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A decision-making framework for responsive litigation behaviour by
governments in administrative law?

Summary – Expert meetings on responsive litigation

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The researchers are responsible for the content of the report. Making a contribution does not automatically mean that the person concerned agrees with the entire content of the report. This also applies to the Ministry of Justice and Security and its minister.

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Summary

Introduction

Procedures in administrative law are often a disappointing experience for citizens. Not only the outcome of a procedure but also the manner in which the procedure is conducted influences the trust between citizens and the government. Diminishing trust can in the long term pose a risk to the democratic rule of law. This was highlighted, among others, in the report ‘Unprecedented injustice’ of the Parliamentary Inquiry Committee on Childcare Benefits.¹ Therefore, the way in which the government conducts procedures deserves attention. By focusing on solving the citizen’s problem, rather than taking a strictly legal approach, citizens feel better heard and understood, and unnecessary procedures can be avoided. This is also referred to as responsive litigation.

The *Deelprogramma Burgergerichte Overheid* is an initiative of the Dutch Ministry of Justice that focuses on improving the relationship between the government and citizens within administrative law and strengthening mutual trust. It supports government bodies in the area of responsive litigation. Reports from the *Deelprogramma Burgergerichte Overheid* indicate signals of a need for an instrument, such as a decision-making framework, to assist government representatives in their interactions with citizens.

Pro Facto and the University of Groningen, commissioned by the WODC, organized four expert meetings to gain insight into the need for an instrument to prevent unnecessary litigation and to encourage responsive litigation behaviour. The participants in these expert meetings were professionals involved in administrative procedures concerning objections and appeals, as well as experts in administrative law, organizational change, and the behaviour of civil servants. Since the professionals participating in the expert meetings represent only a small fraction of all individuals involved in handling objections and representing cases in court, these expert meetings may not provide a representative view of the (desired) litigation behaviour of governments. However, the results of this study do offer a indicative view of the needs for instruments within current practice.

¹ Parliamentary document 35 510, no. 1

During the expert meetings, the following research question was addressed:

What are the needs of (process) representatives of the government in administrative law (objection and appeal) for a decision-making framework to prevent unnecessary procedures and to ensure responsive litigation or by the government? What is the desired content and format of such a decision-making framework and what are the recommendations for its implementation?

The expert meetings revealed the need for the following instruments:

- Guidelines for creating a more citizen-oriented objection process
- Guidelines for responsive litigation in (higher) appeals;
- A decision-making framework for initiating higher appeals.

Guidelines for creating a more citizen-oriented objection process

The participants in the expert meetings agreed on what behavior in the objection phase should be considered as responsive litigation behavior. Objection handlers are expected to have an open conversation with the citizen, allowing the citizen to explain their situation and interests, while the objection handler explains the decision. This approach enables the objection handler to gain a comprehensive understanding of the case and weigh possible alternative solutions that better address the citizen's situation against the contested decision. This method can also contribute to citizens feeling that they have been treated fairly. This approach – essentially aligns with the so-called ‘informal method’ that many Dutch government bodies apply or are attempting to apply – is supported by the expert meeting participants.

The fact that objection handlers do not always exhibit the above-described behaviour is, according to the participants, primarily because this behaviour is insufficiently facilitated and encouraged by the organizations in which process representatives work. Therefore, there is a strong need for a tool that provides governments with guidelines for initiating a shift toward a more citizen-centred organization. These guidelines should focus primarily on governance and management.

For the successful introduction and continuation of a citizen-centred approach, the political and administrative vision of responsive litigation behaviour and the organization of work processes are essential, according to participants. By explicitly defining what the organization understands as responsive litigation behaviour, management is encouraged to stimulate and enable employees to adopt a citizen-centred approach. A political or administrative vision also ensures that initiatives for citizen-centred litigation are not lost when individual employees leave the organization.

The work processes within the organization should be designed in such a way that a citizen-centred approach can be implemented. According to participants, this includes, among other things, learning from each other's cases (e.g., through weekly case discussions), handling objection cases with at least two people (the ‘four-eyes principle’), and ensuring that signals identified during the objection phase reach policymakers and the implementing organization. Participants noted that this enables objection handlers to better apply a citizen-centred approach because they learn from the experiences of colleagues, the risk of arbitrary decisions when providing customized solutions is reduced, and the organization learns from past

mistakes. Participants also emphasized the importance of accountability. Organizations should pay more attention to how certain procedural actions are carried out rather than the frequency with which they are performed. For example, the number of phone calls made during the informal pre-objection phase is less important than the efforts made to ensure those calls are of the highest possible quality.

At the national level, various tools can be provided to organizations seeking to adopt a more citizen-centred approach to litigation. This could include central information about best practices available and implementing these best practices within organizations. Additionally, knowledge-sharing sessions can be a way to encourage organizational change. These information products and knowledge-sharing sessions should focus primarily on the organization's management, as it plays a decisive role in developing, structuring, and establishing visions, policies, and work processes.

Guidelines for responsive litigation in (higher) appeals

Participants indicated that it is not entirely clear what behaviour could be considered as responsive litigation in (higher) appeals. Unlike the objection phase, little research has been conducted into best practices in (higher) appeals. Participants stated that they determine the most fitting approach based on the specific characteristics of the case. However, there is consensus among participants on a set of behavioural standards that governments and process representatives in (higher) appeals should always adhere to. In summary, these standards include: a warm handover between the objection handler and the process representative in appeals, timely collection and submission of case documents, drafting a substantiated statement of defence and higher appeal brief, obtaining the necessary mandate, appearing at the hearing, maintaining a professional demeanour during the hearing, and providing an oral explanation to the interested party/parties when initiating a higher appeal.

As mentioned, little research has been done on the litigation behaviour of governments in (higher) appeals. It is therefore recommended to conduct further research into best practices in responsive litigation behaviour during higher appeals within various administrative bodies. It is also suggested to involve the judiciary in this research. During the expert meetings, it was noted that the judiciary plays a role in promoting responsive litigation behaviour in (higher) appeals. Judges can encourage parties to consult with one another, potentially with the assistance of a mediator. A judge during one of the expert meetings also mentioned that, from their perspective, it is desirable for communication between the parties to go through them. Based on this research, guidelines for responsive litigation behaviour can be further developed.

In addition to the above principles for responsive litigation behaviour, participants noted that the desired litigation behaviour in (higher) appeals depends heavily on the specific case. It was also mentioned that support for the guidelines would be stronger if the individuals required to implement them were involved in their development. Therefore, it is recommended to work with a draft guideline that can be further elaborated within administrative bodies, preferably with the involvement of process representatives. The draft guideline could be developed at the national level, for example, by the Ministry of Justice and Security. The behavioural standards mentioned earlier can serve as a basis for these guidelines.

Subsequently, it is important to raise awareness of the draft guidelines among process representatives and management. A key requirement is that these guidelines should be easy to access, for example, via a dedicated website. These guidelines should also be actively shared with implementing organizations and decentralized governments. In this regard, involvement of the Association of Netherlands Municipalities, the Interprovincial Consultation, and the Union of Water Authorities is recommended.

Decision-making framework for initiating higher appeals

During the expert meetings, it was noted that the decision by an administrative body to file a higher appeal can have a significant impact on citizens. This impact includes prolonging the uncertainty for the citizen regarding the case's outcome, as well as requiring them to invest time, money, and energy in the matter. Administrative bodies should take this impact into account when deciding to file a higher appeal. A decision-making framework for initiating higher appeals could help ensure that administrative bodies consistently do so.

According to the participants, a decision-making framework should consist of two components. First, the framework should include instructions for weighing interests. It should explicitly identify the relevant interests of the administrative body, the citizen, and any other stakeholders, indicate which interests are considered significant or not, and require an examination of available alternatives. Second, the framework should include guidelines for the procedure for deciding to file a higher appeal. For example, the procedure could involve submitting the proposal to file a higher appeal for advice from a senior legal advisor or legal controller, who would then forward their recommendation to the administrative body for a final decision.

The participants in the expert meetings indicated that a policy rule is the most suitable format for the decision-making framework. A policy rule establishes a binding framework for the administrative body and raises awareness among the involved officials. Additionally, it communicates to citizens that the administrative body aims to exercise restraint in filing higher appeals. A logical approach to implementation would be to draft a model policy rule that could subsequently be adopted by various municipalities and implementing organizations. The interests and procedural safeguards mentioned in the report could serve as building blocks for developing a model decision-making framework for initiating higher appeals. When elaborating or supplementing these building blocks in a model policy rule that could also be used by decentralized governments, it is recommended to involve the Association of Netherlands Municipalities, the Interprovincial Consultation, and the Union of Water Authorities.

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