Belangenafweging door de wetgever. Een juridisch onderzoek naar criteria voor de belangenafweging van de formele wetgever in relatie tot de belangenafweging op bestuursniveau.

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Summary

- The balancing of interests by the legislature

A study of the criteria for the balancing of interests by the legislature, with particular reference to how this relates to the balancing of interests at administrative level

- Introduction

The balancing of interests has taken on greater importance in law: in particular, legal criteria have been developed for the balancing of interests by government. The role of the legislature in this context has hitherto been somewhat unclear. The study considers the balancing of interests underlying statute law in the formal sense.

First, it examines what norms the law imposes for the balancing of interests by the legislature, not only from a general legal point of view but also in terms of the legislature’s specific powers under the principles of legality and speciality. The question is what requirements for the proper balancing of interests by the legislature result from the presumed connection with the proper balancing of interests by the authorities when applying the law.

Second, the study considers the nature of the connection presumed on the basis of the principles of legality and speciality to exist between the balancing of interests by the legislature and the balancing of interests by the authorities in practice. It examines the consequences of the balancing of interests by the legislature in general when it comes to establishing and upholding the concrete interests of a party.

- The subject of the study in detail

The legal criteria for the balancing of interests are most detailed as they relate to the balancing of interests carried out at concrete level when making a decision. Chapter 2 describes the legal norms for the balancing of interests at concrete level, based on the law, the literature and the case law. When applying the law, the authorities are obliged to take stock of all the relevant facts and interests, paying particular attention to the concrete circumstances
of the individual case. The various interests must then be weighed up against one another within the framework of the law. This does not mean that no importance may be attached to private interests of third parties; what it means is that the balance of interests arrived at by the legislature must be taken as a guide. The result of the balancing of interests by the authorities must satisfy the principle of proportionality. Thus the decision must be appropriate to the objective, any infringement of private interests must be limited to what is strictly necessary, and a relationship must be established between the various interests involved. Any disproportionality can be remedied by offering compensation (compensation for loss arising from government decisions). It must be clear from the reasons given for the decision how the balancing of interests was carried out.

Chapter 3 sets out the legal norms for the balancing of interests at more abstract level, i.e. that underlying a universally binding rule laid down by the authorities. This part of the study shows that the legal criteria for the concrete balancing of interests do not differ essentially from the balancing of interests underlying a rule. The whole idea of a rule is that it should cover as many concrete cases as possible, from which it follows that the abstract balancing of interests must satisfy the requirements of due care, reasonableness and proportionality. The rule must indicate what importance is to be attached to individual interests in the light of these requirements. The range of interested parties covered must be as wide as possible. It is important for interested parties and experts to be involved in the decision-making, as it is more difficult to have an overall view of the scope of the rule.

Chapter 4 looks at the balancing of interests by the legislature from a similar point of view to that from which the legal criteria are examined in Chapter 3, since most statutes lay down universally binding rules. This part of the study shows that the legal acceptability of the balance of interests arrived at by the legislature is influenced by the specific characteristics of the statute. This is due firstly to the relatively high level of abstraction at which the decision-making takes place: the statute must therefore indicate clearly the context in which this occurred. When balancing the various interests the legislature must take into account the subsequent legislation to which the statute will give rise. Secondly, the democratic nature of the law is reflected in criteria laid down as part of the legal process. The lawmakers must try to reach the greatest possible consensus with the interested parties. The legislative procedure must be such that it is certain that all the various interests can be adequately taken into account.

In addition to looking at the issue from a general point of view, Chapter 5 of the study examines the balancing of interests by the legislature from the point of view of its specific powers. The general principle is that the
legislature is the ideal body to determine what the public interest is: this can be defined as those interests of individuals which are best regulated in a general manner. It follows from the principle of legality that it is the legislature's responsibility to achieve a balance between the various public interests and those of individuals. This balance must be as all-encompassing as possible so as to provide a proper foundation for subsequent legislation. In the system of hierarchical norm-setting, the balancing of interests by the legislature has a structuring function: it must be evident from the statute what its object is, how the interests at stake are to be weighed up against one another within the context of this object and how this relates to previous instances of the legislature balancing the same interests. The legislature must leave sufficient scope for the abstract balance of interests to be fleshed out at a more concrete level, enabling justice to be done to the circumstances of individual cases.

Chapter 6 sets out the criteria for assessing the balancing of interests by the legislature in relation to the balancing of interests by the authorities in practice. The criteria are classified as follows:

- Thoroughness and public interest
- Survey and consultation
- Transparency of the objective
- The framework within which the balancing of interests takes place
- The abstract nature of the balancing of interests
- The extent to subsequent legislation is taken into account
- The degree of specificity
- Appropriateness, necessity and proportionality
- The importance attached to established interests
- The account taken of individual interests in general
- The reasons given

Chapter 7 examines the significance of the criteria in practice, taking as examples the Pig Farming (Restructuring) Act and the Health Service Provisions Act. This part of the study shows that it is difficult to gauge the legal acceptability of the balancing of interests underlying two Acts. Although it cannot immediately be concluded from this that the balancing of interests by the legislature was incomplete, it does show that the function of the law is adversely affected: if it is not evident how the legislature weighed up the various interests, the authorities cannot be expected to be guided by this. The study then examines the case law to see what the relationship is between the balancing of interests by the legislature and the status of a concrete interest in the balancing of interests by the authorities. It emerges firstly that the legislature's considerations, insofar as they can be ascertained, do indeed
guide the decision-making at concrete level. When establishing what the law-makers’ considerations were the courts are initially guided by the text of the law; the explanatory documents also play an important role. In cases where the legislature’s considerations are not manifest, it is not clear whether the legislators considered that the infringement of the concrete interest was justified, and the lawfulness of the balancing of interests carried out at administrative level cannot be assessed within the framework of the law. The case law shows that in such cases the courts are guided to a large extent by the criteria they have developed in previous cases.

**Conclusions**

The increasing attention being paid to the balancing of interests is justified, in my opinion. Justice is done by weighing up interests, and the balancing of interests by the legislature plays an important part here. The legal criteria relating to the universally binding rule in general are also important to the legislator. How these criteria are fleshed out depends to a large extent on typical characteristics of statute law, viz. the abstract level at which the decision-making takes place and the democratic nature of a statute. Criteria for the balancing of interests also arise from the specific powers of the legislature, and these various criteria form a framework within which the balance of interests arrived at by the legislature can be assessed.

The legal acceptability of the balance of interests at concrete level must be judged within the framework of the law upon which the decision is based. The general principle is that the legislators should achieve a balance between the public interest and individual interests, which is then fleshed out by the authorities on the basis of the concrete circumstances of the case. If the legislature’s considerations were incomplete or not entirely evident, it is not clear within what framework the authorities are to balance the various interests. There are no points of reference for gauging the legal acceptability of the decision at concrete level. This not only creates uncertainties for the interested parties; the authorities have to weigh up the interests themselves, a task for which they are not, in principle, equipped. This can result in the administrative decision not being sufficiently abstracted from the facts, giving rise to problems in similar cases due to the effect of the principle of equality. In the absence of statutory reference points the courts also have to lay down their own yardsticks for the lawfulness of a decision, and if they cannot refer to a general rule laid down by the legislature, the legitimacy of their decisions is affected.

It is important not to lose sight of the fact that it is impossible for the legislator to have an overview of all the cases the law is intended to cover: sometimes the area is so complicated and technical that the law-makers
cannot be expected to lay down all the norms themselves. Scrutiny of the balancing of interests in practice shows that it is difficult to achieve a full balance of interests that satisfies all the criteria: this is generally a very complex process. Nevertheless, it is important that structure be introduced into the process in the system of hierarchical norm-setting. The legislators should in any event satisfy the legal criteria for the balancing of interests in essence, so as to provide the authorities and the courts with the most important – substantive – points of reference. If it is not possible for the lawmakers to flesh out the balance of interests in detail, they should indicate this in so many words. In such cases the status of a particular interest in the overall balance can better be judged by the authorities and the courts.

The study concludes that it is very important for the legislator to weigh up the various interests fully, respecting the criteria set out in the study. The substance of the balance should be clear from the text of the law, and the factors taken into account should be indicated in the explanatory notes. Firstly, this will improve the quality of the balancing of interests by the legislature. Secondly, it will encourage better balancing of interests by the authorities. Thirdly, it will create the conditions for more structured and legitimized scrutiny by the courts. Lastly, it will contribute to the legitimacy of legislation: if interested parties can see from a law that their interests have been weighed up systematically within a particular framework, this makes it more acceptable.