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Procedural Justice in Dutch Administrative Court Proceedings

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1. Introduction

In this paper we present and discuss some recent developments in administrative court¹ proceedings in the Netherlands, called ‘*de Nieuwe Zaaksbehandeling van de bestuursrechter*’, that is the New Approach of the administrative law judge. An important aspect of these developments is that Dutch administrative law judges try to incorporate within the procedure the lessons learned from research and field studies on procedural justice. Right from the outset of this paper, we would like to emphasize that the New Approach of the administrative law judge is a programme and a guideline for judges. In this approach, the judge tries to implement strategies and actions which are presumed by the administrative courts to help parties to perceive the way they are treated within proceedings as fair and just. What the New Approach offers is a work-in-progress model of a real and realistic enactment of enhancing procedural justice.²

Although what we describe and discuss in this paper focuses on the Dutch situation, we have reasons to believe that many of these considerations apply to all administrative court proceedings in at least Europe. There are, of course, regional differences, so some aspects might be particular for the Netherlands, but the themes and difficulties that face the administrative law judge seem to be common to many countries.³

During the last two decades the national discussion on the courts’ performance has demonstrated two fundamental changes.

The first fundamental change was a step towards *improved final dispute resolution*. There was a strong demand for an improvement of the available techniques for dispute resolution and for the invention of new techniques. In the past, administrative court decisions used to focus exclusively on the question whether or not an administrative decision (such as a permit, a penalty, the withdrawal of a subsidy) should be annulled. In many cases they did not solve the entire legal dispute, as they took no notice of

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1 In the Netherlands an administrative court is an *independent* body established by statute which is charged with the administration of justice in administrative matters. An administrative court, therefore, is not a review agency within the administration. The judges are called administrative (law) judges.

2 Furthermore, we would like to emphasize that what we discuss is the New Approach in the way it was intended. We cannot claim that every administrative law judge in the country clearly adheres to this approach.

3 As was apparent in the Conference of the Association of European Administrative Judges on 24 May 2013 in Utrecht, the Netherlands. <<http://www.rechtspraak.nl/Organisatie/CRvB/Nieuws/Pages/BezoekrechttersuitdelidstatenvandeRaadvanEuropaanNederland.aspx>>, (last visited 10 October 2014).

the question which decision the administrative authority should take instead of the decision that was annulled. Administrative courts were concerned with the past of the legal dispute, but they seemed to shy away from the future. The discourse on this issue caused a real paradigm shift in administrative law. Since approximately 2007, the courts try to answer the question how legal disputes can be solved for the future. In the interaction with parties during proceedings and when arriving at his judgment, the judge must respect the discretionary power of the administration. Once the court determines that the administrative decision is unlawful, it examines which alternative decision the administrative authority would or should take. On this basis, the court itself may take the replacing decision. Of course, this is only possible if the new decision is clear and lawful.

Moreover, many judges try to do even more than that. These judges try to discover the real-life conflict underlying the legal dispute and to guide the parties towards a solution of their real problem(s). These judges try to narrow the gap between the court proceedings and legal decisions, on the one hand, and the conflict as experienced by the parties themselves, on the other. In many cases the nature of the conflict is transformed into a legal dispute, framed in legal concepts and focused on the administrative decision. This legal dispute is not necessarily the same as the conflict of interests between the parties in their real lives. To be able to narrow this gap, judges use new techniques during court hearings, partially based on ADR techniques (mediation). And they try to enhance some aspects of procedural justice, in particular respect, voice and explanation.

Both ambitions (one related to the legal dispute, the other to the real-life conflict) gave rise to the modernization of administrative court proceedings known as the *New Approach*.

In the meantime, the mind-set of administrative judges changed in some other respects as well. This is where the second fundamental change comes in. When in 1994 the *Algemene wet bestuursrecht* (General Administrative Law Act, GALA) entered into force, the legislator's idea was that fact-finding should be the courts' responsibility. It was up to the administrative courts to find the truth as proved by the facts. That is why administrative law judges have an impressive set of instruments at their disposal to be used in the process of establishing the truth, e.g. they can order an examination of witnesses, appoint a judicial expert or have a court inspection of the premises. This is at least the way the legislator perceived this judicial task; one might ask whether the jurisprudence of that time supported that view. Therefore it was not surprising that right from the very beginning in 1994, the way administrative courts dealt with fact-finding evolved quite differently from what the legislator foresaw. Producing evidence became the primary responsibility of the parties involved, while the courts, instead of using their own fact-finding instruments, limited themselves to an assessment of the evidential value of the parties' efforts.⁴ That is how an *inquisitorial* system evolved into an *adversarial* system. In other words, an investigation-based system developed into a party-driven fact-finding system.

Since the legislator foresaw and intended the administrative law judge as the actor responsible for searching and investigating the relevant facts, the GALA does not lay down any rules of evidence, not even on the way judges should decide which party carries the burden of proof. That is, the chapter of GALA concerning court proceedings, Chapter 8, doesn't lay down any rules of evidence; from the chapters of GALA concerning administrative decision-making some rules of evidence can be derived and actually are derived for court proceedings. But these rules are intended for the decision-making phase and they are too general in scope to be applied as rules of evidence in each individual case during court proceedings. So, not surprisingly, in the adversarial system, that evolved in practice, rules of evidence proved to be indispensable. In 2007 the Third Evaluation of GALA made the administrative judges aware of this deficiency. Closely related, it gradually became clear that the insights from decades of research on *procedural justice* deserve particular attention. Now, we should note that these insights are not part of the official programme, known as the New Approach, but our view is that the New Approach obviously cannot exist without giving attention to these insights. In the particular Dutch situation, we see that especially the lack of clarity in matters of evidence forced the administrative law judges to start paying attention to these insights from procedural justice research. Possibly, this particular Dutch perspective lends the way the

4 Y.E. Schuurmans & D.A. Verburg, 'Bestuursrechtelijk bewijsrecht in de jaren '10: opklaringen in het hele land', 2012 *JBplus*, pp. 117-138.

administrative law judge within the New Approach tries to enhance procedural justice its own taste and flavour, slightly different from the lessons usually learned from research on procedural justice.

Due to the lack of rules of evidence in administrative court proceedings, it sometimes remains unclear to the parties which of them bears the burden of proof. Sometimes a party has to learn from the ruling that that burden fell on him, although this cannot be traced back to any statutory provision or interlocutory decision. At that moment, it is too late to bring (new) evidence to the court. Citizens who are involved in a legal dispute subject to an administrative court are supposed to discover for themselves what, if any, is the burden of proof they bear, using their experience as a repeat player or their common sense as a one-shotter.⁵ This unsatisfactory status quo made judges more and more aware of the need for transparency and ‘voice’ in administrative court proceedings. We will elaborate on this in Section 3.

The central questions in this paper are:

- a. What is the New Approach in Dutch administrative court proceedings?
- b. What are the lessons learned from research on procedural justice (especially respect, voice, explanation) as adopted in the New Approach:
 - to narrow the gap between the legal dispute and the real-life conflict,
 - to support final dispute resolution,
 - to advance the procedural position of civil parties in an adversarial system, taking into consideration that problems arose especially for those civil parties?

In this paper we will first, in Section 2, unfold what the New Approach of the administrative judges in the Netherlands, as adopted by the district courts in 2010/2012, is. Then the lessons learned from research on procedural justice, as adopted within the New Approach, will be examined in Section 3. In Section 4 we will discuss some problems in implementing the New Approach, such as unpredictability, the difficulty for individual judges to adopt the New Approach stemming from individual capabilities, and the feeling that enhancing procedural justice could overshadow the importance of attaining the legal outcome one is entitled to. In Section 5 we will end with some conclusions. As said before, in the Dutch situation matters concerning evidence will intertwine all these sections.

2. The New Approach of the Dutch administrative law judge

Administrative law judges in the Netherlands deal with a vast amount of different cases, both small-scale and large-scale. The kinds of cases the administrative courts deal with vary:

- from denied unemployment benefits,
- to denied access to our country in asylum cases,
- to building permits for the garden fence of one’s neighbour,
- to the decision to cut the budget for the *Concertgebouworkest*,
- to decisions about offshore wind farms in the North Sea, etcetera, etcetera.

Taking into consideration that large variety of cases, it might sound astonishing that administrative courts during the first 15 years of GALA dealt with all cases in essentially the same manner: the plaintiff’s appeal, the defendant’s reply and other briefs were received, the courts did not initiate any research, almost a year after proceedings started a court hearing was scheduled, during that hearing the parties could once more state their views on the case, the judges typically asking only a few questions, inviting parties to clarify this topic or that ... and that was it! A few weeks later the ruling would be delivered.

Without going into details, we would like to emphasize that, for a long time, there were really good reasons for this kind of procedure sobriety,⁶ but during the first few years of the 21st century, these

5 See: B.J. Schueler, ‘Last van de vrije bewijsleer’, in G.H. Addink et al. (eds.), *Grensverleggend bestuursrecht*, 2008, pp. 443-458; B.J. Schueler, ‘De metselaar’, in T. Barkhuysen et al. (eds.), *AB Klassiek*, 2009, p. 565 (extensive comments on an exemplary ruling of the Central Appeals Tribunal (*Centrale Raad van Beroep*)); R.J.N. Schlössels et al., *Bestuursrechtelijk bewijsrecht: wetgever of rechter?*, VAR-reeks 142, 2009.

6 The main reason being that before GALA, the length of proceedings was excessive. Proceedings taking three to five years were certainly not an exception. And, as said before, more than once, neither the underlying conflict, nor the judicial dispute really ended with the

kinds of proceedings increasingly failed to meet society's and parties' expectations of what administrative proceedings should be. Growing criticism arose from politicians, from repeat players like lawyers and government institutions, from citizens' surveys, and from academia. All that criticism accumulated in the aforementioned Third Evaluation of GALA.⁷ The main issues raised in the evaluation report itself and the research reports underpinning that report were:

- due to open-ended rulings, these proceedings all too often do not really solve the problems which the parties involved have,⁸
- due to a lack of transparency parties are left in the dark as to what they should do to win their case, especially concerning matters of evidence,
- due to the 'one size fits all' approach of court proceedings, these fail to meet the demands for tailor-made proceedings in which the judge gives due attention to each case, based on the complexity and juridical merits of the case.

The good thing about this vast amount of criticism, of course, is that the administrative judges became aware of the need for change. So the New Approach of the administrative law judge, adopted by the eleven district courts in the Netherlands in 2010/2012, seeks to tackle these downsides. The New Approach has three central themes (1) early stage hearings, approximately in the fourth month after proceedings have started, (2) final dispute resolution, i.e. trying to reach real problem-solving decisions, not only focusing on the juridical merits of the case, and, perhaps even more importantly, not confining the rulings to the examination of an administrative decision made in the past, (3) tailor-made approaches in which the judge gives each case the kind of attention, direction and intervention it needs.⁹

Tailor-made approaches

Striving for tailor-made approaches implies that administrative judges, together with the parties concerned, determine whether the case ends in a classic ruling, mediation, a negotiated result i.e. a parties' settlement or an amicable solution, an extra round of delivering and discussing evidence, requesting reports from court experts, hearing witnesses, or even the simple withdrawal of a case because of the satisfactory result of the hearing itself.

Tailor-made approach in matters of evidence and the burden of proof

Especially when the discussion during the hearing calls for an extra round of delivering and discussing new evidence, the need for transparency enters the stage. As mentioned before, parties were left in the dark on matters of evidence and the burden of proof.¹⁰ It used to be quite normal for them to read in the ruling that they had failed to prove their stance, without ever being informed what they had to prove to win their case. Administrative law judges, therefore, now view it as their task to give, during hearings, preliminary judgments. For instance, a judge could say: 'The burden of proof rests on the Minister, the defendant, but the way I look at it now, I think the Minister has brought up enough material to uphold his decision, unless you, the plaintiff, can give us some more information, and support that with some kind of evidence.' Of course this judge has to phrase this kind of statement carefully, because he should prevent himself from sounding partial to one side or the other.

ruling. Procedure sobriety under GALA served to reduce the length of proceedings.

7 Commissie Evaluatie Awb III, *Toepassing en effecten van de Algemene wet bestuursrecht 2002-2006*, (Commissie IJink), 2007 (the evaluation committee report on the administration and effects of GALA 2002-2006); T. Barkhuysen et al., *Feitenvaststelling in beroep*, 2007 (the research report on fact-finding during administrative court proceedings); B.J. Schueler et al., *Definitieve geschilbeslechting door de bestuursrechter*, 2007 (the research report on final dispute resolution by means of administrative court rulings).

8 Which is of course a polite way of saying that administrative judges were solving some kind of judicial jigsaw puzzle but not the real problems.

9 'Wat & waarom nieuwe zaaksbehandeling?', 'Project Differentiatie van Werkstromen Bestuursrecht' (both stating the official characteristics of the New Approach), B.J. van Ettehoven & D.A. Verburg, 'Nieuwe Zaaksbehandeling bij de bestuursrechter', Ministerie van BZK, 2011, pp. 12-14 (an outline of the New Approach, written by two senior judges of district courts). Available at <<http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Bestuursrecht/Pages/Wat-waarom-nieuwe-zaaksbehandeling.aspx>> (last visited 10 October 2014).

10 Y.E. Schuurmans, 'De eigen aard van het bestuursrechtelijk bewijsrecht', in *Bestuursrechtelijk bewijsrecht: wetgever of rechter?*, VAR-reeks 142, 2009, p. 121 (Schuurmans states that on matters of proof parties were 'left to their fate'). E.g. CRvB 1 June 2005 (ECLI:NL:CRVB:2005:AT7174, JB 2005/237 with annotation by D.W.M. Wenders) and 8 April 2011 (ECLI:NL:CRVB:2011:BQ0845, AB 2012/214 with annotation by A.T. Marseille).

The kind of conversation that can develop is a discussion in which the judge tries to find out what each party can do to win the case. In discussing this, the judge can evaluate whether this or that kind of evidence would help or not, or the other party can state whether he would or would not be convinced when that kind of evidence would be presented to the court. And what is even more important, when one of the parties states that he or she is able to deliver some kind of evidence, and the judge thinks that this is a potentially good contribution to the proceedings, the New Approach implies that that party should be given the opportunity to present that evidence. This means that parties are given the opportunity to have a say in the way the judge will decide how the case shall be dealt with. As can be seen, this entails a discussion with all parties, not only with the party that is supposed to adduce new evidence.

Tailor-made approach and final dispute resolution

Perhaps rather implicit until now is the tight connection between this tailor-made approach, especially when it comes down to judges directing parties in their encumbrances to bring the necessary evidence to court, on the one hand, and the judges' striving for final dispute resolution on the other. One of the most striking findings of the Third Evaluation is what really hampers reaching final dispute resolution. For decades administrative law professionals would sing in unison that in democratic societies government authorities have some kind of *discretion* in deciding whether citizens, companies and NGOs are entitled to permits, subsidies, allowances, etcetera, and that this discretion makes it difficult for administrative judges to achieve final dispute resolutions. Now, the Third Evaluation of GALA pointed out that what is really hampering final dispute resolution is the mere fact that, when administrative judges decide to annul the administration's decision, they simply don't have the facts, the details, the evidence on the situation here and now to know what the right decision should be.¹¹ That is, primarily, what makes it difficult for administrative judges to achieve final dispute resolution. True, there are other factors that hamper final dispute resolution as well. The two main other factors in our view are: (a) in order to decide what the right decision should be, the judge should take into consideration the relevant interests of other people, even when they are not party to the case; the administrative authority is better equipped to do that, and (b) to come to the right decision it takes a formal procedure, determined by law, e.g. the procedures for zoning plans or development plans.¹² Nevertheless, the attention given to matters of evidence, by means of preliminary judgements and interlocutory decisions, the way administrative judges try to direct parties to present the best evidence possible – all part of the tailor-made approach discussed before – are strongly believed to be a powerful machine to reach final dispute resolution in more cases than ever before.

Perhaps implicit as well is the U-turn the administrative law judges made. The judge no longer confines himself to the retrospective examination of an administrative decision made in the past. Now, the judge tries – within the context of the law – to reach final dispute resolution in cases where he decides to annul the contested decision. That means he has to look prospectively what has to be done in times ahead: what is the decision for now and the future, what alternative decision is best.

In many cases, after the judge determines that the contested decision is unlawful, further steps have to be taken by the administrative authority. Final dispute resolution becomes easier as the administrative authority is better able to repair defects in the contested decision (e.g. by preparing a new justification or obtaining a new expert opinion). If rectifying the defect is not possible without changing the content of the decision, the court examines which alternative decision the administrative authority would (preferably) take. On this basis, the court may solve the dispute. Sometimes the court itself cannot reach a final solution because the responsibility of the administrative authority itself comes to the fore. Some examples are a planning decision that includes many technical regulations and cases in which an extensive factual investigation is required before the dispute can be settled. In such cases, the judge may order the administrative authority to take a decision and his ruling may include more detailed directions for the decision to be taken.

11 Barkhuysen et al. 2007, supra note 7, pp. 75, 83, 156-157, 319, 331-336 and p. 339; Schueler et al., 2007, supra note 7, pp. 119-120; Commissie Evaluatie Awb III 2007, supra note 7, pp. 34 and 44.

12 A remarkable example of (b) is that a dispensation had to be allotted by a notary public: Cbb 16 December 2011 (ECLI:NL:CBB:2011:BV0936, AB 2012/161 with annotation by J.M.J. van Rijn van Alkemade).

Connections between the tailor-made approach and the need for an early stage hearing

Furthermore, there is also a tight connection between the tailor-made approach and the need for an early stage hearing. It's probably not hard to imagine that when a hearing is scheduled almost a year after proceedings have started, the judge feels a strong inclination to 'be done' with the case. And that resulted in rulings shortly after the hearing, no time for further investigation, no time for new evidence brought to the court, etcetera. So, to give each case the specific approach it needs, it is necessary to have hearings in (preferably) the fourth month after proceedings have started. Only then, it is possible to have highly qualified lawyers, the judge and the court clerk determining which route this case deserves. And, as said before, the hearing leads to the opportunity to discuss with the parties involved what *they* think the right way to deal with the case is. Moreover, the early stage hearing facilitates that parties are able, have the time and opportunity to do what is needed to win their case, especially when it comes to bringing new evidence to the court. In other cases, if the hearing results in the judge, together with the parties, concluding that no further actions are needed to reach a decision, he can give his ruling immediately after the hearing (an oral ruling) or only a few weeks after the hearing (a written ruling). So, for the tailor-made approach to thrive, early stage hearings are vital.

Now, this early stage hearing serves a dual purpose. In the first place, the hearing will in most cases be the one and only hearing. Even when a new round of bringing evidence to the court ensues, scheduling a second hearing is rather exceptional. So even then, the parties concerned must say all they want to say during that (first and only) hearing; after that, proceedings will continue by briefs. Furthermore, quite a few cases are ready for a ruling once the discussion on the merits of the case has ended. In other cases an amicable solution is reached, and therefore proceedings can end. And in still other cases, after discussing things during the hearing, the parties involved simply decide to call it a day. That last one is a striking result of digging into the real-life conflict: sometimes the plaintiff gets what he *really* wants, not by winning his case in any judicial kind of way, but just because the representative of the administrative authority says 'Sorry, we think the decision we took is right, but the way we treated Mr. X was not.' So, the first purpose of the hearing is that parties use this opportunity to state what their real interests are, what worries them, what the real issue is, etcetera, because this hearing will most probably be the only meeting, the only moment of oral discussion.

Secondly, it can be the starting point for further steps to be taken. This will be the case when the hearing results in the need for a new round of bringing evidence to court, as said before. But these further steps could also be trying to reach an amicable solution or starting mediation. Outcomes like that are more often than not ideally *prepared* in a courtroom, but *developed and reached* elsewhere, and not in a stately setting like a courtroom. So, the second purpose of the hearing is that the judge, after hearing what really concerns the parties involved, can direct them towards their solution, can stimulate them to take the steps that suit their (real) interest, either a formal route or an informal route.

Before we turn to the next section, we can conclude that all this means that the New Approach turns hearings into multifaceted meetings, demanding quite a lot from the participants. Parties need to be prepared to discuss both legal and real-life aspects, should know what they really want and be ready for new, perhaps unexpected initiatives to deal with the case. This makes the hearing a delicate encounter for all the persons involved, with parties entering the courtroom with some kind of trepidation. Even lawyers who are experts in administrative law say that the New Approach makes hearings unpredictable.¹³

3. The relevance of procedural justice research for the New Approach

3.1. Introduction

When 'designing' the New Approach, with its focus on real-life conflicts, its way of trying to deal with the lack of transparency and its effort to offer tailor-made proceedings, it was quite clear for the administrative courts that the insights from procedural justice research had to be taken into consideration as well.¹⁴ That,

13 J-P Heinrich & H. den Herder, 'Ook gemachtigden van bestuursorganen zijn aan de slag met de Nieuwe Zaaksbehandeling', 2013 *JBplus*, Para. 3, especially p. 216, and E.J. Daalder, 'Observaties en gedachten over de nieuwe zaaksbehandeling', in A.T. Marseille & L. van der Velden (eds.), *Vertrouwen verdient. Verdient vertrouwen. Visies op geschilbeslechting door de overheid*, 2014, pp. 163-164.

14 One can find similar developments in other sections of Dutch district courts. E.g. in civil law: R.J. Verschoof, *Waar gaat het over?*, inaugural

at least, is our view when we look into the developments that arose when the administrative judges tried to meet the needs of the moment to come to a new way of dealing with administrative court proceedings. One of the research reports of the Third Evaluation of GALA we didn't mention before is the study on citizens' perspective on administrative court proceedings.¹⁵ This report implies that administrative law judges should pay heed to the findings of social sciences, among which are studies on procedural justice. Without clinging to the rather oblique maxim that lawyers and psychologists will never understand each other, we must conclude that this proved to be difficult.

There is a great deal that we know from procedural justice research that is relevant for court proceedings. We know that when people feel uncertain and insecure, they are very susceptible to being treated in a fair manner. They are looking for cues to answer a question like: 'Can I trust this judge, this authority who is going to take a decision in my case?'¹⁶ We also know that procedural justice research shows strong relations between certain factors, for instance respect and voice, and perceived procedural justice.¹⁷

But there are (at least) two things we do not know. In the first place, there is no widely accepted scale of procedural justice available and, as a consequence, we cannot state exactly what procedural justice-enhancing factors need the judges' attention during administrative court proceedings, in order to influence perceived procedural justice. There is no top five listing of the most important factors. And when designing the New Approach, of course judges were looking for *instruments* they could apply for this 'other kind of justice' that was quite new to them. Actually, if one could see right into the heart of a judge, one would probably see that judge strongly wishing for some kind of magic tap, he could simply open, so all parties can quench their thirst for procedural justice. Until now, we find ourselves in a world where no such tap has been invented. And since procedural justice is all about *perceived* procedural justice, a universal, always applicable tap will probably never be invented.

This brings us, secondly, to the other thing we don't know. The fact that we know that factors like respect and voice are important still leaves open to discussion what the here-and-now enactment of these factors takes. What should a judge do, say and show to make clear to the parties involved that he *does* feel respect for them, that he *is* interested in what they want to say?

These two known unknowns led administrative law judges to make a choice as to what they thought would best meet the needs of parties involved in administrative court proceedings.¹⁸ In making this choice, the judges did of course try to incorporate the lessons learned from procedural justice studies, but, until now, the New Approach cannot claim some kind of evidence-based 'implementation' of procedural justice-enhancing factors. Further study is needed.

We think it is important to emphasize that some elements that are related to procedural justice have been the stock in trade of administrative judges for ages. Neutrality, of course, is the first trait one would (and is entitled to) expect in a judge. Professional competence is another. And all judges asked whether they think they ought to be polite and respectful to the parties that come to their hearings, will definitely say 'yes'. So what we will discuss in this section is whether the New Approach calls for some different kind of respect (different from listening in silence, without showing doubts, without asking questions, without offering some kind of transparency) and we will discuss whether the New Approach calls for other approaches related to procedural justice, approaches new to the administrative law judges. In discussing

speech Utrecht University, 2013, especially pp. 17-27, R.J. Verschoof, 'What Is It All About? An Overview of the Dutch Research and a Plea for a Change', 2014 *Utrecht Law Review* 10, no. 4, pp. 41-55, J. van der Linden, *De civiele zitting centraal: informeren, afstemmen en schikken*, 2010, J. van der Linden et al., *Meesterlijk gedrag: leren van compareren*, 2009. And in criminal law a recent study shows that suspended sentences are more effective when the offender feels that the judge has treated him in a just and respectful manner: P.G.M. Aarten, *Suspended Sentences: Public opinion, Compliance and Recidivism*, 2014.

15 M.T.A.B. Laemers et al., *Awb-procedures vanuit het gezichtspunt van de burger*, 2007. A short overview can be found in Appendix 2, pp. 99-102, Commissie Evaluatie Awb III 2007, supra note 7, pp. 15-19.

16 K. van den Bos et al., 'When do we need procedural fairness? The role of trust in authority', 1998 *Journal of Personality and Social Psychology* 75, pp. 1449-1458, K. van den Bos, 'Rechtvaardigheid en onzekerheid', in W.L. Tiemeijer et al. (eds.), *De menselijke beslisser. Over de psychologie van keuze en gedrag*, 2009, especially pp. 89-100.

17 E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice*, 1988, G.S. Leventhal, 'What should be done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships', in K.J. Gergen et al. (eds.), *Social Exchange: Advances in Theory and Research*, 1980, pp. 27-54, K. van den Bos, 'What Is Responsible for the Fair Process Effect?', in J. Greenberg & J.A. Colquitt (eds.), *Handbook of Organizational Justice: fundamental questions about fairness in the workplace*, 2005, pp. 273-300.

18 Schuurmans & Verburg 2012, supra note 4.

this, we will try to relate the choices made in the New Approach to the findings from procedural justice research. Of course, we state that what we discuss is the New Approach as it was intended, not necessarily being the way individual judges adopted this programme.

3.2. Procedural justice

In line with the contribution by Van den Bos, Van der Velden and Lind in this issue of the *Utrecht Law Review*,¹⁹ we define procedural justice as the answer to the question whether citizens perceive interactions with, or the way they were treated by an authority as fair and just. This is also referred to as ‘treatment fairness’,²⁰ but in the remainder of this article we will refer to it as ‘(perceived) procedural justice’, since that is most commonly used in literature on this subject.

There is by now a large body of research that confirms that people’s thoughts, feelings, attitudes and behaviour are strongly influenced by their perceptions of justice.²¹ When citizens perceive their interaction with an authority as procedurally fair, they will respond far more positively than when they perceive their interaction as unfair or unjust. In case of perceived procedural fairness they will feel happier about their dealings with the authority, they will trust that authority more and are more willing to accept and abide by its decisions. As a result the authority’s legitimacy increases.²²

The complementary side is that people who feel they have been treated unfairly are far less cooperative, they are more likely to complain or to resort to legal action to try to prove their case, or to behave in an anti-social manner.²³ From the vast amount of available research, we now know that people’s perception of procedural justice may be influenced by a number of factors.²⁴ Considering the above-mentioned effects of perceived procedural justice, and the problems pointed out in the Third Evaluation of GALA, showing what we see as (among other problems) a lack of perceived procedural justice by citizens, lawyers and administration representatives in administrative court proceedings, investing in procedural enhancing factors is evidently important for administrative law judges. Since the ground-breaking first procedural justice study by Thibaut and Walker,²⁵ many procedural justice-enhancing factors were traced.²⁶

As said before, there is no widely accepted scale of the most important or most effective factors enhancing procedural justice and the here-and-now enactment of the relevant factors enhancing procedural justice is difficult and unclear. We are therefore somewhat limited in our exploration and conclusions considering the relevant procedural justice-enhancing factors within the New Approach. Therefore, we will simply follow the elements of the New Approach the administrative law judges chose from analyzing what they thought would best meet the needs of the parties involved in administrative

19 K. van den Bos et al., ‘Procedural Justice and Citizen-Government Interactions. On the Role of Perceived Procedural Justice in Citizens’ Reactions to Government Decisions and the Handling of Conflicts’, 2014 *Utrecht Law Review* 10, no. 4, pp. 1-26.

20 E.A. Lind et al., ‘The Social Construction of Injustice: fairness judgments in response to own and others’ unfair treatment by authorities’, 1998 *Organizational Behavior and Human Decision Processes* 75, no. 1, pp. 1-22, K. van den Bos & E.A. Lind, ‘The Psychology of Own versus Others’ Treatment: self-oriented and other-oriented effects on perceptions of procedural justice’, 2001 *Personality and Social Psychology Bulletin* 27, pp. 1324-1333.

21 Van den Bos 2005, supra note 17, pp. 273-300, Lind & Tyler 1988, supra note 17.

22 K. van den Bos, *Vertrouwen in de overheid: Wanneer hebben burgers het, wanneer hebben ze het niet, en wanneer weten ze niet of de overheid te vertrouwen is?*, 2011, K. van den Bos & L. van der Velden, *Legitimiteit van de overheid, aanvaarding van overheidsbesluiten en ervaren procedurele rechtvaardigheid*, 2013.

23 J. Greenberg, ‘Stealing in the Name of Justice: informational and interpersonal moderators of theft reactions to underpayment inequity’, 1993 *Organizational Behavior and Human Decision Processes* 54, no. 1, pp. 81-103, J. Greenberg, ‘A Social Influence Model of Employee Theft: beyond the fraud triangle’, in R.J. Lewicki et al. (eds.), *Research on Negotiation in Organizations*, Vol. 6, 1997, pp. 29-52, J. Greenberg & E.A. Lind, ‘The Pursuit of Organizational Justice: from conceptualization to implication to application’, in C.L. Cooper & E.A. Locke (eds.), *I/O Psychology: what we know about theory and practice*, 2000, pp. 72-105, E.A. Lind, ‘Fairness Heuristic Theory: justice judgments as pivotal cognitions in organizational relations’, in J. Greenberg & R. Cropanzano (eds.), *Advances in Organizational Behavior*, 2001, pp. 56-88, and E.A. Lind et al., ‘The Winding Road from Employee to Complainant: situational and psychological determinants of wrongful termination claims’, 2000 *Administrative Science Quarterly* 45, pp. 557-590.

24 K. van den Bos et al., ‘The Consistency Rule and the Voice Effect: the influence of expectations on procedural fairness judgements and performance’, 1996 *European Journal of Social Psychology* 26, pp. 411-428, Leventhal 1980, supra note 17, pp. 27-54, Lind & Tyler 1988, supra note 17.

25 J.W. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis*, 1975.

26 N.J. Finkel, *Not Fair! The typology of commonsense unfairness*, 2001, Leventhal 1980, supra note 17, pp. 27-54, Lind & Tyler 1988, supra note 17, R.H. Moorman, ‘Relationship between Organizational Justice and Organizational Citizenship Behaviors: do fairness perceptions influence employee citizenship?’, 1991 *Journal of Applied Psychology* 76, pp. 845-855, Van den Bos 2005, supra note 17, pp. 273-300, and K. van den Bos, ‘Procedurele rechtvaardigheid: Beleving bij burgers en implicaties voor het openbaar bestuur’, in A.F.M. Brenninkmeijer et al. (eds.), *Werken aan behoorlijkheid: De Nationale ombudsman in zijn context*, 2007, pp. 183-198.

court proceedings, would be the best way for dealing with the problems the Third Evaluation of GALA pointed out, and would be the best way to incorporate the lessons learned from procedural justice studies. A *caveat* is needed here. There is no corpus of procedural justice elements explicitly adopted within the New Approach programme, but derived from literature²⁷ and our own experience, working within the New Approach, our view is that at least the following elements almost necessarily show up when the New Approach is put into practice.

The choice the administrative law judges made to meet the need for enhancing procedural justice are the following five elements: (1) respect, (2) voice and due consideration, (3) some influence on how proceedings will continue, (4) an explanation of how proceedings will continue and (5) direct interpersonal contact. Although in a somewhat different order, we will discuss all these elements in the next sections.

3.3. Voice and due consideration

The principle of hearing both sides of the argument (*audi et alteram partem*) is probably the most fundamental and long-time familiar value in court proceedings. But looking at it from a procedural justice perspective, reasons other than traditional reasons for thinking that this principle is important come to mind. People more often than not are uncertain whether or not they are entitled to the contested permit, subsidy or social benefit. The more people are convinced that there is no certainty about that entitlement, the more susceptible they are to the importance of both sides of the dispute being heard.²⁸ Therefore, Stuart Hampshire qualifies this principle as a foundation of ‘procedural fairness’.²⁹ Here the elements of ‘voice’ and ‘neutrality’ probably go hand in hand. The fact that all parties will be heard in itself is not a sufficient reason to assume that the procedure will be perceived as procedurally fair. The opinion of the parties as to the fairness of the procedure depends not only on whether the judge has listened, that is: passively listened, to them.

Research on procedural justice shows the importance of *voice, coupled with due consideration*. Basically, it is what Allan Lind said: ‘you don’t just give voice, you have to attend to the voice’.³⁰ For the judge it implies that it is not enough to listen to what parties are saying. It is not even enough to take what parties are saying into consideration. The judge has to *show* that he has listened to the parties by turning the listening into some kind of action, for example paraphrasing back to the parties what they said to him. ‘It is not just that you are worth having a right to speak, you are worth being listened to and that is a key element of voice’.³¹ So, listening for a judge is and ought to be hard work.

Within the New Approach, the judge will typically (after a short introduction) start the hearing by asking both (or all) parties some kind of family doctor question: ‘Where does it hurt?’ or, less metaphorically, questions like ‘What, to you, is this case essentially about?’, ‘What worries you if you were to lose this case?’. These questions are deliberately put in a non-legal phrasing. If the plaintiff brings a lawyer along, the question will not be asked to the lawyer, but to the plaintiff himself. Depending on what answer he gets, the judge will specify his next question, and the next, and possibly even a fourth question, each question zooming in on the answer to the former question, and only then, if possible, will he reflect on what the parties say, for instance by stating: ‘I understand that you would like me to decide (...). Before I can do that, there are quite a lot of obstacles. These obstacles concern matters of law and jurisprudence. I would like to discuss them with you.’ or ‘I understand that you would like me to decide (...). I must say that, the way I look at your case now, the law does not allow an outcome like that. And as a judge I of course have to abide by the law.’ Now, these examples are of a legal nature, but depending on the answers given by the parties, the judge’s response might well be of a more practical nature. The introduction of the New Approach included training for judges to say things like this respectfully and not

27 D.A. Verburg, ‘De nieuwe zaaksbehandeling van de bestuursrechter’, 2013 *Tijdschrift Conflictantering*, no. 3, pp. 19-23.

28 Van den Bos 2011, supra note 22 and Van den Bos 2009, supra note 16.

29 S. Hampshire, *Justice is Conflict*, Princeton Monographs in Philosophy, 2000.

30 K. van den Bos & L. van der Velden, *Legitimiteit van de overheid, aanvaarding van overheidsbesluiten & ervaren procedurele rechtvaardigheid. Prettig Contact met de Overheid 4*, 2013, p. 41. See also: T.R. Tyler, ‘Procedural Justice and the Courts’, 2007 *Court Review* 44, no. 1/2, Paper 217: ‘People infer whether they feel that court personnel, such as judges, are listening to and considering their views’ <<http://digitalcommons.unl.edu/ajacourtreview/217>> (last visited 10 October 2014).

31 Ibid.

in some kind of rash and untimely way. Before judges come up with problems, obstacles, etcetera, they are trained to make sure that parties have finished saying all they want to. Helpful questions for judges to turn from asking questions only, to the moment they start reflecting on what they heard, prove to be: ‘*What would it mean to you if I were to adjudge your appeal?*’, followed by: ‘*And what would it mean to you if I were to reject your appeal?*’.

The following step, in many cases, will be the ruling. Having a keen eye for the delicate relationship between the court hearing and the ruling is an important aspect of the New Approach. The idea is that the perceived quality of the ruling largely depends on the quality of the hearing. Parties should preferably be able to recognize the ruling as a judgment on a discussion in which they are personally involved.³² This does not only mean that the ruling must include a judgment on all points of dispute raised during the hearing, it also means that during the hearing the judge should refrain from evoking expectations he ultimately cannot live up to. What people expect from the ruling depends to a large extent on the matter discussed during the hearing. If much time is spent on discussing the substantive merits of the case, the plaintiff will probably be disappointed when at the end his claim is denied for nothing more than procedural reasons. For example, if his appeal is in the end rejected because the court does not regard him as an interested party, it would have been better if this possible outcome had been explained in clear-cut, but respectful wording during the hearing. It is essential, within the New Approach, that during the hearing the court explains why the substantive aspects of the case may not be dealt with in the ruling.³³

3.4. *Explanation and some influence on how proceedings will continue*

From procedural justice research we know that many people have feelings of uncertainty when starting a lawsuit or appealing for administrative review. Stemming from this uncertainty, they are very susceptible to ‘fairness information’, they are looking for information that tells them, gives them some kind of clue that they entered a situation in which they can trust the authority, either an administrative authority that, or a judge who, is going to decide in their case.³⁴ That uncertainty can be the result of a lack of knowledge as to what the rules are that determine whether they are entitled to this permit, this subsidy, this allowance, etcetera. Looking at it from a legal perspective, one could say that this is material uncertainty. It can also be that they don’t know what the right or normal procedure is to reach a decision. Looking at it from a legal perspective, one could say that this is procedural uncertainty.

What we know from procedural justice research is that one of the factors that can possibly help people to sense they are being treated in a fair and just way is an explanation by the authority, in our case the judge, an explanation telling them what to expect, what the procedure and further steps to be taken will be, what they can contribute to that process, etcetera.

In an interview with Lynn van der Velden, Allan Lind put it like this:

‘If someone will explain to me in a way that I’ll understand, why they are doing what they are doing to me, why they reached the decision that they reached, again I’ll feel fairly treated. Because that very explanation makes it clear that they regard me as a reasonable actor within this process and they are going to tell me why decided what they decided so that I can factor that into my behavior in the future. An explanation of the decision that makes reference to voiced concerns shows one has listened – even if the explanation must be about how those concerns cannot be honoured in this decision. I tell you in terms of what you’ve already said to me, [then] I feedback into the impression that I have actually listened to the voice that I gave. So if I say to you “I understand that you don’t think that you owe taxes on this form of income or that you should have this type of exclusion from your tax obligation, I understand that that is what you think but that is not the law. The law is this...” Then what I would have done is to recognize their position and explain why I cannot go along with it. But giving them an

32 K.E. Haan, ‘De Nieuwe Zaaksbehandeling op het goede spoor? Verslag van het symposium op 29 oktober 2012 in Utrecht’, *Nederlands Tijdschrift voor Bestuursrecht* 2013/1, no. 3, p. 24.

33 Schuurmans & Verburg 2012, supra note 4.

34 Van den Bos et al. 1998, supra note 16, pp. 1449-1458, K. van den Bos & E.A. Lind, ‘Uncertainty Management by Means of Fairness Judgments’, 2002 *Advances in experimental psychology* 34, pp. 1-60, Van den Bos 2009, supra note 16, especially pp. 89-100.

explanation not in formalistic or technical terms but in the terms and context of their existence again establishes the connection that is at the heart of this subjective procedural fairness. It is really, again in the final [analysis], just a way to make it all more human. Still regulated, still the State encountering the citizen, but more human in some context and making them feel as though they have personhood, some individuality in this process.

There is another kind of explanation that is quite important in the perception of fairness and that is “*Explain to me what is going to happen. Give me an understanding of how this process is going to play out so I can exercise some active role in it. If it is something that affects my life, if it is my one chance – as often these interactions with the State are – my one chance for actual consideration by a government official, [then] help me understand how this is going to play out so that I can be a participant in it*”. And I think as I look at some of the data that we have collected around this: this is one of the things that is quite often missing because of course, judges and administrators understand the process quite well, and it has been so long since they didn’t understand the process that they forget to explain it.³⁵

Tom Tyler says:

‘To emphasize this aspect of the court experience, judges should be transparent and open about how the rules are being applied and how decisions are being made. Explanations emphasizing how the relevant rules are being applied are helpful.’³⁶

One of the most important effects of the New Approach is offering more transparency within administrative court proceeding. In the former, traditional approach, the parties involved, and especially the plaintiff, did not have an adequate view on their position within the process. Parties were surprised by certain decisions they read in the ruling, and they did not understand what they should have done differently.³⁷ Within the New Approach the judge invests in informing the parties at an early stage.

A specific trait of the New Approach is that the judge not only offers procedural information to parties (how these proceedings will continue, what steps will be taken to reach a decision), but also offers material information (what possible outcomes are to be expected when I come to a ruling, what additional evidence is needed from parties to convince the judge, and possibly the other party), transparency and preliminary judgments. Both quotations by Lind and Tyler reflect on this kind of material explanation, but the main procedural justice research focuses on procedural information.

We are struggling with the phrasing ‘explanation’. This phrasing tends to be top-down (‘alright, I will once more explain to you how things work in proceedings like these’). We think that in these times a much more horizontal way of communicating is needed. Institutional authority is declining, so we cannot expect people entering administrative proceedings with some kind of awe, regarding the Judiciary as a powerful institution handing down the law as manna from heaven. It simply doesn’t work that way anymore. Not the judiciary as a whole, but this one judge is either going to do the job or not in convincing people that they have entered a situation where justice shall be done. And if he does well, his performance can help people to trust the judiciary as a whole. So what we can see, in our view, is a total turn-around. Forty years ago the individual judge derived his personal authority from the institutional authority of the judiciary; nowadays, it’s the other way around: if this judge performs well, if he is able to be authoritative, the parties involved will think of the judiciary as a whole in some kind of more positive perspective.³⁸ So, from this perspective, we think the phrasing ‘explanation’ is all wrong. We would like to turn to phrasings like ‘giving information’ and ‘exchanging perspectives’. What this is really about

35 Van den Bos & Van der Velden 2013, supra note 30, pp. 42-43.

36 Tyler 2007, supra note 30, p. 30. Further references: J. Brockner et al., ‘When it is especially important to explain why: Factors affecting the relationship between managers’ explanations of a layoff and survivors’ reactions to the layoff’ 1990 *J. Exp. Soc. Psychol.* 26, pp. 389-407.

37 M. Knapen, ‘Bestuursrechtadvocaat nieuwe stijl’, 2012 *Advocatenblad*, no. 1, p. 28.

38 Th. Jansen et al. (eds.), *Gezagsdragers. De publieke zaak op zoek naar haar verdedigers*, 2012, the introduction, pp. 11 et seq., and the contribution of G. van den Brink, pp. 19 et seq.

is that the judge tells the parties: ‘All right, I understand your view, but this is the set of rules I have to deal with. (...)’ That is probably a way of phrasing that fits the times we live in. But since the phrasing ‘explanation’ has become part of the well-accustomed procedural justice vocabulary, here we stick to that word, although reluctantly.

Providing transparency and information within the New Approach is particularly important when it comes to matters of evidence. Informing parties of their burden of proof or giving a preliminary judgement on the evidence yields an insight into the procedure, some influence on the way the case will be decided and possibly confidence of the parties that they have a fair chance to take the case into their own hands.³⁹ For example, in the New Approach, the judge, during the hearing, will typically tell one of the parties that he or she must bring forward new evidence in order to obtain success. Moreover, the opportunity is offered to repair a certain lack of evidence after the hearing. In the traditional approach, this message was brought in the ruling.⁴⁰

This kind of transparency is linked with both the factors respect and explanation, and with the factor voice, when it comes to that. In the New Approach, proceedings start with a hearing shortly after the plaintiff’s appeal and the defendant’s reply were received. During the hearing, the judge first examines what the real conflict is. Do parties ask the court to review the lawfulness of the contested decision only? Or is there an underlying conflict? Once the judge knows what keeps the parties divided, he can discuss with the parties involved what is needed for the settlement of either the legal dispute, or the underlying conflict, and what his contribution can be. Examining the underlying conflict does not necessarily mean that the judge is going to *solve* that problem. But within the New Approach, the judge thinks it better to first *address* the underlying problem and then *explain* what the limits to his job are; that is: better than to simply ignore the underlying problem. Among other reasons, the goal is that parties can sense that they themselves can influence how their case shall be dealt with. Another goal is that parties will have a better understanding of what differences there may be between the legal dispute and the underlying problem.

3.5. *Respect and direct interpersonal contact of the judge with the parties involved*

We know from procedural justice research that respect is one of the top-notch factors enhancing procedural justice.⁴¹ But not much research has yet been done on the specific behaviour the judge should show to create a situation in which parties feel that they are being treated respectfully. And respect is, of course, a culturally-embedded phenomenon. Since district courts in the Netherlands deal with many cases in which the plaintiff comes from a Moroccan or Turkish background, respect might have a different connotation than in cases in which the plaintiff has a Dutch background. This calls for a case by case approach. Close to what we pointed out when discussing ‘voice’, one might almost say that ‘respect’ is a verb, not a state. It involves *showing* respect.

The enactment of interpersonal contact is even more difficult. Once again, we know from procedural justice research that interpersonal contact is an important factor in enhancing procedural justice.⁴² It involves the judge showing that he is a human being, just like the parties involved. But the necessity to keep his impartiality and neutrality forces the judge to do so in a limited way. A judge saying that he thinks the decision he has to take is difficult for him, because he can see both sides, is probably doing the right thing in most cases. A judge showing too much empathy for one side, is probably asking for trouble. It’s a thin line. The judge, nowadays, needs to be a human being, but nevertheless, he has to stick to his professional values of impartiality and neutrality. The judge is not a therapist, not a supporter, he is a judge, appointed to take decisions in cases where parties themselves are not able to settle things.

39 Schuurmans & Verburg 2012, *supra* note 4.

40 *Ibid.*, p. 125.

41 T.R. Tyler, ‘What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures’, 1988 *Law and Society Review* 22, no. 1, p. 129, T.R. Tyler, ‘Legitimacy in Policy implications’, 2010 *American Society of Criminology, Criminology and Public Policy* 1, no. 1, p. 130.

42 R.J. Bies & D.L. Shapiro, ‘Procession Fairness Judgments: The Influence of Causal Accounts’, 1987 *Social Justice Review* 1, p. 199, T.R. Tyler & R.J. Bies, ‘Beyond Formal Procedures: The Interpersonal Context of Procedural Justice’, in J.S. Carroll (ed.), *Applied Social Psychology and Organizational Settings*, 1990, pp. 77-78, T.R. Tyler, *Why People Obey the Law*, 2006, p. 276, K. van den Bos, ‘Humans Making Sense of Alarming Conditions: Psychological Insights into the Fair Process Effect’, in M.L. Ambrose & R.S. Copranzano (eds.), *Oxford Handbook of justice in work organizations*, 2013.

The developments described in Section 2 of this paper show the increasing importance of the hearing within administrative law proceedings. Instead of the emphasis on the preliminary research and written rounds, the emphasis within the New Approach is on the oral hearing in the courtroom. For that reason, the New Approach requires a judge to have an open and active attitude coupled with professional curiosity.⁴³ The administrative judge should actively perform the act of enhancing procedural justice by providing parties with information and giving them some kind of apprehension that he is respectfully listening to them.⁴⁴ Moreover, the New Approach implies that judges and parties join in a reciprocal conversation. This does not only change the vertical, top-down approach of a judge towards parties, but it may contribute to the accountability of the judge as well, since parties may perceive this horizontal and easily accessible relation as an approach lending them more freedom to state their views or even to criticise the judge. Overall, we can conclude that direct, interpersonal contact by the judge with the parties involved becomes more and more important.

Within the New Approach, the great shift from emphasizing the judgment to focusing on the oral hearing causes a parallel shift from state of the art legal craftsmanship to communicative skills as well.⁴⁵ One significant change caused by the New Approach is that the judge discusses with parties what the most adequate way of dealing with their case is.⁴⁶ The judge designs together with the parties the way proceedings will continue, instead of unilaterally deciding what will happen. Within the New Approach, the judge particularly invests in a dialogue with the parties involved. This is important, since in many cases the plaintiff starts with an information lag. Since the plaintiff does not necessarily know what he is entitled to, he searches for fairness information in order to know whether he or she can trust the authorities.⁴⁷ Related factors that determine whether a party decides to trust the authority, and influence perceived procedural justice, are that the party is informed in an accurate and caring way (accuracy), that the party knows that other people are treated in the same way (consistency) and that the party feels he or she can sufficiently state his or her opinion on the way decisions are taken (voice and some influence on how proceedings will continue).⁴⁸

Especially this last one is manifestly visible in the New Approach of the administrative judge, since parties are given more opportunity to influence proceedings and become some kind of a co-director instead of a visitor to their own process.

Against the background of these developments, it is not surprising that respectful treatment can enhance perceived procedural justice. When discussing procedural justice within the judiciary, often respect is taken for granted, since it is often perceived as evident that parties are treated in a decent and respectful manner by the judge. But respect does not come automatically. This, also, is hard work for the judge. During their – often one and only – ‘day in court’ it is very important for citizens to be treated in a respectful manner by getting the attention of an *involved* and professional judge. This may be a complex balance for the judge between keeping a professional distance, on the one hand, and being in some way emotionally involved with the parties’ statements on the other hand.

The New Approach presents some serious challenges for the administrative judge as well. The administrative judge is no longer a sphinx who listens in silence, without showing doubts. The need to treat parties with a more active, curious and open attitude raises new issues concerning the acquired skills of judges. For example, the vulnerability of the New Approach is illustrated by the allotments of recusal requests in the Dutch case law, in cases where the active attitude of the judge causes some doubts with regard to his impartiality.⁴⁹

43 Knapen 2012, *supra* note 37, p. 29.

44 A.T. Marseille & P. Nihot, ‘Regie in de rechtspraak: de bestuursrechter’(1), 2013 *Rechtstreeks*, no. 1, p. 44.

45 Until now, the Dutch training system for administrative judges was mainly focused on the careful analysis of a legal issue. See Marseille & Nihot 2013, *supra* note 44.

46 L. van der Velden, ‘Procedurale rechtvaardigheid. Hóe heb je in deze zaak beslist?’, an interview with Antoinette Schaap and André Verburg, Ministerie van BZK 2013, Van den Bos & Van der Velden 2013, *supra* note 30.

47 Van den Bos 2011, *supra* note 22, p. 17.

48 Van den Bos 2009, *supra* note 16, p. 96.

49 E.g. District Court of Breda 13 October 2011 (AB 2012/274), District Court of Arnhem 15 March 2012 (AB 2012/273) and District Court of Utrecht 20 November 2012 (ECLI:NL:RBUTR:2012:BY3933).

4. Two possible problems concerning the New Approach

Before we will end this paper with our conclusions, we will elaborate on two problems of the New Approach in Dutch administrative court proceedings, which are the possible or supposed collision between legally right outcomes and procedural justice, and the lack of uniformity and predictability.

4.1. *The link between legally right outcomes and procedural justice*

The fear many lawyers have is that the focus on procedural justice might reduce the focus on what the plaintiff is legally entitled to (does one have a real claim to this permit, this subsidy, this allowance?). This fear is, in itself, not unrealistic. For instance, the judge, while studying the case before the hearing, sees that legally speaking the plaintiff is actually entitled to some kind of allowance that has been denied to him by the administration. Now, during the hearing the judge takes great pain to treat parties with respect, he gives them full opportunity to state their views, he shows that he understands the problems the plaintiff has, he shows that he understands the views of the administrative authority as well. This results in a really good and realistic debate on all details of the case. And at the end the plaintiff says: 'I can see how things are now, and I am glad the representative of the administrative authority said sorry for how they treated me. So, I withdraw my appeal now. Thank you.' The opposite could happen as well. The judge, while studying the case, sees that legally speaking the plaintiff is not entitled to the allowance and the administrative authority was right to deny him that allowance. Once again, the judge and parties have a really good and realistic conversation on all the details of the case, and then the representative of the administrative authority shows a lack of backbone and gives in.

So, the question is does paying attention to procedural justice during administrative court proceedings imply the risk that legally right outcomes⁵⁰ are being ignored? Among lawyers, to whom until recently the word 'justice' referred to 'legally right outcomes' only, and to whom the whole concept of procedural justice is astoundingly new, this is a threatening perspective, touching upon one of the very core values they cherish in their profession. These lawyers are inclined to frame this problem as the discrepancy between distributive justice and procedural justice.⁵¹ But, as in the field of procedural justice research 'distributive justice' refers to *perceived* distributive justice,⁵² that way of framing the problem which lawyers are inclined to do, would, within the context of this paper, be confusing, so in this paper we shall refrain from using 'distributive justice' as referring to legally right outcomes.

When we try to analyze this issue, in the first place, one must really wonder whether the traditional way of dealing with cases is a sure way of attaining legally right outcomes. Picture this. The judge might think that proceedings start when the doors of the courtroom open, but realistically speaking, this is what one gets: one enters a stately building, one has to go through security examinations, handing in one's watch, keys, cell phone and belt. One enters a waiting room, without knowing when the hearing will really start. So, there you are. That's the starting point at least the one-shotter finds himself in ... Now, do we really expect that person to be fully cooperative? That is probably slightly optimistic. And full cooperation is often needed for the judge to get to the bottom of the case, to be able to check the facts, to be able to analyze all interests and views parties have. Without that full cooperation attaining a legally right outcome is, to say the least, dubious.

One does not need to be a communication expert to see that parties, having gone through these estranging experiences, upon entering the courtroom need some kind of reassurance before they can really participate. And when parties do enter the courtroom, new uncertainties lie in waiting: for most

50 In Anglo-American literature, one will find the phrasing 'lawful outcomes', meaning the same as 'legally right outcomes', used in this paper. The reason we use 'legally right outcomes' is that in the continental tradition, the word 'lawful' has a stricter connotation and reference than in the Anglo-American tradition; with 'legally right outcomes' we refer to outcomes in accordance with both the law and earlier case law.

51 One of the authors of this paper recently became entangled in a discussion with a lawyer who maintained that there is 'real justice' (meaning attaining legally right outcomes) and 'well, yes, uhm, this other thing' (meaning procedural justice).

52 E.g. T.R. Tyler, 'Social Justice: Outcome and Procedure', 2000 *International Journal of Psychology* 35, pp. 117-125, especially pp. 118-119, J. Brockner & B.M. Wiesenfeld, 'An integrative framework for explaining reactions to decisions: Interactive effects of outcomes and procedures', 1996 *Psychological Bulletin* 120, pp. 189-208, and J. Brockner, *A contemporary look at organizational justice: Multiplying insult times injury*, 2010, especially Chapter II.

people, going through court proceedings is a rare, often a once in a lifetime, experience. One enters the courtroom, a stately room, with the portrait of His Majesty on the wall, two people in 16th century attire⁵³ behind a table. 'Am I allowed to sit down, and if so, where?' And as we said before, because of the open-ended character of hearings the New Approach brings along, even experienced lawyers and representatives of administrative authorities enter that courtroom with their own feelings of uncertainty. Procedural justice research shows that people, confronted with feelings of uncertainty, especially when they don't know whether they are entitled to the permit, the allowance, etcetera which the case is about, and don't know how their case will be dealt with and decided upon, will be very susceptible to 'fairness information'. One will be looking for clues to decide whether this is a situation he can trust or not, whether this is a situation in which he will be treated fairly and justly. And only after feeling safe on those issues, he will decide to cooperate.

So, logically, the judge must establish some kind of relationship before the parties involved can take that huge step before partaking in some kind of real communication. That is the paramount reason why the judge, during the beginning of the hearing, must seriously invest in creating some kind of relationship with the parties involved.⁵⁴ Within the New Approach, a judge, typically, will welcome all those present explicitly, saying their names, informing them where they can sit, introducing the case in neutral words and informing the parties how he, the judge, thinks this hearing shall go (for instance: 'I will start by asking you both some questions, then you will both get the opportunity to state all you would like to contribute to this case and which was not discussed before, after that you and I together will try to find out how the proceedings should continue; these proceedings might end in a ruling, or in an amicable solution, or we might decide that bringing new evidence to the court is necessary for one of the parties before I can come to a ruling.') All this has one purpose: to get to that unique situation in which parties open up to say what they really mean and want. And that's what's needed to get to the bottom of the case. A judge ignoring the emotions, relationships and procedures, will never get to the bottom of the underlying problem, nor to the best attainable outcome.⁵⁵ So, in our view, the judge paying attention to procedural justice is also investing in ... legally right outcomes.

Elaborating on this, we think that when the judge manages to cover all the elements of the New Approach discussed before, there is more than a good possibility that there is no real difference between procedural justice and legally right outcomes. Because the judge says what he can and cannot do, because he discusses matters of proof with the parties involved, because the parties know the limits of what can be expected on the one hand, and because the judge, by carefully listening to what the parties think is important, knows and says what he thinks he is going to do on the other hand, parties know what they can expect. By really listening to what parties say, by giving them some kind of influence on how proceedings will continue, and by giving parties information on what the expected outcome will be if they don't bring any new evidence to the court, there is some kind of clarity or transparency on what can be expected of the outcome. Putting it the other way around, the New Approach, the way we see it, claims that (a) parties, when knowing that their statements are really heard and taken into consideration, will be more cooperative in delivering the information the court needs to obtain the real facts⁵⁶ and (b) a judge giving preliminary judgments and offering transparency on what parties can expect when he would come to a ruling, will prevent them from making the wrong decision from a legal point of view. Further research must show whether these two claims are correct, but procedural justice research seems to support at least claim (a). So, if this proves right, procedural justice and legally right outcomes are not opposed, but positively interlinked.

53 In the Netherlands, by the way, judges don't wear wigs.

54 D. Allewijn, *Tussen partijen is in geschil... De bestuursrechter als geschilbeslechter*, dissertation Leiden University, pp. 158-160.

55 The Harvard negotiation model, R. Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In*, 1981, F.G. van Arem & D.A. Verburg, 'Vreemdelingenrecht en de Nieuwe Zaaksbehandeling van de bestuursrechter', 2013 *JNVR*, no. 7, p. 58.

56 A.F.M. Brenninkmeijer, 'Een eerlijk proces', 2009 *Nederlands Juristenblad*, pp. 2050-2056.

4.2. *The need for predictability*

As explained above, tailor-made procedures are a characteristic of the New Approach. In this approach, there is not one standard pattern for all cases. However, tailor-made procedures can cause unpredictability as well and they can challenge legal certainty. What can parties expect?

To begin with, we must state that some degree of unpredictability is inevitably connected with the New Approach. A tailor-made approach by definition leads to different approaches in different cases. But on the other hand, tailor-made procedures offer more opportunities for parties to influence the course of the proceedings. The main purpose of procedural certainty, to give parties control over the proceedings, is achieved, albeit in a different way than in the past. Certainty in our understanding of the New Approach is provided less by applying uniform procedural rules in the same way in different cases, and more by enhancing transparency and offering opportunities to allow the course of the proceedings to be influenced by the parties themselves.

In a sense, the New Approach requires something different from the parties than the old system did. They can no longer argue their case in extensive speeches and should respond more often ad hoc. But they don't always know in advance what the judge is going to ask during the hearing. This makes it harder to properly prepare the session. Especially for lawyers this may cause problems, as they try to make sure that their behaviour and presentation will be as professional as possible.⁵⁷ Therefore, it is important for the judge to be aware of this side-effect of the New Approach and while preparing the hearing, he should take this seriously. He might consider informing the parties involved a few days before the hearing what topics he, the judge, thinks are particularly important.

One problem related to the uncertainty of what to expect concerns the personal abilities of the individual judge. One judge can be simply more able to live up to the expectations of the New Approach than the other. On the one hand, one could say that this is a fact of life and in itself it's no reason for New Approach champions to limit their performance during hearings, just because the colleague next door is a judge less capable of arriving at problem-solving and real and realistic discussions during hearings. On the other hand, this difference in personal abilities is a serious problem for what people can expect when they enter a courtroom.

5. Conclusions

In this paper we presented some recent developments in administrative court proceedings in the Netherlands, called the New Approach. The New Approach has three central themes (1) early stage hearings, approximately in the fourth month after proceedings have started, (2) final dispute resolution, i.e. trying to reach real problem-solving decisions, not only focusing on the juridical merits of the case, and, perhaps even more importantly, not confining the rulings to the examination of an administrative decision made in the past, (3) tailor-made approaches in which the judge gives each case the kind of attention, direction and intervention the case needs. Especially the goals mentioned in (2) and (3) imply that the Dutch administrative law judges to try to incorporate within the procedure the lessons learned from research and field studies on procedural justice. Judges, therefore, try to implement strategies and actions that may help parties to perceive the way they are treated during proceedings as fair and just. At this point we should admit that we at least think that giving attention to these lessons learned from procedural justice research is intertwined with the New Approach. But of course, each administrative law judge can have his or her own view when it comes to this subject.

During the last decade, the available techniques for dispute resolution have been improved in order to give the courts effective instruments for resolving legal disputes between citizens and the administration. Moreover, judges try to discover the real-life conflict underlying the legal dispute and to guide parties to a solution of their real problems. These judges try to narrow the gap between the court proceedings and legal decisions, on the one hand, and the conflict as experienced by the parties themselves on the other.

57 An optimistic response from lawyers to the New Approach: Heinrich & Den Herder 2013, *supra* note 13, pp. 210-215; more critically: R. van der Velde, 'Ook de gemachtigde van burgers is aan de slag met de Nieuwe Zaaksbehandeling (en denkt daar het zijne van)', 2014 *JBplus*, pp. 71-75.

In 1994 the legislator intended the administrative law judge to be the actor responsible for searching for and investigating the relevant facts. The General Administrative Law Act does not lay down any rules of evidence, not even on the way judges should decide which party bears the burden of proof. Gradually the administrative judges became aware of this deficiency. In the particular Dutch situation, we hold that especially this lack of clarity in matters of evidence forced the administrative law judges to start paying attention to the insights from procedural justice research.

When designing what later became the New Approach, administrative judges faced two problems in 'implementing' the insights from procedural justice research. The first problem is that, although a lot of factors influencing perceived procedural justice have been identified during the last few decades, there is no easy top five listing of the most important factors. The second problem is that not much is known of how to turn those factors, like respect and voice, into a here-and-now enactment. What these judges did is that they went back to the findings from the Third Evaluation of GALA, since that report was the starting point for the process of changing towards a new approach. The choice the administrative law judges, following these findings from the Third Evaluation of GALA, made to meet the need for enhancing procedural justice are the following five elements: (1) respect, (2) voice and due consideration, (3) some influence on how proceedings will continue, (4) an explanation of how proceedings will continue and (5) direct interpersonal contact.

Experience in recent years shows some of the problems of the New Approach in Dutch administrative court proceedings. The most important is the fear of a collision between procedural justice and substantive legality, which means, in this article: legally right outcomes. We expect that if the judge manages to cover all elements of the New Approach, there is more than a good chance that there will not be a clash between procedural justice and legally right outcomes. One of the intentions behind this approach is to increase the parties' willingness to cooperate. And full cooperation is often needed for the judge to be able to check the facts, to analyze all the interests and views the parties have. Thus, the New Approach may help judges to reach fair outcomes, both from a procedural perspective and from a material perspective. Another problem is the lack of predictability, exactly because of the judges' striving for tailor-made approaches. This unpredictability *at the start of proceedings*, before the hearing, calls for the judges' extra attention *during proceedings* that predictability and certainty are being offered 'along the way', by giving parties information and preliminary judgments. We furthermore have to admit that differences between the individual capabilities of judges cannot be ruled out. One judge might be extremely capable of entering some kind of realistic and transparent kind of discussion with the parties involved, while another judge simply lacks that kind of capabilities. Both the selection and the training of judges in recent years fails to meet these goals.

This means that on the one hand the administrative judges really try to narrow the gap between the legal dispute and the real-life conflict, that they try to support final dispute resolution and that they try to advance the procedural position of civil parties in an adversarial system, taking into consideration that problems arose especially for those civil parties, but that on the other hand serious problems remain. The first problem which remains is the relationship between legally right outcomes and procedural justice. That problem seems to be solved or solvable within the New Approach. The second problem which remains concerns predictability. Now here improvement seems to be possible. In the first place it would take more unity among judges. For the parties involved to be at ease as to what to expect, it would take a nationwide adoption of the New Approach, and we cannot claim that to be the present situation. In the second place it would involve the training of judges to dare to take the step towards more transparency and more procedural justice that is called for. So, in the end, we must say that the New Approach is a movement, some kind of a development, that has started, but is still 'under construction'. But what we dare to claim is that with this New Approach, time is on our side. The New Approach is quite in sync with the demands society poses on administrative law judges. ¶