staatscommissie Rechtsstaat
Ellen Verheij, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Wubbo Wierenga, Staatscommissie Rechtsstaat

Experts meeting 4 September 2023
Jan van den Broek, VNO-NCW
Jaap Dirkmaat, Das & Boom
Tijn Kortmann, Stibbe
Jaap Lameijer, Shell Nederland
Teun Verstappen, Omgevingsdienst Brabant Noord
Frans Vollenbroek, Advocaat van de Aarde
Johan Vollenbroek, Mobilisation for the environment

Experts meeting 23 November 2023
Tim Bleeker, Vrije Universiteit Amsterdam
David Evers, Planbureau voor de Leefomgeving
Nienke Homan, VNCI en EDSN
Elbert de Jong, Universiteit Utrecht
Ton de Lange, Gerechtshof Den Haag
Rowie Stolk, Universiteit Leiden
Rosa Uylenburg, Raad van State
Maarten Verhoeven, Rechtbank Oost-Brabant
Nanke Verloo, Universiteit van Amsterdam
Martijn Verwoerd, Bouwend Nederland

Departmental contactboard 11 July 2023
Jeroen van Bergenhenegouwen, Ministerie van Infrastructuur en Waterstaat

Krystof Krijt, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Lieve Maas, Ministerie van Infrastructuur en Waterstaat
Sophie de Maat, Ministerie van Infrastructuur en Waterstaat
Coen Ripson, Ministerie van Infrastructuur en Waterstaat
Edwin Tijdeman, Ministerie van Infrastructuur en Waterstaat
Peter van Tilburg, Ministerie van Landbouw, Natuur en Voedselkwaliteit

Departmental contactboard 20 February 2024
Seger Bauwens, Ministerie van Economische Zaken en Klimaat
Renée van Bommel, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Erik Bouwmeester, Ministerie van Infrastructuur en Waterstaat
Rudolf Haije, Ministerie van Economische Zaken en Klimaat
Geert Koskamp, Ministerie van Infrastructuur en Waterstaat
Sophie de Maat, Ministerie van Infrastructuur en Waterstaat
Harald Oldenziel, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Anne Reitsma, Ministerie van Landbouw, Natuur en Voedselkwaliteit
Paul Rijkse, Ministerie van Infrastructuur en Waterstaat
Josien Stoop, Ministerie van Infrastructuur en Waterstaat

Reviewers
Marjolein Demmers, Natuur en Milieu
Kars de Graaf, Rijksuniversiteit Groningen
Martijn Verwoerd, Bouwend Nederland

OVERVIEW OF PUBLICATIONS

2024
Spatial planning in a changing climate. [‘Ruimtelijke ordening in een veranderd klimaat’]. June 2024 (2024/02)

Firm Foundations: recommendations for a National Approach to the Problem of Unsound Foundations. [‘Goed gefundeerd: advies om te komen tot een nationale aanpak van funderingsproblematiek’]. February 2024 (2024/01)

2023
Systemic failure in policy on the living environment: a problem exploration. [‘Systeemfalen in het leefomgevingsbeleid: een probleemverkenning’]. December 2023 (2023/08)

Bridging the implementation gap: tackling factors impeding policy for the physical living environment. [‘De uitvoering aan zet: omgaan met belemmeringen bij de uitvoering van beleid voor de fysieke leefomgeving’]. December 2023 (2023/07)

Phasing out the throw-away society. [‘Weg van de wegwerpmaatschappij’]. November 2023 (2023/05)

Working together: opting for future-proof business parks [‘Samen werken: kiezen voor toekomstbestendige bedrijventerreinen’]. October 2023 (2023/04)

Good Water, Good Policy. [‘Goed water goed geregeld’]. Mei 2023 (Rli 2023/02)

Every region counts! A new approach to regional disparities [‘Elke regio telt! Een nieuwe aanpak van verschillen tussen regio’s’]. March 2023 (Rli 2023/01)

2022

Finance in transition: towards an active role for the financial sector in a sustainable economy [‘Financiering in transitie: naar een actieve rol van de financiële sector in een duurzame economie’]. December 2022 (Rli 2022/05)

Towards a sustainable food system: a position paper on the framework law. December 2022 (Rli/EEAC)

Splitting the atom, splitting opinion? Decision-making on nuclear energy based on values [‘Splijtstof? Besluiten over kernenergie vanuit waarden’]. September 2022 (Rli 2022/04)

Providing shelter: maximising the performance of housing associations [‘Onderdak bieden: sturen op prestaties van woningcorporaties’]. May 2022 (Rli 2022/03)

Nature-inclusive Netherlands, Nature Everywhere and for Everyone. [‘Natuurinclusief Nederland. Natuur overal en voor iedereen’]. March 2022 (Rli 2022/01)

2021

Farmers with a future. [‘Boeren met toekomst’]. December 2021 (Rli 2021/06)

Give direction, make space! [‘Geef richting, maak ruimte!’]. November 2021 (Rli 2021/05)

National Growth Fund. [‘Investeren in duurzame groei’]. October 2021 (Rli 2021/04)

Towards an integrated accessibility policy. [‘Naar een integraal bereikbaarheidsbeleid’]. February 2021 (Rli 2021/03)

Digitally Sustainable. [‘Digitaal duurzaam’]. February 2021 (Rli 2021/02)

Hydrogen: the missing link. [‘Waterstof: de ontbrekende schakel’]. January 2021 (Rli 2021/01)

2020

Access to the city: how public amenities, housing and transport are key for citizens. [‘Toegang tot de stad: hoe publieke voorzieningen, wonen en vervoer de sleutel voor burgers vormen’]. October 2020 (Rli 2020/06)

Stop land subsidence in peat meadow areas: the ‘Green Heart’ area as an example. [‘Stop bodemdaling in veenweidegebieden: Het Groene Hart als voorbeeld’]. September 2020 (Rli 2020/05)

Green Recovery. [‘Groen uit de crisis’]. July 2020 (Rli 2020/04)

Changing Tracks: Towards Better International Passenger Transport by Train. [‘Verzet de wissel: naar beter internationaal reizigersvervoer per trein’]. July 2020 (Rli 2020/03)

Soils for Sustainability. [‘De Bodem bereikt?!’]. June 2020 (Rli 2020/02)

A Grip on Hazardous Substances. [‘Greep op gevaarlijke stoffen’]. February 2020 (Rli 2020/01)

2019

Towards a Sustainable Economy: The Governance of Transitions. [‘Naar een duurzame economie: overheidssturing op transities’]. November 2019 (Rli 2019/05).

Desirable Tourism: Capitalising on Opportunities in the Living Environment. [‘Waardevol toerisme: onze leefomgeving verdient het’]. September 2019 (Rli 2019/04).

European Agricultural Policy: Working Towards Circular Agriculture. [‘Europees Landbouwbeleid: inzetten op kringlooplandbouw’]. May 2019 (Rli 2019/03).

Aviation Policy: A New Approach Path. [‘Luchtvaartbeleid: een nieuwe aanvliegroute’]. April 2019 (Rli 2019/02).

The Sum of the Parts: Converging National and Regional Challenges. [‘De som der delen: verkenning samenvallende opgaven in de regio’]. March 2019 (Rli 2019/01).

Original title

Met recht balanceren: juridisering in de leefomgeving

Copy editing (Dutch version)

Bert Pots, Amsterdam

Saskia van As, Tekstkantoor van As, Amsterdam

Infographics

Today Designers, Utrecht (pages 9, 10 and 19)

Photo credits

Cover: Peter Hilz / ANP/Hollandse hoogte

Page 5: Tineke Dijkstra / Mediatheek Rijksoverheid

Page 12: Ivo Vrancken Beeldmaker / Mediatheek Rijksoverheid

Page 15: Koen Suyk / ANP XTRA

Page 20: Branko de Lang / ANP

Page 25: Dirk Verwoerd / Mediatheek Rijksoverheid

Page 30: Vincent van den Hoogen / Mediatheek Rijksoverheid

Graphic design

Jenneke Drupsteen Grafische vormgeving, The Hague

Rli Publication 2024/03

June 2024

Translation

Acolad, Maastricht

Preferred citation

Council for the Environment and Infrastructure (2024). Judging the Right Balance: Juridification in the Living Environment. The Hague.

ISBN 978-90-834697-1-3

NUR740