Evaluation of articles 8:69a and 6:22 Awb
Examination of the relativity requirement and bypassing defects in (legal) practice

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Summary

Introduction

1. Reason for the research

The Act to Amend Administrative Procedural Law [Wet aanpassing bestuursprocesrecht, Wab] went into effect on 1 January 2013. The Wab led to a number of changes in administrative procedural law, which streamlined proceedings and encouraged the effective, final settlement of disputes, among other things. Two changes are examined in this research. First of all, the amendment of article 6:22 of the General Administrative Law Act [Algemene wet bestuursrecht, Awb], which offered greater freedom to bypass defects in a decision. The second change relates to article 8:69a Awb and the introduction of a relativity requirement. The evaluation of article 6:22 Awb was promised by the government in the First Chamber. The evaluation of article 8:69a Awb is laid down in article 1a, Part C of the Wab.

2. The problem and the approach used

The investigation was evaluative in nature, and led to the following statement of the central problem: Do the amended article 6:22 Awb and the new article 8:69a Awb have the effect envisioned, and what are the secondary effects on the protection offered by the law and the quality of decisions?

The research was conducted as follows. First, the parliamentary history was examined in a desk study followed by an analysis. The analysis was complemented by a review of the expectations found in the legal literature before the articles 8:69a and 6:22 Awb went into effect (desk study). The expectations of the legislature were distilled from the parliamentary history and the literature. These were used to analyse the jurisprudence related to the two articles in the Awb (desk study).
The analysis of the parliamentary history, the literature study, and the jurisprudence led to the formulation of a number of questions that are relevant to the problem investigated. These questions were incorporated in a series of interview questions designed to better reveal the application of articles 8:69a and 6:22 Awb in (legal) practice. The questions were presented to 30 people in the period May—July 2015, comprising judges in the administrative courts (including both the highest administrative courts and the lower courts), providers of legal assistance (attorneys and legal aid workers), and officials in a variety of administrative authorities (local authorities, provinces, water boards, and central government).

The research data were collected between 1 March and 1 July 2015. After the analysis the research report was written and discussed with the advisory committee. Developments after 1 July 2015 are dealt with only incidentally in the discussion.

Part I Evaluation of article 8:69a Awb

1. Summary of findings

The research shows that virtually all the jurisprudence on the relativity requirement in article 8:69a Awb relates to spatial and environmental law. Apart from that, the requirement has been applied in only a very limited number of cases. This is because multi-party disputes are more frequent in the area of spatial law. The experience that the relativity principle is applied mainly in spatial law corresponds with what the government had written in the Explanatory Memorandum, as well as what had been previsioned in the literature. Whether the legislature also expected that the relativity principle would virtually never appear outside of spatial law cannot be determined from the legislative history.

The main intention underlying the introduction of the relativity principle is to progress from review to dispute resolution. The introduction of the requirement explicitly matches this intention. The jurisprudence corresponds with the legislative intent.

The way the relativity requirement is applied in the jurisprudence of the Administrative Law Division of the Council of State closely matches the intentions the government set down in the Explanatory Memorandum.
The case law explicitly seeks to connect with the claimant's actual underlying interest. What is needed to annul a disputed decision is that this interest is actually harmed (or is under threat of harm). Otherwise, the ground of appeal strands on the relativity requirement. It is striking that these precise elements cannot be directly derived from the text of article 8:69a Awb. To that extent, more is read into the law (via the Explanatory Memorandum) than is actually present. It appears that the relativity requirement is not formulated exactly according to the legislature's intent. The legislative history shows that the Administrative Law Division of the Council of State has offered an interpretation that does find support in the intentions underlying the relativity principle.
The jurisprudence shows that the relativity principle is mainly used to counter claimants who appeal to the interests of others rather than their own. There are also cases where the claimant appeals to a rule made to cover the general interest, without making the case that his own interest runs parallel to or is sufficiently allied with the general interest. This is an application that coincides in substance with the legislator's intent.

The effects of the relativity requirement on dispute resolution (including finality) are sometimes, but not always observed by the judges interviewed. If the effect is observed, it is because sometimes the decision is not annulled. There are fewer promising grounds for appeal and therefore less chance of an annulment.

The interviews show that the relativity requirement can be used to 'peel apart' the conflict and penetrate to its essence (which fits well with the New Case Handling).

The jurisprudence and the interviews do not permit the conclusion that the relativity requirement has made administrative process law more efficient, with quicker proceedings as a result.

It was expected that the relativity requirement would help ensure that the protection of the law would be offered where the citizens' rights and interests were being harmed, while simultaneously countering the undesired side-effects of legal protection. In this context, undesired side-effects should be understood to include the fact, observed in practice, that decisions can be annulled on grounds that are not entirely relevant in the context and circumstances of the dispute. It would therefore help repress the unnecessarily legalistic effects of administrative jurisprudence.

The jurisprudence does indeed show that this result is achieved in cases where the relativity requirement is applied. The interviews did not allow a general picture to be drawn of the opinions on the subject held by those involved.
There is thus no answer as to whether the application of the relativity requirement actually does curb undesired forms of legalism, since the outcomes of the interviews offer too little evidence. The research shows that the relativity requirement does crop up regularly, albeit virtually only in the area of spatial and environmental law. This does not mean, of course, that it acts to counter legalism.

Judges regularly have to consider the relativity requirement with great care and discuss it among themselves, which takes time. Clear lines can be found in the jurisprudence originating from the Administrative Law Division of the Council of State, dating back to the Crisis and Recovery Act [Crisis- en herstelwet], meaning that the application does not have to be considered and discussed afresh in concrete cases. Even though discussion is still possible concerning the amount of protection offered by a given norm in public law, the case law has become increasingly clear on the subject. In that sense, the relativity requirement has come to take up less time. This research cannot answer the question of whether or not there is a delaying effect, on balance, since the work was not quantitative in nature.

When questioned about the adverse effects of the relativity requirement, the administrative authorities and legal representatives interviewed made no mention of legal uncertainty in its application.

There is some reason to suppose a certain anticipation of the relativity requirement, for example because grounds for appeal that the government agency suspects might strand on the relativity requirement can be handled relatively rapidly in the objection phase. There is no reason to suppose that this is a structural, large-scale phenomenon, but it is still far too early to be able to say anything about how the administration will deal with it, when the outline of the Administrative Law Division's jurisprudence (concerning the interests that will no longer succeed before a judge) become more widely known.

While the European Union Court of Justice has not yet issued a judgment on the Dutch relativity requirement, it is clear that European law, as it develops, is critical of restrictions on access to the courts and the scope of judicial review. Whether these developments will undermine the Dutch relativity requirement remains to be seen.

2. Answer to the researchproblem related to article 8:69a Awb

The way article 8:69a Awb is applied in (legal) practice agrees in broad terms with the legislature’s intent, such as progressing from review to dispute resolution. Neither the jurisprudence nor the interviews, however, permit the conclusion to be drawn that the relativity requirement has made administrative procedural law more efficient, so that cases are dealt with faster. The question whether the application of the relativity requirement genuinely curbs undesired types of legalism cannot be answered, since the outcomes of the interviews offer too little evidence. Regarding an adverse effect, the research has found that administrative authorities anticipate the relativity requirement from time to time, in the sense, for example, that grounds for objection that the administrative body suspects will fail on the relativity principle, are dealt with relatively rapidly in the objection phase.

Part II Evaluation of article 6:22 Awb

1. Summary of findings

The research shows that article 6:22 Awb is applied in case of formal and material defects. Formal defects include defects in the reasoning underlying decisions and the care taken. Material defects often include defects of jurisdiction, but other types are also bypassed, such as the application of incorrect legal rules, or mistakes in calculating the amount of a benefit. Article 6:22 Awb is applied relatively more frequently in the judicial phase than in the objection phase. If a defect in a decision is discovered in the objection phase, it is usually repaired in the decision on the objection.

Whether or not a defect is bypassed does not just depend on the nature of the flaw. The relevant area of law is also relevant. Article 6:22 Awb is used relatively little in taxation law. An 'educational effect' is present in concrete cases where defects in decisions are bypassed.

In general, the line followed is that if the substance of a decision could have been different in the absence of the defect, then it will not be bypassed.

Certain defects are not as a rule bypassed by the courts. One such is a failure to hear interested parties during the objection phase.

Defects found in a disputed decision, or in the way it was arrived at, are in many cases 'repaired' later during the court proceedings. This is done by submitting inquiry details that are relevant to the disputed decision, *post facto* supplementing or improving the disputed decision, or making all parties aware of items that are relevant to the disputed decision. If the parties have had an adequate opportunity to respond to the administrative authorities' attempted repair, then the defect can be bypassed.

Whether or not it may plausibly be stated that the other parties have been disadvantaged by the defect does not find expression in all the judgments examined, which is not to say that the court has not performed such an assessment. Those judgments that do contain legal considerations along these lines reveal a range of approaches adopted by the courts. Sometimes, despite the provisions of article 6:22 Awb, only the parties to the dispute are looked at. If other parties are named, then the judge is sometimes satisfied to state that there is no evidence that other interested parties have been disadvantaged by the defect, with no further indication of how this was assessed. Such information is provided only in occasional cases.
In two-party disputes it is relatively simple to assess whether interested parties have been disadvantaged. What counts then in deciding whether a defect can be bypassed is the content of the disputed decision.

Different judges appear to deal differently with compensation of court fees and orders for costs. A lot depends on the circumstances of the case. There seem to be no fixed patterns. The circumstances of a concrete case, in particular the number of grounds for appeal and their nature, play an important role in the decision to compensate (or not) court fees and legal costs when article 6:22 Awb is applied.

The court's application of article 6:22 Awb will come as no surprise to the parties. The judges interviewed stated that they always shared their views with the parties on the possible application of article 6:22 Awb during the hearing.

In many cases where the court can apply article 6:22 Awb, a similar result can be achieved, broadly speaking, by annulling the decision and confirm the legal effects. In case of serious defects, some judges prefer to confirm the legal effects, in acknowledgment of the litigant's sense of justice. They believe that application of article 6:22 Awb is suitable only for 'futilities'.

The research has found no reason to suppose that the expansion of article 6:22 Awb has exerted an adverse influence on the quality of decisions. It does not appear that the expansion of article 6:22 Awb has led administrative authorities to exercise any less care in the decision making phase.

In general, those involved mention few adverse effects related to article 6:22 Awb. This is probably because the article is principally applied to grounds for appeal that offer little gain to the claimant and little loss to the respondent. Moreover, the limits that article 6:22 Awb sets on bypassing defects can easily be circumvented by the courts by using their authority to confirm the legal effects when annulling a decision.

2. Answer to the researchproblem related to article 6:22 Awb

The application of article 6:22 Awb in (legal) practice broadly corresponds with the legislature's intent. The article is no longer applied only to defects in the sense of 'formal requirements'. Different judges act differently when assessing whether it can reasonably be ascertained that interested parties have been disadvantaged by bypassing a possible defect (which is also expressed differently in their judgments; sometimes there is absolutely no mention of it in the judgment). If the courts look only at the interests of the parties to the dispute, they are not acting in accordance with the legislature's intent. No evidence has been found of demonstrably adverse effects, either on administrative authorities' decision making or the protection of the law.