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Access to Justice in Administrative Law: A Socio-Legal Perspective on the Appeals Procedure

The right of access to the judiciary, guaranteed by Article 6 of the European Convention on Human Rights, is of the utmost importance in today's society. Especially in the field of administrative law, judicial procedures are of vast importance as settlements are rare. Dutch law prescribes that citizens who experience a conflict with an administrative authority should first start an objection procedure against the decision 'in primo' at the body itself (Art. 7:1(1) in conjunction with 8:1(1) of the *Algemene Wet Bestuursrecht*). Per annum, 2,6 million notices of objection are lodged to administrative authorities. The objection stage functions to a large extent as a sieve: only one out of ten of the negative decisions taken after the objection stage result in an application for judicial review to a district court.

During the procedure at a district court the judge will evaluate the legality of the decision 'on objection'. Judgments from the administrative division of the district court can, as a general rule, be appealed both by citizens and administrative bodies. Appeals are filed both on questions of law and on facts. Appellate proceedings take place at one of the four administrative courts of appeal, with the Central Appellate Administrative Court and the Judicial Department of the Council of State handling the majority of all appeals.

Research indicates that citizens appeal more often for judicial review than administrative bodies do. Partly, this difference is caused by the lower success rate of citizens at the district courts. However, even if we take this lower success rate into account, citizens appeal about four times more often than administrative bodies do. Although citizens appeal more often, they are less successful than administrative authorities. If an administrative body appeals, its chance of success ranges from 70 per cent to 55 per cent. If a citizen appeals, he or she will be successful only in one out of five cases.

Due to this development, administrative appellate courts in the Netherlands are now facing large numbers of appeals in cases with no real prospect of success. This necessitates an investigation into the current use of the appeals procedure by citizens. My research therefore explores whether the appeals procedure in administrative law is used in an efficient manner. To answer this question, I will examine which factors influence the decision of an actor in an administrative process to appeal at a higher court, if such an appeal is legally possible. Moreover, I will analyse whether citizens' appeal strategies reflect the functions of the appeals procedure as envisaged by the legislator. These functions include a second chance for parties, supervision by the appellate court on the district courts and the development of uniform case law at the district courts.

Data will be collected in four fields of administrative law: social assistance law, aliens law (excluding asylum cases), national tax law and construction law. Together, these four fields account for the majority of all cases in administrative appellate proceedings. Moreover, this selection guarantees that the major appellate courts are included in the study.

In all areas, one hundred surveys will be conducted with citizens who have received a negative decision from a district court and who have already chosen whether or not to appeal. Half of these surveys will be conducted with citizens who did appeal, and half of the surveys will be conducted with those who did not. Citizens will be questioned on their motives to appeal for review. For instance, it will be investigated whether the choice to appeal is taken in a rational fashion by weighing costs and benefits, or whether citizens are led by normative concerns.

In addition, the judgments of the court of first instance in the cases in the sample will be examined. From the judgments, information will be gathered concerning the merits of the

case and the procedure at the court of first instance. By using this research method, more objective information can be gathered on factors that influence the decision to appeal.

Both data collection methods will be used to evaluate whether the current utilization of the appeals procedure by citizens is in line with the functions of the appeals procedure. However, in order to investigate this matter further, operationalization of these functions is necessary. In Germany, a leave is currently needed to appeal for review in administrative law. Such a leave is granted if a case fulfils one of five criteria outlined in § 124 of the *Verwaltungsgerichtsordnung*. Appeal is possible in case of serious doubts as to the correctness of the judgment, if the case is complex with regard to the facts or to the applicable law and if the case is of fundamental importance. In addition, a leave will be granted if the judgment deviates from the case law of higher administrative courts and if there has been a deficiency in the procedure at the court that may have affected the judgment.

The German system of administrative procedural law is broadly comparable to the Dutch system. Moreover, the functions of the appeal procedure in Germany are the same as in the Netherlands. This study will therefore use the German criteria for granting an appeal to measure the efficiency of the utilization of the appeals procedure. For this purpose, the criteria have been adapted to the Dutch legal system and translated into questionnaire items and items in the checklist for the file research. Any differences in the scores on these items between citizens who did and those who did not appeal will be analysed in the light of the functions of the appeals procedure.

By combining file research and questionnaires, a clearer picture can thus be obtained of both citizens and administrative bodies' rationales for appealing and the efficiency of the utilization of the appeals procedure by citizens in administrative law. In this manner, a clearer picture can be obtained of the choices made by participants in administrative proceedings, which may inform judges, lawyers and the legislator.