Nadeelcompensatie en tegemoetkoming in planschade

Hoofdstuk 13

Summary

13.1 Reason for the study

This is a book about compensation due to no-fault state liability, known in Dutch as 'nadeelcompensatie'. Late in the 1990s, attempts were already made to include a general regulation on *nadeelcompensatie* in the General Administrative Law Act (hereinafter referred to as 'Awb'). Reasons for this included the "increasing social importance" of *nadeelcompensatie* and a large number of developments in case law. In 2004, the situation gained momentum when the government noted in its memorandum 'Towards decisive administrative law' that the *Groningen/Raatgever* judgment gave "cause to think about amending the legislation on compensation for governmental actions." Subsequently, on the initiative of the Committee for Legislation on General Administrative Law, an expert meeting on this subject was organized at the Ministry of Justice on 29 March 2004. Experts from the judiciary, the legal profession, ministerial departments, and academia were present. With regard to the subject of *nadeelcompensatie*, dissatisfaction existed in particular due to the complex division of powers between the civil and administrative courts, something which still exists today. The experts present therefore advocated a general statutory system of *nadeelcompensatie* based on the principle of 'égalité devant les charges publiques', or 'equality before the public burdens' (hereinafter referred to as the 'égalité principle'), which would be in line with the decision-making model that works well in current legal practice on *nadeelcompensatie*.

After this expert meeting, the Minister of Justice, also on behalf of the Minister of the Interior and Kingdom Relations, set up a broad-based study group. The task of this study group was to find solutions to bottlenecks in the area of compensation for unlawful government acts. If necessary, it was also allowed to include compensation for damage caused by lawful government acts. The study group got underway at the beginning of 2005 and published a preliminary draft report in May 2007. This preliminary draft report has developed to become the '*Nadeelcompensatie* and compensation for damage caused by unlawful public decision-making Act'[1] published in the Bulletin of Acts, Orders and Decrees on 15 February 2013. The part of this Act that deals with compensation for unlawful government acts has already entered into force. The part of this Act that concerns *nadeelcompensatie* (hereinafter referred to as 'the Wns') has yet to enter into force. For this

1 In Dutch: de Wet nadeelcompensatie en schadevergoeding bij onrechtmatige besluiten.

dissertation, it is particularly important that this Act will include a general basis to grant *nadeelcompensatie*, based on the égalité principle, in Title 4.5 of the Awb.

The Wns has been the subject of discussion since early in its development stage. The importance of general legislation about *nadeelcompensatie* is widely recognized, but it appears that the questions involved are so difficult to answer and the (financial) interests are so great that the entry into force of Title 4.5 of the Awb is increasingly being postponed. An important part of the issues confronting the legislature concern the scope of Title 4.5 of the Awb and - in relation to this - the extent to which this Title leaves room for, or should leave room for, or can replace (parts of) the multitude of special statutory and extra-statutory *nadeelcompensatie* schemes that currently exist.

The legislature has repeatedly stated its intention to substitute many of the current *nadeelcompensatie* schemes with Title 4.5 of the Awb. Depending on the response to the aforementioned questions, the Title could contribute greatly to the extent to which the legislature achieves its objective of simplifying, standardizing and harmonizing Dutch *nadeelcompensatie* law. This harmonizing effect is not limited to the substantive criteria and procedural requirements for the granting of *nadeelcompensatie*. Title 4.5 of the Awb will also have a harmonizing effect in the field of legal protection. It will always - with a few exceptions, such as damage caused by formal legislation or criminal investigations - serve as a basis under public law for deciding on applications for *nadeelcompensatie*. As a result, such decisions qualify as decisions that can be contested before an administrative court. Nevertheless, arguments have also been put forward in support of the assertion that there will continue to be a need for special regulations even after Title 4.5 of the Awb enters into force. It is this tension between the objective of simplification, standardization and harmonization on the one hand, and the need for *nadeelcompensatie* regimes tailored to special situations on the other, which formed the direct reason to write this dissertation. In this book, I focus in particular on two 'legislative relationships': (1) the relationship of Title 4.5 of the Awb to special, formal *nadeelcompensatie* legislation; and (2) the relationship of Title 4.5 of the Awb to special, 'lower' *nadeelcompensatie* schemes. I will explain both briefly below.

With regard to the relationship between Title 4.5 of the Awb and special, formal *nadeelcompensatie* legislation, the debate in recent years has mainly focused on the question whether a special compensation regime should apply to environmental law, or whether, on the contrary, the current status separate from environmental law should be abolished. In this context, choices have to be made regarding, among other things, the legal standardization of the requirement of an abnormal burden[2] and whether or not to maintain exclusive and exhaustive enumerations of potential causes of damage that may give rise to damage eligible for *nadeelcom-*

2 One of the requirements for granting *nadeelcompensatie* which, together with the requirement for a special burden, characterizes the égalité principle.

pensatie. This discussion is currently being conducted in particular in the context of the Environmental Law Act[3] (hereinafter referred to as 'Ow'). Upon adoption and ratification of the bill currently pending before the First Chamber of the Senate for the Environmental Law Implementation Act (hereinafter referred to as 'IOw'),[4] a special *nadeelcompensatie* scheme - in the form of Section 15.1 of the Ow - will be added to the Ow for damage resulting from lawful governmental actions based on the Ow. It follows from the explanatory documents accompanying the IOw that Title 4.5 of the Awb will come into force at the latest at the same time as Section 15.1 of the Ow. This is expected to take place on 1 January 2021.

Section 15.1 of the Ow will operate as a supplement to Title 4.5 of the Awb and will also replace a multiplicity of *nadeelcompensatie* schemes that are important under current law. The best-known example of this is the regulation on compensation for planning damage laid down in Section 6.1 of the Spatial Planning Act.[5] Other examples are Article 22 of the Transport Infrastructure (Planning Procedures) Act,[6] Article 7.14 of the Water Act[7] and Article 4.2 of the General Environmental Law Act.[8] As a result, the majority of applications for *nadeelcompensatie* under future law will be dealt with under Title 4.5 of the Awb, which may or may not be supplemented by Section 15.1 of the Ow and/or other (lower) *nadeelcompensatie* schemes. When it comes to the relationship between Title 4.5 of the Awb and formal *nadeelcompensatie* legislation, this dissertation therefore mainly focuses on the relationship between this title and Section 15.1 of the Ow.

The relationship between the formal general *nadeelcompensatie* legislation of Title 4.5 of the Awb and 'lower' special *nadeelcompensatie* schemes must also be clarified before Title 4.5 of the Awb can enter into force. Such schemes are referred to here as special *nadeelcompensatie* schemes, because the substantive and procedural provisions laid down in Title 4.5 of the Awb are regarded in this dissertation as the main source of general *nadeelcompensatie* law, compared to which all other *nadeelcompensatie* schemes are of a special nature. This does not alter the fact that these special schemes may be of a more or less general nature. An example of a *nadeelcompensatie* scheme of a more general nature is the 'Policy Rule on *nadeelcompensatie* Infrastructure and Water Management 2019'.[9] This policy rule plays a particularly important role in the practice of wet and dry water management by the Ministry of Infrastructure and Water Management. Moreover, this policy rule has served as an example in the adoption of many other policy rules and regulations, and even in the adoption of Title 4.5 of the Awb. Another example of a special *nadeelcompensatie* scheme of a general nature is the 'Gene-

3 In Dutch: de Omgevingswet.
4 In Dutch: de Invoeringswet Omgevingswet.
5 In Dutch: de Wet ruimtelijke ordening.
6 In Dutch: de Tracéwet.
7 In Dutch: de Waterwet.
8 In Dutch: de Wet milieubeheer.
9 In Dutch: de Beleidsregel nadeelcompensatie Infrastructuur & Milieu 2019.

ral *Nadeelcompensatie* Ordinance of the Municipality of Amsterdam'.[10] In principle, it applies to all lawful acts of the Amsterdam municipal authority. However, it does not apply to damage caused by the construction of the 'North/South Line'[11] - a metro line connecting the north and south of Amsterdam. For the compensation of this damage, the Amsterdam municipal council has in fact adopted a separate regulation in the form of the 'North/South Line *Nadeelcompensatie* Ordinance'.[12] Another example of a special *nadeelcompensatie* scheme that - like the North/South Line *Nadeelcompensatie* Ordinance - has a less general character is the 'Joint *nadeelcompensatie* regulation for the expansion of Schiphol Airport'.[13]

13.2 Objective of the study and the research questions to be answered

The standards laid down in Title 4.5 of the Awb will, in principle, apply to the majority of all applications for *nadeelcompensatie* once it enters into force. However, it is conceivable that competent legislatures or administrative bodies will make use of the explicit or implicit possibilities offered by Title 4.5 of the Awb for interpretation, derogation and/or supplementation. Choices as to whether or not to maintain (in an unchanged form) the existing *nadeelcompensatie* schemes can only be made in a meaningful manner if there is sufficient insight into the relationship between Title 4.5 of the Awb and Section 15.1 of the Ow and other special *nadeelcompensatie* schemes. Lack of this insight seems to be a major contributory factor in the repeated postponement of the entry into force of Title 4.5 of the Awb. The purpose of this study is to contribute to this insight. To this end, the following main research question will be answered:

Do the objectives and underlying principles of the Wns, partly in the light of explanations for the differences between the current nadeelcompensatie schemes, give reason to: (a) amend Title 4.5 of the General Administrative Law Act (Awb); (b) amend Section 15.1 of the Ow; and/or (c) provide any other means for a special interpretation of Title 4.5 of the Awb, supplementation of Title 4.5 of the Awb, or deviation from Title 4.5 of the Awb?

Subsections (a) and (b) are intended to clarify which points of Title 4.5 of the Awb and Section 15.1 of the Ow respectively need to be amended in order to bring them more in line with the objectives and underlying principles of the Wns. Subsection (c) deals with other measures to which these objectives and underlying principles could give rise. These could include the adoption or amendment of a formal Act other than Title 4.5 of the Awb or Section 15.1 of the Ow. Consideration may also

10 In Dutch: de Algemene Verordening Nadeelcompensatie van de gemeente Amsterdam.
11 In Dutch: de Noord/Zuidlijn.
12 In Dutch: de Verordening Nadeelcompensatie Noord/Zuidlijn
13 In Dutch: de Gemeenschappelijke regeling Schadeschap Luchthaven Schiphol.

be given to the adoption of lower regulations and/or policies, for example at the municipal level. Finally, other types of measures are also conceivable. For instance, the court or the administration may sometimes be able to contribute to the promotion of the objectives and underlying principles by motivating a court ruling or decision in a certain way. A recommendation to adopt a model letter or a model decision could also be considered.

The main research question is first addressed in Chapters 3 to 10 for each material criterion and procedural rule determining the granting of *nadeelcompensatie* (such as the criteria of abnormal and special burden, and procedural requirements for the submission and processing of the application for *nadeelcompensatie*). The insights gained then form the basis for a comprehensive answer to the main research question in Chapter 11 - the final chapter of this dissertation. The main question is divided into three sub-questions. The first sub-question is of a general nature:

1. *What are the objectives and underlying principles of the Wns?*

This sub-question is answered in section 2.4.2 and aims to determine the assessment framework for this dissertation. This assessment framework consists of the objectives and underlying principles of the Wns. This was chosen because these objectives and underlying principles are the most recent reflection of the values that the formal legislature considers important for a general *nadeelcompensatie* scheme.

In addition, in order to address the main question in Chapters 3 to 10, it was necessary to answer a second and third sub-question relating to the substantive criterion or procedural requirement to be examined. They read as follows:

2. *Are there differences in the way in which the selected schemes currently in force shape the right to nadeelcompensatie and, if so, how can these differences be explained?*

3. *How will Title 4.5 of the General Administrative Law Act and Section 15.1 of the Ow shape the future right to nadeelcompensatie?*

13.3 Structure

This dissertation consists of three parts. The first part consists of the first two chapters of the book. The first chapter is, of course, included to set out the reason, purpose and structure of the dissertation. The second chapter answers the first sub-question but also has a different function. It describes the emergence of the current '*nadeelcompensatie* landscape' and maps out the most important contours of that landscape. These contours are the result of the interplay between various actors, who are jointly responsible for the content of (general and special) *nadeelcompensatie* law. Some insight into these contours, and how they have developed,

is required because they were a reason for the formal legislature to adopt Title 4.5 of the Awb and Section 15.1 of the Ow. Moreover, some insight into the role played nowadays by the various actors with regard to the application and interpretation of the égalité principle (and *nadeelcompensatie* schemes based thereon) is required in order to be able to adequately answer the second and third sub-question and the main question. Of great importance, for example, is the formation of law by the formal legislature, which, among other things, incorporates exclusive and exhaustive enumerations of potential causes of damage that may give rise to damage eligible for compensation (for example Article 6.1, paragraph 2, of the Spatial Planning Act) or further prescribes the demarcation of the normal social risk (for example Article 6.2 of the Spatial Planning Act). It also regularly occurs that a decentralized regulator provides for *nadeelcompensatie* regulation for special projects (for example the North/South Line *Nadeelcompensatie* Ordinance) or, in a general sense, includes specific substantive criteria and/or procedural requirements in a regulation (for example the Policy Rule on *nadeelcompensatie* Infrastructure and Water Management 2019 and the General *Nadeelcompensatie* Ordinance of the Municipality of Amsterdam). Executive administrative bodies apply such formal laws and other regulations, after which the administrative court, in turn, can rule on concrete executive decisions regarding *nadeelcompensatie*.

The second part of the book provides for the examination of the substantive criteria and procedural requirements for the granting of *nadeelcompensatie*. In Chapters 3 to 9 the second and third sub-questions and the main question are answered with regard to all the material criteria. Respectively, consideration is given to the potential causes of damage that may give rise to damage eligible for compensation (Chapter 3), the requirements regarding the causal relationship between the alleged damage and the alleged cause of damage (Chapter 4), what damage is eligible for compensation and how it should be assessed (Chapter 5), the criteria of abnormal burden (Chapter 6) and special burden (Chapter 7), active and passive risk acceptance and other types of situations in which the applicant contributed to the occurrence of the damage (Chapter 8), and other reasons for leaving damage at the applicant's expense (Chapter 9). Chapter 10 answered these research questions with regard to the procedural requirements for the granting of *nadeelcompensatie*.

Thus, in the second part of this dissertation the main question is answered per material criterion and procedural requirement for the granting of *nadeelcompensatie*. These fragmented answers to the main question form the basis of a comprehensive answer to the main question in Chapter 11 - the final part of this dissertation.

13.4 Answering the research questions

In the remainder of this summary, I will discuss the answers to the research questions. However, it would make little sense here to attempt to summarize the answers to these sub-questions exhaustively. After all, to do so, I would have to list all the differences between the selected *nadeelcompensatie* schemes currently in force

and the explanations found for them, or provide a conclusive overview of Title 4.5 of the Awb and Section 15.1 of the Ow, as well as the way in which the provisions contained therein are to be applied. With regard to these sub-questions, therefore, I shall confine myself to a few general remarks. For more detailed information, I refer to the relevant sections of the previous chapters of this book.

13.5 The first sub-question

Section 2.4.2 of this book shows that the Wns has four objectives, namely: (1) simplification, standardization and harmonization of *nadeelcompensatie* law; (2) increasing legal certainty and legal equality; (3) codification of *nadeelcompensatie* law; and (4) increasing the effectiveness of *nadeelcompensatie* law and reducing administrative burdens. It also has three underlying principles: Title 4.5 of the Awb should: (1) only codify the égalité principle; (2) be consistent with the decree model; and (3) where possible, be consistent with the Awb and the Civil Code.

13.6 The second sub-question

An answer to the second sub-question was needed in the first place because the objectives and underlying principles of the Wns are not absolute in nature. For example, the codification of a special risk acceptance regime in Section 15.1 of the Ow could be in line with the objective of increasing legal certainty, but at the same time undermine the objective of standardizing and harmonizing (as far as possible) the right to *nadeelcompensatie*. By analysing the differences between the *nadeelcompensatie* schemes currently in force and the explanations that can be given for them, this study will contribute to the understanding that the legislature needs in order to be able to make the choices necessary for the entry into force of Title 4.5 of the Awb. After all, on the basis of this, statements can be made about the desirability and/or necessity of a certain type of provision in Title 4.5 of the Awb, Section 15.1 of the Ow, or lower legislation or policy. However, this is not the only reason why the law currently in force was examined. After all, a study of that law is also relevant because one of the objectives of Title 4.5 of the Awb is to codify current *nadeelcompensatie* law. The extent to which Title 4.5 of the Awb and Section 15.1 of the Ow are suitable for achieving this objective cannot be determined without examining the extent to which the substantive criteria and procedural requirements for the granting of *nadeelcompensatie* are consistent with the interpretation of those criteria and rules under current law.

Since, under current law, there are dozens of formal statutory *nadeelcompensatie* schemes and hundreds of lower-ranking *nadeelcompensatie* schemes, the second sub-question can only be answered with regard to a selection of currently applicable *nadeelcompensatie* schemes. The choice fell on Section 6.1 of the Spatial Planning Act, the Joint *nadeelcompensatie* regulation for the expansion of Schiphol Airport, the Policy Rule on *nadeelcompensatie* Infrastructure and Water Management 2019, the North/South Line *Nadeelcompensatie* Ordinance and the General

Nadeelcompensatie Ordinance of the Municipality of Amsterdam. This selection of schemes is sufficiently representative of contemporary *nadeelcompensatie* law to be able to make general recommendations regarding the development of this field of law. To this end, it is important that the selected schemes are of great practical importance and have a valuable background in their origin and application. A balance was also sought between formal statutory schemes and schemes of lower rank, a balance between central and decentralized schemes, and a balance between schemes of a general and special nature.

In answering the second sub-question, it was noted that a relatively large number of differences between the selected current *nadeelcompensatie* schemes can only be explained by the fact that these schemes have been drawn up by different regulators over a period of several decades, while those regulators do not seem to have paid attention to alignment with other *nadeelcompensatie* schemes and/or consultation with each other, let alone intended to create a substantive difference. This does not detract from the fact that other kinds of explanations have also regularly been found. I will suffice here with two examples. First of all, in sections 6.1 and 7.2.1 it emerged that the criteria of abnormal burden and special burden did not play a significant role under Article 49 of the former Spatial Planning Act.[14] This can be explained by the fact that this provision was not based on the unwritten égalité principle, but on the principle of material legal certainty. The second example of a different kind of explanation can be found in section 4.2.3.2. It follows that the Administrative Jurisdiction Division of the Council of State introduced an alternative causality test for *nadeelcompensatie* disputes settled under Article 21 'Aanwijzingsbesluit 1996',[15] in order to prevent the Minister from taking advantage, to the detriment of the affected citizens, of the fact that he had neglected his statutory duty to establish sound noise standards for about 18 years.

13.7 The third sub-question

The third sub-question concerns the design of the future right to *nadeelcompensatie* through Title 4.5 of the Awb and Section 15.1 of the Ow. The necessity of its answering speaks for itself. After all, knowledge of the content of both regulations, and insight into the way in which these regulations should be applied according to the accompanying explanatory documents, is necessary in order to be able to determine how these regulations relate to the objectives and underlying principles of the Wns. By answering the third sub-question, it became clear that Title 4.5 of the Awb provides relatively little substantive and procedural guidance for the processing of an application for *nadeelcompensatie*. Section 15.1 of the Ow, on the other hand, does provide such guidance on the substantive aspects of the right to

14 In Dutch: de Wet op de Ruimtelijke Ordening.

15 A decision designating the airport area of Schiphol. Among other things, this decision established noise zones and made it possible to intensify the use of the existing four runways and the construction and use of the fifth runway.

nadeelcompensatie for damage caused by lawful governmental actions based on the Ow. The choices made by the government in its proposal for this section can to a large extent be explained by the way in which future environmental law will be shaped by the Ow. Furthermore, some provisions of Section 15.1 of the Ow raise the question of why the standards contained therein have not been included in Title 4.5 of the Awb so that they would apply uniformly to the greater part of *nadeelcompensatie* law.

13.8 The main research question

The main research question is answered in a fragmented manner throughout Chapters 3 to 10 with regard to all the substantive criteria and procedural requirements for the granting of *nadeelcompensatie*. The insights gained and recommendations given are considered in relation to each other in Chapter 11. Sections 11.2 and 11.3 describe respectively how Title 4.5 of the Awb and Section 15.1 of the Ow would look if the legislature were to adopt all these recommendations. The recommended provisions generally fit in well with the objectives of simplifying, standardizing and harmonizing *nadeelcompensatie* law, increasing legal certainty, and codifying *nadeelcompensatie* law. Depending on the relevant criterion or procedural requirement, other objectives or principles underlying the Wns also played a role. Sometimes they were important in deciding whether or not to recommend the inclusion of standards in Title 4.5 of the Awb or Section 15.1 of the Ow - for instance, the principle of adherence to the Civil Code advocated against the inclusion of special standards relating to the assessment of damage. However, these objectives and underlying principles often also influenced the way in which the recommended provisions were formulated - for example, the principle of adherence to the Awb led to the recommendation of including a provision on advance payments in Title 4.5 of the Awb formulated as a supplement to the general provision concerning advance payments of 4:95 Awb.

Title 4.5 of the Awb

Examination of Title 4.5 of the Awb shows that from a substantive point of view, this title consists only of a summary of the criteria for awarding *nadeelcompensatie*. However, the title does not provide any rules on how these criteria should be applied. This is noteworthy because of the objectives of the Wns to codify *nadeelcompensatie* law and to increase legal certainty. To a certain extent, the lack of substantive guidance seems to be explained by the broad scope of Title 4.5 of the Awb. For example, it is difficult to prescribe a demarcation of the normal social risk or method of damage assessment that can be applied in a general sense to all forms of loss of income, without creating the risk of undesirable and/or unreasonable outcomes. Although I have not found any concrete indications for this, I do not rule out the possibility that political reasons also played a role at the time in the government's choice to submit a bill that offered relatively little substantive guidance. After all, a legislative proposal that merely lists the criteria

for the granting of *nadeelcompensatie* that have been undisputed in the judiciary for several decades, is less likely to meet with opposition in parliament than a legislative proposal that, for example, offers further guidance on the demarcation of the normal social risk. This was already known at the time by the experiment of the statutory fixed amount of Article 6.2, paragraph 2, of the Spatial Planning Act, and was recently reconfirmed during the parliamentary discussion of the proposal for the statutory fixed amount of Article 15.7, paragraph 1, of the Ow. The wording of Title 4.5 of the Awb that I have proposed offers considerably more substantive guidance. For example, it contains a provision entirely devoted to the criterion of a causal link between the damage and the allegedly damaging government actions. Another example concerns the inclusion of a normative criterion to apply the criterion of the special burden.

Title 4.5 of the Awb also provides relatively little procedural guidance. This may be partly due to the fact that the Awb was originally a regulation that in a general sense provided procedural standards for the formation of decisions, and the way in which citizens are dealt with who have reservations about a decision which is proposed or was already adopted. However, Chapter 10 shows that all of the selected *nadeelcompensatie* schemes currently in force show a need for more far-reaching standards than those offered by the interplay between Chapter 3 and Title 4.1 Awb and the procedural requirements from the current wording of Title 4.5 of the Awb. Therefore the objectives of simplifying, standardizing and harmonizing *nadeelcompensatie* law, increasing legal certainty and codifying *nadeelcompensatie* law regularly led me to recommend the inclusion of more procedural standards in Title 4.5 of the Awb. These provisions address, among other things, expert consultation, time limits to be observed by the administration, and interruption of limitation periods.

Section 15.1 of the Ow

Two characteristics of the environmental law laid down by the Ow were decisive for the government's proposal for Section 15.1 of the Ow. First of all, this environmental law - like current environmental law - is characterized by tiered decision-making. The government is of the opinion that this kind of tiered decision-making combines poorly with the broad scope of Title 4.5 of the Awb. For this reason, an exhaustive and exclusive enumeration of potential causes of damage that may give rise to damage eligible for compensation has been included in Article 15.1, paragraph 1, of the Ow. Section 3.4.2.1 of this study shows that the exclusive nature of this enumeration is ambivalent in relation to the objectives and principles underlying the Wns. As a result, they do not constitute sufficient reason to abandon this exclusive character. On the contrary, it seems desirable and possibly even necessary now that environmental law is characterized by a system of tiered decision-making. In my opinion, however, the objectives and principles underlying the Wns do require that a solution be found for the problems experienced with regard to

damage caused by actions based upon the Ow not included in the enumeration (hereinafter referred to as 'indicative governmental actions').[16]

Secondly, it is established in section 2.4.3 that the zoning plan based on the Ow norms will have a much more global character than the zoning plan based on the Spatial Planning Act norms. It follows from section 3.4.2.3 that in both the Advisory Division of the Council of State and legal literature, critical comments have been made on the desirability of a zoning plan with such a global character. I, too, have my reservations about the desirability of this more global character of the zoning plan, partly seen from the objectives and principles underlying the Wns. However, the purpose of this study is not to assess the desirability of the way in which the Ow will shape environmental law. In answering the question of whether the objectives and underlying principles of the Wns give cause to amend Section 15.1 of the Ow, I therefore proceed on the basis of the way in which this Section functions within the context of environmental law regulated by the Ow, and how this relates to the *nadeelcompensatie* law of Title 4.5 of the Awb.

Because of the more global nature of the zoning plan standardized by the Ow, the government envisages a "generic shift" of "the moment an application for compensation can be made." Without this shift, I do not rule out the possibility that Section 15.1 of the Ow would become so unworkable that it would conflict with all the objectives and principles underlying the Wns. Nonetheless, this shift also entails complications, some of which relate to the causality test and the estimation of damages. In short, I recommend that the government clarifies these complications. Another complication is that the shift actually leads to an increase in the problems regarding damage caused by indicative governmental actions. The government wanted to offer a solution to this problem with its proposal for Article 15.5 Ow. However, there is consensus in the legal literature that this solution is too ineffective. I have taken this into account in my search for the previously recommended, generic solution to this problem.

This solution partly consists of a provision that lifts the exclusive nature of the exhaustive enumeration of potential causes of damage that may give rise to damage eligible for compensation in case of loss of income. One of the reasons for this provision is that - barring errors in the ascertainment of such damage - there is no risk of overcompensation if the applicant is able to demonstrate that he or she has suffered the loss of income as a result of indicative governmental actions. Moreover, in order to ensure that global planning is not obstructed too much - as the government fears in a general sense - the second paragraph of the recommended provision stipulates that the damage must have a certain severity and duration in order

16 In Dutch these problems are referred to as 'schaduwschadeproblematiek'. The enumeration only contains final and binding governmental actions based on the Ow. Therefore indicative governmental actions based on the Ow - which for example do affect the value of real estate - like the publishing of a spatial development strategy, cannot lead to the granting of *nadeelcompensatie*.

to qualify for compensation. For damage in the form of temporary depreciation of real estate, a provision has been suggested that limits the refusal of *nadeelcompensatie* because of active risk acceptance by the applicant. Because of this provision, potential purchasers should attach less value to indicative governmental actions. Of course, it cannot be ruled out that a buyer of real estate will take account of the fact that 4% of the damage that will be caused if the measure announced by the indicative governmental actions is realized, because of Article 15.7, paragraph 1, of the Ow, will continue to be borne by him. However, the selling party will have to take this for granted, because the 4% would have remained for its account even if it had not sold. Moreover, it is free to agree with the buyer that, for example, each party will bear 2%. Sometimes real estate will also become temporarily unsaleable. For those situations, it is recommended that in Chapter 11 Ow, a right of buy-out is granted to the owner who has not been able to sell his house for a certain period of time as a result of the indicative governmental actions.

Unlike Title 4.5 of the Awb, Section 15.1 of the Ow, as adopted by the Lower House of Parliament, does provide some guidance on the application of the criteria for the granting of *nadeelcompensatie*. In view of the objective of simplifying, standardizing and harmonizing *nadeelcompensatie* law (and sometimes also the objective of increasing legal equality), this regularly raised the question of why this guidance was not included in Title 4.5 of the Awb. This led on several occasions to the recommendation that the content of provisions from Section 15.1 of the Ow in a general sense be moved to Title 4.5 of the Awb. In some cases, proposals were made for additional special provisions in Section 15.1 of the Ow. For instance, it was proposed that the basic conditions for passive risk acceptance should be included in Title 4.5 of the Awb and that these conditions should be tailored more closely to environmental law in Section 15.1 of the Ow. Sometimes, proposals were also made to bring the provisions of this section more into line with current case law and/or developments that are expected to take place therein. Finally, it was recommended that the 4% threshold proposed by the government as a demarcation of the normal social risk should apply not only to indirect but also to direct damage.[17]

Remaining recommendations

In answering the main question, in addition to some other proposals for formal legislation, recommendations are also made to provide for special interpretations and supplementations of Title 4.5 of the Awb. These recommendations are addressed to the main actors in the legal field of *nadeelcompensatie*: namely the government, other administrative bodies, and the courts. I provide an example for every actor. Section 6.4.3 concludes that at first sight, it is poorly geared toward

17 Indirect damage will be suffered as a result of developments on surrounding plots of land, while direct damage will be suffered as a result of changes to the rules for the use of one's own plot of land.

the objectives of simplifying, standardizing and harmonizing *nadeelcompensatie* law, increasing legal certainty, and codifying *nadeelcompensatie* law that Title 4.5 of the Awb and Section 15.1 of the Ow do not contain any special rules on the demarcation of the normal social risk in the event of damage in the form of temporary loss of enjoyment of residence. However, it also became apparent that too little guidance can be found in the current law and jurisprudence to set such standards. It is therefore recommended that the government sets up a working group to investigate how more legal certainty can be offered to citizens, the government and/or courts. On the basis of the findings of this working group, the government could decide to adopt regulations.

It is argued in section 4.4.1 that it is not always easy to fathom out the reasons for the judicial causality judgment under current law. Of course, the grounds of appeal determine which causality questions a court can answer. However, in view of the objective of increasing legal certainty, it is recommended that when answering these questions, the courts should always explicitly state which causality question it answers when, and which circumstances it considers relevant to what extent. In line with this, it is recommended that the courts should, as far as possible, use one uniform formula when answering the attribution question that is part of the causality test, namely:

> "Damage that is in such a connection with [the alleged cause of damage] that, also in view of the nature of the liability and of the damage, it can be attributed to [the administrative body] as a direct consequence of [the alleged cause of damage]".

Implementation of these recommendations would contribute to increased legal certainty by making the causality assessment more understandable and therefore more predictable. It would also increase legal certainty and equality by avoiding an overlap between the causality criterion and other requirements of Title 4.5 of the Awb for the granting of *nadeelcompensatie*.

In view of the objectives of increasing legal certainty and equality, simplifying, standardizing and harmonizing *nadeelcompensatie* law, and increasing the effectiveness of *nadeelcompensatie* law and reducing administrative burdens, section 4.4.2 makes a number of recommendations to administrative bodies regarding complex causality questions. With regard to damage arising as a result of multiple acts by the same administrative body, it is recommended that this administrative body should take a constructive approach when answering the question as to which part of these acts can be brought within the scope of Title 4.5 of the Awb and/or Section 15.1 of the Ow. A number of recommendations are also made to administrative bodies that jointly enter into a project that could potentially lead to applications for *nadeelcompensatie*. In my view, they should contact each other and citizens who could potentially be affected as early as possible. Furthermore, they should deal with any applications for *nadeelcompensatie* jointly, and should jointly conduct a single judicial procedure if the applicant does not agree with the

outcome of the primary decision-making and the decision-making at the objection stage.

13.9 Final remark

I would like to thank everyone who contributed to the realization of this book. I hope the book will be useful for the actors involved in *nadeelcompensatie* law and in its future development.