UDK: 347.99(492) *1.02 Review article*

Participation of Citizens in Pre-Trial Hearings. Review of an Experiment in the Netherlands.

Barbara Brink
University of Groningen
b.brink@rug.nl

Albert T. Marseille
University of Groningen & Tilburg University
a.t.marseille@rug.nl

ABSTRACT

In 2011 the Dutch Central Appeals Tribunal, the highest Dutch court of appeal in legal areas pertaining to social security and the civil service, started consulting the parties of a dispute at an early stage in the procedure, in order to include them in the decisions about the procedural steps to be taken in the settlement of the appeal. One of the underlying rationales is that the involvement of the parties will lead to more acceptance of and contentment with the result. Since the acceptance of court decisions is considered as a criterion for the quality of the procedure, this approach should result in a better quality of the case treatment. In this article the initial results of this new case treatment are presented in the light of expectations from the literature on citizen participation in policy processes of public agencies. The data indicate that the New Case Management Procedure at the Central Appeals Tribunal can lead to an improvement of the quality of the case treatment, by inviting citizens to discuss with the judge about the case treatment. However, the procedure itself does not guarantee this increased quality.

Key words: *new case management procedure, community involvement, Dutch Central Appeals Tribunal, final dispute resolution*

JEL: D73, K40

1 Interaction Between Public Institutions and the Public

For a few years, the administrative judges in the district courts in the Netherlands have dealt with their cases in accordance with the so called New Case Management Procedure: judicial review cases are put down for hearing as quickly as possible. At the hearing the judge discusses with the parties how the case can best be handled. Ideally, it should be dealt with in a way that is in keeping with the interests of the parties concerned, meets the demands of procedural justice and brings the dispute between the parties to a timely, satisfactory and final resolution.

In the fall of 2011 the Dutch Central Appeals Tribunal, the highest Dutch court of appeal in legal areas pertaining to social security and the civil service, started an experiment to consult the parties of the dispute at an early stage in the procedure, in order to include them in the decisions about the procedural steps to be taken in the settlement of the appeal. One of the underlying rationales is that the involvement of the parties will lead to more acceptance of and contentment with the result. Since the acceptance of court decisions is considered as a criterion for the quality of the procedure, this approach should result in a better quality of the case treatment.

In this article the initial results of this new case treatment are presented in the light of expectations from the literature on citizen participation in policy processes of public agencies. First we introduce the Dutch New Case Management Procedure. Before proceeding with a description of the results of the experiment at the Central Appeals Tribunal, we first examine the literature on participation, in order to explore the plausibility of the rationale behind the procedure. Lastly, we explore the initial results of this new case treatment.

2 Participation in Administrative Law Procedures

Over the past decade views on the role of administrative courts in the Netherlands have changed. The legal rules have been altered very little if at all, but they are now applied in a different way.

Appeals to the administrative court against decisions are made by administrative bodies. Since the General Administrative Law Act (*Algemene wet bestuursrecht*) came into force in 1994, administrative courts have given judgment on the basis of the notice of appeal. The court's main focus is on the reasons why the appellant disagrees with the decision, and its review of the lawfulness of the contested decision responds to the arguments the appellant has put forward. Aspects of the decision which the appellant has not referred to in the notice of appeal are not considered in the review.

The fact that the General Administrative Law Act requires the administrative court to focus on the appellant's grievances when considering the contested decision has made the court more attentive to other interests of appellants. One primary interest of which the court has become more aware is speed. A person who brings an appeal benefits from a prompt decision by the court. For the past ten years or so administrative courts have taken timely decision-making very seriously. The result is that appeal cases at district courts are now processed in nine months on average. At Appeal Courts it is clear that cases can be processed even more quickly.

In addition to speed, the courts also became interested in final dispute resolution. The aim was for its judgment not only to contain a judgment about the lawfulness of the contested decision, but also to make it as clear

as possible what decision would apply in the future. This provides more legal certainty for parties. Powers under the General Administrative Law Act which make it possible to achieve the ideal of final dispute resolution are used more and more frequently (De Graaf & Marseille, 2012).

Next, administrative courts became interested in the concept of a dispute, which had traditionally been defined as "a difference of opinion between the parties regarding the lawfulness of the decision being appealed". Due to the rise of alternative dispute resolution, administrative courts increasingly came to realize that parties involved in proceedings before an administrative court may have differing opinions about more than just the contested decision, and that it is quite possible that the actual dispute between the parties is not about the decision on which the court has been asked make a judgment, but about something else altogether. The realization that the "contested decision" and "the dispute between the parties" are not always identical led to the courts becoming interested in alternative solutions for disputes between parties.

The focus on speed, combined with the discovery of the range of options for dispute resolution, made administrative courts realize that even though every appeal is against a decision, not every appeal should be dealt with in the same way. Depending on the nature of the decision and the dispute about it, the court should choose in each case which of its powers it should and should not use. The best way for it to make this choice is to involve the parties. Then it can take their wishes into account. Some cases benefit from a thorough preliminary inquiry, others from comprehensive discussion at the hearing, and in other cases the most important thing is to put the parties themselves to work, by giving them the opportunity to provide evidence for their statements, or to give them a chance to consider together whether they can resolve their dispute.

As a result of all this, the courts developed the New Case Management Procedure. This method of case management is based upon the underlying rationale that the chance the procedure will result in a final resolution of the dispute between the parties will be greater if the parties are involved in decisions about how the case is managed. If the parties play an active role in discussions about the best way to deal with their case, the court's decisions will be better adapted to the wishes and needs of the parties. Consequently, the parties will be more satisfied with the result, thus increasing the chance that a final settlement of the dispute will be attained.

3 Objective of Participation

The last decennia public agencies have actively experimented with the involvement of citizens in public procedures. This interest is most apparent in the public administration literature. Although community involvement can have different connotations, in general it comprises the involvement of citizens in the development or implementation of policies. It means the public

agency actively invites citizens and other stakeholders to explore problems and their solutions in a transparent process and, by doing so, on the basis of equality, influence the final decision (Van Peppel, 2001, p. 34).

Interaction with the community is not a novelty. However, the areas in which people are involved have increased and the modes in which they are involved have changed over the last decades (Stephan, 2005, p. 662).

The involvement of the community comes with various promises. On the level of specific programmes, the involvement of the community is believed to lead to an "increasing transparency of public policy implementation" (Stephan, 2005, p. 663). This could then increase the public support for the concerned policy.

De Graaf (2007) studied this relation between community involvement in a policy process and the support for the results. He argues that the involvement of people in decision making processes will provide participants with information, allowing them to judge the quality of the decision. In other words, people will come to an informed judgment (De Graaf, 2007, p. 50). An informed judgement will be favourable for the support for the decision and will therefore, subsequently, increase the support for the decision (Teisman et al., 2001, p. 37).

According to De Graaf, support can be divided into contentment with the process and contentment with the result. Support can be seen as the sum of both. Van den Bos, however, identifies a causal relation between the two. When citizens experience a just procedure, they will then use this knowledge to evaluate the final decision, resulting in an increase of the support for the decision (Van den Bos, 2007, p. 189). In other words, not only the transparency is important. The availability of information enables people to judge the procedure, and this judgement influences the judgement of the final outcomes.

An increase in the support for a decision could lead to a decrease of the costs of the process, because people will not oppose or obstruct the decision making. However, research does not provide evidence for this relation (Urving & Stansburry, 2004, p. 57). If this relation exists, it could prove to be very attractive for policy makers to include citizens when it is expected that people will not easily accept the potential outcome. It could also lead to shorter procedures, since the acceptance of a certain decision might lead to less resistance when the policy is implemented. However, the literature is not clear about this relation either: empirical data show that community involvement can both expect to lead to faster procedures and to delays (Van Peppel, 2001, p. 39).

4 Conditions for Successful Participation

The involvement of people in policy making does not necessarily result in an increase in support for the policy. A growing body of evidence shows the conditions under which community involvement can lead to successful participation, which would lead to more support for the results of the process. A condition for a successful participation trajectory seems to be the access to accurate information. Accurate information would lead to a (positive) judgement of the procedure. The literature on community involvement specifically mentions importance of informing the participants beforehand on the expected contribution of the various participants. If this is unclear at the start, unrealistic expectations can arise, which can lead to less support (Pröpper, 2009, p. 162). Nevertheless, also other requirements are found, both on the side of the people to be involved as the side of the public agency.

Policy processes tend to be complex. Not only due to the complicated processes, also because policy programmes can be based on (advanced) technical knowledge. In order to participate, people need a certain degree of knowledge and skills. Another selecting requirement is the available time to be involved (Stephan, 2005, pp. 674–675). The public agency on the other hand, can facilitate the process by taking into account the way the community learns to participate. Time is therefore also a necessary resource for the agency: the participation trajectory needs to be based upon the time demanded for the adaption (Taylor, 2007). In order to adjust the procedure to this timescale, the organisation requires resources (knowledge and financial resources) to enable this transition (Pröpper, 2009, p. 61). The organisation also needs to be willing to do this: it demands a constructive relation between the various participants (ibid., p. 56). This is not only dependent on the individual involved, but also on the existing work culture within the organisation. It is therefore important to not only adapt the processes of community involvement to the pace of the people, but also to the work processes of the organisation (Bekkers, 2012, p. 186).

Specifically for judicial procedures, Van den Bos adds further elements: people have expectations based on own experiences and experiences of others with similar procedures. They want to be treated according these constructed ideas. This emphasises the importance of a consistent procedure over time and between people. Also, participants need to feel they have been given the opportunity to participate sufficiently, equal to the contribution of others. Therefore, within the process, courts need to strive for representation within the process, whereby all stakeholders have the chance to be heard (Van den Bos, 2007, p. 189).

5 The Experiment at the Dutch Central Appeals Tribunal

5.1 Different Kind of Appeals; Specialisation

The Central Appeals Tribunal decides on appeals concerning decisions of public authorities about the application/execution of different laws. Almost all of the appeals are concerned with legislation covering civil servants, invalidity benefits, social assistance, social support, unemployment benefits and sickness and maternity benefits.

Most judges working at the Central Appeals Tribunal are specialised in one these six fields. As a consequence, a judge that handles cases about civil servants does not handle cases about invalidity benefits, a judge that handles cases about social assistance does not handle cases about unemployment benefits.

5.2 Differences Between "Regular" Procedures and the New Case Management Procedure

In a "regular" procedure, the judge concentrates his attention on the juridical dispute between the citizen and the public authority. Basically he is only interested in the question: is the disputed decision (un)lawful?

In the New Case Management Procedure, the judge is supposed to be interested not only in the juridical point of view of the parties of the dispute, but also in their interests. As a consequence, he is supposed to investigate whether the parties of the dispute are involved in a conflict that goes beyond their juridical dispute – and if so, whether it would be helpful to them to talk with each other to try to resolve that conflict. Additionally, the judge is supposed to give the parties of the dispute comprehensive information about the possibilities and limitations of the procedure. As a consequence, it is expected that the judge regularly decides to reopen the preliminary enquiries, granting the parties of the dispute the opportunity to substantiate their arguments concerning the relevant facts.

In a "regular" procedure, a case is assigned to a three-judge section. Only if these three judges think the case is very simple, they will refer it to a single judge.

In the New Case Management Procedure, cases are assigned to a single judge, who has to decide whether or not to refer it to a three-judge section.

5.3 Participation by the Parties of the Dispute

The New Case Management Procedure, as implemented in the experiment at the Central Appeals Tribunal, aims at giving the parties of the dispute more influence on the course of the procedure.

This influence concerns three different choices the judge (in the experiment it is always – and contrary to the normal situation in appellate cases – a single judge) has to make at the end of the hearing.

1. The judge has to decide whether the preliminary inquiry has to be reopened. There are two main causes/reasons for reopening:
   - The parties of the dispute want to try to settle their dispute. By reopening the preliminary inquiry, the judge gives them the opportunity to try to settle their dispute. If they do not succeed, the procedure will be resumed.
   - One or both parties want to substantiate their arguments concerning the relevant facts. By reopening the preliminary inquiry, the judge grants them that opportunity. After they have collected evidence, the procedure will be resumed.
2. The judge has to decide whether he will come to a decision as soon as possible after the hearing, or that the parties of the dispute have to get a chance to argue their case at a second hearing.
3. The judge has to decide whether the decision on the appeal will be made by himself (a single-judge) or by a three-judge section.

The New Case Management Procedure aims at granting the parties of the dispute influence on these three decisions. At the hearing, the judge has to consult the parties about these three choices he has to make. He will decide, but – intentionally – only after consulting the parties.

6 Researching the New Case Management Procedure

The research project to evaluate the New Case Management Procedure at the Central Appeals Tribunal consisted of four parts.

1. We collected data about the course of 248 procedures in which the New Case Management Procedure was applied. 35 concerned legislation covering civil servants, 47 invalidity benefits, 65 social assistance, 27 social support, 21 unemployment benefits and 43 sickness and maternity benefits, 10 other legislation. The data that were collected concerned i.e. the length of the hearing, the degree in which the preliminary inquiry was reopened, the outcome of the procedure, the proportion of the procedures in which a second hearing was organized, the proportion of the procedures in which the decision was taken by single-judge or by a three-judge section.
2. We attended twelve hearings.
3. We interviewed the eleven judges that took part in the New Case Management Procedure.
4. We interviewed (by telephone) parties of the dispute: 21 citizens, 65 representatives of citizens, 57 representatives of administrative bodies.

7 Results

7.1 Hearings

We attended twelve hearings by four different judges, so we only got an impression of the way judges conducted the hearings. However, we noticed remarkable differences between the hearings of an 'unemployment benefits' judge and the hearings of a "social assistance" judge.

The hearing of the "unemployment benefits" judge was "traditional": he seemed to be only interested in clarifying the juridical aspects of the case. He hardly consulted the parties of the dispute about the decisions he had to take regarding the continuation of the handling / management of the case. After an average of 20 minutes, the hearing was over. The hearings of the "social assistance" judge took far more time: on average more than an hour. Besides, this judge extensively discussed with the parties about the way the procedure should be continued after the hearing.

Judging by the hearings we attended, different judges give different interpretations of the function of the hearing and of their task with regard to the management of the case and the degree in which the parties of the dispute are to be involved by the decisions about the management of the case after the hearing.

7.2 Interviews with Judges

We interviewed eleven judges that took part in the New Case Management Procedure. The interviews showed substantial differences between these judges. They specifically addressed the understanding of their duty as a judge in a higher court.

Some of the judges we interviewed were of the opinion that one of the most important tasks of higher courts is the development of jurisprudence. They therefore argued that most of the appeals must be decided by a three-judge section, regardless of the preference of the parties of the dispute.

Other judges we interviewed stressed that the preferences of the parties of the dispute should prevail, thereby giving less importance to the development of jurisprudence. As a consequence, if the parties of the dispute prefer a decision by the single judge that dealt with the case during the hearing, they will be granted that request, even if the case is important with regard to the development of jurisprudence.

Another noticeable difference between judges deals with the understanding of their job. Some of them indicate that, being a judge in administrative law, they are only interested in the question whether the disputed decision is (un) lawful, because their task is to judge the lawfulness of decisions of public

authorities. Other judges argue that, as a judge, they are interested in what exactly divides the parties of the conflict, because their task is solving conflicts.

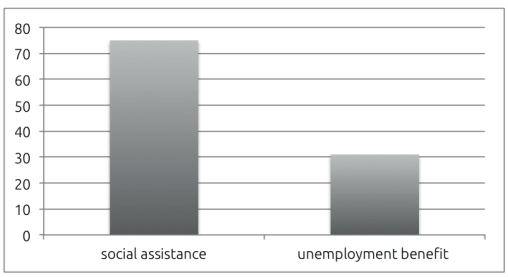
It was striking that judges that handle social assistance cases were far more positive about the New Case Management Procedure and their role as "mediator" than the unemployment benefit judges that we interviewed. These judges stressed that their task was constricted to judging the lawfulness of decisions of public authorities.

7.3 Case Management

We were curious whether the differences we observed at the hearings we attended, and the different opinions of the judges we interviewed about how they see their job, especially between the social assistance judges and the unemployment-benefit judges, would also be visible by examining the proceedings of the case[1].

We show four figures about different aspects of the proceeding of the case, in which we distinguish between the social assistance and the unemployment cases. The first figure shows the length of the hearing.

Figure 1: Length of the hearing (minutes)

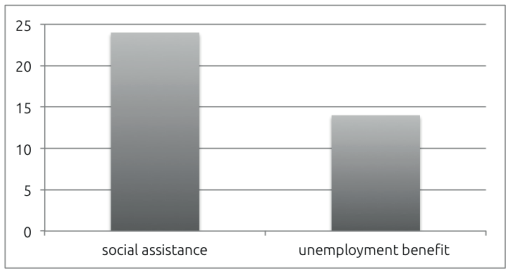


The figure shows a substantial difference. The average length of a hearing in an unemployment benefit case is 31 minutes, in a social assistance case 75 minutes.

The second figure shows to what degree the preliminary inquiry is reopened after the hearing.

1 Because of the relatively small amount of unemployment cases (21, against 65 social assistance cases), the results presented in this section give an indication of the differences between the two categories. However, we didn't examine whether the differences we found are statistically significant.

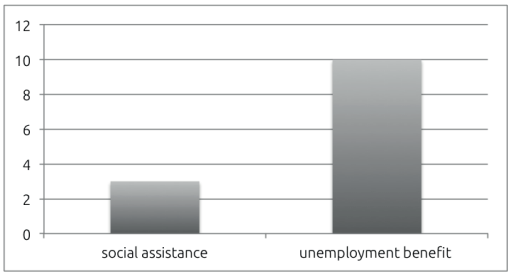
Figure 2: Reopening preliminary enquiry (%)



Again, the figure shows a notable difference. In 14 % of the unemployment benefit cases the preliminary inquiry is reopened after the hearing, in 24 % of the social assistance cases.

The third figure shows how often the judge decides to organize a second hearing.

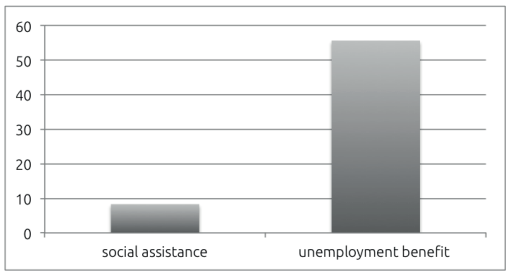
Figure 3: Another hearing? (%)



Again, the figure shows a considerable difference. In 10 % of the unemployment benefit cases a second hearing is organized, in only 3 % of the social assistance cases.

The fourth figure shows how often the judge decides to refer the cases to a three-judge section to take the decision on the appeal.

Figure 4: Judgment by a 3-judge section



Again, the figure shows a substantial difference. In social assurance cases, if the outcome of the procedure is a decision by the court, only in 8 % it is a

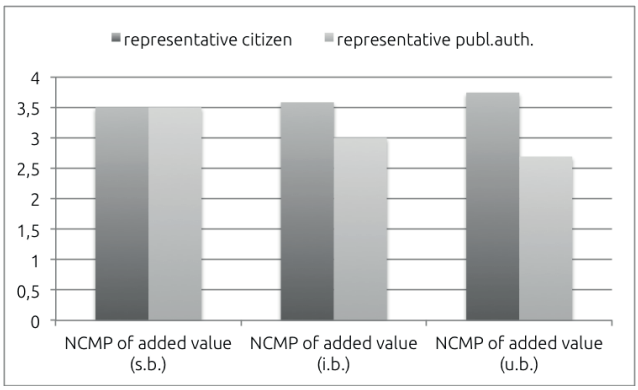
decision by three-judge section. In unemployment benefit cases, in 56 % the decision is taken by a three-judge section.

7.4 Satisfaction of the Parties of the Dispute

Do the parties of the dispute appreciate the New Case Management Procedure? We interviewed (by telephone) parties of the dispute about their experiences. We were especially interested in the differences between the hearings concerning different fields of administrative law. Because we only interviewed 21 citizens, we can only make a comparison between the representatives of citizens (65 interviews) and the representatives of administrative bodies (57 interviews). We show two figures that indicate two relevant differences between these two groups.

The first figure (figure 5) shows how the representatives react to the following proposition: "The hearing of the New Case Management Procedure is of added value compared to a 'regular' hearing at the Central Appeals Tribunal." If the respondent fully agreed, he scored a '5', if he fully disagreed, he scored a '1'. In the figure, we compare between sickness and maternity benefits (s. b.), invalidity benefits (i. b.) and unemployment benefits (u. b.).

Figure 5: Reaction to proposition: NCMP is of added value

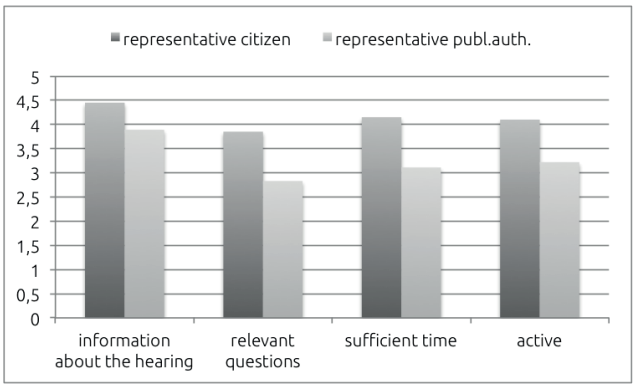


The figure shows that it depends on the field of administrative law whether the two groups differ. With regard to sickness-benefits cases, both groups fully agree: they think the hearing is – marginally – of more value in the New Case Management Procedure. With regard to social assistance cases, the representatives of the citizens disagree with the representatives of the public authorities: the representatives of the citizens score a 3.74, the representatives of public authorities a 2.69.

The second figure (Figure 6) is concerned only with social assistance cases. We asked representatives of citizens and representatives of public authorities whether they were satisfied with certain aspects of the "management" of the hearing by the judge. Did they think the information of the judge about

the formal aspects of the hearing was sufficient, did they think the judge asked relevant questions, did he give the parties of the dispute sufficient time to explain their points of view, was he active and involved in the case?

Figure 6: Reaction to proposition about the "management" of the hearing by the judge



On all these aspects, the representatives of citizens were more positive than the representatives of the public authorities.

8 Conclusions

Our research leads us to three conclusions about participation of the parties of the dispute in procedures at administrative law courts.

First, even when a court decides to grant parties more possibilities to participate, the attitude of individual judges can be a serious obstacle for the realization of participation. A project in which the judge consults the involved parties and then decides which procedure should be followed, implies the judges have the willingness, knowledge and skills to do so.

At the Central Appeals Tribunal, the judges that took part in the experiment agreed to let the parties of the dispute participate in the procedure. However, only about half of the judges stood by that agreement. This attitude has influenced the approach they took during the case treatment. This research does not show whether skills and knowledge are important factors for the success of the procedure.

Second, participation has an effect on the course of the procedure. When judges consult parties about the choices to be made, decisions on the course of the procedure are influenced. In contrast to the normal procedure, during the New Case Management Procedure, activities of the parties of the dispute take the centre stage. In terms of the theory of development of community involvement, this is an example of the involvement of the public: parties are invited to participate and thereby have a chance to influence the court

decisions. Since this is an example of involving the public, we could theorise this approach can lead to an increase in the support for the process and the result. The data shows that this is the case for the citizens.

Third, not all the parties of the dispute are enthusiastic. The (representatives of) citizens are more positive than the representatives of public authorities. There are various possible explanations. First, the chance to get involved gives citizens higher expectations about their chances to win the procedure. Another explanation is that the involvement of citizens has the effect described in the literature: involvement leads to an informed judgement of the procedure and the result, which has a positive effect on the judgement of the results. The effect does not occur for representatives of public authorities: their access to information does not depend on the procedure that is followed. This research has not looked into the resources and competences of the participants. The literature shows that this could also be an element of the explanation of the discrepancy.

In conclusion, the data gives an indication that the New Case Management Procedure at the Central Appeals Tribunal can lead to an improvement of the quality of the case treatment, by inviting citizens to discuss with the judge about the case treatment. However, the procedure itself does not guarantee this increased quality. In this paper different conditions that can influence the outcome of the procedure have been indicated.

Barbara Brink *received her doctorate degree from Strathclyde University, Glasgow. She is now a lecturer in Public Administration at the University of Groningen.*

Albert Marseille *received his doctorate degree from the University of Groningen. He is now a professor in Public Administration, in particular the Empirical Study of Administrative Law, at the University of Groningen and professor in the Empirical Study of Administrative Law at Tilburg University.*

POVZETEK

1.02 Pregledni znanstveni članek

Udeležba državljanov v predhodnih postopkih. Pregled poskusa na Nizozemskem.

Ključne besede: novo upravljanje postopkov, udeležba in vključitev skupnosti, nizozemski Osrednji pritožbeni tribunal, pravnomočna rešitev spora

Leta 2011 je nizozemski Osrednji pritožbeni tribunal, najvišje nizozemsko pritožbeno sodišče za pravna področja, ki se nanašajo na socialno varnost in sistem javnih uslužbencev, v zgodnji fazi postopka začelo svetovati strankam v sporu, z namenom da bi jih vključilo v odločitve o postopkovnih korakih pri reševanju pritožbe v smislu poravnave. To utemeljuje s pričakovanjem, da bo vključitev strank pripeljala do boljšega sprejetja in večjega zadovoljstva z izidom. Ker je sprejetje sodnih odločitev merilo kakovosti postopka, bi posledica tega pristopa morala biti kakovostnejša obravnava primera. V članku so predstavljeni prvi rezultati tega novega načina obravnave v luči pričakovanj iz literature o udeležbi državljanov v procesih obravnave javnih politik. Ti podatki kažejo, da novi postopek upravljanja primerov Osrednjega pritožbenega tribunala, ki državljane povabi k razpravi o obravnavi primera s sodnikom, lahko pripelje do izboljšanja kakovosti obravnave. Kljub temu sam postopek ne zagotavlja večje kakovosti.

Bibliography and references

Bekkers, V. (2012). *Beleid in beweging: achtergronden, benaderingen, fasen en aspecten van beleid in de publieke sector*. 2nd ed. Den Haag: Boom Lemma.

Bos, K. van den (2007). Procedurele rechtvaardigheid: beleving en implicaties. In A. F. M. Brenninkmeijer, M. van Dam, & Y. van der Vlugt (Eds.), *Werken aan behoorlijkheid: De Nationale ombudsman in zijn context*. The Hague: Boom Juridische Uitgevers.

Graaf, L. de (2007). *Gedragen beleid. Een bestuurskundig onderzoek naar interactief beleid en draagvlak in de stad Utrecht*. Delft: Eburon.

Graaf, K.J. de & Marseille, A. T. (2013). Final Dispute resolution by Dutch administrative courts: slippery slope and efficient remedy. In S. Comtois & K.J. de Graaf (Eds.), *On Judicial and Quasi-Judicial Independence* (pp. 205–218). The Hague: Boom Juridische uitgevers.

Irvin, R. A. & Stansbury, J. (2004). Citizen Participation in Decision Making: Is It Worth the Effort? *Public Administration Review, 64* (1), 55–65.

Peppel, R. van (2001). Effecten van interactieve beleidsvormig. In J. Edelenbos & R. Monnikhof (Eds.), *Lokale interactieve beleidsvorming: een vergelijkend onderzoek naar de consequenties van interactieve beleidsvorming voor het functioneren van de lokale democratie* (pp. 33–49). Utrecht: Lemma, .

Pröpper, I. (2009). *De aanpak van interactief beleid: elke situatie is anders*. 3rd ed. Bussum: Coutinho.

Stephan, M. (2005). Democracy in backyards: a study of community involvement in administrative decision making. *Environment and behaviour*, *37*, 662–682.

Taylor, M. (2007). Community participation in the real world: opportunities and pitfalls in new governance spaces. *Urban Studies, 44* (2), 297–317.