

The Relational Turn in Dutch Administrative Law

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1. Introduction

The traditional structure of most continental systems of administrative law is determined by the notions of strict legal verticality and the undivided public interest. In the present era of individualization, privatization, decentralization and internationalization, these notions have come under increasing pressure. The continental model of administrative law typically developed from the idea of the state as a sovereign master, holding sway over its legal subjects by an unbound and indivisible public *imperium*.¹ Modern times, however, have seen a break-up of this *imperium* into separate pieces, not only left in the hands of supranational or subnational authorities but also entrusted to private actors. Meanwhile, individuals tend to perceive themselves not merely as *subjects*, but also or even primarily as *customers* or *partners* of the state, depending on public services and organizing themselves in non-governmental organizations or pressure groups that aim to influence or co-create public policy. These trends contribute to a ‘fragmentation’ and ‘horizontalization’ of public law that is strongly at odds with the idea of a clear vertical hierarchy that still serves as continental administrative law’s typical fundament.² In search of a proper response to such developments, many jurisdictions have tended to revise their administrative law systems, enriching administrative law with all kinds of ‘horizontal’ elements but leaving the ‘vertical’ and abstract grammar of the classical model virtually intact.³ Other than Baron Münchhausen, however, administrative law has proven unable to pull itself out of the swamp by its own hair. Only a multidimensional and critical re-examination of the underlying values and concepts of the system itself may finally result in a stable and legitimate model of administrative law that lives up to its modern institutional and socio-cultural context.⁴

The need for a fundamental re-examination of continental administrative law’s theoretical fundamentals clearly emerges from recent developments in Dutch administrative law as a case in point. Responding to its changing socio-cultural and institutional context, the system of Dutch administrative law underwent some significant changes, slowly but surely drifting away from its classical orientation on the lawful division of goods and services among all members of society towards dispute settlement and the protection of individual rights as its primary aims. Originally directed at safeguarding the abstract legal order against unlawful infringements, judicial review of government decisions traditionally followed the logic of the

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1 See, e.g., S. Cassese, ‘Die Entfaltung des Verwaltungsstaates in Europa’, in A. von Bogdandy, S. Cassese & P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum*, Vol. III (2010), pp. 7-9.

2 See, e.g., A. von Bogdandy, ‘Verwaltungsrecht im europäischen Rechtsraum’, in A. von Bogdandy, S. Cassese & P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum*, Vol. IV (2011), pp. 4-8.

3 For French law, see, e.g., P. Gonod, ‘La réforme du droit administratif’, in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe. La mutation du droit administratif en Europe* (2006), pp. 67 et seq. For German law, see, e.g., J. Masing, ‘Der Rechtsstatus des Einzelnen im Verwaltungsrecht’, in W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, Vol. 1 (2012), pp. 437 et seq.; E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung* (2004); A. Voßkuhle, ‘The reform approach in the German science of administrative law: the ‘neue Verwaltungsrechtswissenschaft’’, in M. Ruffert (ed.), *The transformation of administrative law in Europe* (2007), pp. 89 et seq.

4 Cf., e.g., von Bogdandy, supra note 2; M. Ruffert, ‘The Transformation of Administrative Law as a Transnational Methodological Project’, in M. Ruffert (ed.), *The Transformation of Administrative Law in Europe. La mutation du droit administratif en Europe* (2006), pp. 3-6.

'recours objectif', typically directed at safeguarding the 'légalité abstraite' of government decisions *erga omnes*. Driven by the centrifugal forces of the ongoing 'horizontalization' and 'fragmentation' of the public sphere, the General Administrative Law Act (GALA) of 1994 replaced legality *erga omnes* with the 'recours subjectif' as its main orientation, geared towards the 'protection des droits individuels des particuliers' rather than towards abstract legality.⁵ Notwithstanding some significant modifications, however, the GALA left administrative law's underlying structure untouched, adhering to the *ex tunc* legality test of government decisions as its unaltered 'objective' skeleton. In this way, Dutch administrative law has developed into a 'bipolar' and thus rather incoherent and unstable system. A pervasive analysis of its hidden presuppositions and conflicting assumptions is indispensable for finding a proper cure.⁶

In particular, a deeper understanding is needed of the elusive concept of 'relational administrative law', introduced into Dutch legal doctrine in the wake of Norbert Achterberg's sociological theory of law that describes the legal order as a complex web of socially embedded legal relations rather than a set of abstract rights and duties.⁷ The GALA is partly built on similar suppositions, with the legislative history stating, e.g., that modern law requires a government that no longer presents itself as an entity *above* citizens, but rather as a legal actor *besides* citizens, mutually entangled in a compound network of 'reciprocal legal relations' that requires the protection of the justified expectations of all parties involved.⁸ On the one hand, this means that the government is principally bound by unwritten rules and principles from which it is no longer relieved within a 'freies Ermessen' as a legal vacuum. On the other hand, however, the idea of a prepositive legal relation, an essential 'vinculum iuris' between government and citizens also has consequences for the latter. As the legislative history of the GALA assures us, the GALA does not require private actors to advance the general interest as a primary purpose; that remains the responsibility of the government. However, its legislative history also emphasizes that the legal idea of an essential relatedness between government and citizens encompasses the inescapable obligation of 'both to take heed of the position and the interests'.⁹ Concerned about the introduction of unwritten legal obligations on the part of citizens, most scholars were eager to dismiss 'relational administrative law' as a mistaken concept, labelling the theory as an inadmissible 'privatization' or even 'feudalization' of public law that jeopardizes the hard-fought public autonomy of citizens.¹⁰

The general dismissal of 'relational administrative law' as a viable dogmatic concept did not prevent positive Dutch administrative law from developing in a 'relational' way, gradually moving away from its traditional focus on abstract legality.¹¹ More than the 'classical' paradigm, its 'relational' successor seems fit to respond to administrative law's 'horizontalized' and 'fragmentized' social and institutional context. Lacking an accepted theoretical basis, however, the 'relational turn' of the system tends to materialize in a pragmatic and unreflected way, building on unaltered classical fundamentals and thus leaving the system in a rather disjointed and unbalanced situation. How, then, may administrative law be reformed in a way that befits its modern context while also acknowledging the abstract classical values on which it was originally

5 For the classical French distinction between the *recours objectif* and *recours subjectif*, see, e.g., J. Vincent, *La justice et ses institutions* (1982), p. 747: 'On constate en effet que la matière contentieuse se développe autour de deux pôles distincts. Tantôt l'action tend à assurer le respect de la légalité abstraite, tantôt elle vise la protection des droits individuels des particuliers. (...) On parle dans le premier cas de contentieux objectif; l'action a pour but la réparation d'atteintes portées à la légalité objective; dans le second cas, le contentieux est dit subjectif parce qu'il concerne des prérogatives personnelles du sujet de droit, l'individu.' A good account of the *recours objectif* and *recours subjectif* in Dutch law as compared to French and German law has been given by A.J. Bok, 'Judicial Review of Administrative Decisions by the Dutch Administrative Courts. Recours Objectif or Recours Subjectif? A Survey, including French and German law', in F.A.M. Stroink & E.C.H.J. van der Linden (eds.), *Judicial Lawmaking and Administrative Law* (2005), pp. 153-179.

6 Cf., e.g., M. Schreuder-Vlasblom, 'Tweepolig procesrecht [Bipolar procedural law]. Over de aanvulling van rechtsgronden en feiten in het geding volgens het procesrecht van de Awb', in T. Barkhuysen et al. (eds.) *Bestuursrecht harmoniseren: 15 jaar Awb* (2010), pp. 411-429; S.E. Zijlstra, 'Dynamiek in de bestuursrechtspraak', (2015) 17 *Nederlands Tijdschrift voor Bestuursrecht*, no. 4/5, pp. 128-133.

7 N. Achterberg, *Die Rechtsordnung als Rechtsverhältnisordnung. Grundlegung der Rechtsverhältnistheorie* (1982), esp. pp. 32 et seq.

8 *Kamerstukken II 1988/89*, 21221, 3, p. 11.

9 *Kamerstukken II 1988/89*, 21221, 3, p. 12.

10 P. de Haan, *Recente ontwikkelingen in de verhouding publiek-/privaatrecht*, Mededelingen van de Afdeling letterkunde van de KNAW, vol. 62, no. 7 (1999), pp. 22-23; R. Schlössels & S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, Vol. 1 (2010), pp. 48-50; J.C.A. de Poorter & K.J. de Graaf, *Doel en functie van bestuursrechtspraak: een blik op de toekomst* (2011), pp. 99-100.

11 Cf., e.g., D.R. Kloosterman, 'Ongeschreven burgerplichten', in M. Herweijer et al. (eds.), *Alles in één keer goed* (2005), pp. 209-224; J.B.J.M. ten Berge, *Burgerplichten jegens de overheid* (2007); Ch.W. Backes & A.M.L. Jansen, 'De wederkerige rechtsbetrekking als panacee voor de gebreken van de 'besluiten-Awb'', in T. Barkhuysen et al. (eds.), *Bestuursrecht harmoniseren: 15 jaar Awb* (2010), pp. 75-96.

founded? To what ideological background may the classical system of Dutch administrative law be properly understood? Why was it once generally assumed that administrative law should not primarily focus on the relational exercise of rights and legal competences in *concreto*, but rather on the integrity of the legal order in *abstracto*? How may a coherent, stable and legitimate system of judicial review of government actions take shape that responds to its modern context of ‘horizontalization’ and ‘fragmentation’, but still remains connected to the ideals of public autonomy and the common good as its classical roots? Does ‘relational administrative law’ necessarily amount to a ‘privatization’ of administrative law, dangerously undermining its classical focus on abstract legality and the general interest? Or could one conceive of a model of ‘relational administrative law’ that responds to the ‘horizontalization’ and ‘fragmentation’ of public law but still adheres to the classical ideals of abstract right and public autonomy?

2. ‘Autonomous’ and ‘relational’ law

In order to shed light on such issues, it is required to examine the system of Dutch administrative law not only in dogmatic isolation, but also in its broader intellectual, historical and socio-cultural context. Classical Dutch administrative law may be properly described as an emanation of what Nonet and Selznick have identified as ‘autonomous law’. In response to the ‘repressive law’ of the pre-modern era, ‘autonomous law’ embraces the idea of law as an artificial creation of free-choosing individuals. As such, it comprehends fairness in a procedural rather than a substantive way. Characteristically, ‘autonomous law’ focuses on general rules and abstract principles rather than concrete relations and particular circumstances. Professing the independence and strict neutrality of the judiciary, it typically draws sharp lines between legislative, administrative and judicial functions. Evoking the Weberian ethos of rational legality, its main competence is to restrain government, emphasizing the importance of correct procedures and fidelity to formal rules as the ‘purest’ model of legal authority. By narrowing the range of legally relevant facts, however, ‘autonomous law’ is easily at risk of becoming alien to the life world on which it imposes itself.¹² Much of modern legal theory can be understood as a quest for a concept of law that mitigates the afflictions of ‘autonomous law’ without disregarding its central tenets of equal freedom and legality.¹³ In this respect, Nonet and Selznick have proposed a model of ‘responsive law’ that retains a grasp on what is essential to its abstract institutional integrity while also attuning to the particular and broader societal context that it aims to regulate. Other than ‘autonomous law’, this model is explicitly concerned with the relational context in which abstract rights and principles are operative.¹⁴ Therefore, I refer to it in this article as ‘relational law’.¹⁵

Following a general trend in continental and Anglo-American jurisprudence, Dutch private law went through a phase of ‘relational’ reform in the early twentieth century. Breaking with its former ‘autonomous’ detachment from social reality, ‘relational’ private law accepted a contextual outlook in epoch-making judgments like *Lindenbaum/Cohen*, in which the Dutch Supreme Court decided that legal subjects in private law are not only bound by formal rules and abstract principles, but also by the ‘relational’ notion of an unwritten standard of due care with regard to other subjects, seen in the light of all relevant facts and circumstances of a particular case.¹⁶ Whereas private law thus took a decisive ‘relational turn’, the ‘autonomous’ (not to say rather ‘autistic’) orientation of Dutch public law remained largely intact.¹⁷ For one thing, a ‘relational’ understanding of public law was resisted by those who feared that the concept of

12 Ph. Nonet & Ph. Selznick, *Law and society in transition. Toward responsive law* (2001 [1978]), pp. 53 et seq.

13 Cf., e.g., J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992), p. 15.

14 Nonet & Selznick, *supra* note 12, pp. 73 et seq.

15 See also L. van den Berge, *Bestuursrecht tussen autonomie en verhouding. Naar een relationeel bestuursrecht* (2016), pp. 4-7.

16 HR 31 januari 1919, *NJ* 1919/161 (*Lindenbaum/Cohen*). For a good account of the ‘relational turn’ in Dutch tort law, see, e.g., A.M. Hol, ‘Fault and Legal Doctrine in The Netherlands’, in N. Jansen (ed.), *The Development and Making of Legal Doctrine* (2010), pp. 164 et seq., with an analysis of *Lindenbaum/Cohen* on p. 167. An illustrative case from contract law is HR 15 november 1957, *NJ* 1958/67 (*Baris/Riezenkamp*), in which the Dutch Supreme Court expended considerable effort in explaining that contracting parties have entered into a ‘legal relation’ that is not only determined by their formal contractual agreements, but most fundamentally by the intersubjective and contextual notion of ‘good faith’, entailing that they should take proper heed of each other’s reasonable interests and justified expectations. See also C. Mak, ‘Formation of Contracts. Liability for Negotiations’, in D. Busch et al. (eds.), *The Principles of European Contract Law and Dutch Law* (2002), pp. 129-133.

17 Cf., e.g., D. Allevijn, *Tussen partijen is in geschil... De bestuursrechter als geschilbeslechter* (2011), p. 147.

'reciprocity' would seriously hamper the implementation of democratic decisions, regarding the breakdown of a governmental 'freies Ermessen' as an open invitation to intense juridification.¹⁸ Others were concerned that the 'relational' orientation of the GALA might endanger the principle of legality as a leading principle of public law. To be sure, their concerns were not directed towards the 'principles of proper government' as a widely accepted source of law, but rather towards the 'principles of good citizenship' that the GALA seems to be acknowledge as their logical counterpart.¹⁹

3. The 'autonomous tradition'

Such concerns can only be fully understood against the backdrop of an 'autonomous tradition' in political philosophy that adheres to the ideal of public space as a cooperative venture of autonomous individuals, only bound by the rules that they have set themselves as their sole authors. Dutch administrative law has strong intellectual roots in the idea of the state as an artificial construct that liberates its citizens from the harsh forces of nature. Making life 'nasty, brutish and short' or otherwise unbearable, the 'state of nature' would entail a clash of private interests that makes an enduring social peace impossible. As the only way out of intersubjective dependencies, the principle of equal freedom would require a transformation to a 'civil state' in which each subject conforms to the state as a 'work of art' that is exclusively directed at the undivided public interest.²⁰ Anglo-American public law typically follows Locke in the idea of the 'inalienable' subjective rights of individual citizens towards the government, with the latter being bound in its relation to its subjects by a 'public trust' as a residue from the state of nature.²¹ Continental public law, however, tends to follow contractarians like Hobbes, Rousseau and Kant in the belief that the conversion of a natural to a civil state may only succeed when the transformation is a total one, leaving no room for any subjective rights of citizens towards the government as a remainder of the state of nature. Paradoxically, man can only liberate himself from his interpersonal dependencies by accepting the absolute rule of a sovereign master or the general application of some abstract principle like Rousseau's 'volonté générale' or Kant's 'allgemeines Gesetz der Freiheit' as the only way in which the autonomy of the one can be reconciled with the autonomy of any other.²²

In the development of Dutch administrative law, the 'autonomous' tradition of political and legal artificiality and abstract integrity can be clearly recognized in the legal thought of J.T. Buys (1826-1893) and J.A. Loeff (1858-1921) as two of Dutch administrative law's most prominent 'founding fathers'. With characteristic pathos, Buys described the state as an artificial 'bulwark of freedom', providing the only defence against the natural right of the stronger as the ultimate driving force of uncontrolled society. In Buys' view, the 'state preaches unity', whereas 'society breeds division'. The state, he explained, expresses the 'collective will' of its citizens, symbolically united in the state as an artificial person. Enforcing its public will, the state is engaged in a 'constant battle' with society as a domain of clashing private interests and interpersonal dependencies. To be sure, Buys recognized the need for a civil society as a private sphere in which citizens are free to look after their own interests and to pursue happiness in the way that seems most fit to each. Lacking regulation, however, society may tend to 'rear suppression', leaving individual citizens helpless against the 'might makes right' of nature. The state, then, is described as the 'banner of freedom' under which the right of the stronger may yield to the law as the expression of the people's undivided 'general will'. As an abstract entity, however, the state has no means of fulfilling its liberating task on its own;

18 Concerns of this kind were most influentially – and controversially – expressed by a 'working group' of politicians who protested against the GALA as a law that would 'juridify public policy' and would thus be a serious threat to effective government. See Werkgroep-Van Kemenade, *Bestuur in geding* (1997).

19 See esp. the papers collected in E.C.H.J. van der Linden & A.Q.C. Tak (eds.), *Eenzijdig en wederkerig? Beschouwingen over de wederkerige rechtsbetrekking als basisconcept in het bestuursrecht* (1995). Cf. also Ten Berge, *supra* note 11, pp. 20 et seq.

20 See esp. Van den Berge, *supra* note 15, pp. 27 et seq.; for the intellectual roots of classical Dutch administrative law in early modern contract law, cf., e.g., J. van der Hoeven, *De drie dimensies van het bestuursrecht. Ontstaan en vorming van het Nederlandse algemene bestuursrecht* (1989).

21 See esp. A.V. Dicey, *The Introduction of the Study of the Law of the Constitution* (1915), comparing the English 'rule of law' to French administrative law in Chapter 12, pp. 213-267.

22 Cf., e.g., G. Gozzi, 'Rechtsstaat and Individual Rights in German History', in P. Costa et al. (eds.), *The Rule of Law. History, Theory and Criticism* (2007), pp. 237-259.

in order to staff its governmental bodies, it is dependent on society as its only source of recruits. Therefore, the 'bulwark of the state' is in constant danger of being overthrown from within, infected by the private interests of those who have been entrusted with its sovereign powers. Only restraint on government actions by a relentless system of judicial review by independent judges may prevent the bulwark from falling.²³

The influence of Buys as a prominent legal scholar weighed heavily on the attainment of a constitutional reform in 1887 that permitted a general system of judicial review of administrative actions. As one of Buys' students, the lawyer and politician Loeff proposed a model of judicial review of administrative actions that explicitly aims at 'purifying' law from 'vague notions' like 'natural justice' or any understanding of a common ethics ('Sittlichkeit') as a source of legal obligations. Instead, Loeff adhered to an imperativist notion of law in which the state is recognized as an 'absolute master', ruling its subjects in the unbound artificial sovereignty that would, paradoxically, be indispensable for the fulfilment of its liberating task, redeeming its subjects from the intersubjective dependencies in which they would be entangled in the state of nature. In Loeff's view, a theoretical basis for a system of judicial review should not be sought in the 'mistaken notion' of 'public subjective rights' on the part of citizens, incompatible as they would be with a 'civil state' in which the state is artificially invested with absolute sovereignty. In Loeff's positivist legal universe, there is no such thing as a 'vinculum iuris' between government and citizen; both, as he explained, are merely obliged towards the abstract body of laws as they are propounded as absolute commands by the state. The 'rule of law', as Loeff understood it, demands that these commands are obeyed without exception, be it by those 'fallible human beings' who make up the government or by other legal subjects. His system of judicial review is therefore geared towards the absolute maintenance of abstract legality, ultimately aiming at a 'pure legal order' that is cleared of any unlawful infringements.²⁴

The radical nature of Loeff's 'autonomous' positivism explains why his model of judicial review never materialized; its uncompromising character evoked all kinds of political and doctrinal counterforces that it was ultimately unable to overcome. However, Buys' and Loeff's 'autonomous' understanding of administrative law turned out to be of enduring influence and still has a certain grip on the debate as it is waged today. Deeply ingrained in Dutch legal thought is the idea that private law is a system of organic and 'bottom-up' 'common law' ('gemeen recht'), only infringed by top-down rules of public law as a domain of artificial exception. With Loeff's proposal for judicial review being held off by Parliament, the 'common law doctrine' ('gemene rechtsleer'), originally of German descent, served as a theoretical basis for the extension of the competence of the civil court so as to at least partly fill the gap in the judicial protection of citizens' rights against government actions. By default, the 'common law doctrine' understands the government and its subjects as each other's 'Rechtsgenossen', bound by private law as the common and partly unwritten 'law of the land'. As such, the civil court has jurisdiction over the government, with the latter 'not standing above, but in the law'.²⁵ Within the artificial domain of public law, however, the government would be exempted from its common law bonds, entrusted with discretionary powers that enable the enforcement of the 'general will' of the state. A widely-shared view in Dutch law, in fact, entails that public law (other than private law) would not really deserve to be called 'law', but should rather be referred to as 'some other thing', that is, as a set of artificial commands that liberate the government from its natural deference to the law as its 'bottom-up' master.²⁶

23 See L. van den Berge, 'Het schelpdier en zijn schelp. Johannes Theodoor Buys (1826-1893) over administratieve rechtspraak', in D. de Ruyscher et al. (eds.), *Rechtsgeschiedenis op nieuwe wegen. Legal history, moving in new directions* (2015), pp. 133-168 for a more detailed account of Buys' legal thoughts and further references.

24 J.A. Loeff, *Publiekrecht tegenover privaatrecht* (1887); J.A. Loeff, *Ontwerp voor een Wetboek van Administratieve Rechtsvordering* (1906); J.A. Loeff, 'Wenschelijkheid van administratieve rechtspraak hier te lande', (1912) 31 *Themis*, no. 1, pp. 144-172. See Van den Berge, supra note 15, pp. 81 et seq. and L. van den Berge, 'Der Staat soll Rechtsstaat Seyn'. Loeff, Struycken en de Duitse staatsfilosofie', (2014) 175 *Rechtsgeleerd Magazijn Themis*, no. 2, pp. 80-88 for a more detailed analysis and further references.

25 H.J. Hamaker, 'De tegenstelling van publiek- en privaatrecht', in *Verspreide geschriften*, Vol. 7 (1913 [1894]), p. 140, borrowing the idea of 'common law' ('gemeen recht') from O. von Gierke, *Die soziale Aufgabe des Privatrechts* (1948 [1889]), p. 34.

26 Hamaker, supra note 25, p. 161. See Van der Hoeven, supra note 20, pp. 101 et seq. for excellent treatment (and criticism) of the Dutch tradition of administrative law as 'artificial law'.

4. The ‘relational tradition’

In addition (and contrary) to an ‘autonomous’ tradition of administrative law, one may discern a ‘relational’ tradition that has its roots in the Aristotelian understanding of the political community as a natural entity and of man as a political animal (*dzōion politikon*).²⁷ As a reaction to the Revolution as an aberration of the Enlightenment, the Aristotelian conception of law and politics gained particular momentum in the German ‘Vormärz’ as a formative period of modern legal thought. Resisting the ‘autonomous’ conception of the state as an artificial construct, scholars like Friedrich-Julius Stahl (1802-1861) described the state in a Hegelian vein as an ‘ethical whole’ (‘sittliches Ganze’), a natural ‘body’ that *precedes* individual citizens instead of being created by them. For Stahl, judicial review of government actions by independent judges, reasoning along rational rather than ethical lines, is a major threat to the integrity of the state, robbing its citizens of their natural membership of the political community and thus leaving them in a lonely and rather desolate state in which they are not able to live up to their full human potential. As a disruptive force, judicial review would breed nothing but division, hopelessly juridifying and ultimately even breaking the relations between individual citizens and the government as an ‘ethical power’ whose main task would consist of keeping the ‘ethical body’ of the state together. In the development of Dutch legal thought, a similar view was most influentially expressed by the statesman and scholar Johan Rudolph Thorbecke (1798-1872). As a tireless warner against the invasion of the human life world by the ‘titanic efforts of pure reason’, Thorbecke adhered to an ‘organic’ conception of law and state that leaves no room for the ‘juridification’ of administrative functions by partly outsourcing them to independent judges, one-sidedly intent as they would be to rely on abstract reason rather than a heartfelt sense of communal ethics.²⁸

The dogmatic resistance against Loeff’s proposal for a model of judicial review followed similar lines. Loeff’s most prominent opponent A.A.H. Struycken (1873-1923) had directed a polemical attack against Loeff’s plans in which he clearly drew on the Hegelian notion of the state as an ‘ethical whole’. In a rhetorical brochure that has a canonical place in Dutch legal history, Struycken dismissed Loeff’s ‘autonomous’ conception of law as an aberration of a ‘liberating project’ that originally aimed at realizing individual citizens from feudal interdependencies, but ultimately came down to a ‘legalistic justicialism’ that drew up unnecessary boundaries between the government and its subjects as ‘heterogeneous elements’, thus severely disturbing the integrity of the political community.²⁹ Whereas Loeff defended a ‘pure theory of law’, warning against any notion of ‘Sittlichkeit’ as a mysterious and in fact rather arbitrary instrument in the hands of the government, Struycken adhered to an anti-positivism grafted upon the idea of ‘Sittlichkeit’ as law’s most essential fundament. In accordance with the ‘mighty voice of Hegel’, Struycken rejected the ‘all-reasonable (...) spirit of Enlightenment’, one-sidedly intent as it would be on the destruction of existing cultural and historical structures and institutions. The ‘rule of law’ in the welfare state would require more and more discretionary powers on the part of the government, with the legislator providing the administration with open-ended political instruments rather than restricting its policies. In modern law, therefore, effective protection against government actions inevitably entails weighing and balancing incommensurable rights and interests – a task for which ‘pure’ judicial reason would be hopelessly inapt. Relying on the proper ‘Bildung der Beamten’, Struycken rather put his trust in a review within the hierarchy of the government itself, better capable as they would be to judge administrative actions on the basis of their appropriateness and ethical quality.³⁰

Evidently, the appeal of scholars like Stahl and Struycken to ethical integrity – and perhaps most in particular their naïve trust in the proper ‘Bildung der Beamten’ – is outdated. Modern law tends to refrain from seeing the government as an ‘ethical power’, wielding power over the state as an ‘ethical body’ with individual citizens as its mere constituents. It typically no longer regards the common identity of a legal

27 Cf., e.g., Gozzi, *supra* note 22, pp. 241-242.

28 See esp. L. van den Berge, ‘Die Zeit in Gedanken erfasst’. Hegel en Thorbecke over het recht, de staat en de geschiedenis’, (2014) 53 *Ars Aequi*, no. 7-8, pp. 525-533. Cf. also Van den Berge, *supra* note 15, pp. 70-76, with further references.

29 The attack on Loeff was made in A.A.H. Struycken, *Administratie of rechter* (1910) and continued in A.A.H. Struycken, *Wenschelijkheid van administratieve rechtspraak hier te lande* (1912).

30 See Van den Berge, *supra* note 15, pp. 99 et seq. and Van den Berge, *supra* note 23 for a more detailed analysis and further references.

community as some kind of a transcendent idea, but rather as something that needs constant deliberation and renegotiation amongst its subjects.³¹ For modern ‘relational’ thinkers, therefore, judicial review of government actions is an established fact, and rightly so.³² The ‘organicist’ fears of juridification, however, are no less pertinent for us today. As it has become increasingly clear in the past decades, the ‘autonomous’ idea of ‘abstract right’ has inflicted several ‘pathologies’ on law that severely disturb its communal function.³³ Not in the least does the disruptive nature of these pathologies manifest itself in modern public law, which more than private law is modelled on abstract rules and principles that seriously hamper the communicative rationality and conflict-solving potential of ordinary social life. Struycken’s sharp eye for the harm that may come with one-sided judicial abstraction and rational reduction in many ways resembles the analysis of modern philosophers like Honneth, who warns against the ‘pathologies of reason’ that ‘autonomous law’ would have inflicted upon us.³⁴ As a cure for these pathologies, Honneth proposes an understanding of law that acknowledges the inherently social nature of man without disregarding the ‘autonomous’ claim of fundamental subjectivity. As such, he proposes the idea of a *democratic* ‘Sittlichkeit’, not identified from some Archimedean point, but rather seen as the preliminary outcome of a public debate in which no one has the last word. The communicative rationality that is inherent in social life could only flourish in a legal system in which such ‘Sittlichkeit’ is properly recognized.³⁵

5. ‘Reciprocal administrative law’

Looming large as it did in the canonical debate between Loeff and Struycken, the tension between ‘autonomous’ and ‘relational’ conceptions of administrative law manifests itself no less in the contemporary debate on ‘reciprocal administrative law’ as it was introduced in the GALA. Following Achterberg in his denouncement of any natural or artificial ‘Mehrwert’ of the state with regard to other legal subjects,³⁶ the GALA’s legislative history resists the ‘autonomous’ idea of a ‘freies Ermessen’ as a legal domain in which the government is exempted from law. Instead, it embraces the ‘relational’ idea that both public and private legal powers are always restricted to their proper exercise within concrete relations. As such, the GALA introduces a model of ‘reciprocal administrative law’ in which both public and private actors are not only bound by abstract right, but also – and more fundamentally – by underlying principles of proper behaviour. As the GALA’s legislative history has it, ‘the principles of proper governance’ as they were developed from the 1950s onwards ‘reflect a conception of the relation between government and citizen’ that differs from the way in which their positions towards each other was generally perceived in earlier times. Modern times would require a more horizontal approach to public law in which public and private parties are recognized as actors on a common stage, both actively giving shape to the public domain in mutual interaction. To be sure, the GALA does not require private actors to advance the general interest as a primary purpose; that remains the responsibility of the government. However, its legislative history also points out that, to a certain extent, the concept of ‘reciprocal administrative law’ binds citizens to unwritten principles of proper behaviour towards the government.³⁷

The notion of reciprocity in public law was particularly opposed by administrative law scholars adhering to the ‘Maastricht school’, with A.Q.C. Tak as the most prominent advocate of an ‘autonomous’ model of administrative law that is explicitly built on the ‘autonomy of each human being, only bound by the autonomy of other human beings’. Firmly grafting his theory on the ‘autonomous’ tradition in law and philosophy, Tak embraces the idea of essential divides between state and society, public and private law and distributive and corrective justice. In Tak’s view, a true ‘Rechtsstaat’ requires a clear vertical hierarchy between the legislator and the administration, with the law clearly binding the latter to the ‘will of the people’. For Tak,

31 Cf., e.g., C. Lefort, ‘L’image du corps et le totalitarisme’, in *L’invention démocratique* (1981), pp. 159-176.

32 See, e.g., Habermas, supra note 13, pp. 208 et seq.; A. Honneth, *Das Recht der Freiheit. Grundriß einer demokratischen Sittlichkeit* (2011), pp. 471-472.

33 A. Honneth, *Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte* (1992), pp. 13-19.

34 Cf. Van den Berge, supra note 15, pp. 106-108.

35 Honneth, supra note 32, pp. 157 et seq.; see also Van den Berge, supra note 15, pp. 50 et seq. with further references.

36 Achterberg, supra note 7, p. 32.

37 *Kamerstukken II* 1988/89, 21221, 3, pp. 11-13.

this means that the government should concentrate on the enhancement of the undivided general interest as its sole purpose, thereby disregarding any concrete relations with its subjects. Only seemingly related to concrete citizens, the administration should stick to its exclusive focus on distributive justice *erga omnes*, that is, on the lawful distribution of rights and goods among all members of society. The task of the court, however, would be the opposite one. As Tak has it, the separation of powers doctrine requires the judge to concentrate entirely on corrective justice *inter partes*, granting individuals absolute protection against unwarranted infringements by the government. As such, Tak adheres to a ‘pure’ model of public law with the autonomous freedom of each individual as its ultimate source; under no circumstances is he willing to give up or modify that ‘pure’ theoretical point of departure for the sake of ‘impure’ pragmatics. His rejection of any ‘principles of good citizenship’ is equally categorical. In his view, any unwritten duty of citizens towards the government would be ‘irreconcilable with the Western legal tradition’.³⁸

Standing in diametrical opposition to Tak’s autonomous understanding of public law, a modern ‘relational’ conception of public law is most influentially advocated by the Dutch legal scholar and politician E.M.H. Hirsch Ballin. Drawing on a wide range of communitarian philosophers, Hirsch Ballin dismisses the ‘autonomous’ conceptions of the ‘Western’ public law of Tak and others as belonging to a ‘previous phase’ of legal thought that would now be ‘hopelessly obsolete’. The ‘autonomous paradigm’ would ‘misconceive’ liberty by negatively understanding it as ‘freedom of interference’, ultimately reducing it to the mere self-determination of ‘atomic’ individuals. Instead, Hirsch Ballin proposes to conceive of liberty in a more positive way, adhering to the Aristotelian view of man as a ‘political animal’, dependent on his relations with proximal and more distant others for the fulfilment of his human potential. For Hirsch Ballin, the mutual reliance on others – within the circles of the household, the workplace and the Church, but ultimately also within the state as a natural community – is nothing less than the ‘pre-positive essence of the law’ as it could be derived from man’s communal nature. The state would not be an artificial construct, created by man to be liberated from interpersonal interdependencies. Instead, Hirsch Ballin regards the state as an ethical community, most fundamentally originating in the natural human condition of essential relatedness with others. For Hirsch Ballin, in fact, there is no *real* difference between the state and other legal entities. Surely, states usually stand out as ‘important organizations’, but nevertheless as ‘organizations like many others’. Neither would there be a *real* difference between public and private law – as they would both be derived from man’s communal nature as their most essential fundament.³⁹

The philosophical idea of essential human communality brings Hirsch Ballin to far-reaching conclusions with regard to the development of positive administrative law. As a prominent intellectual driving force behind the GALA’s ‘relational turn’, Hirsch Ballin proposes a ‘reciprocal’ or ‘intersubjective’ theory of administrative law that follows Dutch private law in shifting from a deductive model of adjudication, merely subsuming a particular case under a general rule, to a balancing approach in which adjudication ultimately comes down to the weighing of opposing interests and principles. On the part of the government, this means that so-called ‘discretionary powers’ are not only reined in by their abstract democratic limits, but also – and most essentially – by unwritten legal principles that demand their proper application within concrete intersubjective relations. In defiance of the traditional Dutch adherence to the ‘common law doctrine’ (‘gemene rechtsleer’) that regards public law as an artificial domain in which the state – and the government as its representative – is exempted from law, Hirsch Ballin proposes a ‘mixed law doctrine’, built on the idea that both public and private legal powers are unreservedly restricted to their proper concrete exercise. In fact, Hirsch Ballin adheres to a ‘holistic’ conception of law that leaves no room for a fundamental divide between public and private law as separate legal ‘domains’, both ultimately determined as they would be by the human relatedness to others as the ‘pre-positive essence of law’. Breaking with the idea of discretionary public powers being wielded in some sort of legal ‘vacuum’, Hirsch Ballin’s ‘mixed law doctrine’

38 A.Q.C. Tak, ‘Het Moment X’, (1990) 16 *Tijdschrift voor Openbaar bestuur*, no. 2, pp. 134-138; A.Q.C. Tak, *De overheid in het burgerlijk recht* (1997); A.Q.C. Tak, ‘Vrijheid. Over vrijheid, democratie en rechtsbescherming’, in G.H. Addink et al. (eds.), *Grensverleggend bestuursrecht* (2008), pp. 127-134. See also J.M.H.F. Teunissen, *Het burgerlijk kled van de staat. Beschouwingen over de tweewegenleer* (1996). See Van den Berge, *supra* note 15, pp. 151 et seq. for a more detailed analysis and further references.

39 For Hirsch Ballin’s legal and philosophical thought, see, a.o., his collected essays in E.M.H. Hirsch Ballin, *Rechtsstaat en beleid* (1991). Detailed analysis and further references are provided in Van den Berge, *supra* note 15, pp. 13-15.

concerns a considerable improvement of the legal position of individual citizens towards the government. As a complication for this position, however, his theory also confronts citizens with unwritten obligations towards the government – derived from the same ‘pre-positive essence’ of law that binds the latter.⁴⁰

6. ‘Real common law’

It is widely agreed upon in circles of Dutch administrative law scholars that a ‘pure’ theory of law like Tak’s is not very attractive. In its conscious disregard for the relational context of administrative law, one-sidedly holding on to all kinds of ‘a priori’ notions of ‘abstract right’, Tak’s model seems out of touch with a social reality of ‘horizontalization’ and ‘fragmentation’ that public law will inevitably have to deal with. Moreover, the binary divides between public and private law and between state and society that Tak aims to uphold are at odds with the blurring of these boundaries that is typical of the ‘life of the law’ as we experience it all around us.⁴¹ Hirsch Ballin’s ‘holistic’ model of essential relations and legal reciprocity, however, also encounters much criticism. Many scholars fear that ‘relational administrative law’ as Hirsch Ballin understands it will ultimately come down to infecting public law with the notion of mutuality (‘do ut des’) as a contract law principle that is fundamentally strange to public law. Professedly emancipating citizens by placing them ‘on a par’ with the government, Hirsch Ballin’s model would effectively often leave them helpless against the government as a ‘horizontal partner’ who may at any time unveil his true vertical identity, one-sidedly taking legally binding decisions after all.⁴² ‘Reciprocal administrative law’ is broadly described in Dutch literature as a ‘misleading concept’, distracting us from the undivided general interest as public law’s classical focus, ‘a distant echo from feudal times’ which fails to liberate citizens from interpersonal dependencies.⁴³ Evoking the suggestion of ‘cooperation’ and ‘partnership’ between government and citizens, it would ignore the fact that relations in public law are actually overshadowed by a fundamental legal inequality that makes true cooperation and partnership impossible. Along similar lines, a leading report on the state of Dutch administrative law has recently dismissed ‘reciprocal administrative law’ as a paradigm that would be ‘irreconcilable with the fundamental principles of Dutch administrative law’.⁴⁴

However, the broad dismissal of ‘reciprocity’ in public law did not prevent Dutch administrative law from developing in a relational way. In response to the ongoing socio-cultural trend of the ‘privatization’ and ‘fragmentation’ of the public sphere, Dutch public law undeniably follows a broader European shift ‘from government to governance’ that is fundamentally at odds with the classical ‘autonomous’ ideal of abstract right and the ‘autistic’ enhancement of the common good.⁴⁵ The lack of an accepted theory of ‘relational public law’ explains why Dutch administrative law’s basic ‘autonomous’ architecture does not follow this development. Perhaps such a theory could be found in the so-called ‘real common law doctrine’ (‘gemeenschappelijke rechtsleer’), developed in the 1990s but only recently gaining some ground in Dutch dogmatics.⁴⁶ It understands itself as the *real* version of the ‘common law doctrine’ because it not only recognizes private but also public law as ‘common law’. In accordance with Hirsch Ballin’s theory, the ‘real common law doctrine’ dismisses the ‘monism’ of classical autonomous law and adheres to a pluralistic and intersubjective account of law as a practice that is inherently grafted upon man’s social nature and

40 E.M.H. Hirsch Ballin, *Het grondrecht op behoorlijke rechtspraak in het Nederlandse administratieve recht* (1983); E.M.H. Hirsch Ballin, ‘Wederkerig bestuursrecht [Reciprocal administrative law]’, (1989) 150 *RM Themis*, no. 1, pp. 1-4; E.M.H. Hirsch Ballin, *Dynamiek in de bestuursrechtspraak* (2015). See Van den Berge, *supra* note 15, pp. 136-139 for a more detailed analysis and further references.

41 See, e.g., B.J. Schueler, ‘Een doolhof met vertakkingen. Naar een verbeterde rechtsbescherming tegen schadeveroorzakende besluiten?’, (2007) 5 *Overheid & Aansprakelijkheid*, no. 1, pp. 55-63. See also the critical responses to Tak’s theory in T. Barkhuysen, W. den Ouden & Y.E. Schuurmans (eds.), *Het model Tak. Verhoogde rechtsbescherming in het bestuursrecht?* (2006).

42 Among the many critics of ‘reciprocal administrative law’, J.M.H.F. Teunissen stands out for theoretical depth. See esp. ‘De ‘wederkerige rechtsbetrekking’ als strategisch concept voor nivellerende rechtswetenschap?’, in E.C.H.J. van der Linden & A.Q.C. Tak (eds.), *Eenzijdig en wederkerig?* (1995), pp. 277-322.

43 De Haan, *supra* note 10, pp. 22-23; cf. also Teunissen, *supra* note 42 and Ten Berge, *supra* note 11.

44 De Poorter & De Graaf, *supra* note 10, pp. 99-100.

45 See B.J. Schueler, ‘De grote verandering. Finaliteit in een nieuw bestuursprocesrecht’, (2012) 14 *Jurisprudentie Bestuursrecht Plus*, no. 2, pp. 101-117 for a convenient overview.

46 F.J. van Ommeren, ‘Een andere visie op de verhouding tussen publiek- en privaatrecht. Van de ‘gemene rechtsleer’ naar de ‘gemeenschappelijke rechtsleer’’, (2012) 51 *Ars Aequi*, no. 7-8, pp. 562-572; M.W. Scheltema & M. Scheltema, *Gemeenschappelijk recht. Wisselwerking tussen publiek- en privaatrecht* (2013).

thus inevitably involves principles and legitimate expectations – instead of isolated individuals – as law’s most essential ‘relational’ building bricks. Other than Hirsch Ballin’s theory, however, the ‘real common law doctrine’ acknowledges the unique position of the state among other legal actors as the sole wielder of legitimate force, inhabiting an elevated position above other legal subjects that is not only based on substantive disparity, but also on an inequality that is clearly formalized in law. Whereas both public and private law could be traced back to common principles of a ‘relational’ ethics that precede the public-private law divide, the distinctive nature of each domain would legitimise differences in the ways that these common principles work out within concrete relations – their legal area of application being one of the circumstances that play a role in the ultimate determination of their meaning.⁴⁷

7. *Schutznorm*

A good example of Dutch administrative law’s relational turn – and also of the resistance and the problems that it encounters – is the recent introduction of the ‘requirement of relativity’ (*Schutznorm*) into Dutch administrative law. This requirement entails that a litigant cannot successfully invoke a legal norm that does not pertain to the protection of his interests. According to an ‘autonomous’ understanding of law, there could be no place for such a requirement, aiming as it does at the abstract integrity of the legal order and granting legal subjects an almost absolute right to be exempted from the consequences of unlawful actions. In a ‘relational’ conception of law, however, such a right cannot be accounted for, as it necessarily entails the balancing of material interests and legitimate expectations in the case at hand. As for private law, the *Schutznorm* was introduced as one of the features of the ‘relational turn’ of Dutch private law in the interwar period. Moving from ‘autonomous’ *Begriffsjurisprudenz* towards a more relational approach, the Dutch Supreme Court accepted an unwritten standard of due care in its ground-breaking judgment in the tort law case of *Lindenbaum/Cohen*. Along similar lines, the Supreme Court exchanged an ‘absolute’ concept of legal liability – imposing liability for ‘any unlawful act’ to the detriment of others – for a ‘relative’ understanding of liability that reserves liability for acts that are not merely unlawful ‘in abstracto’, but more specifically wrongful with specific regard to the claimant ‘in concreto’. A breakthrough decision in this regard was reached in 1928 in *De Marchant et d’Ansembourg*, in which the Supreme Court ruled that damages suffered by Count De Marchant et d’Ansembourg fell outside the scope of the procedural provisions broken by the government while planning to expropriate him of his property.⁴⁸

The introduction of the *Schutznorm* in private law gave rise to fierce criticism. On the one hand, there were those who saw no grounds for ‘relativizing’ wrongfulness, holding on to an absolute theory that denounces the idea that what is ‘a fault to the one’ could ever be ‘faultless to the other’. On the other hand, there were also those who considered the *Schutznorm* as an unnecessary embellishment of private law, ‘relativizing’ wrongfulness as a legal concept that, with the acceptance of the unwritten standard of due care, had been turned into a ‘relational’ notion already by itself. P.H. Smits, for example, argued for an interactional model of delictual liability in which the standard of due care – as it was introduced in *Lindenbaum/Cohen* – does not just entail an expansion of liability grounds, but rather encompasses other grounds for liability (including abstract unlawfulness) as an overriding principle. Despite gaining quite some support, the ‘Smits doctrine’ was never turned into positive law; as it is widely agreed upon, the breach of statutory duties is still recognized as an independent factor in the establishment of liability. As such, Dutch tort law made a decisive ‘relational turn’ without abandoning its ‘autonomous’ roots altogether, continuously searching for the right balance between *Begriffsjurisprudenz*, on the one hand, and *Interessenjurisprudenz* as a radical ‘relational’ approach, on the other. The search for such equilibrium also manifests itself in the development of the Dutch *Schutznorm* doctrine. In 1958, the Supreme Court adopted the so-called ‘Langemeijer correction’, entailing that the violation of a statutory provision may in some cases be regarded

⁴⁷ See Van den Berge, *supra* note 15, pp. 141-144 for more details and further references.

⁴⁸ HR 25 mei 1928, NJ 1928/1688 (*De Marchant et d’Ansembourg*). For the development and application of the *Schutznorm* in Dutch private law, see esp. G.H. Lankhorst, *De relativiteit van de onrechtmatige daad* (1992) and P.W. den Hollander, *De relativiteit van wettelijke normen* (2016).

as an independent indication of the violation of an unwritten duty of care and can thus establish liability also in cases in which the claimant's damage falls outside of the provision's immediate scope of protection.⁴⁹

Lagging far behind private law in making a 'relational turn', Dutch administrative law is similarly struggling to find a proper balance between its 'autonomous' roots and its new 'relational' elements. As a most controversial reform, the newly adopted Article 8:69a of the GALA reads that the administrative court may not annul a government decision on the ground that it conflicts with a written or unwritten rule if the claimant's interests 'manifestly fall outside the scope of that rule'. The introduction of the administrative *Schutznorm* was explicitly meant to enhance the efficacy of government, making it easier for administrative authorities to ignore specific substantive and procedural legal standards.⁵⁰ As such, it was directly inspired by recent developments in tort law, in which the application of the *Schutznorm* seems to be often determined by the court's wish to close the 'floodgates' of state liability rather than by the desire to find the right balance between 'autonomous' and 'relational' approaches to law. Thus, the implementation of a similar norm in Dutch administrative law – more or less as a 'legal transplant' from private law – gave rise to much criticism from scholars adhering to the 'autonomous' public law ideals of protecting abstract rights and safeguarding the lawfulness of government actions *erga omnes*.⁵¹ In response to such criticism, however, the Dutch administrative court gave the *Schutznorm* its own specific 'administrative twist', clearly discerning the administrative *Schutznorm* from its private law counterpart. In fact, it developed its own 'Schutznorm doctrine' in which the protective scope of applicable rules is defined in a much wider sense than in private law – with only the interests that are contrary to the claimant's real interests clearly falling outside their sphere of protection.⁵²

Thus, the introduction and subsequent development of the *Schutznorm* of Article 8:69a GALA sees the 'relational turn' unfold itself in Dutch administrative law. On the one hand, the introduction of the relativity requirement is a clear step away from the 'autonomous' administrative law ideology as it was developed by Buys and Loeff and echoed later by scholars like Tak. On the other hand, its development reveals concerns about a model of administrative law that emulates private law in depriving individual citizens of their abstract right to be exempted from the negative consequences of unlawful government actions. Compared to private law, Dutch public law seems more hesitant to endorse one-sidedly 'relational' approaches in which abstract legal positions are subjected to a judicial balancing act in which all relevant social interests and circumstances represent a certain weight. Some opponents of the administrative 'Schutznorm', for example, dismissed it as an inadmissible infringement of a public right of legal certainty, entailing that individual citizens should always be able to base their actions on the legitimate expectation that governmental bodies will abide by well-defined and sufficiently specific rules of law.⁵³ In a recent landmark case, this line of reasoning was partly followed by the Administrative Court of the Council of State, stating that the government's infringement of a statutory duty should weigh as an independent factor in the application of Article 8:69a of the GALA. The Court did not go as far as to recognize an 'abstract right of legal certainty', pointing out that such a right would bereave the relativity requirement entirely from its 'relational' character. However, it did acknowledge the government's breach of a statutory provision as an independent (and thus 'autonomous') indication that some other legal norm may be broken, like, for example, the equality principle as a general principle of proper government.⁵⁴

49 For the Dutch *Schutznorm* doctrine as an equilibrium between 'Begriffsjurisprudenz' and 'Interessenjurisprudenz', see L. van den Berge, *Recht tussen norm en belang* (2012); Van den Berge, *supra* note 15, pp. 232 et seq., with further references.

50 Cf., e.g., T. Barkhuysen, W. den Ouden & Y.E. Schuurmans, 'The Law on Administrative Procedures in The Netherlands', (2012) 1 *Netherlands Administrative Law Library*, no. 1, pp. 1-26.

51 See, e.g., G.T.M. Jurgens, *Relativiteit in het bestuursrecht* (2004); G.T.M. Jurgens, 'Rechtsbescherming voor aan de wet ontleende verwachtingen', (2006) 8 *Nederlands Tijdschrift voor Bestuursrecht*, no. 3, pp. 85-86.

52 See, e.g., B.J. Schueler, 'Een relativiteitsleer in wording', (2011) 13 *Nederlands Tijdschrift voor Bestuursrecht*, no. 9, pp. 265-271.

53 See, e.g., Jurgens (2006), *supra* note 51, pp. 85-86.

54 ABRvS 16 maart 2016, ECLI: NL:RVS:2016:732. This decision is discussed extensively by W. Konijnenbelt, 'Een correctie op het relativiteitsvereiste van 8:69a Awb?', (2016) 18 *Nederlands Tijdschrift voor Bestuursrecht*, no. 6, pp. 159-162; A.J. Verheij, 'Kan het bestuursrecht iets leren van het civielrechtelijk relativiteitsvereiste?', (2016) 18 *Nederlands Tijdschrift voor Bestuursrecht*, no. 6, pp. 159-162; K.J. de Graaf & G.A. van der Veen, 'De correctie Widdershoven gewogen', (2016) 18 *Nederlands Tijdschrift voor Bestuursrecht*, no. 6, pp. 169-176.

8. Conclusion: towards a 'relational' and 'pluralist' model of administrative law

What, then, could be a way forward for Dutch administrative law? Like many other continental systems of administrative law, the Dutch system clearly struggles with an 'autonomous' ground structure that fits badly with a 'privatized' and 'fragmentized' public sphere as a social reality in which it is operative. Deeply ingrained in Dutch legal culture is the 'autonomous' idea that a 'pure' model of public law remains clear from any unwritten ethical obligations on the part of citizens, liberating them from 'Sittlichkeit' as a mysterious and in fact rather arbitrary instrument in the hands of government. Whereas private law was eager to make a 'relational turn' in the early twentieth century, Dutch administrative law remained largely faithful to its traditional 'monist' and 'formalist' character, understanding public law mainly as an artificial domain of exception with regard to private law as a natural domain of common law. Early warnings against the 'pathologies' that may come with such an artificial conception of administrative law were given by Struycken, who famously polemicized with Loeff as 'autonomous' administrative law's most prominent intellectual 'founding father'. In its focus on abstract legality and the undivided common interest, 'autonomous' law may easily alienate itself from the life-world that it aims to regulate, foregrounding abstract legal principles but losing sight of the normative grammar of ordinary social life. With the 'rule of law' in the welfare state granting the administration more and more 'open' powers, the 'autonomous' ideology of administrative law would have become hopelessly outdated, formally granting citizens some protection against government actions but, in reality, leaving them empty-handed against the administration's 'freies Ermessen' as a legal vacuum.

With the 'shift from government to governance', breaking down the classical idea of an indivisible public *imperium* and leaving the public sphere in a privatized and fragmentized state, Struycken's objections against Loeff's 'autonomous' ideology of 'legalistic justiticism' have gained considerable weight. Increasingly held back by the 'autonomous' (not to say rather 'autistic') grammar of classical Dutch administrative law, public law is in need of a 'relational' paradigm that is more responsive to its modern social and institutional context. The enduring pertinence of Struycken's objections against 'autonomous' administrative law does not mean, of course, that his solutions are equally persuasive for us today. Struycken's 'relational' account of administrative law draws heavily on the Hegelian idea of the state as an ethical whole, held together by the enigmatic notion of a common 'Sittlichkeit' as the ultimate source of law. Modern 'relational law' is different. It does not ascribe a common (and legally binding) ethics to the workings of some mysterious 'Geist' or to some other Archimedean point of reference. Instead, modern 'relational law' adheres to a pluralist understanding of 'Sittlichkeit' as the temporary outcome of a never-ending – and principally open – public debate. Other than its 'organicist' predecessor, emphasizing the role of the government as an 'ethical power' at the head of the state as an 'ethical body', modern 'relational law' forestalls an active role for the courts within a model of 'checks and balances' rather than a system in which legislative, administrative and judiciary functions are brusquely separated. In line with its pluralist conception of 'Sittlichkeit', modern 'relational law' also advocates a pluralist understanding of the *trias politica*, without any place for some self-evident hegemony of the one above the other. What the law requires is seen as the result of an ongoing intersubjective dialogue – within society at large, but also more specifically within the *trias politica*.

Modern 'relational law' thus opens the door for a system of judicial review of government actions in which the court actively contributes to a continuing dialogue with the other actors within the *trias* in which no one has the last word. In defiance of the 'autonomous' model of mere subsumption, an effective review of government decisions will inevitably involve the balancing of opposing principles and interests, requiring the judge to be much more than just the 'mouthpiece of the law' as some would rather have him. Modern 'relational law' breaks with the idea of a governmental 'freies Ermessen' as a domain in which the administration is discharged from the law, unhindered by the administrative court 'occupying the chair of the executive'. A 'relational' and pluralist account of the *trias politica* also emerges in the administrative *Schutznorm* doctrine, explicitly inviting the court to determine the scope of statutory provisions while taking into account the relevant interests and circumstances of the case at hand. The reduction of the protective scope of legal rules to the interests to which the court interprets them to pertain is at odds with the 'autonomous' idea that legal subjects should at all times be exempted from the consequences of

unlawful actions. Instead, it embraces the concept of law as a difficult balancing act between 'autonomous' principles of abstract right, on the hand, and 'relational' principles on the other. The development of the *Schutznorm* doctrine in Dutch private law shows that legal relativity revolves around a precarious balance between 'relational' and 'autonomous' conceptions that should also not be ignored. A similar equilibrium has to be found in administrative law. Nevertheless, administrative law requires a relativity doctrine that does not just copy its private counterpart, but does justice to the administrative sphere as its specific domain of application.

The development of the *Schutznorm* doctrine in administrative law – at first introduced into administrative law more or less as a transplant from private law, but subsequently developing its own character – may illustrate administrative law's way forward. Inevitably, administrative law will have to make a 'relational turn', responding to the 'privatized' and 'fragmentized' public sphere that it is supposed to regulate. Such a 'relational turn', however, does not necessarily amount to a 'privatization' or to some kind of 'neo-feudalization' of administrative law, relativizing or completely absorbing the 'autonomous' ideal of public law as a legal order that is primarily directed towards the undivided common interest and the lawful division of goods and rights among all members of society. To be sure, these abstract 'autonomous' ideals may obstruct the 'normative grammar' of what Habermas has labelled as the human 'life-world' and are thus in need of a 'relational' counterweight. That is not to say, however, that the traditional 'autonomous' identity of public law should be completely abandoned. As the sole wielder of legitimate force, bound to its task of lawfully dividing rights and goods among all members of society, the government inhabits an elevated position above other legal subjects that is not only based on substantive disparity, but also on an inequality that is clearly formalized in law. In contract law, mutuality and equal freedom between legal actors may serve as a proper 'autonomous' point of dogmatic reference – balanced, as it is in modern 'relational' private law, by the acknowledgment of substantive inequalities between the parties involved. The fundamental juridical inequality between public and private actors in public law, however, requires the opposite line of reasoning. The 'autonomous' notions of legal verticality and the undivided common interest still have to be considered as viable 'autonomous' dogmatic reference points – embedded, to be sure, within a 'relational' and 'pluralist' conception of public law that acknowledges the 'horizontalized' and 'fragmentized' social and institutional context that it is supposed to regulate. ■