

K.J. de Graaf, J.H. Jans, A.T. Marseille & J. de Ridder, 'Administrative decision-making and legal quality: an introduction', in: K.J. de Graaf, J.H. Jans, A.T. Marseille & J. de Ridder, *Quality of Decision-Making in Public Law*, Groningen: Europa Law Publishing 2007, p. 1-10.

CHAPTER I

---

**Administrative decision-making and legal quality: an introduction**

K.J. de Graaf, J.H. Jans, A.T. Marseille & J. de Ridder



## I Introduction

Administrative decisions made by government bodies are a fact of life: members of the public are confronted with them all the time. Whenever a citizen applies for a building permit, a driving licence or benefits, or is faced with an environmental enforcement measure, an administrative decision is involved; it is in administrative decisions that government bodies give legal shape to governmental regulations. Administrative decisions are juristic acts; they are as it were the legal packaging of everyday experiences such as receiving benefits, learning how to drive, building a house or paying taxes. The legal quality of administrative decisions therefore obviously matters to people. It matters in at least three ways. First of all, when issuing administrative decisions, public authorities should treat citizens according to their rights, including the right to equal treatment and the right to legal certainty. Secondly, the rights of third parties should be protected; for instance, they should not suffer from the external effects of an administrative decision without adequate compensation. Thirdly, the public is entitled to the protection of general public interests. Tax assessments should neither overcharge individual taxpayers nor reduce public revenue. Building permits should not go against the public interests as laid down in zoning laws, but at the same time they should give the applicants the building rights they are entitled to. While legal remedies (review procedures, appeal to a court of law) are usually available to citizens who feel they have been unfairly treated by a public authority, it is in the interests of both individual citizens and the general public for government bodies to make legally correct decisions the first time around. Court procedures to review incorrect decisions are cumbersome and costly, both to the individual involved and to the taxpayer. Moreover, if a public authority has a reputation for making the right decisions in the first place, this will generate public trust in the government and reinforce the legitimacy of administrative decision-making.

The legal quality of administrative decision-making is therefore of primary importance to the individual citizen and to the public at large. It is an important element in the administration of justice by public authorities and it is important in upholding the credibility and sustainability of the government as a whole. It was on these grounds that we decided to produce a volume of essays associated with this theme. This collection draws on the combined research experience of a group of Dutch scholars in administrative law and public administration, so that the topic is examined from a variety of perspectives. Before going into the way the various contributions deal with the issues at hand, let us first look at some basic questions. What is meant by this core concept of legal quality? And how can it be applied when assessing administrative decision-making?

## 2 Legal quality

Even though every legal scholar will agree that legal quality is recognizable when it is there, it remains an elusive concept. It is made up of two component terms that are equally intangible. It therefore seems appropriate to discuss the concept in some depth. Because this volume is about the legal quality of administrative decisions, before taking a closer look at certain components of legal quality we will start by examining administrative decision-making itself.

### *Administrative decision-making*

Administrative decision-making can be described as the application of general rules to individual cases, often in the context of performing public tasks. The administrative decision-making process consists of both administrative activities and legal acts, acts intended to have legal consequences. A certain chronological order is inherent to this process. Activities that precede the decision can be qualified as preparatory; once the decision has been made, a second round of activities – the implementation of the decision – follows. Enforcement of the decision by the administrative body itself can also be considered part of this process. The concept of legal quality may apply both to decision-making in individual cases ('first-order legal quality') and to the decision-making process in general, abstracted from individual cases ('second-order legal quality'). Assessment of 'first-order legal quality' is primarily a subject for legal experts. For instance, legal quality of the 'going by the book' variety in mass-produced administrative decisions is routinely gauged by internal or external auditors. Some would say that the final verdict on the quality of an individual decision is given in a court of law. Nevertheless, examination of court cases and administrative decisions by legal experts can do a lot to improve our understanding of legal quality. 'Second-order legal quality' should be jointly assessed by legal scholars and empirical researchers; such an assessment might produce insights into how administrative decision-making should be organized in order to gain better first-order legal quality.

### *Quality*

Quality is a diffuse concept. It can be applied to a variety of phenomena, such as the organization and structure of procedures and the outcomes of those procedures, including decisions. All of these phenomena can be examined and assessed as regards their quality. Essentially quality has to do with the extent to which a certain concrete phenomenon corresponds to the ideal version of that phenomenon. The more characteristics of the ideal a concrete phenomenon has, the higher its quality is. In assessing quality, the 'amount of quality' – the number of aspects which meet the criteria – is not the only issue; the quality of each aspect separately is also relevant. This can be expressed in a numerical rating or in a verbal classification ('high', 'moderate', 'poor', etc.) An additional question is whether the quality is 'sufficient or insufficient'.

For the concept of quality in itself it is not important who has defined the ideal version – with its composite characteristics – of the phenomenon. Different assessors may give different quality definitions of the same phenomenon. To put it in a different way: assessors may apply different criteria, such as lawfulness, effectiveness or acceptability. Moreover, each of these criteria may have a certain weight of its own. Assessors also establish their own quality scale and determine when there is sufficient or insufficient quality, which may also lead to differences between the assessors. Assessors may include the administrative body itself, the interested party in a particular case, the supervisory body or the court. Some assessors, such as the court and the supervisory body, have formalized positions. Their assessments are legally binding or may lead to legally binding measures.

### *Legal conformity*

The definitive mark of legal quality in the administrative decision-making process is conformity with the legal provisions which apply to that process. This means that the decision made by the administrative body must be made by somebody who is authorized to do so. The decision itself must be consistent with national and international, written and unwritten law. During the preparation of the decision the relevant standards must be observed; the same applies to the reasoning behind the decision and to its implementation. Conformity means compliance both with substantive norms and with administrative procedure as laid down in the Dutch *Algemene wet bestuursrecht* (General Administrative Law Act).

In most cases conformity with the applicable law means that the requirement of lawfulness must be met: the primary decision-making process must take place lawfully, according to the legal standards which exist for juristic acts under public law. This is also true of juristic acts under private law and merely factual acts. Moreover, government actions must be in line with the standards of propriety developed by the National ombudsman. The standards of propriety are not as restrictive as the requirement of lawfulness. For administrative bodies, standards of propriety are standards of conduct. It is only in exceptional cases that effectiveness and efficiency are laid down as independent legal standards for administrative bodies at the level of primary decision-making. At the primary decision-making level it is not a legal requirement for decisions to be acceptable.

Often it is perfectly clear what conformity with standards implies in a particular case. Why is this? Many government decisions consist of the application of a general standard to a specific situation. This always involves assessing the applicability of the standard in question. There are plenty of examples: anyone who is 65 years old and has thus reached pensionable age may claim an old-age pension, and anyone who is unfit for work is entitled to an invalidity benefit. The administrative body must establish whether or not the person applying for the benefit meets the criteria for eligibility. In the case of the old-age pension this is

not difficult. The standard is straightforward – ‘65 years of age’ – and it is very rarely a problem to establish whether the applicant meets this criterion. There is more uncertainty if the administrative body has to decide whether an applicant is eligible for an invalidity benefit. The standard – ‘unfit to work’ – is not so clear-cut, and the outcome of its application is therefore uncertain. However, the situation is uncertain not only for the applicant – ‘will the administrative body accept my claim?’ – but also for the administrative body – ‘will our interpretation of the concept of incapacity for work be approved by the court?’ This is particularly applicable if new legislation has to be interpreted. Usually a court of law is the most appropriate authority to provide clarity in cases of this kind. The court can hand down a binding ruling as to whether or not the decision conforms with the standards.

#### *Influence of judicial review on legal quality*

The legal quality of administrative decision-making can be measured by judgments of the court. However, there are certain dangers involved in relying solely on the standards formulated in case law. In the first place, the court does not have exclusive rights to the assessment of the legal quality of government actions. While it is true that the court’s judgment determines how much an administrative body may or must do, this does not alter the fact that it can be argued that the court has set the bar too low or too high in certain cases. In other words, court judgments of government actions taken as a whole represent only one of many possible views of the legal quality of government actions. Court judgments give an indication of the legal quality of government actions but they cannot be regarded as the only relevant benchmarks.

A second danger is that if the court exercises restraint and gives the government a considerable amount of freedom to use its discretionary powers in certain areas, the government may gear its policy to the court’s custom of restraint. An example is the situation where the administrative body makes a large number of similar decisions against which only a few citizens appeal. If these citizens are successful, the court’s ruling will mean that the administrative body must change the erroneous decisions which affect the people who challenged them, but not those which affect people who failed to do so. This leeway provided by the court may tempt the administrative body in question not to take any action with respect to the people who did not appeal. However, the administrative body may also choose to make its own arrangements to compensate those who sought no legal remedy against the decisions which turned out to be erroneous. In both cases the administrative body is acting within the boundaries laid down by the court, but in the second case the legal quality of the administrative body’s decision-making is higher than in the first case.

Another problem arises when the rule, although correctly applied, proves to be unable to achieve a satisfactory result. In this case desirability and legal reality are at odds with each other. However, the administrative body does not have the power to change a rule or to introduce a supplementary rule, and in general

the court will not be able to provide a solution either. For problems of this nature an administrative body can only turn to the legislators.

### *Influences on legal quality*

Before suggestions can be made for improving the legal quality of the decision-making process, the problems must be pinpointed ('in which areas is there a lack of legal quality?'), and then analysed ('what factors cause the lack of quality?') Then, on the basis of the desired situation ('sufficient legal quality' or 'higher legal quality'), a solution should be thought out ('which factors will help in achieving the desired situation?'). It should be borne in mind that an improvement in the legal quality of administrative decision-making may be at odds with quality requirements which are not – or not primarily – legal in nature. For example, in terms of effectiveness increasing legal quality may be regarded as undesirable.

Insight into the factors which influence the legal quality of administrative decision-making is essential both in analysing and in solving problems. The influence of these factors may be either to raise or to reduce quality. The quality factors are legal or non-legal in nature. The legal factors consist of the regulations in the broad sense and of case law. The non-legal factors are numerous and vary widely; they include public information, the level of expertise of an administrative body's staff, supervision of implementation, cuts in implementation budgets, etc. There is no systematic overview of the non-legal factors, nor do we know very much about the way in which quality factors – separately or in conjunction – exert their influence. In this volume attempts are made to fill in some of these gaps.

## **3 Outline of the book**

As stated above, the topic of this book is the assessment of legal quality in administrative decision-making and the factors which influence that quality. The first three papers concentrate on the concept of legal quality as applied to administrative decision-making.

Herweijer discusses the tensions between legal quality and other quality requirements which must be taken into account to arrive at an assessment of the overall quality of administrative decision-making. Examination of the lawfulness of public decisions by legal scholars is fundamentally different from empirical research into the effectiveness, efficiency and propriety of these decisions. If researchers want to pass unreserved judgment on the quality of public decisions, they should integrate the conclusions of four different types of research. We have only a modest understanding of the interactions between the four aspects of administrative quality. We should bear in mind that improvements in legal quality may be offset by reductions in efficiency, effectiveness

or propriety. Successful improvements regarding one aspect of administrative quality may entail sacrifices regarding others.

Taking the relationship between bureaucracy and *Rechtsstaat* as a point of departure, De Ridder discusses the importance of administrative organization in achieving not only high legal quality in administrative bodies' decision-making but also excellence in administrative justice. Legal quality at the most basic level means administrative compliance with the law, but at the highest level it implies administrative justice. Administrative quality is more than legal quality alone. De Ridder focuses on the influence of the choices made by public servants in their day-to-day work and the factors that determine their choices.

Bröring and Tollenaar present an overview of the legal factors which have some bearing on the way administrative authorities go about making decisions. There are several legal factors which influence the quality of decision-making. These are divided into three categories. First of all there are the factors which have to do with the relationship between the government and the public as set out in administrative law. This relationship is based on the core concepts defined in the Dutch *Algemene wet bestuursrecht*. There are three elements in this relationship: an administrative decision, a public authority which has made this decision, and one or more interested parties. The first category of legal factors which may influence legal quality has to do with the implications of these three concepts. The second category of factors pertains to the regulations which govern this relationship. On the one hand the law allows public authorities a certain discretion, but on the other hand the legislator has attempted to set standards for the rules adopted by public authorities. This leads to the codification of policy rules and the existence of 'pseudo policy rules'. The last category of factors consists of those relating to systems of checking whether or not administrative authorities comply with the regulations. These systems cover both supervisory bodies and legal protection.

Three of the contributions are concerned with specific dilemmas faced by administrative authorities in their attempts to achieve legal quality. Tolsma's paper deals with a specific question in relation to the quality of administrative decision-making when a public authority is caught in the middle of conflicting interest groups. Can mediation improve the quality of decision-making? Mediation is a method of conflict resolution whereby an independent third party is brought in to supervise the parties involved in a dispute in their attempts to find a solution for that dispute. Tolsma explores possible ways of incorporating the mediation method into the current administrative decision-making process and discusses a proposal for making mediation compulsory. If administrative authorities have a legal duty to strive towards consensus, the introduction of mediation may be a pressing issue. Two questions arising from this proposal are discussed: on what legal standard might this duty be based, and in what circumstances would the duty apply? The third topic discussed is to what extent

the element of mediation can be implemented in a legal system in which administrative authorities have special purpose powers.

De Graaf and Marseille focus on another dilemma which administrative authorities may have to face in their efforts to achieve legal quality. Confronted with an erroneous decision which has become legally incontestable, an administrative authority has to establish whether it can or should do anything to change the decision. The dilemma is whether the notion of legal quality is best represented by providing legal certainty – and thus by restraint as regards reconsidering unlawful decisions – or by safeguarding lawfulness, and thus by broad powers to change previously made decisions.

Jans provides some insights into the significance of European legal principles for national administrative decision-making. He focuses on the question of whether European law requires a more formal application of substantive regulations and attempts to pinpoint the obligations for public authorities which arise from Article 3:2 of the *Algemene wet bestuursrecht* (the requirement of due care) against the background of the principle of precedence and the doctrine of direct effect, in order to prevent decisions which contravene European law.

The exploration of the legal quality of administrative decision-making continues with two contributions which examine legal quality in different areas of administrative decision-making. Noordam presents an exposition, based on the available research data, of legal quality in the field of social security. The implementation of social security law does not have a good reputation in public opinion. This paper investigates how the implementation is judged by bodies such as the court, the National ombudsman, the Netherlands Court of Audit, the supervisory bodies, etc. The criteria used to assess the quality of implementation (lawfulness, effectiveness, efficiency, etc.), are examined one by one. In recent years the social security implementation bodies have to an increasing extent paid systematic attention to the quality of implementation. The paper is an impression; it does not provide a complete, representative picture of social security implementation. This impression confirms the implementation's unfavourable reputation. However, it is appropriate to put this into perspective: most of the implementation takes place without any problems. Moreover, the implementation bodies are frequently confronted with legislation of poor quality, passed down by the national government.

Winter and Bolt focus on the quality of decision-making in Dutch aliens law, especially with regard to asylum law. The goal of the Dutch *Vreemdelingenwet 2000* (Aliens Act 2000) was to improve the quality of decisions relating to applications for asylum and at the same time to speed up the administrative decision-making process. Winter and Bolt discuss factors which may influence the quality of decision-making, dividing them into legal and non-legal factors. On the basis of data from the recent evaluation of the *Vreemdelingenwet 2000*, reports by the National ombudsman, and annual reports from the *Immigratie- en Naturalisatiedienst* (IND) and the district courts, they attempt to analyse the rela-

tionship between legal and non-legal factors and the quality of decision-making in asylum cases.

To conclude this investigation of legal quality in administrative decision-making, two essays assess the legal quality of public administration on the basis of specific case studies. Damen's essay addresses the following question: When do administrative decisions and administrative decision-making have sufficient legal quality? Taking a specific case study about a burgomaster who failed to apply for a permit as a point of departure, Damen formulates criteria for sufficient legal quality. An administrative body which is at the service of the 'ordinary' citizen should provide information, ask questions, empathize and help to find solutions. Within the boundaries of legislation and case law and of the public interest, it should adopt a sympathetic attitude and consider how it can help citizens to get what they are entitled to, by a) active and adequate information provision, b) lending citizens a helping hand, c) fair play and giving citizens a voice, d) meticulous preparation, asking questions about the citizen's wishes and examining the feasibility of those wishes with appropriate administrative and technical accuracy, e) choosing the most favourable alternative and the least onerous decision, and f) punctual decision-making, at least always within the legal time limit.

Tromp presents a case study of administrative decision-making in a complex process of physical planning, involving many different stakeholders. In this case the primacy of the rule of law was severely tested. Tromp focuses on the decisions which had to be made by various administrative authorities before planning permission could be given for a pumping station with a lock in the province of Groningen in the Netherlands. The case study explores the hypothesis that the quality of decision-making determines whether or not the public at large will have faith in the authorities. Can the so-called 'gap' between the public and government be closed by structural reforms or is it something else that needs reform to ensure the legal quality of administrative decision-making?