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Chapter V

Generations of Administrative Procedure in the Netherlands: Towards a Third Generation?

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Abstract. In this chapter, three generations of Dutch administrative procedural law are identified and discussed. The first generation is characterized by appeal procedures within the administration, among which the appeal to the Crown. This generation did not focus on the protection of individual rights, either procedural or substantive. Rooted in a formal Rechtsstaat conception, subjective rights against the state were thought to compromise the sovereignty of the state. Instead, administrative appeal was meant to uphold the quality and legality of decision-making and therefore the common good. Although this did not necessarily preclude assigning procedural rights to parties, the legislator thought extensive procedural law would jeopardize administrative efficiency. During the first half of the 20th century, specialized and independent law courts were created, but these mainly followed the design of the administrative appeal procedure, focusing on legality review. Although this often resulted in a form of accessible and inexpensive legal protection, the first generation's procedural law did most certainly not turn around the concept of parties.

Throughout the 20th century, independent judicial review began to gain ground, especially after the ECHR judged the appeal to the Crown in violation of the right to a fair trial. At the same time, the intellectual idea began to take hold that the goal of administrative procedure should be individual legal protection. In 1994, the General Administrative Law Act (GALA) came into force, signaling the start of the second generation of procedural law. Although the legislator explicitly chose individual conflict resolution as the main goal of administrative procedure, the foundational reorientation remained incomplete. Leaving many of the first generation's characteristics, such as legality review of single administrative decisions, intact, while at the same time assuming an increased responsibility for litigants, the

GALA turned out to foster a climate of efficiency, echoing the spirit of the first generation's focus on the public good. Furthermore, the focus on individual legal protection hampered the development of procedural law for collective decision-making procedures like rulemaking or policy instruments.

Over the last years, the incapacity of administrative law to adequately deal with some major crises of governance have highlighted the vulnerable design of the second generation's procedural law. On the one hand, the GALA does not effectively protect the individual, as Dutch administrative law lacks certain procedural safeguards and substantive individual rights to do so. On the other hand, the GALA fails to adequately tackle the collective dimension underlying many major administrative problems, by scattering policy conflicts and bureaucratic failure in single law cases on single decisions. Currently, many proposals are made to rectify these tendencies. A common theme in these is the turn to constitutional values and safeguards within administrative law, such as human rights protection and enhancing democratic control. Accordingly, a steady maturation of a more substantive and responsive notion of the Rechtsstaat emerges. Together, these developments show how individual rights protection and enhancing collective decision-making procedure are not antithetic, but, when integrated in an overarching design, can strengthen each other. Although it might be too early to speak of a definitive third generation, contemporary developments like digitalization can be excepted to only contribute to the contours of a new procedural law, fit for the 21st century.

1. Introduction

Whereas many European codifications of administrative procedure have taken the protection of subjective rights as a starting point, this has traditionally not been the premise of Dutch administrative law. For a very long time, administrative procedure was seen as a way to uphold the common good by means of ensuring the correct application of the democratically produced law. This we can qualify as the **first generation** of Dutch administrative procedure. Only in the second half of the 20th century, partly under the influence of European codifications and jurisprudence, the idea began to take shape that individual judicial protection is in fact pivotal to administrative procedure. When the current Dutch General Administrative Law Act (GALA) was introduced, subjective legal protection was therefore qualified as its main goal. This is the **second generation** of Dutch administrative procedure. However, over the last decades, several crises of national administration have shown how this second generation is not always capable of fulfilling its own promise of offering realistic judicial protection. This has evoked a quest for a "new style of governance" and therefore a "new type of administrative law".

In this chapter, we will ask ourselves what this new type of administrative procedure might look like. We will do so by first looking back into the first generation of of non-contradictory procedural law (section 2) and the second generation of individual legal protection (section 3). We will then illustrate the shortcomings of this generation by illustrating its operation in a major crisis of national governance: the child care benefit scandal, which led to the fall of the government within the Netherlands.

As will become clear, the diagnosis is twofold: on the one hand, the individual protection paradigm lacks embedding in a more substantive conception of individual rights protection, and on the other hand, it fails to engage the multi-layered and collective dimension that hides behind every public dispute. With this diagnosis in hand, we will envision a **third generation** of administrative procedure, that integrates substantive individual protection with collective decision-making procedure.

2. First Generation: Procedural Law for the Public Good

The first generation of administrative proceedings in the Netherlands is commonly framed as "classical administrative procedural law". This generation developed out of administrative appeal within the administration, but increasingly opened specialized judicial review procedures. The backbone of this generation can be found in the Law on the Council of State (for administrative appeal) and the Law of Appeal for the Social Security Tribunals and the Central Council of Appeal (for judicial review). Although many of the key debates throughout the history of Dutch administrative law focused on the question whether the administration or an independent court should have jurisdiction over administrative disputes, within the realm of that discussion the essence of procedural law was often discussed. Historically, administrative appeal within the administration focused on the protection of the public good, and whenever judicial review was available, legality review took center stage. This often resulted in a non-contradictory procedure without any formally recognized "parties" or procedural rights.

The Netherlands know a long history of the resolution of disputes between government and its citizens **within the administration**. From the beginning of the republic in the 16th century, administrative appeal has been the default procedure in adjudication. Citizens could appeal to the provincial executive (Gedeputeerde Staten) and, after the establishment of the Kingdom of the Netherlands, to the Crown (Kroon) on advice of the Council of State. These institutions derived their authority from their formal position within the State and did not need formal procedural law to legitimate their decisions. Within government, there was a strong sentiment to not have the civil law courts interfere in disputes of an administrative nature, nor to have an administrative procedure that resembled a contradictory, civil-like procedure. Though the Council of State had been modelled on the French Conseil d'État, ideas to copy it's procedural law were rejected because it was considered to be far too detailed, complex and costly.[1]

1 K.A.W.M. de Jong, *Snel eenvoudig en onkostbaar: Over continuïteit en verandering in de aard en de inrichting van het bestuursprocesrecht in 1815 tot 2015*, Den Haag 2015, pp. 26–28.

The first draft of a **law** of administrative proceedings was laid down in the Law on the Council of State (Wet op de Raad van State) in 1861.[2] The goal of the procedure in administrative appeal was to have the Council of State advice the Crown as accurately as possible – and factually sound. To that end, an informal procedure would do, as long as citizens had enough opportunity to put forward their views. The legislator in the Law on the Council of State explicitly rejected the concept of "parties" within administrative procedure. Interested parties could not appeal themselves; they had to ask the responsible minister to request an advice of the Council of State. Neither did the administrative authority have a formal role within the procedure. If the Crown could overturn an administrative authority's decision formally defended in a public procedure, the uniformity of government would be in danger. Against this background it was completely logical that administrative procedure did not have any subjective rights, nor elements of due process rights. All the legislator wanted was anything but a contradictory procedure that resembled adjudication in courts.[3] The government chose a procedure in which the adjudicator was *dominus litits*. In four articles the Law on the Council of State described the procedure followed by the Council, now and then mentioning the possibility for interested persons to provide information.[4]

Although appeal within the administration remained the default procedure of adjudication in administrative law in the Netherlands, around the turn of the century, specialized, independent administrative law **courts** were established, of which the Social Security Tribunals and the Central Council of Appeal were the first.[5] Their procedural law was created within the Law on Appeal (Beroepswet) of 1902. Although the Act established an independent administrative court, the borderline with administrative appeal was not that sharp, as both employers and employees sat as laymen on the Social Security Tribunals (*Raden van Beroep*). In design, there was an overlap with the procedure of the Council of State: it should be easy to follow, flexible, speedy, with a central role of the adjudicator and **not** resemble civil law procedure. However, the pressure out of Parliament to introduce contradictory elements out of the perspective of a fair trial grew. As a result, parties obtained, for example, the right to speak before the court would close a hearing. Nevertheless, a central role for parties was still rejected, as that might have impeded the court's task to secure the right application of the law by the public authority.[6] In the procedure a notion of the courts task to compensate inequalities of arms

2 Wet houdende regeling der zamenstelling en de bevoegdheid van den Raad van State, *Stb*. 1861, 129.

3 K.A.W.M. de Jong, *Snel eenvoudig en onkostbaar*..., pp. 29–46.

4 "Kamerstukken II" 1860/61, LXXX**I**, 2.

5 See W.J.M. Voermans, Y.E. Schuurmans & R. Stolk, *Judicial Organization*, [in:] *Introduction to Dutch Law*, eds. L. van den Herik, E. Hondius, W.J.M. Voermans, Alphen aan den Rijn 2022, chapter 6.

6 K.A.W.M. de Jong, *Snel eenvoudig en onkostbaar*..., pp. 91–110.

(*ongelijkheidscompensatie*) was introduced, but it appears to be primarily seen as a needed instrument to find the truth and protect the public interest. In conclusion one can say that though legal protection of vulnerable employees was the incentive to create an administrative court, once the procedure had started judicial control over the legality of the application of law by the administration was the main point of focus. The Law on Appeal stressed the tasks and powers of the court to find the facts and apply the law, rather than spelling out the rights of litigants.

In 1905 Minister Loeff, an avid proponent of generalized judicial review, submitted a bill on the introduction of general administrative law, with an appeal to a general administrative law court.[7] The bill, and its subsequent criticism and withdrawal, is exemplary for the debate on administrative procure in the Netherlands. Though the need for control of the administration was widely accepted, this control often took the shape of an *ultra vires* type legality review of single decisions. Administrative norms were mostly seen as instruction norms for the government, that could best be protected within the administration, as it was feared that judicial review would hamper the freedom of the administration to serve the general interest.[8] Although the concept of the *Rechtsstaat* clearly underlay the debate on administrative procedure, most authors adhered to quite a formal notion of the *Rechtsstaat*, with firm theoretical roots in the sovereignty of the state. It was primarily the protection of the public interest and the democratically produced formal law that asked for review in administrative procedure; the idea that citizens could possess subjective rights against the State was commonly rejected, also by Loeff.[9] The only acknowledged justiciable subjective rights were property, debt claims and civil rights, that fell within the exclusive competence of the civil law courts.[10] In its advisory role the Council of State advised Loeff to firstly reform substantive administrative law, so that a clear concept of instruction and legal norms could be implemented – because only then judicial review would make sense.[11]

To cut a long story short, the assumption that the first generation of administrative procedure is based on a concept of public subjective rights protection, including due process standards, cannot be recognized in administrative procedural law in the Netherlands. Administrative procedure foremost served the goal to control whether the administration had applied the law correctly and hence contributed to the protection of the public good. Consequently rules on administrative procedure rather focus on the tasks and duties of the adjudicator, than on the rights of parties.

7 *Wettelijke maatregelen tot regeling der Administratieve Rechtspraak*, "Kamerstukken II" 1904/05, 159, 1–3.

8 See J. van der Hoeven, *De drie dimensies van het bestuursrecht* (VAR-reeks 100), Alphen aan den Rijn, p. 119.

9 See *ibidem*, pp. 94–96.

10 Art. 165 of the Constitution of 1815 (nowadays art. 112 Gw). This was a deliberately chosen deviation from the competence of the French Council of State, Van der Pot a.o., *Nederlandsch bestuursrecht*, Samson 1932, pp. 255 and following.

11 "Kamerstukken II" 1905/06, 63, 2; K.A.W.M. de Jong, *Snel eenvoudig en onkostbaar*..., pp. 76–77.

3. Second Generation: Procedural Law for Individual Dispute Resolution

Although general judicial review of administrative action seemed far away in the beginning of the 20th century, the rest of the century saw a slow and somewhat erratic progression towards a more generalized procedure of judicial review. In 1963, the wet BAB (Administrative Decisions Appeal Act), generalized appeal to the Crown for all decisions by the **central** government. In 1976, the wet Arob (Administrative Jurisdiction for Government Decisions Act) introduced a generalized procedure for decisions by **all** government entities that were not covered by a specialized appeal procedure. Although this Act constituted an independent judiciary branch of the Council of State as the first **general** administrative court, this act continued the notion of legal protection against government decisions through non-adversarial legality review. Furthermore, by not subsuming the different specialized procedures, it left a highly complicated system of different (administrative) appeal procedures intact, with parallels with the British tribunal system. The legal uncertainty this created led to the adoption of a new constitutional provision prescribing general rules of administrative law.[12] Furthermore, and partly under influence of the European Convention of Human Rights, in academic circles the idea began to take shape that administrative procedure should serve individual legal protection rather than legality and a sound application of the law in the interest of the public good, which should be left to internal oversight procedures.[13] Finally, in 1985, the European Court of Human Rights, in the *Benthem* decision, judged the remaining appeal procedure to the Crown to be in violation of the right to a fair trial as laid down in article 6 of the convention, as the Crown was not an independent and impartial tribunal.[14]

All these factors led to the introduction of the General Administrative Law Act (GALA) in 1994.[15] The act unified several different procedures, codified both procedural and substantive general administrative law and was accompanied by a thorough reorganization of the courts system. Although the GALA clearly started off a "new era" of procedural law in practice, it remains a matter of ongoing debate whether it really breaks with the previous generation in principle.[16] On the one hand, the explanatory memorandum signals a major shift in theoretical

12 Article 107 of the Dutch Constitution; see www.government.nl for a translation in English.

13 K.A.W.M. de Jong, *Snel eenvoudig en onkostbaar*..., pp. 174–178.

14 ECtHR 23 October 1985, appl no. 8848/80 (*Benthem v the Netherlands*).

15 E.g. T. Barkhuysen, W. den Ouden, Y.E. Schuurmans, *The Law on Administrative Procedures in the Netherlands*, "NALL" 2012 (doi.org/10.5553/NALL/.000005) and [in:] *Codification of Administrative Procedure*, ed. J.-B. Auby, Bruxelles 2014, pp. 253–276.

16 E.g. Commissie Rechtsbescherming van de VAR, *De toekomst van de rechtsbescherming tegen de overheid*, Den Haag 2004.

orientation.[17] Instead of protecting the legality of government action, the main goal of judicial review of administrative action is now "legal protection" or "individual dispute resolution". On the other hand, the GALA left many of the characteristics of the "first generation" of administrative procedure intact. The object of the administrative procedure remains the single administrative decision.[18] Although the grounds of review have steadily been supplemented, now including open norms like carefulness and proportionality, the result of the procedure is still to announce the single decision lawful or unlawful. And despite an expansion of judicial remedies, the main remedy is still to annul the decision, after which the administration will have to decide again.

The result of this incomplete merger of underlying premises is often described as internally contradictory or at least ambiguous.[19] Nevertheless, the theoretical shift to "legal protection" and "individual dispute resolution" has led to a number of developments that focus the procedure more on the subjective position of parties and less on the objective legality of government decisions.[20] For example, in 2013 the legislator introduced a *Schutznorm*-type requirement into administrative law, requiring a breached norm to protect the civilian's interest before the judge can annul a decision. Furthermore, the administrative courts are now bound by the grounds of appeal of plaintiffs and parties have a duty to adduce evidence, in line with civil procedure. Another illustrative example of the envisaged transition from "legality review" to "individual dispute resolution" is offered by Article 6:22 GALA. That provision gives the courts in judicial review the power to uphold unlawful decisions, as long as it seems likely that the infringement of legal norms has not prejudiced the interests of the litigants.

It is nevertheless doubtful whether this development towards an adversarial procedure has really led to an increase in "legal protection".[21] From the drafting of the GALA, the legislator substantiated this theoretical shift not by reference to a desire to protect either individual procedural or substantive rights, but to a changed understanding of the relation between government and citizen in administrative law. Instead of strictly unilateral and vertical, this relationship has become more and more reciprocal and therefore horizontal. Accordingly, the citizen can increasingly

17 All relevant parliamentary deliberations when enacting the GALA can be found at PG Awb Digitaal – PG Awb (in Dutch). In PG Awb II (the second tranche), the theoretical framework of administrative procedural law is explained, para 2.2 and 2.3 specifically.

18 The GALA creates an appeal against "orders", Article 1:3 GALA, but Article 8:3 excludes appeals against regulations and policy rules.

19 M. Scheltema, *De toekomst van de bestuursrechtspraak*, "TREMA" 2011, p. 317.

20 E.g. K. de Graaf, A.T. Marseille, *On Administrative Adjudication, Administrative Justice and Public Trust: Analyzing Developments of on Access to Justice in Dutch Administrative Law and its Application in Practice*, [in:] *On Lawmaking and Public Trust*, eds. S. Comtois, K. de Graaf, Den Haag 2016, pp. 103–120.

21 Critically: L. Damen, *De autonome Awbmens?*, "Ars Aequi" 2017, pp. 635–636.

derive not only rights, but also duties from this legal relationship. Therefore, the notion of "legal protection" somewhat paradoxically led to a decrease of compensation of inequality of arms, and an increase of responsibility of civilians for their own litigatory decisions. In addition to this theoretical shift, the legislator's wish for efficient and speedy procedures has increasingly come to the surface. In 2013 a major revision of the GALA took place with the Act on the Adjustment of Administrative Procedure,[22] which further cut down on procedural safeguards that were considered to be unnecessarily burdensome from the perspective of effective government. Here the notion reechoes that at the end administrative procedure should serve the public good.

Like the first generation, this second generation of Dutch administrative procedure seems to follow a slightly different path of evolution than the common comparative trend. Instead of moving towards broad rulemaking regulation, the perspective shifted more and more to individual dispute resolution – at the cost of an initially envisaged design to broaden the scope of administrative procedural law to regulations, policy rules and plans. Initially, the GALA provided that the limited jurisdiction of the administrative courts to only review single, individual, decisions, would be broadened to rulemaking. After several years, however, the legislator feared mass litigation if an appeal against rules would exist and a distortion of the constitutional equilibrium and maintained the narrow competence.[23] As a consequence, Dutch administrative law still focusses on the legal protection against individual decisions, like permits, benefits, administrative fines or revoking decisions and does not provide in so-called notice-and-comment proceedings.

Of course, the GALA does know some administrative procedural law for decisions that may impact a wide range of interested parties. It contains an extended preparatory procedure for orders that involve many interested parties or have a significant impact on the living environment, for example in the field of environmental law and local planning. Still, it is the individual interest that triggers standing and the goal of these proceedings remains the protection of individual interests – and not that much the protection of certain communities and dispersed interests (supra-individual interests).

4. Towards a Third Generation?

Although the GALA corrected some of the first generation's pathologies, from its introduction on, it has been the subject of some major criticism. For some, the move towards individual legal protection did not go far enough, or was even criticized

22 Wet aanpassing bestuursprocesrecht of 2013 (Parliamentary papers 32450, *Stb.* 2012, 682).
23 Article 8:3 GALA, previously codified in Art. 8:2 GALA.

for hollowing out the civilian's position, while others criticized the underdeveloped instruments of courts to perform cautious statutory interpretation and secure the uniformity of the law, due to an overfocus on individual dispute resolution. Over the last few years, this criticism has come to a head because of some major crises of national government, and the way our administration handled these. Most prominent is the child care benefit affair that brought the third Rutte Cabinet to a fall in 2020.[24] In this affair, the tax authorities wrongly labeled thousands of parents receiving child care benefits as fraudsters and reclaimed large sums of money from them, plunging many into deep financial and personal problems, resulting in evictions or custodial orders. Even though many of these parents appealed to the administrative courts, it took the Council of State years to finally judge this course of action unlawful. A Parliamentary Committee tasked with investigating the child care benefit scandal reproached the administrative-law courts for not having secured individual rights and neglecting various key principles of good governance.[25] According to many insiders and outsiders, this affair exposed the fundamental weakness of administrative procedure under the GALA.[26] In general, two major and mutually reinforcing pathologies can be observed.

On the one hand, the affair illustrates the shortcomings of the GALA in protecting vulnerable individuals. The procedural shift to "individual legal protection" is often a dead sparrow within a legal culture that focuses more on the legal norms instructing the government in their decision-making process instead of assigning substantive rights or procedural guarantees for individuals. Under these circumstances, fighting an unwilling government authority is often fighting a losing battle. Although independent judicial review is available, this procedure focuses on the lawfulness of the decision more than on the position of the claimant. This often leads to a strict interpretation and application of the law.[27] Dutch administrative law does know general principles such as proportionality, but these are often unable to effectively compensate for bureaucratic webs of legislation. Furthermore, the focus on the lawfulness of the end result often overshadows the importance of a sound decision making process within the administration. Procedural mistakes, such failing to organize a hearing, can often be ignored when the end result seems

24 J. Henley, *Dutch Government Resigns over Child Benefits Scandal*, "The Guardian" 2021, January 15th.

25 Parliamentary interrogation committee on child benefits, *Ongekend onrecht (Unknown injustice)*, Den Haag 2020 (Parliamentary papers 35 510, no. 2), https://www.tweedekamer.nl/sites/default/files/atoms/files/20201217_eindverslag_parlementaire_ondervragingscommissie_kinderopvangtoeslag.pdf (accessed: 3.01.2022).

26 E.g. L. van den Berge, *Bestuursrecht na de toeslagenaffaire: hoe nu verder?*, "Ars Aequi" 2021, p. 987; A. Brenninkmeijer, A. Marseille, *Een dialoog met de Raad van State na de toeslagenaffaire*, "Nederlands Juristenblad" 2021, no. 8, p. 601; Y.E. Schuurmans, *Toeslagenaffaire: Outlier of symptoom van het systeem?*, "RM Themis" 2021, p. 205.

27 L. van den Berge, *Bestuursrecht...*

to be in accordance with the law, even when they seriously hampered the civilian's ability to explain his position. Over the last few years, this diagnosis has resulted in an increased call for individual justice or "tailored decision-making". This has led to a number of proposals, including fortifying substantive rights, increasing the possibility to deviate from strict legislation and strengthening the procedural position of civilians.[28] On a more fundamental level, this development coincides with a transformation from the formal *Rechtsstaat*, protecting civilians against state infringement, to a "responsive" or "social" *Rechtsstaat*, requiring the government to effectively safeguard the basic conditions of human life. Next to legality, legal certainty and formal equality, this conception of the rule of law focuses on the active fulfillment of substantive rights, values and principles such as reasonableness and fairness. Within that narrative, sound administration becomes a matter of constitutional importance.[29] It is therefore no surprise that, within the debate on individual justice, a major role is played by the human rights discourse. Of course, many social rights can be limited, but such limitations always require sound procedure and a reasonable balance, feeding into the reinforcement of administrative procedural law.[30] It is also telling that it is not grand constitutional debate, but administrative dissatisfaction that has finally led to the now seemingly inevitable demise of the constitutional provision prohibiting judicial constitutional review of legislation, traditionally a cornerstone of Dutch constitutional tradition.[31]

On the other hand, the affair illustrates how extremely difficult it is to get a grip on mass injustice and bureaucratic failure if citizens can only appeal individually against their single decisions. For instance, it turned out that many citizens that had to repay their benefits, had a second nationality and were stigmatized as "fraudulent" claimants after supposed racial profiling. However, during court procedures against single payment orders, litigants and judges had no clue of this discriminatory practice. Furthermore, the dramatic consequences of the rigorous interpretation of the tax legislation became clear only after years of administration. Only when looking back in retrospectivity, courts realized that their interpretation of the tax law turned out to have a grossly disproportionate outcome; the judiciary recognized that insight came too late.[32] Although a notice-and-comment procedure might be a step too far for Dutch legal culture, many feel that there should be

28 E.g. Y.E. Schuurmans, A.E.M. Leijten, J.E. Esser, *Bestuursrecht op maat*, Leiden 2020.

29 E.g. R. Schlössels, *Constitutionalisering van behoorlijk bestuur*, "JBplus" 2016, no. 4.

30 Y.E. Schuurmans, A.E.M. Leijten, J.E. Esser, *Bestuursrecht*..., pp. 23–26.

31 As foreshadowed in the most recent coalition compromise presented at the brink of the fourth Rutte Cabinet, *Omzien naar elkaar, vooruitkijken naar de toekomst*, Den Haag 2021, p. 2.

32 The evaluation of the district courts: Werkgroep reflectie toeslagenaffaire rechtbanken, *Recht vinden bij de rechtbank. Lessen uit de toeslagenaffaire*, October 2021, www.rechtspraak.nl (accessed: 5.01.2022). The evaluation of the Council of State: Reflectierapport van de Afdeling bestuursrechtspraak van de Raad van State, *Lessen uit de kinderopvangtoeslagzaken*, November 2021, www.raadvanstate.nl (accessed: 5.01.2022).

a venue to project collective legal problems such as the child care benefit crisis, and a court procedure in which quasi-legislative questions can be cautiously answered, with input from broad factions within society. In line with this direction the possibility of *amicus curiae* participation has been introduced into the GALA[33] and the courts' authority to ask legal advice from an Advocate-general on supra-individual legal issues,[34] has been exercised more frequently.

In reflection on the scandal, courts reproach themselves for not having periodically reflected on the righteousness of their case law, but rather rubber stamped the appealed decisions, because they were in line with case law. They feel the review on the **legality** of the administrative authorities statutory interpretation should shift to the **proportionality of the decision taken**.[35] What hampered their insights is that within the "production line" of the child care benefits various single decisions are made, that have to be appealed one after another (a deposit decision, a determination decision, a decision to revise and one to reclaim the benefits). In adjudication, the competence of the administrative law courts is limited to a single element of the appealed decision. Many see this narrow competence as one of the most limiting factors in delivering justice in administrative law relations and more and more plea for this legal relationship to be the object of judicial review.[36]

Dutch parliament proposed to have the Venice Commission reflect on the child care benefit scandal and the vulnerabilities within the Dutch legal system that added up to the scandal. A major finding of the Venice Commission is that the concept of the rule of law still seems to be interpreted formally in the Netherlands (including courts), in the meaning of the "rule by law". The Commission stresses that they advance a more substantive concept in which any application of the law that results in a substantively unfair, unreasonable, irrational or oppressive decision is considered to be a violation of the rule of law.[37] In respect to the judiciary, it advises to establish channels for the judiciary to draw the other branches' attention to legislation which is giving rise to systemic problems in practice. Besides, it recommends to fortify mechanisms to secure human rights protection, possibly through opening up constitutional review. The general scholarly opinions seems to be that

33 Article 8:12b GALA, introduced in 2021.

34 Article 8:12a GALA, introduced in 2013.

35 The evaluation of the district courts: Werkgroep reflectie toeslagenaffaire rechtbanken, *Recht vinden bij de rechtbank. Lessen uit de toeslagenaffaire*, October 2021, www.rechtspraak.nl (accessed: 5.01.2022). The evaluation of the Council of State: Reflectierapport van de Afdeling bestuursrechtspraak van de Raad van State, *Lessen uit de kinderopvangtoeslagzaken*, November 2021, www.raadvanstate.nl (accessed: 3.01.2022).

36 E.g. F. van Ommeren, P. Huisman, G. van der Veen, K. de Graaf, *Het besluit voorbij* (preadviezen VAR), Den Haag 2013.

37 Cf. the Netherlands Opinion on the Legal Protections of Citizens of the Venice Commission, Opinion No. 1031/2021.

courts should adopt a more critical attitude towards rules and policy and not only review the lawfulness of single decisions.[38]

Although it might be too early to speak of a "third generation" of procedural law, it is clear that over the last couple of years, Dutch administrative law is seriously in flux. Although the legislator chose "individual legal protection" as the focus of a new generation of administrative law, the full realization of individual justice needs an accompanying transformation of substantive administrative law with an adoption of individual subjective public rights. At the same time, the "overfocus" on the individuality of legal problems runs the risk of missing out on mass injustice within the administration, especially in the case of automated mass procedures (like the child care benefits were). Therefore, it is not either "individual protection" or "collective decision-making"; they should go hand in hand. In general we see a development away from legality review and a formal conception of the rule of law towards a more substantive orientation, a "responsive *Rechtsstaat*" and the right to administrative justice as a constitutional right.

5. Conclusion

In this chapter, we aimed to identify the generations through which the Dutch law on administrative procedure developed. Although these generations, as with the development of all sociological phenomena, are far from clean-edged, we identified a development from a first generation, characterized by a focus on legality and protection of the common good, moving towards a second generation of individual dispute resolution or legal protection and sketched the outlines of a third generation currently developing, integrating individual rights protection and a more collective approach within a more constitutional narrative.

With this development, the Dutch path is different than that signaled in the introduction of this edited volume. Instead of a development from subjective rights protection towards collective decision-making procedures, the Netherlands saw a somewhat opposite movement from procedures focusing on legality and the common good towards procedures focusing on individual legal protection. This dissimilarity can be explained by the fact that administrative appeal for long has been the preferred procedure over judicial review. The idea of the Sovereignty of State made the political and legal community dismissive towards a concept of

38 Cf. J. de Poorter, *A Future Perspective on Judicial Review of Generally Binding Regulations in the Netherlands: Towards a Substantive Three-step Proportionality Test*, [in:] *Judicial Review of Administrative Discretion in the Administrative State*, eds. J. de Poorter, E. Hirsch Ballin, S. Lavrijssen, Den Haag 2019, pp. 83 and following.

subjective rights of citizens against the State. Within the first phase, administrative procedure mainly served as a venue to reexamine whether the administration had applied the law correctly, foremost out of the perspective to serve the public good, just like the objective law does. Within this design one still may develop an advanced procedure with various due process rights, like the French did. Although the Dutch Council of State is a cousin of the Conseil d'État, the government purposely chose a different direction. Its negative sentiment towards civil-like procedure, with a complex, lengthy and costly process, led it to reject a procedure with a role for parties. A public debate between local authorities, the Council of State and the Crown would moreover be a threat to the unity of government and the Sovereignty of the State. Fundamental theory and pragmatism went hand in hand in the rejection of adversarial procedure. The first generation of administrative procedure knew concise, flexible procedural law, that mainly focused on the powers of the adjudicator. The development towards subjective rights protection would only come up in the second phase of administrative procedure with the enactment of the GALA, and even now in the third phase needs maximum scholarly and judicial attention to get fully realized.

The three generations of administrative procedure in the Netherlands do know a genetic relationship. Rule by law, serving the public good (and efficient procedures to contribute to that goal) and judicial deference towards the exercise of public powers are in the DNA of Dutch administrative procedure. In the second generation of procedural law, when individual legal protection became the gist of procedure, this was transformed into *individual* protection against arbitrary or illegal exercises of power. This individuality asked for rules on standing, the introduction of a *Schutznorm*-requirement and a larger personal responsibility to litigate, for example in putting forward grounds of appeal and in adducing evidence, but did not lead to substantive rights protection. In the end, decisions that the administration thought to serve the public good would only be overturned if the individual proved that decision to be illegal **and** harming his interests. The concept that underpinned the second generation was the idea of a more horizontal, reciprocal relation between citizens and government, rather than the aspiration of individual rights protection. In the current, third, phase, elements of the Dutch DNA are thoroughly reexamined under the pressure of the child care benefit scandal over which our government fell. A salient topic of debate is whether the "rule by law" should be transformed to the "rule of law", with, indeed, a more substantive individual rights protection. However, Dutch administrative law practice mostly speaks of "tailor made administrative law", which is portrayed, quite classically, as a norm of good governance for the administration, rather than a justiciable individual right. It is predominantly the human rights discourse that convincingly transforms Dutch DNA to fully incorporate individual rights protection.

Quasi-legislative questions, participation rights for all factions within society and the protection of dispersed interests do get attention, but do not yet

characterize a new generation. They all still need to mature and may be part of our third or even a fourth generation. The orientation of future generations will definitely also be prompted by the rise of automated decision-making. In this third generation we already detect an impact, as proximally over half of all single decisions made by public authorities in the Netherlands is produced with the assistance of algorithms.[39] The limited insight into input data and algorithm hamper the individuals capacity to oppose the decision and give reasoned arguments. The nature of the possibly illegalities (like discriminatory profiling, incorrect data, unlawful processing) almost naturally asks for societal input, expertise outside parties and the protection of supra-individual interests. Courts have emphasized the importance of the principle of equality of arms and pressed authorities for openness, but probably more instruments are needed to facilitate collective modes of legal protection. The collectiveness will invariably attract our attention once again to quasi-legislative questions, participation rights and the protection of dispersed interests, like privacy.

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39 B.M.A. van Eck, *Geautomatiseerde ketenbesluiten & rechtsbescherming*, Tilburg 2018; B. van der Sloot, S. van Schendel, *Procedural Law for the Data-driven Society*, "Information & Communications Technology Law" 2021, vol. 30, issue 3.