On Administrative Adjudication, Administrative Justice and Public Trust.

Analyzing Developments on Access to Justice in Dutch Administrative Law and Its Application in Practice

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1. **Introduction**

In efforts to improve the good administration of justice in the context of administrative law disputes in the Netherlands, the Dutch legislator regularly amends the procedures that the General Administrative Law Act (GALA) has prescribed since 1994 for settling disputes concerning single case decision-making by public authorities. For the same reasons, public authorities and administrative courts sometimes change the manner in which these procedures are applied in practice. A basic assumption in this chapter is that administrative adjudication, administrative justice, and public trust are interconnected. Administrative procedural law and its application in practice can contribute to the acceptance of public law decision-making, the court’s judicial review of those decisions and therefore public law in general.

Legal protection against administrative law decisions (single case decision-making) is available to interested parties in the Netherlands. First, an interested party may object to a decision by lodging a formal objection with that public authority. Lodging an objection leads to an objection procedure that is regulated by provisions found in Chapters 6 and 7 of the Dutch GALA. This procedure allows the public body to re-evaluate its decision in light of the applicable norms and all the relevant public and private interests involved. Secondly, this party may – if the objection procedure didn’t successfully address the objections – lodge an appeal with the administrative court. In administrative court procedures, Chapters 6 and 8 of GALA provide the necessary procedural provisions to allow for a full judicial review of the administrative law decision by a specialized administrative law court.

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Improving the adjudication of administrative law disputes is a concern for both public authorities in objection procedures and administrative courts in appeal procedures, as well as for the legislator. Public authorities, when re-evaluating a decision in the objection procedure, administrative courts, when reviewing the legality of an administrative law decision, and the legislator, when amending the procedural provisions for the objection procedure and the administrative court procedure, all strive to find a balance between the need for efficient procedures and professional treatment that will lead to legally sound decision-making and/or judgments.

In this paper, we intend to analyze the changes and developments in practice and law during the last 20 years in the light of Mashaw’s theory of administrative justice. This theory, which can be used to analyze the changes in the objection procedure and which can be inspirational in analyzing changes in the procedure before the administrative law courts, distinguishes between three ideal types of decision-making. Decision-making by public authorities in the objection procedure and the preparation of judgments by administrative law courts can be assessed by using these three models. The main questions we want to answer are rather simple. Could analyzing the changes in law and practice using Mashaw’s analytical framework provide relevant insight? Will such an assessment provide clarification with respect to the developments that aim to improve the administration of justice in Dutch general administrative law? Can a general trend be observed? Since Mashaw’s theory of administrative justice is concerned with governmental bodies delivering justice in a bureaucratic context, this theory seems especially relevant for the assessment of the objection procedure’s developments. That assessment will be complemented by a recent Dutch model that has been introduced in order to assess governance in the judiciary. This model seems relevant for assessing the developments in the administrative court procedure. In Sections 3 and 4, we apply this framework to several developments in both the objection procedure and the administrative court procedure. The analysis allows us to answer the questions above and draw conclusions on possible trends in the efforts made in both practice and law to improve the good administration of justice in administrative law disputes (section 5).

2. Analytical framework to assess developments

The theory of administrative justice

The manner in which legal rules are implemented in practice has always been a topic of research and discussion. Many agree that the administration of justice should be the aim of any legal system. This is also true in administrative law where governmental bodies strive to deliver justice in a bureaucratic context. In his 1983 work *Bureaucratic Justice*, Mashaw\(^2\) has given a definition of justice in the

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context of an administrative system. According to his work, it means “those qualities of a decision process that provide arguments for the acceptability of its decisions”. Based on an empirical study of the administrative decision-making concerning the American Disability Insurance Scheme, he expanded on this definition by identifying and assessing three different models of administrative justice. He named these Bureaucratic Rationality, Professional Treatment, and Moral Judgment. According to Mashaw, these models are competitive, but not mutually exclusive, within any administration.3

According to the Bureaucratic Rationality Model, the administrative justice system should be developed in a way that enables it to process as many cases as possible at the least possible cost. It should therefore be both accurate and cost-effective, accuracy being defined here as the ability to distinguish between right and wrong. Focusing on facts and knowledge, bureaucratic rationality provides for decision-making that is rationalized to keep costs in mind. It therefore ignores arguments of value, preference or ethics. This bureaucratic view is legitimized by its conservation of state budgets and realization of politically (democratically) set goals. While bureaucratic rationality is focused on the effective and efficient implementation of the rules, the goal of the Professional Treatment Model of administrative justice is to serve the client. The legal professional should not just blindly follow the system, but should also make sure that the client is provided with the resources or help that is needed. The Professional Treatment Model also lets the professional himself make the appropriate decisions, thus relies less on rationalized systems. However, this means that, besides efficiency, hierarchical control is also somewhat lost. The professional is given freedom, which can lead to decisions that are difficult to check and review. This is acceptable because of the service the professional can deliver. The Moral Judgment Model revolves around the ideas of fairness and fair allocation of benefits and burdens. In considering the purpose of adjudicatory situations, it is accepted that one of its main aims lies in the resolution of disputes. Decision-making is a defining value according to the Moral Judgment Model. This means that there should be an even opportunity for all parties to prove their claims. Also, it promotes results that are agreed upon by all parties. The legal professional should seek the ultimate outcome using common moral principles within the context painted by the different parties.

According to Mashaw, these three models of administrative justice can be distinguished by their legitimating values, their primary goals, their structure or organization and by their different cognitive techniques (Figure 1).

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Since 1983, many scholars have offered criticism of Mashaw’s three models of administrative justice. Sainsbury has criticized Mashaw’s interpretation of administrative justice. According to Sainsbury, the efficiency of Bureaucratic Rationality has nothing to do with justice and should therefore not be included as a legitimating goal. Besides that, the features related to “structure or organization” and “cognitive techniques” should not be considered components of administrative justice. Sainsbury argued that only two qualities should be shown during a decision-making process: accuracy and fairness (fairness in this case entails promptness, impartiality, participation and accountability). One other critic is Adler, who attempted to improve Mashaw’s work. An overview of Adler’s ideas on administrative justice is given in his 2010 work Administrative Justice in Context. He identifies three more models and makes some adjustments to Mashaw’s original three models. He adds the managerial, consumerist and market models and renames the existing three models as the bureaucratic, professional and legal models.

Although Adler’s criticism is convincing and certainly brings new value and nuance to the existing theory of administrative justice, we are of the opinion that Adler’s view on administrative justice – for the purpose of this paper – is unnecessarily complicated. In the sections below, we will therefore primarily focus on Mashaw’s three decision-making models and use them as the analytical framework for assessing the developments in the objection procedure and the administrative court procedure. A limitation of all theories of administrative justice is that they concern justice as delivered by organizations that belong to the executive. However, a recent report on the future governance of the judiciary seems to suggest that theories concerning the justice of an administrative system can also be relevant for organizations that are within the judiciary, like

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administrative courts. Remember that justice in the context of an administrative system refers to those qualities of a decision process that provide arguments for the acceptability of the decisions.

The governance model of the Dutch judiciary

In the beginning of 2014, the Dutch School for Public Governance (DSPG) released a report that offered a framework for reflection on the current and future forms of governance within the Dutch judiciary branch. One of the main goals of the research was to assist the Dutch judiciary to start an appropriate, well-structured and thought-out discussion on the current governance model in order to improve the manner in which the judiciary governs itself. For the purposes of the report, the researchers interviewed many different stakeholders that play relevant roles within the Dutch judiciary, such as judges and their managers.

The report concluded that, in the last 25 years, a development in the Dutch judiciary has resulted in the rise of a new, modern public management style of governing, co-existing in parallel with the traditional, professional way of governing. This development caused a visible tension between the world of “governance” or “management” and the legal “professionals” who “just want to do their job”, according to the report. Two opposite views of the governance structure of the Dutch judiciary are reinforcing this struggle. According to one viewpoint, the judiciary simply consists of a group of professionals who should be left alone as much as possible; this viewpoint embraces a highly decentralized form of governance. From the other point of view, the judiciary is a national system that should function as one single organization. This viewpoint advocates not only the introduction of central policies on many issues, but also the uniformity and transparency of these policies. In the report, the researchers distill, from their research and interviews, three different viewpoints on the governance of the Dutch judiciary. The term “judgment” is used as a metaphor for the judiciary in the figure that is used in the report to explain the three viewpoints (Figure 2).

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Figure 2: Three viewpoints on governance in the judiciary

The first viewpoint (the genius judgment) is that the legal magnificence should be at the core of the judiciary’s organization. The second (the efficient judgment) stands for the opinion that the judiciary should function as a business and be managed in the sense that the best results are reached at the lowest possible cost. The third viewpoint is that of the relevant judgment (for society): the goal is to resolve the parties’ dispute and make sure that the conflict is settled. The report goes on to state that, in the Netherlands, the “genius judgment” is no longer the most important or dominant view. Many perceive the “efficient judgment” to be the dominant view nowadays. This can be attributed to the rise, in recent years, of the managerial style of governance in the judiciary.

These three views are rather similar in nature to the three models of administrative justice that were established by Mashaw in his 1983 research, but they are not the same. The “relevant judgment” reiterates the importance of the service the judiciary provides for society: dispute resolution within a legal framework. Therefore, it resembles the Professional Treatment Model, which puts emphasis on providing a service to clients (e.g. parties to a conflict). However, there are aspects of the “relevant judgment” that are similar to Mashaw’s Moral Judgment Model. The “efficient judgment” resembles the Bureaucratic Rationality Model since it focuses on accuracy and effectiveness, and stands for a managerial style of governance. But the “efficient judgment” also reminds us of Mashaw’s Professional Treatment Model. Finally, one could argue that the “genius judgment” and the Moral Judgment have a similar background since both put emphasis on allowing either civil servants or judges to function independently in their work to resolve conflicts in a certain context. The “genius judgment” does, however, have some resemblance to the Bureaucratic Rationality Model as well. Our conclusion is that there are indeed both important similarities as well as relevant differences between the models used to analyze the forms of governance within the judiciary and those used in the theory of administrative justice.
In the next two sections (3 and 4) we will use both Mashaw’s theory of administrative justice and the viewpoints on governance in the Dutch judiciary to analyze several important developments in both law and practice in the context of the Dutch objection procedure as well as the administrative court procedures.

3. Analyzing developments: the objection procedure

The objective of the legislator

The objective of the legislator in 1994, when it was decided to introduce a mandatory objection procedure in chapter 7 GALA, was that it should be a gateway for the administrative court procedure. When an interested party cannot agree with an administrative law decision rendered by an administrative authority, lodging an appeal with a specialized administrative law court must be allowed. However, court proceedings are expensive and take a long time. They should therefore be avoided in cases where they are not necessary. The GALA therefore provides that interested parties can appeal to the court only if they have first lodged an objection and participated in an objection procedure. The main goal of the procedure was to increase the chances that the public authority and the interested party reach a solution to their conflict and that, as a result, the court is not appealed to in order to settle their dispute.\(^7\)

When designing the objection procedure, the legislator had several goals in mind. The first of these was flexibility. The legislation gave the public authority the freedom it needed to implement the objection procedure at its discretion. A second goal had to do with the legislator’s fear that the public authority would not take the objections to its administrative law decision seriously. He sought to prevent cases where an interested party would not be granted a fair procedure.\(^8\) Several measures were taken to reach this goal. Amongst other measures, a formal hearing was made mandatory. Another relevant measure was providing that the objections would not be assessed by any civil servant that had been involved in the preparation of the disputed decision, so that the re-evaluation of the decision would be unprejudiced (or by the public authority itself). Furthermore, article 7:13 GALA confers on the administrative body the competence to establish an advisory committee with external members that could conduct the hearing. A third goal was to make sure that the public authority would not assume too quickly that the objections were resolved to the satisfaction of the objector. It was stipulated that the public authority can only assume that an objection is withdrawn when it is done in writing.

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The provisions in Chapter 7 GALA on the objection procedure ensure that the public authority will take a serious look at the concerns of the interested parties. In addition, the legislator stressed the need for an objection procedure with a rather informal character; the legislator intended the objection procedure to be an informal procedure. As soon as an administrative law court is involved in the dispute, there is a risk that the dispute will be subject to unnecessary juridification. To avoid this, the interested party and the public authority should try to use the objection procedure to resolve their dispute. The reconsideration of the disputed decision should not only concern the legality of the decision but also its effectiveness and the question of whether or not the outcome is reasonable.

In light of the above, we conclude that the aim of the legislator was – in terms of the models of Mashaw – to realize administrative justice by Professional Treatment.

Developments in practice

When the objection procedure was introduced, public authorities had broad discretion to choose how they wanted to fulfill their obligation to hear an interested party during the objection procedure. Large independent public authorities, such as the tax authorities and the Employee Insurances Implementing Agency, chose to entrust this task to their own civil servants, usually those with a legal education. However, almost all municipal public authorities established external advisory committees consisting of three independent members (art. 7:13 GALA). One reason for doing this was that those municipal public authorities wanted to show that they adhered to an unprejudiced assessment of the objections. There was also a pragmatic reason: establishing an external advisory committee is an inexpensive way to handle many objections. Members of most municipal external advisory committees were lawyers. As a consequence, the objection procedure acquired in practice a rather formal character. After all, when three lawyers are asked to form a committee to provide advice on whether an objection to an administrative law decision is well founded, there is a fair chance that they will take the three-judge section of the administrative law court as an example.9 As a result, many of the hearings of municipal advisory committees were very similar to those of the three-judge sections of the administrative courts. Parties to the dispute (the objector and the administrative body) plead their case before the committee. They frequently expressed their views orally on the basis of written pleadings, as is the case with formal court hearings. Other consequences of the dominating presence of lawyers that were independent from the public authority were that the committee’s written advice focused mainly on the legality of the objected decision and that there was hardly any attention to other aspects.

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of a reconsideration of the decision: effectiveness and reasonableness.\textsuperscript{10} The question of whether it would have been possible for the public authority to pay more attention to the interests of the objector usually didn’t have much impact since the advisory committee mostly concluded – in a judge-like fashion – that the outcome of the weighing of the interests involved was not in such a way unreasonable that no reasonable public authority could have reached that conclusion.

It was also found that – unlike the legislator had assumed – objectors frequently made use of lawyers to assist them in the objection procedure.\textsuperscript{11} This meant a reinforcement of the formal nature of the procedure. The frequent presence of lawyers in the objection procedure raised the question of whether it should be considered reasonable to order the public authority to bear the costs of the legal assistance when the procedure resulted in the amendment of the disputed decision due to a mistake made by the public authority. The GALA did provide for such a provision with respect to the procedure before the administrative law court (article 8:75 GALA), but not with respect to objection procedures. In 2002, article 7:15 GALA introduced a similar scheme for the objection procedure.

A formal aspect of the procedure that was criticized by public authorities, was the way in which the obligation to hear the objector is regulated by the provisions in Chapter 7 GALA. Public authorities of course consider it reasonable that the objector is given the opportunity to explain his objections during a hearing. However, contestants frequently do not show up when the public authority organizes a hearing to provide them with this opportunity. For public authorities it would be easier if they had the power to inform the objector that he would only be granted a hearing if he explicitly informed them of his wish to be heard. If he did not respond within a specific time-period, the public authority would assume that the objector was not interested in a hearing. The risk thus shifts from the government (that organizes a hearing for which the objector does not show up) to the objector (who loses his right to a hearing if he fails to let the public authority know that he wants to be heard). The wish of the public authorities was granted in 2013. Since then, article 7:3 GALA stipulates that a hearing is not necessary when the objector has not declared, within a reasonable period set by the public authority, that he wants to be heard.

The choices made by public authorities concerning the practical aspects of the objection procedure and the amendments made by the legislator with respect to the objection procedure show that, during the first decade after the imple-


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mentation of the GALA, Bureaucratic Rationality was the dominant model guiding the efforts to try and bring about the good administration of justice.

The objection procedure: mandatory or optional?

Prior to the introduction of the objection procedure in 1994, there were discussions about whether this procedure should be mandatory or optional. The legislator opted for a mandatory procedure. The debate on “mandatory or optional” did not fade away when the GALA came into force. A frequently mentioned disadvantage of the obligatory objection procedure was that, in some disputes, the public authority and the interested parties have already exchanged all their arguments in the period before the contested decision and will not be diverted away from their positions. In such a situation, the objection procedure is nothing less than a ritual dance with a predictable outcome and only results in a loss of time and energy. There was rather much support for introducing the possibility of skipping the objection procedure in such situations. In 2004, article 7:1a was added to the GALA. It provides that if someone disagrees with a decision and wants to go directly to the administrative law court, he can raise an objection and ask the public authority to agree to skip the objection procedure. If both the public authority and the court agree, the objection procedure can be bypassed.

When objectors became legally allowed to bypass the objection procedure, it was expected that they would make extensive use of this possibility. That has not been the case. A request to skip the objection procedure is made in less than 1% of the objection cases. Contrary to expectations, the interested parties did not often feel the need to go directly to court and bypass the objection procedure.

The informal pro-active approach model

The past decade has seen a shift in the way public authorities handle objections. While the Bureaucratic Rationality Model initially seemed dominant, there has been a shift during the last decade to a combination of the Professional Treatment and Moral Judgment models. This has everything to do with the emergence of mediation and insights from social psychology concerning procedural justice. In a sense, there is a movement “back to the source.” The way in which a growing number of public authorities are implementing the objection procedure in practice

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is called the Informal Pro-active Approach Model and resembles the initial ideas and intention the legislator had when introducing the objection procedure.\footnote{A.T. Marseille & H.B. Winter, Professioneel behandelen van bezwaarschriften, The Hague: Ministry of the Interior and Kingdom Relations 2013.}

What is this other way of treating objections? It is a pro-active, personal and solution-driven approach that consists of two interventions. First, when receiving an objection, a civil servant ensures quick and direct personal contact with the person that lodged the objection, usually by way of a telephone call. The civil servant tries to assess the reason for the objection and consults with the objector regarding how his objection may be best addressed. Sometimes, the telephone call is not just the first contact with the objector, but also the last. That may be the case if it turns out that the objection is based on a misunderstanding (for example, the objector has misunderstood the content of the decision). Usually, the conversation with the objector is followed by a meeting at the office of the public authority. The objector, an official who has been involved in the preparation of the disputed decision and an “independent” civil servant talk about how the problem which gave rise to the objection can best be solved. This procedure takes place in the shadow of the official procedure laid down in Chapter 7 GALA. Ideally, as a result of the informal approach, the objection is withdrawn. The reason may be that the public authority agrees to modify its decision. Another reason for withdrawing the objection may be that the objector concludes that the decision that he originally disagreed with is correct. A third possible outcome may be that, although it is not possible to change the disputed decision, the public authority can assist the objector in finding a solution for his problem.

The Informal Pro-active Approach Model, which is used by a growing number of public authorities, places the citizen’s problem at the center of attention. The model ideally leads to the solution of his problem, but ensures, at least, that the objector is convinced that the public authority has taken a serious look at his case, resulting in his acceptance of the outcome. In this way of dealing with objections, we mainly recognize elements of the Professional Treatment Model (the public authority focuses on providing a service to the objector) as well as elements of the Moral Judgment Model (the public authority values an outcome that the objector considers fair).

4. Analyzing developments: administrative court procedure

The objective of the legislator

When the legislator codified general administrative law in the GALA in 1994, he had several goals in mind with the introduction of new provisions for administrative court procedures in Chapter 8 of the GALA. One of the key ideas of the Dutch legislator was that the provisions on administrative court procedures
should have as their primary goal the protection of the rights and interests of the individual claimant and should not pursue compliance with all public law regulations in general. In other words, the legislator wanted procedural rules to be an appropriate framework to allow the courts to settle cases relating to an individual’s rights and obligations in a binding, effective, and efficient way. As a consequence administrative courts are, to a large extent, bound by the grounds for judicial review put forward by the claimant and are also restricted in their review by the scope of the request (non ultra petita). Judicial review of a public authority’s decision should furthermore be easily accessible, although appeal periods are short (six weeks). As a consequence, the Dutch GALA does not require an interested party to have legal representation in court procedures and it arranges for a rather low court fee.

One of the distinctive features of general administrative procedural law relevant for our analysis and deemed important by the legislator in 1994, is the fact that an administrative court will always actively search for the relevant and objective truth. When considering questions of fact and evidence, the administrative courts are active and are not bound by what parties have put forward. The courts are granted broad discretion when applying investigatory powers to establish the relevant facts to rule on the dispute. It provides them with an instrument to compensate for the inequality that is deemed to exist between the public authority and the civilian interested party that lodged the appeal against its decision. Together with these discretionary powers, the courts were given freedom to divide the burden of proof between the parties and to assess the probative value of the evidence put forward.\textsuperscript{15} Trusting courts with such broad discretion was based on the assumption that courts know best and that, therefore, there was no need for any substantive provision on evidence, the burden of proof or the probative value of the evidence.

A final element that is characteristic of judicial review in the Netherlands and interesting for our assessment is the fact that appeals are always concerned with the outcome of single case decision-making. Since public authorities are usually granted discretionary powers, many cases before the administrative courts would result in the annulment of a decision by the court only to conclude that the public authority is required to try and make a new decision that can once again be the object of an appeal by the same interested party. Many scholars have argued, in the past, that this potentially continuing ritual of annulment and decision-making is not very efficient and/or effective. Therefore, in 1994, the courts were conferred the power to decide that the legal consequences of an annulled decision will be allowed to stand (article 8:72(3)(a) GALA). The courts can also determine that their rulings will replace the annulled decision (article 8:72(3)(b) GALA). In both

cases, the court can only use these powers when it is sure of the decision that should be taken by the public authority.\textsuperscript{16}

In light of the above, we can easily conclude that the legislator has introduced provisions pertaining to administrative court procedure without any manifest elements of – in terms of the models of Mashaw – Bureaucratic Rationality. The model that seems to dominate in the brief recapitulation of the Dutch legislator’s objectives in 1994 is Moral Judgment. The fact that emphasis was put on effectively and efficiently resolving disputes by Dutch administrative courts shows that elements of Professional Treatment were considered as well.

\textit{Developments in practice}

After Chapter 8 of the GALA had been introduced in 1994, the administrative law courts were considered to be active courts with a keen interest in judging cases based on the objective truth. The general opinion was that the large discretion conferred upon the courts would lead them to actively apply their investigatory powers. Although some administrative courts remained (more) active then others, over time the courts became less inclined to use their investigatory powers. One explanation for this growing passive attitude could be that the interpretation of the new provisions on administrative procedural law is still evolving and that the passive attitude would better fit the developing ideas on the structure and the goals of judicial review. Another argument was that the courts’ organization is a bureaucracy as any other and that agreements between individual judges, judges and their staff, and judges and their management might affect their choice of using an investigatory power.\textsuperscript{17} One of the issues that relates to the lack of active attitude by the administrative courts is the fact that all courts applied the so-called court-hearing-centered organizational scheme for handling cases. The aim of this organizational scheme was to process many cases at low cost. In most cases this meant that a case would be “on the desk of a judge” only several weeks before a court hearing was held and that a judgment would be pronounced within several weeks after the hearing. In many cases, a judge might feel that there was not enough time for the court to use its investigatory powers; any formal investigative power would take time and would prolong an already lengthy procedure. Although the GALA provided a framework for tailor-made case-management by offering discretionary powers to the court, the court-hearing-centered organizational scheme was perceived in practice by both courts and claimants as a binding roadmap for all cases.


A decade after implementing the new provisions in the GALA, it was clear that the notion of the administrative court as an active court could no longer be considered correct. The courts would frequently rule – much to the surprise of the claimant – that the claimant didn't bring forward sufficient evidence to support his argument. Courts themselves were in most cases no longer actively using their investigatory powers, which brought scholars to conclude that administrative courts no longer comply with the normative ideal of the legislator at the time of the codification of administrative procedural law. Also, an evaluative study commissioned by the Dutch Government devoted to questions related to assessing the facts of the case in administrative procedural law came to the same conclusions.

Looking at these developments it is clear that practice has shown that administrative courts should no longer be seen as active courts. In particular, the court-hearing-centered organizational scheme to handle cases has led in practice to the rise of elements of the Bureaucratic Rationality Model in the way courts handle their cases. It seems that the model of the Efficient Judgment (Management) has had some influence in these developments.

The administrative court procedure: efficient and effective dispute resolution?

The Netherlands is no exception to the rule that, in most cases of judicial review, the court’s decision to annul the contested decision does not end the conflict between the parties. The public authority is usually required to make a new decision, which can then be the subject of a new appeal. This is highly ineffective and inefficient. Although Chapter 8 of the GALA already focused, in 1994, on the possibility of granting the courts competence for final dispute resolution, the legislator found sufficient reasons, after 15 years of dispute resolution on the basis of GALA, to try to stimulate effective and efficient dispute resolution by administrative courts in order to provide a better service to the claimants and to protect their rights and interests. The Dutch legislator is keen on the idea that administrative courts have an important role to play in finding

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20 This is sometimes called the “yo-yo” effect, see Philip Langbroek, Milan Remac and Paulien Willemsen, “The Dutch System of Dispute Resolution in Administrative Law”, in: Dacian C. Dragos & Bogdana Neamtu (eds.), Alternative Dispute Resolution in European Administrative Law, Springer 2014, section 4.5.2.
21 We will not discuss here the amended art. 6:22 GALA (substantive and formal illegalities can be passed, should these not affect interested persons) and new art. 8:69a GALA (claimants can invoke only those rules that are specifically intended to protect their interests).
ways to stimulate efficient and effective final dispute resolution by the courts. The legislator has made several relevant amendments to the GALA.

An administrative court’s possibilities to end a conflict by means of a judgment in judicial review procedures are limited due to the separation of powers. This separation would be jeopardized if the courts decided the correct way of exercising a discretionary power that was conferred to the public authority. In 2010, the GALA was amended by introducing a new instrument for the courts to better serve their clients, by providing final dispute resolution without jeopardizing the separation of powers, and to improve the efficiency and effectiveness of administrative adjudication in the Netherlands. This instrument is called an administrative loop (bestuurlijke lus) and it provides the courts with the power to allow the public authority the opportunity to repair the shortcomings or unlawful elements found by the court in the contested decision. A new article, 8:51a GALA, allows the court to rule, in an interim judgment, that it has found unlawful elements in the contested decision and that it will annul the decision in its final judgment. However, the court will give the public authority time to try and repair these unlawful elements and, in that way, still have the possibility of a final judgment to end the conflict.

In the meantime, the case law of the highest administrative law courts in the Netherlands had changed the way the courts assess the possibilities of effectively and efficiently ending the conflict by applying the instruments provided for in article 8:72(3), in an effort to help claimants protect their rights and interests. In an effort to codify these new developments, the Dutch legislator introduced a new relevant provision on January 1st 2013. Article 8:41a GALA stipulates that administrative courts will resolve the parties’ dispute when possible. Although this provision is more or less symbolic, it does encourage the administrative courts to focus on efficient, effective and final dispute resolution in order to provide a service to society. To complement the provision, the legislator also amended article 8:72 GALA in order to be in line with the new emphasis on final dispute resolution by administrative courts.

The emphasis the Dutch legislator has put on efficient and effective dispute resolution implies a shift from a perspective where the Moral Judgment Model was dominant to a perspective where elements of both the Bureaucratic Rationality and Professional Treatment models are also deemed highly relevant. One could argue that the Efficient Judgment and the Relevant Judgment models predominate with respect to these developments.

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The new case management procedure

The past decade has seen a change in the way administrative law courts handle cases. As explained in this section, the passive attitude adopted by courts when establishing the facts of a case has met with some criticism. Also, the courts had to change the way they treat their cases due to the emphasis that has been put on efficient and effective administrative adjudication. This has led the courts away from their dominant management scheme that was focused on the court hearing. Without relevant legislative amendments, the administrative law divisions of the Dutch district courts, and also, to some extent, the highest administrative courts, have been handling their cases in accordance with a New Case Management Procedure (NCMP) since 2012. This new scheme entails that cases are scheduled to be heard as soon as possible. The hearing is meant to allow for a discussion between the judge and the parties in order to deal with the dispute in a way that does justice to the parties’ interests. Judges have a more active role at the hearing. Dealing with a case in an efficient and effective manner, allowing for customization and striving towards final dispute resolution are key elements of this – rather informal – hearing.23

The New Case Management Procedure seems to offer relevant elements for some of the developments we have discussed in this section. First, it could be argued that the NCMP has been introduced in response to criticism that administrative courts have not been very keen on applying their investigatory powers ex officio. The NCMP has not been introduced for the purpose of reverting to the legislator’s initial objective and making administrative courts active once again. With court hearings scheduled as soon as possible and discussions between the judge and the parties on the procedure, claimants should not be surprised any longer by the court’s conclusions concerning the establishment of the facts.

Second, the NCMP is focused on providing each case with the attention and conflict resolution technique that it deserves. In that respect, the NCMP for the administrative court procedure resembles the Informal Pro-active Approach Model for the objection procedure. The dispute between the parties is at the center of attention and this ideally leads to an amicable conflict resolution or to a court procedure that parties can agree upon. Judges do their best to implement theories from social psychology when applying procedure fairly from the users’ perspective, in the sense that the parties feel that they have been heard and have been taken seriously.24

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After the adoption of Chapter 8 of the GALA, developments in legislation and practice have focused, on one hand, on efficiency and effectiveness, which could be interpreted as relating to Mashaw’s Bureaucratic Rationality Model. On the other hand, one could easily argue that the most recent practical development puts an emphasis on the Professional Treatment Model. With respect to the models used in the future to assess the forms of governance in the judiciary, one could say that emphasis, in the case of the recent developments, has been put on both the Efficient Judgment and on the Relevant Judgment.

5. Conclusions

In this chapter we have analyzed some of the developments in Dutch administrative adjudication over the past 20 years, in both the General Administrative Law Act (GALA) that was introduced in 1994 and its application in practice. Improving the adjudication of administrative law disputes is interconnected with the idea of public trust and, therefore, a concern for both public authorities in objection procedures and administrative courts in appeal procedures. Of course, it is also a relevant concern for the legislator. All strive towards legally sound decision-making and/or judgments. In their efforts, all try to find a balance between the need for efficient procedures, professional treatment and an outcome that is in accordance with public law and is perceived as fair.

The analytical framework used to perform the analysis was chosen from the theory of administrative justice, specifically Mashaw’s theory of administrative justice. Although this theory was developed on the basis of research within the bureaucratic context of a government agency, the assumption upon which this chapter is built is that Mashaw’s model can be used to interpret the developments in administrative adjudication in the Netherlands. Some support for this assumption can be found in a recent study on the future forms of governance in the Dutch judiciary. We have endeavored to characterize the developments in decision-making by public authorities and administrative law courts in the context of both objection and appeal procedures by indicating the extent to which it corresponds with the ideal types decision-making that are distinguished by Mashaw: the Bureaucratic Rationality Model, the Professional Treatment Model, and the Moral Judgment Model.

Using Mashaw’s analytical framework to interpret the developments that aim to improve the administration of justice in Dutch administrative law has led us to the following conclusions.

With the introduction of the objection procedure in the GALA in 1994, the legislator was aiming to implement a decision-making procedure that would primarily focus on Mashaw’s Moral Judgment Model. The implementation of the provisions concerned with the objection procedure and the amendments brought to the procedure by the legislator first showed a trend towards decision-making in
accordance with the Bureaucratic Rationality Model. However, in the past decade, a strong trend towards the Professional Treatment and Moral Judgment models can be seen in practice. This trend is mainly due to public authorities embracing the so-called Informal Pro-active Approach Model as an appropriate scheme to handle objections. Focusing on procedural justice and professional treatment, this Informal Pro-active Approach Model seems relevant to improve the administrative adjudication in the Netherlands and therefore public trust.

When chapter 8 of the GALA on administrative procedural law was introduced in 1994, the legislator envisaged a procedure for decision-making (pronouncing judgment) that – as was the case with the objection procedure – would be based primarily on Mashaw’s Moral Judgment Model. In the first decade, the implementation of the provisions which granted the courts discretion with respect to the establishment of the facts fell prey to the Bureaucratic Rationality Model. After years of applying the court-hearing-centered scheme of managing cases, the courts seemed to have become restrained and rather passive where the establishment of the facts was concerned. Also, much attention was drawn to wishes of final dispute resolution as both a service to the client (Professional Treatment) and as a measure to improve efficiency and effectiveness (Bureaucratic Rationality). However, in the past years, the courts have changed the way they manage their cases. The introduction of the New Case Management Procedure (NCMP) can be seen – as was the case with the Informal Pro-active Approach Model (IPAM) in the objection procedure – as a clear trend towards decision-making on the basis of both the Professional Treatment and the Moral Judgment models.

In conclusion, we have found that both the IPAM and the NCMP are primarily focused on decision-making according to the Professional Treatment Model and the Moral Judgment Model. Practical implementation of provisions on administrative adjudication in the Netherlands seems to show a trend towards these two models. Differing from the Bureaucratic Rationality Model, we feel that these two models are the most likely to bring about and promote public trust in administrative adjudication and government as such.