

## Summary

SUPPLEMENTING THE LEGAL GROUNDS. THE SUBSTANCE OF ARTICLE 8:69 AWB IN THE LIGHT OF ARTICLE 48 (OLD) RV.

In both civil and administrative procedural law, a distinction is made between powers relating to the facts and powers relating to the law. Strict application of this distinction leads to problems: the parties will select the facts they wish to submit based on the law they deem to apply to their case and the court will select the applicable law based on the facts submitted by the parties. This means that a difference of opinion between the parties and the court with regard to application of the law or the applicable law readily makes that the facts submitted do not fit the court's application of the law. This in turn could mean that a party may lose a case, not because it was not entitled to what it had claimed, but rather because the case was prepared in a way which proved to be 'wrong' in the sense of different from the way it would have been prepared had the party known the court's application of the law in advance.

Article 8:69, paragraphs 2 and 3 of the General Administrative Law Act (hereafter: Awb) and Article 48 (old) of the Code of Civil Procedure (hereafter: Rv) provided for the court's powers with regard to the law and the facts. In current civil procedural law, Article 24 and 25 Rv fulfil this role. These articles read as follows:

"Article 48 (old) Rv

When deliberating the court shall ex officio supplement the legal grounds which have not been relied on by the parties.

Article 8:69 Awb

1. The District Court shall pass judgment on the basis of the notice of appeal, the documents submitted, the proceedings during the preliminary investigation and the judicial investigation.
2. The District Court shall ex officio supplement the legal grounds.
3. The District Court may ex officio supplement the facts.

Article 24 Rv

The court shall conduct investigations and pass judgment on the basis of what the parties rely on to substantiate their claim, request or defence, unless otherwise specified by law.

Article 25 Rv

The court shall ex officio supplement the legal grounds.”

Article 8:69, parr. 2 and 3 Awb are based on Article 48 (old) Rv. The aim of the research for this thesis was to determine the meaning of Article 8:69 Awb in the light of Article 48 (old) Rv.

The problem was researched from the perspective of the court, legal counsel and the ‘interested party’<sup>1</sup> which finds itself or himself confronted with the application of Article 8:69 Awb and wishes to know what the provisions of this article mean and what their effect is in the proceedings. Research into the meaning of Article 8:69, par. 1 Awb was not exhaustive. The reason for this is that Article 8:69, par. 1 Awb relates to the scope of the legal dispute, whereas the scope of the legal dispute in civil procedural law is not governed by Article 48 (old) Rv.

This thesis is subdivided into four parts. The first part contains the introduction (Chapter 1). The second part deals with civil procedural law and the interpretation of Article 48 (old) Rv around 1994. In the third part, administrative procedural law and Article 8:69 Awb are discussed. Parts II and III begin with a description of relevant concepts used in the thesis in relation to the respective topics (Chapters 2 and 10). This is followed by a definition of the context within which Articles 48 (old) Rv and 8:69, parr. 2 and 3 Awb respectively are applied (Chapters 3 up to and including 6 for civil procedural law, Chapters 11 and 12 for administrative procedural law). The subject of Chapter 9 is the revision of the Code of Civil Procedure and the reports of the Fundamental reconsidering of civil procedural law. Subsequently, the written and unwritten provisions of Article 48 (old) Rv (Chapters 7 and 8) and 8:69, parr. 2 and 3 Awb (Chapter 13) are discussed. Finally, a number of conclusions are formulated (Chapter 14).

#### *Civil procedural law*

In Chapter 2, several concepts are defined within the context of adding to the legal grounds. The most important of these are: ‘rechtsgronden’ (legal grounds: the legal provisions on which the court bases its judgment), ‘feitelijke gronden’ (factual grounds: the factual arguments on which a party relies to underpin its claim or defence, or on which the court relies in its judgment) and ‘feitelijke grondslag’ (factual basis: the facts which meet the procedural requirements and on which the court may base its judgment). The court adds the legal grounds if it bases its judgment on legal provisions which the parties have not invoked. If the court’s interpretation of a legal provision submitted by the parties is different from theirs, it has not added the legal grounds, as it still bases its judgment on a provision invoked by the parties.

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1 Article 1:2, par. 1 Awb: ‘Interested party’ is to be taken to mean a person whose interest is directly affected by the administrative decision.

The principles of party autonomy and judicial restraint are the topic of Chapter 3. Party autonomy starts from the premise that the parties are in control of specific aspects of the proceedings: the institution and continuation of the proceedings; the scope of the legal dispute; taking part in the proceedings. Party autonomy does not apply to the course of the proceedings. This is rather a matter of collaboration between the parties and the court.

During court proceedings, party autonomy is much reduced, particularly in determining the factual basis.

The principle of judicial restraint implies that the court must act with restraint in respect of those aspects of the proceedings over which the parties have control under the principle of party autonomy. Party autonomy and judicial restraint are limited where public policy ('openbare orde') provisions apply.

In Chapter 4, the four requirements of the principle of *audi et alteram partem* are discussed: the parties must be heard and heard equally, the court must listen to and take into account all that the parties put forward. This means, *inter alia*, that the parties must have the opportunity to submit all they wish to submit in order to convince the court of the validity of their claim or defence and that they are entitled to respond to all that is submitted during the proceedings. From this principle it follows that the court may only take those facts into account to which the parties have had sufficient opportunity to respond. Furthermore, the court may only pass judgment on a specific point after the parties have had the opportunity to present their views on it.

Chapter 5 concerns the principle of *ius curia novit*. This principle implies that the application of the law falls within the jurisdiction of the court. The court is responsible for the correct application of the correct legal provisions. The court is therefore neither bound nor limited by the legal observations of the parties.

Chapter 6 deals with the duty of the civil court, which is to *ex officio* decide whether the law justifies awarding the claim on the basis of the facts given.

In Chapter 7, three rules on the application of legal provisions by the court are discussed: the court applies the law *ex officio*, the court assesses the legal constructs of the parties *ex officio* and the court has a duty to *ex officio* supplement the legal grounds. From this it follows that the court is neither bound by the provisions relied on by the parties nor by the legal constructs based on these provisions. Furthermore, it means that the court is obliged to *ex officio* add applicable legal provisions not put forward by the parties and apply these (supplementing the legal grounds).

The duty to add legal grounds is limited by the facts and the factual grounds submitted by the parties, by the claim itself and whether a party clearly limits the legal basis of its claim or defence. The principle of *audi et alteram partem* means at best that the parties must be heard before the court adds a legal ground.

Another topic discussed in this chapter are the various types of legal provisions in civil procedural law: *rechtsnormen van openbare orde* (public policy provisions), *rechtsmiddelen* (legal provisions that the court is not allowed to add *ex officio*), *regelend recht* (dispositive provisions: provisions that parties may set aside and replace by their own legal provisions), *dwingend recht* (mandatory provisions: provisions which may not be set aside) and procedural provisions.

The prohibition against supplementing the facts is discussed in Chapter 8. This prohibition can be subdivided into four rules: the court is not allowed to introduce facts into the proceedings; it is not allowed to supplement the factual grounds of the claim or defence (this prohibition constitutes a considerable obstacle to supplementing the legal grounds, since the court is not allowed to add legal grounds if by so doing it also adds factual grounds); the court is not allowed to take facts into account that do not meet the procedural requirements; the court is not allowed to supplement the facts implicitly by applying a legal provision where the required facts have not been established.

There are several types of 'facts' in civil procedural law: '*notoire feiten*' (facts commonly known), general empirical principles, a judge's own knowledge (knowledge acquired in the capacity of private person, knowledge acquired in his capacity of judge and knowledge of the way in which provisions are applied in practice) and procedural facts.

The following actions with regard to facts were not prohibited under Articles 48 and 176 (old) Rv: inferring from facts; observing that certain facts have not been submitted or established; interpreting documents submitted; characterising facts and asking questions.

The subject of Chapter 9 is the revision of the Code of Civil Procedure and the reports of the Fundamental reconsidering. The following aspects are discussed: adjudication as a government service, party responsibility, the '*substantiëringsplicht*' (in his initiating summons the claimant must include all the arguments the defendant has put forward at that point and its response to these arguments; furthermore, both the claimant and the defendant must identify the evidence they possess) and the duty to be truthful. Changes in party autonomy and judicial restraint, and the role of the court under the new procedural law are also addressed.

Under the new Code of Civil Procedure, the duty to supplement the legal grounds has been laid down in Article 25 Rv. Article 24 Rv now contains the prohibition against supplementing the factual grounds. The rule system that came about under Article 48 (old) Rv is now based on Articles 24 and 25 Rv.

The most important change brought about by the revision is that of the character of civil procedure. Under the current (new) civil procedural law, there is little opportunity to develop the dispute during the proceedings. Instead of continually adding new arguments, facts and evidence, the parties are expected to provide the court with a clearly defined dispute together with all the arguments, facts and evidence.

*Administrative procedural law*

In Chapter 10, a number of concepts are defined in relation to the section on administrative procedural law. These are: 'omvang van het geding' and 'grenzen van de rechtsstrijd' (scope of the review and limits of the legal dispute); legal grounds, facts and factual basis; 'beroepsgrond' (grounds for appeal), 'grief' (complaint), 'argument' (argument) and factual ground; 'onderdelen van het besluit' (components of the administrative decision<sup>2</sup>); 'ambtshalve aanvullen' (to supplement ex officio) and 'ambtshalve toetsing' (to review ex officio); 'reikwijdte van de toetsing' (extent of the review) and 'inhoud van de toetsing' (elements of the review); 'zelf in de zaak voorzien' (settlement by the court).

The topic of Chapter 11 is administrative procedural law as the setting for the application of Article 8:69 Awb. This Chapter is subdivided into three parts. The first part focuses on the choice for protection of rights as the primary objective of administrative procedure. This choice has two important consequences. The first is that the degree to which the court is allowed to review an administrative decision is now limited to the degree to which the administrative decision is disputed by the appellant. The second consequence is the prohibition against *reformatio in peius*.

In the second part of Chapter 11, a number of characteristics and principles of administrative procedural law are discussed. These are: the active court, the requirement to seek to establish the actual truth, compensation for inequality, the principle of finality, the principle of *audi et alteram partem*, the principle of proper administration of justice and *ius curia novit*. The question as to whether party autonomy exists in administrative procedural law is examined as well.

The third part deals with the 'argumentatieve fuik' (argumentative fyke): an appellant may only submit a new ground on appeal (with a District Court), if this ground relates to the grounds the appellant relied on in the previous phase of 'bezwaar' (administrative objection) or if it relates to that which was reconsidered in the administrative objection phase) and the 'bewijsfuik' (evidentiary fyke: the appellant is not allowed to submit new facts and evidence on appeal if it could already have submitted these facts and evidence in the administrative phase (primary phase and administrative objection phase). The following questions are examined: what is the meaning of these fykes, what are their advantages and disadvantages and are these fykes accepted in case law?

The topic of Chapter 12 is the administrative court's task as the context for the application of Article 8:69, parr. 2 and 3 Awb. A distinction may be made as to its task in the first phase (review of the administrative decision)

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2 Article 1:3, par. 1 Awb: 'Administrative decision' is to be taken to mean a written decision of an administrative authority constituting a public law act.

and the second phase (determining the consequences if the administrative decision proves to be unlawful). This thesis deals with the first phase only.

Three aspects of judicial review of administrative decisions are discussed: the court's task (an *ex tunc* review of the lawfulness of the administrative decision), the scope of the legal dispute and the prohibition against *reformatio in peius*. Three systems may be distinguished in relation to the scope of the legal dispute. Firstly, a system by which the review is limited to the grounds submitted by the appellant (the grounds system). Secondly, a system by which the review is limited to the disputed components of the administrative decision, whereby these components are reviewed in all aspects as to the law (the system of a limited full review). Thirdly, a system by which the court thoroughly assesses the grounds submitted and reviews the disputed components marginally (the compromise system). If, during this marginal review, the court finds an administrative decision to be significantly or clearly unlawful, it will annul it. Chapter 12 also deals with the procedural rules governing the limits of the legal dispute developed in case law.

Chapter 13 focuses on Article 8:69, parr. 2 and 3 Awb. A first conclusion is that the provisions laid down in these paragraphs do not often feature in published case law. This is followed by a discussion of the duty to *ex officio* supplement the legal grounds and the discretionary power to *ex officio* supplement the facts.

The duty to *ex officio* supplement the legal grounds entails that the court is obliged to apply applicable provisions even if the parties themselves have not invoked them. The court can only supplement the legal grounds within the confines of the scope of the review, although this is not always the scope as defined by the appellant.

This Chapter also deals with the distinction between supplementing the legal grounds *ex officio* and reviewing *ex officio* (reviewing an administrative decision beyond the limits of the dispute (as set out by the appellant) with regard to public policy provisions). Subsequently, the following matters are discussed: the questions as to whether the duty to supplement the legal grounds also applies to international law and whether the court is obliged to *ex officio* examine possible conflicts between the disputed administrative decision and the European Convention on Human Rights and Fundamental Freedoms or Community Law; some questions regarding the practical application of the duty to supplement the legal grounds; various types of legal provisions in administrative procedural law (public policy provisions, dispositive provisions and mandatory provisions, '*rechtsmiddelen*', law which the parties are free to (not) invoke, procedural provisions and policy rules); the limits to the duty to supplement the legal grounds imposed by civil procedural law; '*exceptieve toetsing*' (assessing a provision's compatibility with a superordinate provision); the rule that interpretation of the law falls within the court's jurisdiction.

The section of the Chapter dealing with the discretionary power to supplement the facts begins with the question of the extent to which this power under

administrative procedural law sets aside the four rules which make up the prohibition against supplementing the facts in civil procedural law. Subsequently, the question is discussed whether Article 8:69, par. 3 Awb only contains a statement of principle or also affords the court the specific power to introduce facts into the proceedings. Within this context, a distinction is made between the power to conduct an investigation into the facts and the power to supplement knowledge the judge already possesses: facts commonly known, general empirical principles and a judge's own knowledge.

The purpose of the power to supplement the facts is subsequently discussed. Two objectives are discerned. The first objective is to meet the requirements of seeking to establish the actual truth and of compensating for inequality. The second is to establish those facts that are necessary to properly perform a judicial duty.

### *Conclusion*

In Chapter 14 a number of conclusions are formulated. The following topics are dealt with: the substance of Article 8:69, parr. 1, 2 and 3 Awb, the role of the scope of the judicial review in the application of Article 8:69, parr. 2 and 3 Awb and the effect of Article 8:69 Awb on the judicial review of administrative decisions. This is followed by addressing the convergence of civil and administrative procedural law in respect of the subject of supplementing the legal grounds.

#### *The substance of Article 8:69, par. 1 Awb*

Article 8:69, par. 1 Awb serves two purposes. First of all, this provision limits judicial review to the degree to which the administrative decision is disputed between parties. The Centrale Raad van Beroep (Central Appeals Tribunal; hereafter: the 'Centrale Raad') limits judicial review to the disputed components of an administrative decision. The case law of the 'Afdeling Bestuursrechtspraak van de Raad van State' (the Administrative Jurisdiction Division of the Council of State; hereafter: the 'Afdeling') is less clear on this, but it would be going too far to state that the Afdeling uses a grounds system. Basing myself on published case law, it is my view that the Afdeling also limits the review to the disputed components of an administrative decision.

If an administrative decision consists of clearly distinguishable separate parts, it is deemed to have components, but also each judgement within an administrative decision can be considered a separate component with regard to the scope of the legal dispute and consequently the limits of the judicial review.

The review is broadened to include a review of those components that are strongly linked to or are interwoven with (the Centrale Raad) or inextricably linked to (the Afdeling) the disputed components. In my opinion, case law developed by both the Afdeling and the Centrale Raad has established that the components that are the object of the review must be reviewed in all

aspects as to the law. There is no reason to assume, in any case, that this review is limited to determining whether the disputed component of the administrative decision is significantly or clearly unlawful.

Both courts apply a grounds system in relation to procedural provisions. The court will only assess compliance of an administrative decision with procedural provisions if the appellant claims that the procedural provision in question has been violated (if need be in his own words) or if the provision is a public policy provision.

The second purpose of Article 8:69, par. 1 Awb is that it provides what the court is allowed to and must take into account when deciding on the case: all that has been submitted during the proceedings and only that. It firstly follows from Article 8:69, par. 1 Awb that the court may only take into account that which has been submitted during the phases referred to in the provision. It may base its judgement only on those facts that are introduced during these phases and it may base its determination of the scope of the judicial review only on the grounds put forward during these phases. Moreover, it is obliged to take into account all that has been submitted in conformity with the procedural rules applying to these phases.

*The substance of Article 8:69, par. 2 Awb*

Two interpretations of the duty to supplement the legal grounds may be discerned in case law. In some cases, this duty is interpreted as a duty to supplement the grounds for appeal. This interpretation is incorrect, however, in view of the comparison with civil procedural law. The duty to supplement the legal grounds must in that case be interpreted as a duty to ex officio supplement legal provisions on which the parties have not relied, and to apply these provisions regardless. The court will have supplemented the legal grounds if it annuls an administrative decision on the grounds of a violation of a legal provision, whose violation the appellant had not claimed, and also if the court upholds an administrative decision based on a legal provision the parties had not invoked.

A distinction must be made between supplementing (the legal grounds) ex officio and reviewing ex officio. When reviewing ex officio, the court examines an administrative decision outside the limits of the legal dispute as established by the appellant. In the case of supplementing ex officio, the court remains within the limits of the legal dispute, although these are not always the limits as set by the appellant. The power to review ex officio is (generally) reserved for public policy provisions. The actions of reviewing ex officio and supplementing ex officio are not each other's opposites. In ex officio review, all three paragraphs of Article 8:69 Awb come into play. Pursuant to paragraph 1, the scope of the judicial review is widened. This is accompanied by supplementing the legal ground (the public policy provision), pursuant to par. 2, and supplementing the factual ground (the factual argument that the administrative decision is unlawful on this point), pursuant to par. 3.

Supplementing the legal grounds always takes place within the limits of the legal dispute. As referred to earlier, however, they are not always precisely the limits the appellant has set. When reviewing *ex officio*, the court widens the scope of the judicial review in order to examine the administrative decision's compliance with the relevant public policy provision. The court supplements the public policy provision within these (expanded) limits.

The question is under what conditions the court is obliged to *ex officio* examine compliance of the administrative decision with a legal provision not relied on by the appellant. Except in the case in which the court adds a legal provision to an argument submitted, this is not a question regarding supplementing legal grounds. The answer to the above question is determined by the limits of the legal dispute and therefore by the question of which system is used to determine the limits. The system of limited complete review and the compromise system allow the court to examine more than merely the grounds submitted. The court may supplement the factual grounds and the relevant legal grounds within the limits of the legal dispute. If the limits of the legal dispute are clear, the question of whether the court must assess compliance of the administrative decision with a certain provision is answered.

The primary answer to the above question is therefore: if it falls within the scope of the judicial review as set by the appellant. In addition, the court is always obliged to assess compliance of the administrative decision with public policy provisions, regardless of the limits of the legal dispute as set by the appellant.

A court that is faced with the question of whether it must assess compliance of an administrative decision with a specific legal provision will first have to determine whether such an assessment falls within the scope of the judicial review as set by the appellant. If so, it will have to examine compliance with this provision and add it. If the assessment does not fall within the scope of the review as set by the appellant, the court must determine whether the provision is a public policy provision. If this is the case, it must assess compliance of the administrative decision with that provision regardless of the scope of the review as set by the appellant. If it does not concern a public policy provision, the court may not assess compliance with this provision and may not add it.

*The Substance of Article 8:69, par. 3 Awb*

Parliamentary history shows that the main reason to include Article 8:69, par. 3 Awb was to indicate that adopting the duty to supplement the legal grounds did not entail adoption of the prohibition against supplementing the facts. In this respect, the provision serves as a statement of principle. This provision makes clear that the administrative court is neither bound nor limited by what the parties submit as regards the facts.

On the basis of a comparison between the prohibition against supplementing the facts laid down in Article 48 (old) Rv and the discretionary power

to supplement the facts in Article 8:69, par. 3 Awb, the latter provision affords the court the following powers:

- the power for the court to introduce facts into the proceedings, including:
  - a general power to conduct an investigation into the facts together with the specific investigative powers afforded in Chapter 8 Awb; and,
  - the power to introduce facts commonly known, general empirical principles and a judge's own knowledge (knowledge he acquired in his capacity of judge) into the proceedings.
- the power to supplement the factual grounds (arguments).

*The Purpose of the Power to Supplement the Facts*

The purpose of the power to supplement the facts is firstly to compensate for inequality. If the difference in skills or resources between the parties is likely to determine the outcome of the review, the court must lend the weaker party a helping hand. Secondly, the purpose of supplementing the facts is to ensure that the administrative decision is based on 'what really happened' and is reviewed as such. The aim of the investigation into the facts and of judicial activity in this respect is to arrive at a carefully composed, consistent and not obviously incorrect or obviously incomplete factual basis.

The discretionary power to supplement the facts becomes an obligation if it concerns facts that are necessary in order to (correctly) perform a judicial duty. This means that the court is obliged to supplement the facts if this is necessary in order to assess the lawfulness of the administrative decision within the scope of the review, to supplement the legal grounds *ex officio*, to review *ex officio* and to assess the compatibility of a provision with a superordinate provision.

*Discretionary Power to Supplement the Factual Grounds*

The court will have supplemented the factual grounds if it annuls an administrative decision on the basis of a factual ground not relied on by the appellant or if it upholds an administrative decision on the basis of a factual ground not relied on by the respondent. Article 8:69, par. 3 Awb affords the court the power to *ex officio* supplement these factual grounds.

As in the case of supplementing the legal grounds, supplementing the factual grounds is restricted to the limits of the legal dispute. Also here, the answer to the question of whether the administrative court may supplement a specific factual ground is determined by the limits of the legal dispute. If supplementing the factual ground falls within these limits, the court is obliged to supplement the factual ground.

*Article 8:69, parr. 2 and 3 Awb and the Limits of the Legal Dispute*

The effect of Article 8:69, parr. 2 and 3 Awb depends on the limits of the legal dispute. The duty laid down in Article 8:69, par. 2 Awb and the discretionary power provided by Article 8:69, par. 3 Awb adapt to these limits. The discre-

tionary power of Article 8:69, par. 3 Awb to supplement the factual grounds becomes an obligation if the scope of the legal dispute dictates that the court must add a factual ground. The obligation to supplement the legal grounds of Article 8:69, par. 2 Awb is blocked, if assessment of compatibility of the administrative decision with the provision falls outside the scope of the legal dispute.

*Article 8:69 Awb and Review of Administrative Decisions*

In view of the above, Article 8:69 Awb has the following effect when a court reviews the lawfulness of an administrative decision:

8:69, par. 1	Review is limited to the disputed components of the administrative decision (complete review) and a review ex officio of compliance of the administrative decision with public policy provisions.
8:69, par. 2	The court is obliged to supplement the legal grounds to the factual grounds submitted by the parties and the court within the limits of the legal dispute as set by the appellant, and to supplement public policy provisions.
8:69, par. 3	The court has the power and is under obligation to supplement the factual grounds within the limits of the legal dispute as set by the appellant and to supplement the factual grounds in the review ex officio of compliance with public policy provisions. The court has the power and is under obligation to add those facts that are necessary to perform its judicial duties.

Pursuant to Article 8:69, par. 1 Awb, review of administrative decisions is limited to reviewing those components of the administrative decision that are disputed by the appellant and to reviewing ex officio compliance of the administrative decision with public policy provisions. The disputed components are fully reviewed and review is not limited to the grounds for appeal submitted by the appellant. These are the limits of the legal dispute.

Within these limits, the court supplements the appropriate provisions if necessary to the grounds submitted by the parties (Article 8:69, par. 2 Awb).

Apart from a review of the grounds submitted, but within the limits of the judicial review as set by the appellant, the court reviews the disputed components for compliance with all applicable substantive provisions. This follows from the fact that there is no grounds system for substantive provisions. If the court finds that the administrative decision is in violation of a provision the compliance with which it assessed ex officio, the court must supplement the factual ground that the administrative decision is unlawful in this respect together with the provision in question (Articles 8:69, par. 3 Awb and 8:69, par. 2 Awb, respectively).

The limits of the legal dispute as set by the appellant are broadened to include assessment of compliance of the administrative decision with public

policy provisions (review *ex officio*). This assessment is always part of judicial review. If the court finds that the administrative decision is in violation of a public policy provision, it will supplement the factual ground that the administrative decision is unlawful in this respect and the public policy provision in question (Articles 8:69, par. 3 and 8:69, par. 2 Awb, respectively).

Article 8:69, par. 3 Awb also entails that the sole fact that certain facts needed to carry out the above reviews are missing, does not mean that these reviews cannot be carried out. If necessary, the court has the power to introduce the missing facts into the proceedings and to conduct an investigation into the facts. This discretionary power is an obligation, inasmuch as these reviews are a judicial duty.

The fact that the appellant does not invoke a specific legal provision is insufficient reason to refrain from assessing compliance of the administrative decision with that provision. This legal ground must be added (Article 8:69, par. 2 Awb). The fact that the appellant did not argue that the administrative decision is incorrect where this particular point is concerned, is also no reason to refrain from assessing compliance of the administrative decision with that legal provision (if such assessment falls within the scope of the legal dispute). This factual ground must be added (Article 8:69, par. 3 Awb). Equally, the fact that the parties did not submit the facts needed to make the assessment with regard to compliance with the legal provision, is no reason to refrain from such an assessment. These facts must be added by the court (Article 8:69, par. 3 Awb).

The above also applies to the upholding of an administrative decision. The fact that the administrative authority (or respondent) does not rely on a legal provision does not mean that the court may not apply that provision to uphold the administrative decision. Nor does the fact that the administrative authority does not rely on a certain factual ground or has failed to submit the required facts, mean that the court must annul the administrative decision. The court must supplement the factual grounds and the facts.

The effect of Article 8:69, parr. 2 and 3 Awb is therefore that, if an administrative decision contravenes a certain legal provision, but this contravention is not argued in a ground for appeal while assessment of compliance of the administrative decision with this provision falls within the limits of the legal dispute, the court must supplement the missing factual ground and legal provision and nonetheless annul the administrative decision on the basis of this unlawfulness.

These provisions also have the effect that, where an administrative decision, contrary to what is alleged, does not contravene a certain legal provision, but the respondent or administrative authority has not submitted the relevant ground to its defence, the court must supplement the missing factual ground (for the defence) and legal provision and uphold the administrative decision.

Article 8:69, par. 3 Awb also has the effect that if certain facts which are required in order to (correctly) perform a judicial duty have not been sub-

mitted, the court must investigate these facts and (correctly) carry out the duty irrespectively.

*Convergence with respect to the subject of supplementing the legal grounds*  
Administrative and civil procedural law have been converging. There is no divergence between these procedural laws in respect of supplementing the legal grounds. Differences do remain, but they do not increase.

The rules of evidence have converged to the extent that in the Awb several parts of the Rv on witnesses and experts have been declared to apply *mutatis mutandis*. Furthermore, direct communication between the court and the parties is deemed of increasing importance in both civil and administrative procedural law.

In both procedural laws, the court has a duty to supplement the legal grounds *ex officio*. The same definition of this duty is found in either system. However, the results differ, because of the different ways in which legal provisions have their effect in the respective proceedings. There is a convergence on this point, since, apart from a review *ex officio*, under the Awb supplementing the legal grounds is limited to those components of the administrative decision that are disputed by the appellant.

Both procedural laws have also converged with regard to the power of the court to supplement the facts. This is mainly due to developments in civil procedural law. The civil court has more powers now with respect to the facts than previously. Another example of convergence is the role of the actual truth. In the new civil procedural law, Article 21 Rv provides that parties must submit all the facts and must be truthful when submitting the facts. Clear differences between the formal truth (the truth established during the proceedings) and the actual truth (what actually happened) are less accepted than was the case under the preceding procedural law. Under administrative procedural law, however, the evidentiary *fyke* has the effect that differences between the formal truth and the actual truth have become somewhat more accepted.

The administrative evidentiary *fyke* and the civil procedural 'substantiëringsplicht' are an implementation of the same idea: the parties must be stopped from continually submitting new facts during the proceedings as this results in the proceedings becoming unnecessarily protracted. However, the evidentiary *fyke* and the 'substantiëringsplicht' achieve this in different ways, because they operate in different stages of the proceedings. The evidentiary *fyke* is effective in the preceding administrative phase, whereas the 'substantiëringsplicht' is effective in the first stage of the court proceedings. This also means that the effect of the evidentiary *fyke* is greater than that of the 'substantiëringsplicht'. The final moment to introduce new facts is not (the first stage of) the court proceedings, but the preceding administrative phase.

There is not much difference between the principles guiding the respective procedural laws. The following principles apply to both procedural laws:

adjudication within a reasonable time, *audi et alteram partem* and *ius curia novit*. There are, however, a number of dissimilarities, as a result of the requirement to seek to establish the actual truth, compensation for inequality and party autonomy.

Convergence is happening in the matter of party autonomy. Under the Awb the administrative court is limited to the scope of the legal dispute as set by the appellant (barring review *ex officio*). And then there is the still greater responsibility the argumentative *fyke* lays on the appellant and the risk it poses to the appellant. As regards the course of the proceedings, the two procedural laws are also gradually approaching each other. Under the new civil procedural law, party autonomy does not apply to the course of the proceedings. Differences should therefore no longer exist between the procedural laws on this point.

Convergence has also taken place with regard to the matter of procedural inequality, with civil procedural law moving closer to administrative procedural law. Frequently, the parties in civil proceedings are unequal. The problem with procedural inequality is that there is a risk that the judgment is not so much determined by the law, but by the better litigator. To compensate for this, administrative procedural law provides for an active court. The civil court has become more active as well. As a result of this, possible procedural inequality is probably better compensated for now.

#### *Closing Remarks*

The division between facts and law and the division between powers relating to the facts and powers relating to the law are less important in administrative procedural law than they are in civil procedural law. The reason for this is that the administrative court has the power, and often a duty, to become actively involved with both aspects. In civil procedural law, there is less allowance for the court to become actively involved with the facts. This leads to problems as the application of law is based on facts. Since the parties select the facts to be submitted based on the law they assume will apply in their case, a difference of opinion between the parties and the court with regard to the application of the law or the applicable law readily makes that the facts submitted do not fit the court's application of the law.

Since the administrative court may get actively involved with the facts and is obliged to become actively involved where this is a judicial duty, this problem is less prevalent in an administrative procedure. It is much less likely that an appellant by the way he has drafted his notice of appeal or the manner of his litigation, has precluded that an applicable provision is included in the judicial review.