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Broring, H.E.; Tollenaar, A.

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Legal factors of legal quality

H.E. Bröring & A. Tollenaar

I Introduction

Legal quality is a characteristic of administrative decision-making that is based on the law. This essay discusses how the law influences legal quality; in other words, what legal factors determine the legal quality of decision-making?

At first glance, looking for the legal factors of legal quality may seem a strange tautology, since the law is part of both the independent variable and the dependent variable in the supposed connection between ‘legal factors’ and ‘quality of decision-making’. In the first place the law is a measure of legal quality: by definition unlawful decision-making is of poor quality. However, in this article we are only concerned with analysing developments in law which influence legal quality.

One of the first problems in describing legal factors is that a very great diversity of relevant factors are conceivable; it is impossible to mention all these factors and to describe their connection with legal quality. We have therefore been compelled to limit ourselves by classifying various legal factors into three categories which we will distinguish below. The factors in each of these categories arguably have an influence on legal quality.

The first category consists of factors connected with the relationship between the government and members of the public in administrative law (the administrative relationship). In the Netherlands this relationship is codified in the *Algemene wet bestuursrecht* (General Administrative Law Act) which came into force in 1994. This codification may be regarded as an essential development as regards the quality of decision-making. One of the arguments for drawing up this Act was that codification of procedural rules in particular would raise the quality of decision-making. In this context the object of study is the legal quality of the concepts used by the legislators to codify the legal relationship between citizens and administration in the *Algemene wet bestuursrecht*; thus the first group of factors whose influence on legal quality will be examined consists of the *core concepts* used in the codification of the *administrative relationship*, and their current interpretation.

Due to the codification of the administrative relationship the plethora of legal concepts has been reduced to the general concept of the ‘decision’.¹ There is an intrinsic tension in the law between the general and the specific.² In the specific sections of administrative law a wide variety of legal concepts – all ‘decisions’ within the meaning of the *Algemene wet bestuursrecht* – and legal standards are to be found. Within this diversity a few general tendencies can be observed. Changing *legal concepts* and *legal standards* constitute a second category of legal factors which influence legal quality.

The administrative court is charged with the supervision of compliance with legal standards, but supervisory bodies also play an important role in this

¹ Art. 1:3 *Algemene wet bestuursrecht* (General Administrative Law Act).

² Not only in administrative law but also, for example, in private law. See De Jong (2003).

context. The third category of legal factors therefore consists of those related to *monitoring* compliance with legal standards and the way this monitoring is shaped in administrative law.

The main points of our contribution have been outlined above. However, at this point it seems appropriate to make two important qualifying comments to put this article into perspective. Firstly it should be noted that a legal factor is usually the reflection in the law of a societal development taking place in the abstract relationship between the public and the government. From the perspective of the law, these societal developments can be regarded as exogenous;³ they have to do with changes in civil society, individualization and citizenship, which may lead to changes in the relationship between the public and administrative authorities. The changes may entail more responsibilities being allocated to citizens, with the government acting only when civil society fails.

Societal developments may influence the categories of legal factors we have distinguished. Different, more reciprocal legal concepts are better suited to the developments referred to above, and the European law dimension has an influence on the relative importance of legal standards in the government's task. And finally, the emphasis on the citizen's own responsibility has consequences for legal protection and therefore also for the way compliance with legal standards is monitored by the administrative court.

A second, partly related point is that ultimately the legal factors may not be the most decisive factors in determining legal quality; the influence of legal factors should not be exaggerated, precisely because these factors are often the result of developments taking place in society. Moreover, the social context also has an influence on the assessment of legal quality itself, since legal quality is a concept in which several legal standards conflict with each other. For example, the standard of legal certainty, which demands speed, may conflict with the standard of due care, which requires more investigation – and thus more time. It is not clear which of the two standards should take precedence and which of the two defines legal quality.⁴ Moreover, beyond the perspective of legal quality there are also other qualities, such as effectiveness or efficiency, against which legal quality can be weighed. Legal quality is not always convincing outside the legal perspective; other values are regarded as more significant.

An example of a situation in which the standards of legal quality are evidently shifting is the rise of mediation in administrative law.⁵ Greater effectiveness and efficiency are achieved if parties can agree through negotiation on juristic acts which are acceptable to both. Precisely in this negotiation process objective lawfulness is regarded as less significant than finding a solution which is acceptable to the parties involved. In certain circumstances even a solution

³ Wetenschappelijke raad voor het regeringsbeleid (2002).

⁴ At this juncture time and timeliness seem to be of great importance. This can be deduced for example from the way uncertainty as to the established facts is accepted in administrative law. See Schuurmans (2005).

⁵ See Donner (2004).

which is legally defective may be accepted, so long as the parties have reached agreement as to the solution.⁶

2 Administrative relationship and core concepts

The object of the administrative relationship is the *decision*⁷ and the relationship is shaped by the administrative body and the interested party concerned as opposite poles. The first category of legal factors which may influence legal quality has to do with the scope of the administrative relationship. Developments in this area are connected with the discussion about the desired level of legal protection, since legal protection is available to interested parties in that they may raise objections to or appeal against a decision made by an administrative body.

Two developments can be pinpointed in this group of factors. Firstly a certain subjectivization can be observed, which in the legal debate is reflected by the interpretation of two core concepts: the concept of the ‘decision’ and the concept of the ‘interested party’. A second development is that the boundary between the public and the private domains is shifting because the public law organizations which shape administrative relationships are also legal entities under private law. This leads to a certain amount of interaction between public law and private law standards.

2.1 Narrowing down the administrative relationship: subjectivization

In his inaugural lecture Schlössels points out the relative value of the concept of the decision in the light of adequate legal protection.⁸ Legal protection is available not only against administrative acts which can be regarded as ‘decisions’,⁹ but also against other acts if the court thinks it is important that it should be possible to raise objections and appeal against these acts even though they do not come under the definition of ‘decision’.¹⁰

Administrative law is focusing more and more on the parties involved in the administrative relationship and less on the juristic acts which take place

⁶ It can even be concluded from *Hoge Raad* (Supreme Court) 9 December 2005, AA 2006, p. 825, with note by Zwemmer, that an agreement determining a legal relationship with the Tax and Customs Administration which partially contravenes the law is null and void only if the agreement is so much in breach of what the law – as a whole – prescribes on the matter concerned that the parties could not rely on compliance with it.

⁷ It is precisely in its focus on the decision as its object that administrative law differs for example from municipal law.

⁸ Schlössels (2003), p. 28.

⁹ As defined in Art. 1:3 of the *Algemene wet bestuursrecht*.

¹⁰ Pront-Van Bommel (2002), p. 62; See De Wijkerslooth (1999), p. 92-93.

between them, at least from the point of view of adequate legal protection.¹¹ This means that in order to examine the legal quality of decision-making it is not the product – that is, the decision – that must be studied but the legal relationship between the parties. In itself this is quite difficult, because a very large number of interactions and actions take place between the parties which bear very little relation if any to the actual juristic act (the decision).

The subjectivization of the administrative relationship is also shown by the interpretation of the concept of the interested party. A question which is constantly asked is whether too many citizens have access to the administrative court. This is a widely perceived problem, but to date no clear solution has been presented.¹² A topical question is whether it is appropriate to apply some form of relativity to the interested party concept.¹³

A restriction of the interested party concept based on the doctrine of relativity perfects the subjective legal relationship. In the legal administrative relationship the doctrine of relativity boils down to a restriction of the claim that can be made by the citizen vis-à-vis the administration for compliance with legal rules which are partly intended to protect the citizen's interests.¹⁴ Views on the restriction of the breadth of the interested party concept range from outright rejection¹⁵ to cautious proposals in that direction.¹⁶

To a certain extent core concepts such as decision, administrative body and interested party are vague in content. Nevertheless, there is not a great deal of latitude in interpreting them. While the boundaries of the interested party concept are ultimately determined by standards and legal policy, without legislative intervention changes in the definition of the concept can be effected only gradually and in a relatively marginal sense. For example, restriction of the interested party concept by introducing the relativity requirement into the concept would require legislative intervention.

2.2 Blurring of the boundary between the domains of public and private law

The second trend in the administrative relationship is the blurring of the boundary between the domains of public and private law. Government tasks are no longer performed only by state, provincial and municipal bodies and other legal entities governed by public law, but also by private organizations. Independent administrative bodies are flourishing on the borderline between public and private law. Various attempts to gain an overview of the number of independent administrative bodies have repeatedly resulted

¹¹ Commissie Rechtsbescherming VAR (2004).

¹² Commissie evaluatie Awb II (2001), p. 18-19.

¹³ De Poorter (2004), p. 62 ff.

¹⁴ Pront-Van Bommel (2002), p. 117.

¹⁵ Pront-Van Bommel (2002), p. 138-139; De Poorter (2003), p. 28.

¹⁶ Schueler (2003), p. 28; See also Verheij (2006), p. 99-112.

in impressive lists of unknown and in some cases unsuspected administrative bodies.¹⁷ By assigning certain government tasks to private organizations the government is in danger of losing sight of the range of its activities.

The proliferation of the kinds and numbers of independent administrative bodies illustrates the changes in the legislators' political focus. On the one hand independent administrative bodies may result from governmentalization, when the legislators recognize public interests in private law relationships and assign public law tasks to legal entities governed by private law. An example of this is the *Stichting Toezicht Effectenverkeer* (Securities Board of the Netherlands). As the *Autoriteit Financiële Markten* (Netherlands Financial Markets Authority) this private board has become a legal entity governed by public law. Occasionally the involvement of a public interest is only recognized by the court and it is only in retrospect, in a specific conflict brought before the administrative court, that it becomes evident that administrative law is applicable. This occurs with boards charged with the allocation of subsidies or benefits, such as the *Stichting Silicose* (Silicosis Foundation) benefits.¹⁸

A trend which is the opposite to governmentalization is that towards shedding public tasks by assigning them to private organizations. Privatization may also take the shape of constructing independent administrative bodies – private organizations set up for the sake of efficiency.

The existence of independent administrative bodies shows that the boundary between government and non-government is blurred. In addition to the question of legal protection, another question with regard to independent administrative bodies is to what standards they must comply. To what extent must independent administrative bodies comply with the principle of legality and with standards of public access? When the chips are down – that is, when a specific conflict is brought before the administrative court – it has to be clear whether or not an administrative body is involved. No matter what trends there may be towards convergence in standards, the question of whether or not an administrative law relationship is involved must be answered unequivocally.¹⁹

3 Standards and legal concepts

The second category of legal factors which influence legal quality consists of legal standards and legal concepts. These have to do with develop-

¹⁷ *Algemene Rekenkamer* (Court of Audit) (2000). The term used, 'rechtspersoon met een wettelijke taak' (legal entity with a statutory task) overlaps to a large extent with the independent administrative body. See also Kloosterman et al. (2002).

¹⁸ *Raad van State* 27 August 2003, AB 2004, 10 with note by Verheij (*Stichting Silicose*). Another example is the *Stichting financiële hulpverlening vuurwerkram* (Foundation for financial aid relating to the fireworks disaster) in *Raad van State* 19 May 2004, JB 2004/256 with note by Peters).

¹⁹ Wetenschappelijke raad voor het regeringsbeleid (2002), p. 132. Ultimately a kind of reciprocity arises whereby public law standards also apply in private law relationships and vice versa.

ments in the way the administrative relationship is shaped in practice. What legal concepts are used and what legal standards play a role in this context?

Traditionally standards have been set through legislation. Special Acts, sometimes supplemented by lower-level legislation, indicate the standards with which citizens and government authorities must comply. Ideal-typically, these standards are in optimal accordance with the principles of legal certainty and legal equality.²⁰ The legislation process guarantees knowable standards, so that ultimately the court is able to establish what is lawful. Moreover, the abstract character of legislature safeguards universal rules and therefore legal equality.

However, alternatives to legislation are developing, such as standardization by the administrative body itself in the form of policy rules, or standardization by or in conjunction with the target group in the form of interactive regulation, self-regulation and agreements. The relevance of these alternatives to legal quality becomes clear when they interpret principles such as legal equality and legal certainty in different ways.

These alternative legal concepts are used mainly for the sake of values which have nothing to do with any legal discourse, such as functionality, efficiency and legitimacy. The idea of functionality also underlies the tendency to replace concrete juristic acts – usually issuing permits – by general rules.²¹ Tailor-made provisions are replaced by universal rules, often with the argument that this reduces the pressure of rules for the public – often companies.²² The consequence of this trend is a shift from preventive towards repressive monitoring, with an increased role for punitive administrative law.

3.1 Developments in legislation

Legislation seems to be becoming a less and less appealing legal concept. This has to do with criticism of classic rule-of-law principles such as legal equality and legal certainty. The principle of equality is felt to be oppressive.²³ A differentiated approach is required to tackle calculating behaviour by members of the public which is detrimental to the public interest, and this is impeded by the general standards laid down in legislation. More open standards and a broader scope for executive administrative authorities are solutions used to combat this problem in legislation techniques and they lead to de-emphasisation of the principle of equality.²⁴ Zijlstra & Van Ommeren strongly condemn this

²⁰ Scheltema (1996).

²¹ For a comparative product study see Houweling (2006).

²² This mechanism has been observed in environmental legislation. Another example is the proposed replacement of the *gebruiksvergunning* (permit to use a public building) with the *Besluit brandveilig gebruik bouwwerken* (Decree on Fire Safety in the Use of Buildings) (see TK 2006/07, 29 383, no. 63, p. 17 ff.).

²³ Government's vision 'De Andere Overheid', TK 2003/04, 29 362, no. 1; See also Tollenaar (2004).

²⁴ Raad voor Maatschappelijke Ontwikkeling (2002), p. 34; Wetenschappelijke raad voor het regeringsbeleid (2002), p. 111. For a government position see the policy document 'Bruikbare rechtsorde', TK

tendency;²⁵ they say that if differentiation is needed in certain cases it should be incorporated or made possible in the legislation itself.

It appears that the principle of legal certainty is not a constant factor either – at least the law is not a good source of legal certainty. Vague standards and a complicated stratification of standards of conduct make the law obscure – not only to the public but also to the court.²⁶ A lack of legal certainty must be compensated for; to an increasing extent government authorities are expected to take an active role in designing policy and providing information about the way in which administrative powers are exercised. This is highlighted not only by the codification of policy rules but also by the rise of new legal concepts such as contracts and agreements.

3.2 Standardization by administrative authorities: policy rules and ‘pseudo policy rules’

The observation that the legislators are failing in their legislative task is anything but new.²⁷ However, the solutions adopted to try to compensate for this failure are new – for example the way standardization is approached by administrative authorities. To the extent that the administrative authority has latitude or freedom in exercising an administrative power, it will inevitably make use of supplementary rules. Policy can be established and made known by means of decisions, but policy may also consist of guidelines, internal instructions, model decisions, etc.

Standardization by an administrative authority has taken the specific shape of the codification of policy rules. In the Netherlands an administrative body is legally authorized to establish policy rules so long as they refer to matters within its field of competence. An administrative body may also lay down policy rules pertaining to the administrative competence of another administrative body, but to do so it needs special authority. If the authority to lay down policy rules is absent, the rules laid down are referred to as guidelines or ‘pseudo policy rules’.²⁸ It is precisely because of the legal basis for the establishment of policy rules that some observers see major similarities between policy rules and universally binding regulations.²⁹

The importance of policy rules increases as legislation grows vaguer. Sometimes the task assigned by the legislators to administrative bodies is so complex

2003/04, 29 279, no. 9, p. 18.

²⁵ Zijlstra & Van Ommeren (2003).

²⁶ This is why Scheltema, for example, questioned the principle of legality: Scheltema (1996).

²⁷ Loeff & Struycken made reference to this. Van der Hoeven (1989).

²⁸ *Centrale Raad van Beroep* (Central Appeals Tribunal) 19 November 2003, AB 2004, 119 with note by Bröring, and Bröring (1993).

²⁹ Ruiter (1986), p. 65-70, and Bröring (1993), p. 387-400. In legal practice it has also proved difficult to make a distinction between the two. See *Raad van State* 1 February 2006, AB 2006, 152 and *Raad van State* 9 August 2006, AB 2006, 366 both with notes by Tollenaar.

that it is almost impossible for them to carry out this task lawfully without having laid down policy rules. In this sense the whole collection of rules which apply in the exercise of an administrative power seems to be a constant factor. When the legislators withdraw, this does not necessarily lead to a reduction in the number of standards, but it does often lead to a change in the way standards are manifested. Ultimately, in administrative bureaucracy people are looking for a digital answer to the question: may I do it or not? An interesting phenomenon in this context is the ongoing IT-ization in which this digital answer is laid down. Depending on the data input, the computer system produces a certain answer. Bovens & Zouridis rightly question how this relates to the classic administrative task which demands that every decision must take account of the concrete circumstances of the case so that any automatic application of rules is inappropriate.³⁰

3.3 Standardization by the target group: interactive standardization and self-regulation

In addition to standardization by the government, standards are set by or in conjunction with those for whom the standards are intended – the target groups. A distinction can be made depending on the extent to which the government and the public are involved in the establishment of the standards. If the standards are set in a reciprocal process between the target group and the government, they are laid down in contracts or agreements in which the administrative authority agrees to exercise its power in a certain way and the citizen agrees to observe certain rules of conduct. Negotiation with the authorities about what standards are to apply fits in with the evolution of citizens from silent subjects to responsible parties, capable of protecting their own interests. Interactive standardization may, for example, take the form of a reintegration agreement between an individual who is returning to the labour force and the administrative body, in which both parties assume certain obligations.³¹

If the administrative authority is not involved in the development of the standards, the process is one of self-regulation. Several versions of this process are conceivable. Often members of the public are assigned a duty of care, or the granting of a permit is made dependent on possessing a certificate. This certificate is part of a number of standards agreed to without any government intervention, laid down for example by the profession concerned. A private certifying institution monitors compliance with these standards. This means that the role of the government has become very indirect.

Often when standards are laid down by members of the public, those involved belong to fairly well-defined professional groups whose actions influence a public interest; an example is the health care sector. The name of anyone who gives medical treatment in the Netherlands must be entered into a central

³⁰ Bovens & Zouridis (2002).

³¹ *Central Raad van Beroep* 30 September 2003, AB 2004, 100 with note by Faber.

register.³² A care provider must provide responsible care (Article 40 *Wet op de beroepen in de individuele gezondheidszorg*: Individual Health Care Professions Act). What ‘responsible care’ entails is laid down in numerous protocols drawn up by the profession itself; moreover, these protocols are enforced primarily by disciplinary measures – that is, by the profession itself.³³ Public law may then intervene by striking off a name from the register in combination with prosecution under criminal law.³⁴

This self-regulation covers a fairly closely-defined group with specialized knowledge. The duty of care laid down in the proposed *Woningwet* (Housing Act) is less clear. Licences are to be granted to citizens who in principle are not professionals but who will be confronted with a far-reaching duty of care for health and safety in connection with a prospective construction or demolition process. This implies that the non-professional citizen has knowledge of quite complicated technical standards, which are moreover not always knowable.³⁵

3.4 Growth of punitive administrative law

Developments in the way standards of conduct are set also have consequences for the way in which compliance with these standards by individual citizens and businesses is monitored. To an increasing extent the enforcement instruments at the disposal of administrative authorities consist not only of remedial sanctions but also of punitive sanctions such as administrative fines. This development indicates that not only is the boundary between public and private becoming blurred (see 2.2), but also the boundary between administrative law and criminal law. More and more skirmishes are breaking out on the borderline between the two areas of law, especially now that attempts are being made to increase the scope of criminal law by enabling the public prosecutor to impose punitive measures without the intervention of the court.³⁶ In future extra attention will have to be paid to the supervision of citizens’ and businesses’ compliance with their obligations. Questions arise, for example, as to how criminal law safeguards are to be implemented when administrative bodies impose punitive sanctions. Is the administrative court adequately equipped and sufficiently active to take on the task of the criminal court?

³² Art. 3 and 4 of the *Wet op de beroepen in de individuele gezondheidszorg* (Individual Health Care Professions Act).

³³ Medical disciplinary rules are governed to a considerable extent by public law because the organization and procedure of the disciplinary tribunal are regulated in some detail in the Health Care Professions Disciplinary Regulations Decree.

³⁴ Art. 7 and 6 of the *Wet op de beroepen in de individuele gezondheidszorg*.

³⁵ See proposed Art. 1a of the *Woningwet* (Housing Act), see TK 2002/03, 29 392, no. 2. For criticism, see Teunissen (2004), p. 418-424 and Otto’s response to it Otto (2004), p. 1750-1751.

³⁶ For supposed differences in quality between administrative law and criminal law see Bröring (2005) (see <http://irs.ub.rug.nl/ppn/296307858>).

3.5 Influence of European law (internationalization)

In the shifting relationship between rule-of-law values, the European-law environment of administrative law has acquired a special meaning. From the perspective of European law, the core standard is the effective implementation of European law regulations. This means that standards set by national law must fulfil certain requirements, since national law must ensure the effective implementation of European law standards. These requirements will probably not be met if a European directive is not implemented in an Act but only incorporated in an agreement or a policy rule.

Moreover, to an increasing extent national principles are interpreted from a European perspective; examples are the nationally operating principle of legitimate expectations and the principle of respect for the discretion of the administrative body. Promises made by an administrative body cannot be enforced if European interests require conformity to European regulations.³⁷ It has also become clear that in certain circumstances European law limits the freedom of the administrative authority not to reassess repeated requests on their contents but to treat them summarily. If an administrative authority's refusal to grant a repeated request contravenes a European interest, it will result in an obligation to reconsider a previous decision.³⁸ On the basis of European law limits are placed on the discretion of administrative bodies.

4 Monitoring

The final category of factors which influence legal quality have to do with the way the actions of administrative bodies are monitored under law.³⁹ In a certain sense monitoring by the court and the supervisory body amounts to a legal quality system. Interested parties can appeal against a decision through the administrative court, while on a somewhat more structural basis, external monitoring is carried out by supervisory bodies.

4.1 From supervision to legal protection and back again

In the 20th century external supervision in the Netherlands developed mainly within the administrative hierarchy. As a legal remedy a member of the public was able to question the correctness of administrative decisions by appealing to an administrative body higher up in the hierarchy

³⁷ Jans et al. (2002), p. 216 ff., and the case law referred to there.

³⁸ Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, AB 2004, 58 with note by Widdershoven.

³⁹ Internal quality checks, including complaint procedures and administrative appeals, are not taken into consideration here.

(administrative appeal).⁴⁰ This higher administrative body had the power to completely reconsider the challenged decision. The citizen could then appeal to the Crown against this higher authority's decision. The judgment in the ECHR *Benthem* case put an end to this system.⁴¹ Administrative appeal has been replaced – or supplemented – by legal protection through the administrative court.

The change from administrative appeal to legal protection through the administrative court means that monitoring has become more and more focused on the product of the decision-making process. The administrative court is only interested in the decision at hand and the conflict about it between citizen and administrative authority.⁴² However, in addition to monitoring at the product level there is also a need for monitoring at the process level; after all, the observation that the administrative authority has made a wrong decision raises the question of whether the administrative authority always makes the wrong decision or whether this is an incidental failure. The logical consequence of shifting legal protection to the administrative court is an expansion of the number of supervisors monitoring the exercise of administrative powers, particularly by lower administrative bodies. The administrative bodies higher in the hierarchy have lost their monitoring function, but have been compensated by being assigned more and more supervisory powers. The fact that to an increasing extent standards relating to administrative law have been codified in universal statutory rules is evidence that supervision is an expanding component of administrative law.

4.2 Legal protection, supervision and legal quality

The developments in legal protection and supervision outlined above have at least two consequences for the legal quality of decision-making. The way the administrative court judges government actions is determined by its perception of its task, which is that in the first place it must try to resolve the conflict at hand.⁴³ The administrative court's aim is not by definition to assess whether the decision is in accordance with objective law. Instead, it responds to the grievances brought forward by the interested party appealing against the decision. The consequence is that in the dispensation of administrative justice the question answered is not whether, in view of the legislation and of general principles of proper administration, the citizen has received what he or she is

⁴⁰ There are exceptions: the *Centrale Raad van Beroep* (Central Appeals Tribunal) has existed for over a hundred years.

⁴¹ ECHR 23 October 1985 (*Benthem*), *AB* 1986, 1 with note by Hirsch Ballin, *NJ* 1986, 102 with note by Alkema.

⁴² Cf. the trend towards subjectivization described in 2.1.

⁴³ Brenninkmeijer et al. (eds.) (2003), specifically the contributions by Marseille and Bröring in this volume.

entitled to, but whether the citizen's objection to the decision justifies changing that decision.

The administrative court seems to be less and less inclined to focus on the substantive correctness of a decision; instead, in assessing a decision it focuses mainly on formal standards, which after all often take the sting out of a conflict. The important thing is the way the citizen was treated, how the decision was prepared and conveyed. In assessing the decision the administrative court takes administrative discretion into account⁴⁴ and is therefore more likely to reverse a decision on the grounds that it does not understand the decision in question (lack of motivation) than on the grounds that the decision in question is substantively incorrect.⁴⁵ After a formal reversal it is again up to the administrative authority to make a better decision, though no judgment has been made as to the substantive quality of the decision.⁴⁶ In new legislation there is evidence of an opposite tendency; adaptations of administrative procedural law through ongoing deformalization (Article 6:22 *Algemene wet bestuursrecht*) and universal introduction of what is known as the 'administrative loop' are intended to move the main focus back to substantive quality.⁴⁷

Since the administrative court cannot be regarded as being capable of providing full quality assurance as regards decision-making, the question arises whether other mechanisms are to be found in the law to safeguard these aspects of quality. If legal protection does not provide a guarantee that administrative bodies exercise their powers in such a way that citizens can obtain what they are entitled to, then supervision by higher administrative bodies might be expected to serve as a safeguard mechanism. However, supervisory bodies do not assess concrete decisions but the organization of decision-making procedures in an administrative body. A supervisory body monitors the presence of the organizational preconditions for making the right decision. The result is a formalization of the administrative task, manifested in the establishment of policy rules.⁴⁸ However, a favourable judgment on the part of the supervisory body as regards the organization and the working procedures described says nothing about whether or not the policy has been applied in a specific case. In other words, supervision also partially fails to assess substantive quality.⁴⁹

⁴⁴ Especially since the report prepared by the Van Kemenade Committee: Kemenade (1997).

⁴⁵ *Raad van State* 11 April 2003, *AB* 2003, 281 with note by A.T. Marseille.

⁴⁶ It is conceivable that a decision of poor substantive quality is repeatedly annulled on formal grounds, replaced by a decision which is substantively identical, and then again annulled on formal grounds. For an example of this see Zwart (1999), p. 90 ff.

⁴⁷ Draft bill, General Administrative Law Act Adaptation.

⁴⁸ For example, the VROM (Housing, Spatial Planning and the Environment) inspection is focused mainly on whether policy and policy rules are in place. Tollenaar (2006).

⁴⁹ Cf. De Ridder (2004), p. 39 ff.

5 Summary and conclusions

In terms of the law, legal quality is influenced by the way in which the administrative relationship has been codified with the help of core concepts, by developments in legal concepts and legal standards, and finally by developments in the way compliance with legal standards is monitored. As regards the core concepts, a salient feature is that the legislators are considering introducing the relativity requirement into the interested party concept. However, the most interesting legal factors are related to changing usage of legal concepts and to developments in monitoring compliance.

To an increasing extent standards are set outside formal legislation. The law itself does not provide a complete answer to the question of what is lawful in a specific case. Nevertheless, in the application of bureaucratic rules the need is felt for a regulation system which leads to binary answers. Regularity and standardization are in fact typical features of all organizations of a certain size.⁵⁰

The use of alternative legal concepts as the law becomes vaguer suggests that there is a regulation constant, based on the need to reduce uncertainty for both the administrative authority and the public. This regulation constant leads to digitization in the form of a regulation system which offers only two answers: the decision is viable or it is not. Shades of grey are not conducive to reducing uncertainty. There are several factors which influence this phenomenon. For example, the number of parties involved in the decision-making process and the frequency of the decision-making process are factors which may well result in universal rules. The regulation constant leads to the conclusion that deregulation is no more than a cosmetic operation whereby standards laid down in legislation are exchanged for standards laid down in other legal instruments such as protocols, policy rules or agreements.

Due to the increasing significance of alternative and extralegal standardization, the question arises of how these legal concepts relate to rule-of-law principles such as legal certainty and legal equality. Alternative, extralegal standards do not lead to the same legal quality of decision-making but do create different relationships between certain aspects of quality. On the one hand alternative or extralegal standards may lead to better quality, for example because of their positive effect on efficiency in the form of a reduction in enforcement costs. On the other hand alternative legal concepts may also lead to poorer quality, for example as regards legal equality, legal certainty or enforceability.

Monitoring and supervision are also important factors in determining legal quality. The shift from a complete review on the basis of objective law to a limited review of the subjective administrative relationship is compensated by administrative supervision which focuses on the whole process of the exercise of an administrative power. The relationship between the court, the supervisory body and legal quality is complex. The administrative court assesses legal quality mainly on the basis of procedural standards, and its assessment of quality is

⁵⁰ Cf. Donner (1987), p. 125.

therefore incomplete. The assessment of legal quality by supervisory bodies is often also focused on procedure, but at the organizational level. Moreover, the supervisory body's focus on working procedures and policy leads to a higher degree of standardization, which means that the individual dispensation of justice is lost. More supervision does not automatically lead to improved legal quality.

An examination of the legal factors determining legal quality raises questions as to exactly how changes in the law influence the way administrative bodies make decisions. It is important to produce empirical evidence for the influence of legal factors, since it is striking that the academic publications studied for this contribution were rarely based on empirical evidence. In particular, assertions about broadening or narrowing of the administrative relationship tend to be based on incidents which have been the subject of a large amount of social and political attention.

In describing the legal factors, a striking aspect is that the law is becoming narrower and narrower. In spite of attempts to move in the opposite direction, there is evidence of increasing juridification or formalization of the administrative relationship. This is a social trend which is inspired by the aim to reduce uncertainty. Reduction of uncertainty leads to making standards more stringent rather than more blurred. Universal legal standards are becoming increasingly concrete and specific. However, in this process regulators run up against the boundaries of what can be regulated. The automatic reflex is then to take refuge in open standards, substantiated by the law by invoking an underlying sense of justice. In the process of making standards more stringent, reasonableness and fairness act as a lubricant in the search for the most just decisions. This is a constant in law; standards are made more and more stringent by being made concrete and if possible codified, but this is automatically corrected by the sense of justice.⁵¹

⁵¹ This same phenomenon is also to be found in private law, where reasonableness and fairness, in spite of or owing to detailed legislation, are also dominating the assessment of lawfulness to an increasing extent.