

This article is published in a peer-reviewed section of the Utrecht Law Review

## Towards a More Responsive Judge: Challenges and Opportunities

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### 1. Introduction

What brings litigants to the courts? The simple and obvious response to this question is: their legal dispute. This is of course correct and yet, at the same time, the courts have started to question this answer. Or, more precisely, they have started to look beyond the purely legal coordinates of the dispute. Because this broader perspective often involves applying principles of alternative dispute resolution (ADR), this new judicial role is internationally often referred to as JDR: judicial dispute resolution.

Within the literature, the conciliatory outcome of JDR is often stressed. According to Sourdin and Zariski, judicial dispute resolution is: ‘The work undertaken by judges to encourage, direct or engage in settlement processes for civil litigation, including judicial conciliation and mediation.’<sup>1</sup> We however find that this definition of JDR is too limited for what we are interested in. In that respect we find Roberge’s concept of JDR more satisfactory. In his definition of JDR the judge aims for: ‘1) distributive justice in rewarding creativity in terms of content; 2) procedural justice by promoting proactivity in terms of process and 3) interactional justice by promoting respect among parties in terms of their interaction.’<sup>2</sup>

This article is about the changing role of judges in the Netherlands. What developments can be distinguished in the way they answer the question of ‘what brings litigants to the courts?’ We label the judge who looks further than the purely legal coordinates of the conflict the ‘new judge.’<sup>3</sup> The new judge is involved in diagnosing the needs of the litigants and decides, together with (and not for) the litigants, which method of dispute resolution (a settlement, a referral to mediation or a court decision) has the best chances for a viable and sustainable solution.

In this article we will describe what developments gave rise to this judicial role. What is it exactly that these judges do? What role does procedural justice play in their work? What are the barriers in becoming a ‘new judge?’ What are some more promising developments? By answering these questions we will explore the assumption that during the past ten years there has been an extensive change in the way judges think about their role in dispute resolution, but they experience difficulties in applying their new-found understanding to their work in the courts. The result of this exploration is a reflection upon

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1 T. Sourdin & A. Zariski, *The Multi-Tasking Judge; Comparative Judicial Dispute Resolution*, 2013, p. 2.

2 J.F. Roberge, ‘The future of judicial dispute resolution: Judges who facilitate participatory justice’, in T. Sourdin & A. Zariski (eds.), *The Multi-Tasking Judge; Comparative Judicial Dispute Resolution*, 2013, p. 30.

3 The inspiration for the term ‘the new judge’ we found in Julie Macfalane’s book *The new lawyer*, 2008.

the challenges and opportunities for a new, more responsive judge. We primarily focus on civil and administrative disputes in the Netherlands. Occasionally, we will also point to developments elsewhere.

Our analyses are based on relevant literature in the field of JDR as well as modest empirical research. The method we used was an explorative one. We did not search for statistical evidence. Instead, we were interested in how judges from various backgrounds felt about their role themselves; if it had changed, if so how (could they mention concrete interventions), and what in their view were the barriers to change? We interviewed seven judges who we knew to be the frontrunners of new approaches and to provide a counterbalance we also interviewed a few who are known to be more critical (six in total). To obtain a more thorough understanding of their concrete interventions and methods, we observed some of them during sessions in court (these court observations included family disputes and commercial disputes). We were able to compare these observations with earlier research.<sup>4</sup> Finally, we organized three expert meetings where only judges were invited: one expert meeting took place among the frontrunners (six participants), the second (27 participants) and third (22 participants) were attended by judges who were interested in the topic, either based on concerns or based on enthusiasm.

## **2. The changed landscape of the Dutch administration of justice: an overview of the last decade**

As stated in our introduction we have noticed changes in the attitude of judges towards their role and task as well as changes in actual judicial practices. These changes form part of a broader evolution that has taken place in the Dutch administration of justice over the last ten years. In this section we will give an overview of some of the most relevant developments.

### **2.1. Revision of the Dutch Code of Civil Procedure**

In 2002 fundamental changes to the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) took place. Some of these changes were focused on judicial case management and hearings and are therefore the most relevant to be mentioned in this article. For instance, the revised Code of Civil Procedure made it an explicit duty for the court to prevent undue delay. 'As a result, the question as to which procedural steps may and should be taken and at what moment is not the exclusive domain of the parties anymore.'<sup>5</sup> Also, it became obligatory for both the defendant and the claimant 'to supply sufficient information in their statements of claim and defense respectively and to indicate the available evidence.'<sup>6</sup> The objective was to gather all the relevant information at the beginning of the procedure, instead of disclosing as little information as possible during the first phase of the procedure.<sup>7</sup> But the most noticeable change would have to be the introduction of the rule that 'after the introduction of statement of defense the judge has a duty to order a personal appearance of the parties in the court unless this would in his opinion be superfluous.'<sup>8</sup> In other words, a hearing became standard practice in civil procedures. The hearing may result in a settlement between the parties, a judicial ruling or, if the judge deems this necessary, he can give the order to introduce further statements or have them plead their case orally.<sup>9</sup> The legal aims of the hearing are: obtaining information, exploring the scope for settlement and discussing the subsequent steps in the procedure with the parties. Research by Van der Linden in 2006 and 2007 showed that in 32% of cases the parties reached a settlement during the hearing.<sup>10</sup> More recent research shows that settlement percentages vary between the courts from roughly 30 to 50%.<sup>11</sup>

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4 M.W. De Hoon & S. Verberk, 'Judicial conflict management: What brings litigants to court?', in T. Sourdin & A. Zariski, *The Multi-Tasking Judge; Comparative Judicial Dispute Resolution*, 2013, pp. 87-103.

5 C.H. van Rhee, 'Dutch Civil Procedural Law in an International Context', in M. Deguchi & M. Storme (eds.), *The reception and transmission of civil procedural law in the global society. Legislative and Legal Educational Assistance to Other Countries in Procedural Law*, 2008, pp. 191-212.

6 Ibid.

7 Ibid.

8 Ibid.

9 Ibid.

10 J. Van der Linden, *De civiele zitting centraal; Informeren, afstemmen en schikken*, 2010, p. 79.

11 A.T. Marseille & H.B. de Winter, *Korte en effectieve kantoncomparaties. Uitdaging voor reflexieve rechters*, 2014, forthcoming.

Van der Linden's dissertation on 'post-statement of defence' hearings (hereafter: hearings) in civil cases is – to date – the best researched study on what actually happens during the hearings and how these hearings are experienced by those involved (the parties, but also their lawyers and the judges). We summarize some of the most striking conclusions.

- Before the hearing the parties (61.8%) and especially the lawyers (77.9%) indicated that they were positively inclined to reach a solution with the other party. At the same time they were negative about the other party's willingness to reach a solution. Only 5.8% of the parties and 6.4% of the lawyers felt that the other party would be willing to explore the possibilities for a solution during the hearing. Also the judges were rather sceptical about the willingness of the parties to reach a solution: 33.3% felt that the plaintiff and 28.6% felt that the defendant would be willing to explore this avenue. Everyone involved (parties, lawyers and judges) was fairly pessimistic about the chances of a settlement as a result of the hearing: 14.4% of the parties, 15.4% of the lawyers and only 9.3% of the judges indicated before the hearing that they felt it likely that a settlement would be reached.<sup>12</sup>
- In 35% of the hearings, the judge presented the advantages of reaching a settlement without asking the parties whether they agreed. Also in 56% of all hearings, the judge offered a preliminary judgment without asking whether the parties were interested in one. In addition, the majority of those judged presented the negative consequences (time, money, future relationship) of continued litigation (as opposed to reaching a settlement). In light of these results it is not surprising that about one third of the parties (31%) and the lawyers (35%) felt that the judge had a personal interest in facilitating a settlement.<sup>13</sup> Also, in the two courts where the study was conducted, a substantial part of the parties and lawyers involved felt they were coerced into a settlement: in the first court in 29% and in the second court in 39% of the cases at least one of the parties or lawyers involved felt this to be the case.<sup>14</sup>
- On average the parties were quite positive about the non-distributive justice aspects of the hearing. On a scale from 1 to 5, the average scores for procedural, interpersonal and informational justice were 3.98, 4.23 and 3.78 respectively. The lawyers were slightly more positive with scores of 4.14, 4.32, and 3.88 respectively.<sup>15</sup>

These and other findings show, according to Van der Linden, that there are areas where judges could improve their interactions in court. Firstly, the information given by judges to the parties and their lawyers could be more tailored to their actual information needs. Also, judges should improve their skills in order to manage hearings properly. This could be done by paying more attention to the actual needs of the parties and avoiding incorrect assumptions and by improving skills such as asking open questions, summarizing, and checking whether summaries are correct. Van der Linden also makes a case for developing best practices for facilitating settlement hearings.<sup>16</sup>

## 2.2. *The rise of mediation*

During the 1990s the concept of mediation slowly gained ground in the Netherlands. Jagtenberg and De Roo have given an account of the introduction of court-connected mediation and the following paragraph draws heavily on their analysis.<sup>17</sup>

In 1996 the Ministry of Justice established an ADR committee whose aim it was to come up with advice on the possibilities for ADR in the Netherlands. The Committee saw opportunities for mediation by the courts as well as various other organizations. In 1999 the Ministry of Justice came up with a policy letter entitled 'More paths to justice' which opened up ways for nationwide experiments with court-connected mediation. That same year the judiciary started with pilot schemes to examine the possibilities of referrals to mediation under the guidance of the Netherlands court-connected mediation agency led

12 Van der Linden, *supra* note 10, pp. 34-45.

13 *Ibid.*, pp. 56-71.

14 *Ibid.*, pp. 80-87.

15 *Ibid.*, pp. 109-111.

16 *Ibid.*, pp. 145-150.

17 R.W. Jagtenberg & A.J. de Roo, 'Frame for a Dutch portrait on mediation', 2011 *The Judiciary Quarterly*, pp. 7-23.

by Machteld Pel. By introducing mediation into the Dutch judiciary the Ministry aimed to dispose of disputes in the most effective way and to make the parties more responsible in solving their dispute.

The pilot phase was followed by the implementation phase in 2005 and lasted until May 2007 with the purpose of having a referral service in place in all Dutch courts by the end of the implementation phase. The consolidation phase, which lasted from May 2007 until October 2009, was strengthening the support base for mediation and developing best practices. It is also during this phase that the phrase 'customized conflict resolution' was coined. The term seeks to convey the search for a tailor-made solution to the conflict at hand and making an explicit choice between adjudication, a settlement and a referral to mediation.

From the implementation phase in 2005 until the end of the consolidation phase in 2009 the number of referrals rose from less than 1,000 to over 4,000 referrals per year. Instrumental to this success was, among other things, creating a support base for mediation. This support base was greatly enhanced when judges, litigants and lawyers did not feel that this method of conflict resolution was being sold to them, but when referral mediation was presented as one of the 'instruments' of a judge just like adjudication and judicially supervised court settlements.

In January 2010 the Dutch court-connected mediation agency ceased to exist. It was thought that by then the courts had enough experience and knowledge on referrals so that a special agency was no longer necessary. In its place came the customized conflict resolution expert group. This group has limited staff in comparison to the former court-connected mediation agency.

### ***2.3. Changed perceptions of the judicial role: the multi-tasking judge***

Both the centrality of the hearing in civil proceedings and the rise of mediation resulted in a shift of the judicial role. Judges became more actively involved in the settlement process. Some of them applied mediation techniques, and others embraced a more practical 'hands-on mentality', often based on many years of experience as working as a judge.<sup>18</sup> Decision making was no longer *the* exclusive task of judges. Nowadays, judges are also case managers and facilitators. In short, they became multi-tasking judges.<sup>19</sup>

Although the enthusiasm in encouraging parties to reach a settlement may also be explained by organizational motives (e.g. a heavy caseload in the courts), the driving force behind the more active role of judges in the settlement process seems to be the acknowledgement that for many litigants a recourse to the courts is primarily a guaranteed way of compelling negotiation.<sup>20</sup> Judges became more aware of the different types of interventions: a referral to mediation, a legal decision, an expert opinion or a settlement. The 'holy grail' was to find out what type of interventions best suited the needs of the litigants (customized conflict resolution).

In 2009 the notion of customized conflict resolution was put into practice in five pilot projects. The pilot projects took place in the district courts of Zutphen, Amsterdam, Utrecht, The Hague and Den Bosch. Judges, sometimes assisted by mediators, gained experience with 'assessing the underlying needs of litigants' (a needs-based approach) and making the right 'conflict diagnosis', i.e. making a choice together with the litigants and lawyers between the most appropriate method of conflict resolution (adjudication, court-supervised settlement hearings or a referral to mediation). The pilot projects involved family law, commercial cases, small claims and administrative law. The following table presents a brief overview of the five pilot projects and their more specific purposes.<sup>21</sup>

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18 S. Dijkstra, 'De rechter nieuwe stijl; De achterliggende filosofie en enkele kritische kanttekeningen', 2014 *Nederlands Juristenblad*, 674, pp. 841-847.

19 See for a comparative overview of the multi-tasking judge Sourdin & Zariski, *supra* note 1.

20 Sourdin & Zariski, *supra* note 1, p. 9.

21 L. Combrink et al., *Op maat beslecht, Mediation naast rechtspraak 1999-2009*, Research Memoranda 2009-5, pp. 90-91.

Type of case		District Court	Purpose
Family law	divorce cases involving minors up to 16 years (44 cases)	The Hague / Utrecht (6 judges)	As early as possible, the judge assesses, together with the parties and their legal representatives, all relevant aspects of the conflict in order to jointly resolve these interdependent issues. During the court procedure the judge distinguishes between the emotional, business and legal aspects of the divorce. Referral to mediation is an explicit option. If multiple sessions are necessary, the same judge is responsible for all court sessions.
Civil law	commercial cases (10 cases)	Zutphen (5 judges / 3 mediators)	Within a month after a case has been filed a court hearing takes place, which is jointly presided over by a judge and a mediator. Together with the litigants and their legal representatives they try to uncover the legal aspects of the dispute as well as the underlying interests of the litigants. Once the conflict has been 'diagnosed' all those present determine the most appropriate method of conflict resolution.
Small claims	commercial cases (5 cases)	Amsterdam (4 judges / 5 mediators)	
Administrative law	administrative cases, excluding tax cases and cases involving immigration and naturalization cases (12 cases)	Den Bosch (6 judges)	Judges in administrative law are being familiarized with examining the underlying issues of disputes instead of solely deciding on legal arguments. The purpose is to make a well-informed decision, together with the litigants and their legal representatives, for either a judicial ruling, a judge-supervised settlement agreement or a referral to mediation. After elaborate training, judges practice their skills during actual court procedures.

The pilot projects showed that judges, in addressing the underlying needs, could discover, in as little as 30 minutes or less, what it is that brings the litigants to the court. That does not mean that the solution for the problem necessarily lies in a needs-based approach. Finding out what brings the litigants to the court can also lead to the conclusion that a rights-based approach, i.e. a judicial decision on who is right (and who is wrong), is the way to move forward. To make that kind of diagnosis requires new (non-legal) skills by motivated judge and a good training programme is an absolute must.

A recent study on hearings in small claims cases showed that the litigants had no preference for the working methods of the judge. A differentiation was made between a directive, facilitative and passive judge. This study indicates an absence of a general superior method, at least for the litigants in terms of perceived procedural justice. From this it might tentatively be concluded that the 'best method' in a concrete case seems to depend on factors that vary per case: the type of case and the personal characteristics of the litigants, the lawyers and the judge.<sup>22</sup>

#### 2.4. New procedure for administrative cases

In a way the 'New procedure for administrative cases', implemented in all Dutch district courts in 2012, can be seen as a follow-up to the pilot customized conflict resolution in administrative law. In the past, in administrative law the judge ruled on whether the administrative authority could have reasonably reached the decision it had done. If not, in most cases the judge ruled that the administrative body in question had to make a new decision – the court case did not result in a solution and the posture of the judge was quite legalistic. Also, procedures before the administrative courts were felt to be too lengthy. The average lead-time of an administrative case at first instance courts was 53 weeks in 2002, falling to 43 weeks in 2005 and 2006, again rising to 47 weeks in 2010 before declining once again to 37 weeks in 2012.<sup>23</sup>

<sup>22</sup> Marseille & De Winter, supra note 11.

<sup>23</sup> N.E. de Heer-de Lange et al. (eds.), *Rechtspleging Civiel en Bestuur*, 2012, p. 114.

The new procedure for administrative cases is meant to address these issues. These days, even when the judge finds certain flaws in the decision of the government body, he has to explore the possibility of upholding the legal consequences following from this government decision. Also, the judge might replace the decision of the government body with his own decision. If these two options are not in order, the judge might give the government body an opportunity to rectify the flaw in the decision. After reporting back to the court, the judge takes this new governmental decision into account when considering his final decision. In this way, lengthy procedures resulting in long-term insecurity for the plaintiff can be avoided. The fact that the case processing time has been set at 13 weeks also contributes to an expeditious procedure.

### **2.5. Other developments**

The innovation of court procedures takes place predominantly within civil and administrative law. In comparison to elsewhere, especially common law systems, we see far less innovation in criminal law. That does not imply, however, that it is completely absent. Most notably, courts in the Netherlands are experimenting with referrals to mediation in criminal cases. In these cases there is a parallel trajectory of case treatment in the criminal courts with mediation between the offender and the victim. The outcome of the mediation can have repercussions for the way the case is decided in court.

A pilot project at the district court of Amsterdam proved to be a success. The pilot project generated broad support among key actors (judges, prosecutors and lawyers) and the option to refer criminal cases was mainly used in juvenile and in less serious cases. In most instances the mediation process resulted in a signed agreement between the offender and the victim. The agreement stipulated the way in which future interactions (if any) were to take place and generally contained apologies by the offender. In most cases both the offender and the victim were satisfied with the process. During the criminal processing of the case, both the prosecutor and the judge took the outcome of the mediation process into consideration: in 70% of cases either the prosecutor decided not to prosecute or the judge decided not to convict the offender.<sup>24</sup> In light of the success in Amsterdam, other district courts have started to experiment with referrals to mediation in criminal cases as well.

## **3. The application in court: concrete interventions**

We argue that when the question of ‘what brings the litigants to the courts’ was answered ten or more years ago, few would give the answer ‘a legal dispute’ without a second thought. But the developments, as described in the preceding section, make it clear that for some judges this answer is no longer satisfactory. Although we cannot provide actual numbers to substantiate our claim, a substantial number of judges feel it necessary to also consider other aspects.

### **3.1. ‘Is your problem solved if you win this case?’**

One of those other aspects is the conflict behind the dispute. Within the Dutch legal tradition, the administration of justice focuses on the application of substantive law and a fair procedure, not so much on conflict resolution.<sup>25</sup> However, the understanding that a judicial decision in a dispute does not (or does not always, or does not always completely) resolve the conflict has become more and more accepted and embraced.

Disputes are a legal translation of conflicts. Therefore, by definition, certain elements of the conflict are not part of the dispute. Ury, Brett and Goldberg distinguish three components of a conflict: 1) the individual interests (concerns and needs), 2) the rights and 3) the position of power of the parties involved.<sup>26</sup> When disputes are brought to court, the rights’ perspective is dominant and the objective of the parties is to be proved right (or sometimes, more accurately, to prove the other side wrong).<sup>27</sup>

24 S. Verberk, *Mediation naast strafrecht in het arrondissement Amsterdam: Een beschrijving van het proces en een verkenning van de effecten*, 2011.

25 G. de Groot, *Met hart voor de zaak*, inaugural speech, VU University, Amsterdam, 2012.

26 M. Pel, *Referral to mediation, A practical guide for an effective mediation proposal*, 2008.

27 Compare Pel, *supra* note 26, p. 29.

Solely viewing the problem as a dispute and not taking the various interests into account can result in a situation where the dispute is resolved (the judge has made a decision) but the conflict continues – not seldom leading to new disputes and court cases.

Our respondents taught us that they use several techniques to find out whether there is a conflict behind the dispute. The central issue is making people aware of the limits of a judicial intervention. Judges ask questions like: ‘Suppose you would win this case, does that mean that your problem is solved?’ If the answer is no, the judge elaborates on the consequences. What would solve the problem? What could both parties contribute? What are the hiccups and how to deal with them? The judge discusses with the parties the options for a follow-up: settlement sessions, a decision from the judge, an expert opinion or a referral to mediation.

### *3.2. Ask questions*

We also noticed that judges ask other types of needs-based questions, like: ‘What is most important for you?’, ‘What were the barriers for resolving this dispute among yourselves?’ And: ‘How does it feel for you to be here, before a judge?’

In the context of family law the so-called ‘Matrix Question Model’ has been developed. This model is derived from the coaching world, and it aims to help people move forward and to become actively involved in reaching a solution for their (judicial) conflict. The judge tries to move the parties (and their lawyers) forward by asking questions on four consecutive themes: facts, problems, goals and actions.

- 1) Facts: The judge asks questions to establish facts that thus far have not become sufficiently clear. The type of questions asked are – self-evidently – very factual and often start with who, where, which, how, when. Asking questions along these lines strengthens ‘logical thinking’ by the parties, the parties learn to make a difference between facts and their assumptions about the facts, and experience that on some facts they can agree with the other party.
- 2) Problems: The judge asks questions to establish what (for each party) is the most troublesome about the facts or assumptions about the facts. Asking questions about facts and assumptions often leads to an exploration of the essence of the conflict. In the most positive scenario, hearing about the impact of the conflict on the other party helps the parties to become less hostile towards each other.
- 3) Goals: The judge asks questions related to the objectives of the parties and requests that these objectives be phrased in terms of wishes or needs. Often, the expressed needs are the inverse of problems, e.g. if litigants indicate that they want to be free of the stress caused by the conflict or have financial clarity, at present the exact opposite is the case. The judge asks questions like: What would you like the situation to be? How would that make you feel? When each party has thus voiced his or her goals, the judge asks if both parties can agree to make these two goals part of one combined agenda. In other words, the judge asks the parties to agree on making the other party’s goals part of the solution. If they agree, a communal exploration for the problem comes into view. If not, in most instances this implies that the judge will render a decision.
- 4) Actions: If the parties have agreed to put each other’s goals on the same agenda, the judge asks each party about how to achieve the objectives. For example: What actions are necessary to reach the objective? What can you do yourself and for which actions do you need others?

Judges who have applied this model in general are quite positive about the effects. They especially value the distinction which is made between facts and problems and the question of what is the most troublesome is about the current situation. They also mention the positive effect of translating negative emotions (problems) into positive ambitions (goals).

### **3.3. Voice, respect, neutrality and trustworthy consideration**

During the expert meetings, it became clear that the judges are well aware of the concept of procedural justice. All the judges, even those judges that were critical about applying a needs-based approach, knew the concept of procedural justice and felt that it offered useful guidance for successful interventions by the judge. In particular the elements of voice and respectful treatment were elements that the judges were well aware of.<sup>28</sup>

- 1) Voice: During the court observations, we noticed judges making sure that not only the lawyers, but also the litigants themselves were able to speak. This is in line with empirical research on the perceptions of the fairness of the mediation procedures, which suggests that the more parties have the opportunity to speak themselves, the fairer they will find the mediation process.<sup>29</sup> We also noticed judges making sure that the speaking time for both sides was more or less balanced. Some of the judges (but not all of them) explicitly asked if there were non-legal needs and concerns that needed to be discussed. We also noticed that many judges used the technique to summarize what was said, a technique that contributes to the feeling of having had the opportunity to voice an opinion. This is in line with previous research results.<sup>30</sup>
- 2) Respect: Procedural justice research suggests that respectful treatment is negatively influenced if the judge: provides an insufficient opportunity to speak, frequently interrupts the parties and the lawyers when they speak, expresses displeasure at the (lack of) progress in the settlement negotiations or evaluates the parties' chances of winning the case without being asked to do so.<sup>31</sup> Although we realize that, due to the limited number, our observations cannot be generalized, we noticed that parties and their lawyers were given the opportunity to speak with only few interruptions by the judge and we never noticed a judge expressing displeasure at the lack of progress in the settlement negotiations. We did notice a judge evaluating the chances of success, either by vague terms ('You may want to reconsider your legal standpoints, so go back to the hallway to, once again, try to settle') or by a concrete preliminary judgment, without being invited to do so by the litigants.
- 3) Neutrality: Evaluations on the merits of the case, without checking whether litigants are interested in such an opinion, negatively affects the perceptions of a fair procedure, according to the procedural justice research.<sup>32</sup> Not only respectful treatment, but also the neutrality of the forum are the elements 'at stake' here. In particular far-reaching preliminary judgments, or disagreeing on a party's legal standpoint without a solid explanation negatively influences the perceptions of a fair procedure. Also, mentioning a specific settlement sum instead of a range of figures has a negative effect.<sup>33</sup>
- 4) Trustworthy consideration: This fourth procedural justice element reflects 'the need people have for a decision-maker who has heard, accurately understood and sincerely considered what they said and who can be trusted'.<sup>34</sup> It is difficult to mention concrete actions related to this aspect, apart from perhaps the earlier mentioned technique of summarizing what the parties have said in order to check whether the judge's perceptions of what was said is accurate. Welsh, Stienstra and McAdoo developed a questionnaire with various aspects of perceptions of procedural fairness, in order to expand the current state of knowledge in this area. This questionnaire includes the question whether the parties' level of trust in the judge is high, medium or low.<sup>35</sup>

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28 There is extensive literature on these and other elements of procedural justice. We refer to the literature overviews of the other articles of this special issue of the *Utrecht Law Review* (2014 *Utrecht Law Review* 10, no. 4).

29 R.L. Wissler, 'Representation in Mediation: What we Know from Empirical Research', 2009 *Fordham Urban Law Journal* 37, no. 1, pp. 419-471.

30 Van der Linden, *supra* note 10, pp. 219-220; J. van der Linden et al., 'Meesterlijk gedrag: Ieren van compareren', 2009 *Rechtstreeks*, no. 3.

31 Van der Linden et al., *supra* note 30, p. 38; N. Welsh et al., 'The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions', in T. Sourdin & A. Zariski (eds.), *The Multi-Tasking Judge; Comparative Judicial Dispute Resolution*, 2013, pp. 57-85.

32 Welsh et al., *supra* note 31, pp. 74-75.

33 *Ibid.*; Van der Linden et al., *supra* note 30, p. 28.

34 Welsh et al., *supra* note 30, p. 75.

35 *Ibid.*

## 4. Changes in context

The changes in the administration of civil and administrative law, as described in the previous sections, need to be considered within a broader context. First we will discuss some relevant societal changes, then we will look at the courts' search for legitimacy and we will conclude with some international developments.

### 4.1. Societal changes

Over the past few decades the relationship between government and citizens has been altered. Several reports by Dutch advisory committees have analyzed this change. Recurring themes are: the traditional vertical model between government and citizens no longer accurately describes the relation between government and citizens in the current horizontal network society; governmental authority is no longer a given and there is a decline in public trust in democratic institutions; partly due to (neo)liberal ideas, the government has transferred certain tasks to the private sector and society. Some refer to these developments as transposing the ideal of equality with the ideal of participation.<sup>36</sup>

For the courts, as well as for other public institutions, their authority can no longer be automatically considered as given. In his 2008 'Lecture for the judiciary' Van den Brink pointed to this decline in the authority of judges and the judiciary. The fact is, he stated, that classic public institutions such as the judiciary cannot automatically appeal to their authority because of their special status and roles of competence. That does not mean judges lack authority, but according to Van den Brink, they need to acquire it through their personal and professional performance. This coincides with the development that citizens have become more independent and vocal. This has increased the public debate about the judiciary, not in the least because of the very active role that the media play in this discussion.<sup>37</sup> The judiciary is very much aware of this. As Geert Corstens, President of the Dutch Supreme Court, put it in 2009: 'Our natural authority, which we once probably had, has to a large extent disappeared. It is no use being gloomy about it. These good times have passed.'<sup>38</sup> Also a recent study on the reputation of the courts in the Netherlands concluded that the judiciary is no longer automatically a 'strong brand'.<sup>39</sup>

### 4.2. The search for legitimacy

Authority has to be deserved and in order to gain or maintain authority the courts not only have to meet the criterion of legality, they also have to meet the criterion of legitimacy. Whereas legality is linked to 'power', legitimacy is linked to 'authority'; '[L]egitimacy presupposes legality, the existence of a legal system and of a power issuing orders according to its rules. But legitimacy also provides the justification of legality, by surrounding power with an aura of authority. It is a kind of special qualification, a surplus to the (pure) force which the state exercises (...).'<sup>40</sup> A legitimate judiciary implies that the authority of the judiciary and judicial decisions is recognized. As Gribnau explains, legitimacy concerns evaluative criteria for the obligation to obey the law.<sup>41</sup>

Research, with Tom Tyler as one of the most prominent authors in the field, has shown that procedural justice is an important contributor to legitimacy.<sup>42</sup> As shown, paying attention to the principles of procedural justice is a common denominator in the developments we described above.

36 See for example: Raad voor Maatschappelijke Ontwikkeling (RMO), *Terugreden is vooruitzien. Maatschappelijke veerkracht in het publieke domein*, 2013; RMO, *Mind the trap*, 2012; Wetenschappelijke Raad voor Regeringsbeleid (WRR), *Vertrouwen in burgers*, WRR rapport nr. 88, 2012; Nederlandse School voor Openbaar betuur (NSOB), *De weg omhoog*, 2010.

37 G. van den Brink, *Rechtspraaklezing 2008. Geloofwaardige rechtspraak: de rechter als bruggenbouwer*, 2008, p. 35, <<http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/publicaties/Pages/Rechtspraaklezingen.asp>>. (last visited 24 September 2014).

38 <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Pages/Vertrouwen-in-de-rechtspraak.asp>> (last visited 13 August 2014).

39 P. Frissen et al., *Reputaties gewogen. Beelden over de rechtspraak bij beslissers en publieke opinieleiders*, Research Memoranda 2012-4.

40 J.L.M. Gribnau, 'Legitimacy of the Judiciary', in E. Hondius & C. Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law*, 2002, pp. 25-45.

41 Ibid.

42 T.R. Tyler, 'Citizen discontent with legal procedures: a social science perspective on civil procedure reform', 1997 *American Journal of Comparative Law* 45, no. 4, pp. 871-904.

### 4.3. International developments

The developments in the Netherlands are not unique to our country. They fit within broader developments in other legal systems as well. ADR and mediation stand for concepts and practices that originated in the United States and have made their way across the North Atlantic. More recently the theory of therapeutic jurisprudence has become part of the legal and academic debate in common law countries. Therapeutic jurisprudence focuses mainly on criminal law and explicitly asks the courts to address the underlying problems of disputes. This is interpreted fairly broadly and the movement suggests that courts should contribute to solving the variety of human problems that are responsible for bringing cases to the court.<sup>43</sup> Other closely connected theories or practices are: restorative justice, the holistic practice of law et cetera.<sup>44</sup>

Another development that took place within different (Western) law systems is the rise of judicial case management. Case management is an instrument that aims to improve the judiciary's managerial capacity, in order to make procedure less complex, less costly and less lengthy. In the UK case management was at the heart of Lord Woolf's reforms approximately 15 years ago. Since then, the judiciary's managerial capacities have been extended, even after it became clear that case management did not lead to a reduction in the total costs of the procedure.<sup>45</sup> Similar developments took place in the USA and in the Netherlands. Strengthening the judiciary's managerial capacity is also one of the goals of the recently proposed reform of the Dutch civil procedure rules.<sup>46</sup>

Obviously, a judge who takes case management seriously is not a judge who sits back and waits to see what the litigants do and what they adduce. Instead, it is a judge with a proactive mindset and attitude, acting accordingly. Trying to find out what it is that brings the litigants to the courts takes this proactive mindset and attitude one step further.<sup>47</sup>

By what we have written thus far, we may have given the impression that the concept of 'the new judge' is broadly accepted and well embedded in the Dutch administration of justice. Is this a reality? How much has really changed? We explore this question by introducing Jeffrey: a three-year old boy, who became the victim of a tragic accident.

## 5. The Jeffrey case: how much has really changed?

This case is about a tragedy that took place in a swimming pool. Jeffrey drowned after swimming therapy. His parents initiated legal proceedings, holding the employer of the swimming therapist responsible for the death of their son. They requested a declaratory judgment instead of a judgment on the compensation of damages. Jeffrey's parents claimed that, for them, a declaration of liability would help them to begin their process of mourning. In three instances an inadmissibility judgment followed. According to the Dutch Supreme Court (*Hoge Raad*), a purely emotional interest is not considered a sufficient interest within the meaning of article 3:303 of the Dutch Civil Code (*Burgerlijk Wetboek*).<sup>48</sup>

Now, how would Jeffrey's parents experience their court proceedings if they initiate this procedure in 2014? And what about the inadmissibility? The *Jeffrey* case received a great deal of criticism. And, in a more recent case, the Supreme Court held that, although the claimant had not suffered financial damage, the claimant could request a declaration of liability. The Supreme Court held that this declaration could satisfy needs that were within the scope of the legal needs that can be upheld in court.<sup>49</sup> So, probably, the outcome of the *Jeffrey* case would be a different one in 2014.

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43 D.B. Wexler & B.J. Winick, 'Therapeutic Jurisprudence', in *Principles of Addiction Medicine*, 2003, p. 3, available at <[www.ssrn.com/abstract=1101507](http://www.ssrn.com/abstract=1101507)> (last visited 8 March 2014).

44 P.H. Murrell & Ph.D. Gould, 'Education for therapeutic judging: Strategies, concepts, and outcomes', 2009 *Revista Juridica de la Universidad de Puerto Rico* 78, no. 1.

45 Lord Justice R. Jackson, *Review of Civil Litigation Costs: Final Report*, 2010, available at <[www.judiciary.gov.uk](http://www.judiciary.gov.uk)> (last visited 24 June 2014).

46 Wetsvoorstel 'Vereenvoudiging en digitalisering rechtspraak', available at <[www.overheid.nl](http://www.overheid.nl)> (last visited 24 June 2014).

47 M.W. de Hoon & S. Verberk, 'Judicial Conflictmanagement: What brings litigants to court?', in T. Sourdin & A. Zariski (eds.), *The Multi-Tasking Judge; Comparative Judicial Dispute Resolution*, 2013, pp. 89-90.

48 HR 9 October 1998, *NJ* 1998, 853.

49 HR 19 March 2010, *NJ* 2010, 172.

### 5.1. *Depending on the judge assigned to the case*

But how would the court deal with the case and the litigants' needs if the procedure was initiated in 2014? Based on what we have seen and heard so far, a safe conclusion would be: That depends on the specific judge who is assigned to this case. Some judges would use the needs-based approach, instead of the claim-based approach. By doing so, the judge would use the hearing to ask about the needs and expectations from a court order. He would use the techniques that he learned to discover the real issue behind the claim. The parents' expectations of the court proceedings would be on the agenda of the hearing. The judge would manage the expectations in case they were beyond what can be expected of a proceeding in court. He would do so at the earliest possible moment in the proceeding. This would have given Jeffrey's parents the opportunity to rethink their strategy to achieve justice at a much earlier stage. Perhaps it would have prevented Jeffrey's parents from going all the way up to the Supreme Court to finally hear that their purely emotional interest is not the type of interest that opens the door to the courthouses and their civil proceedings.

But the chances are that the judge who dealt with their case would choose a different approach; a more formalistic one, in which the judge does not look behind the legal claim. The hearing (if there was one) would be used to clarify what happened on that catastrophic day, what the swimming instructor did or did not do. He would focus on what the different standpoints are, and perhaps ask for the legal argumentation behind these standpoints. In this hearing, Jeffrey's parents would not be required to talk very much. The lawyers would do most (if not all) of the talking. The judge would stress that continuing this lawsuit would cost a great deal of time and money, and finally, he would send the litigants to the public hallway for twenty minutes in order for them to try to settle.

The standpoint of what is considered a 'sufficient interest' within the meaning of article 3:303 of the Dutch Civil Code may have changed over the years, but – depending on the judge assigned to the case – the chances are that Jeffrey's parents would experience the same hearing in 2014 as they did in 1998 and the years before that.

## 6. Barriers to change

As promising as some of the developments described above may be, it seems that the changes are not as widespread as one would expect. We asked the judges to respond to the hypothesis that, despite the many changes that may have occurred, judges find it difficult to apply their new-found understanding in court. All the judges we spoke to, even the frontrunners in the new approaches, confirmed this hypothesis. And it was in line with (some of) our court observations. A substantial part of the hearings we observed showed a pattern that we know from earlier court observations.<sup>50</sup> This pattern resembles the formalistic style not unlike the judge we 'invented' in the second (fictitious) *Jeffrey* case. We asked the judges what, in their view, are the barriers to change. We have grouped their answers into barriers on an organizational level, a professional level and a personal level.

### 6.1. *Barriers on an organizational level*

All judges referred to barriers on an organizational level. A lack of time was mentioned most often. Many judges preside over several hearings (in different cases) on one day, with no more (and sometimes less) than one or two hours for each hearing. According to many judges, this is hardly enough time to discuss the facts of the case and ask for a clarification of the legal standpoints. Trying to find out what is behind the legal claim (or what is important to the claimant) is, in their view, yet another (or one too many) issue on an already full agenda.

Another barrier on an organizational level is the lack of support from the court management. Some managers seem to encourage judges to come up with inventive approaches to change, while others keep a firm control over attaining 'organizational' targets (e.g. the targets concerning the number of court decisions and lead times).

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<sup>50</sup> Van der Linden, *supra* note 10, pp. 216-217.

A third – and most fundamental – barrier on an organizational level has to do with the structure of the procedure. The written debate on legal standpoints prior to the hearing forces the litigants to adopt opposite positions. Also, the procedure forces the litigants to bring forward every possible argument and respond to all the aspects (legal standpoints and statements of facts – even the details) that are mentioned in the written documents. Failing to do so means running the risk of a judge declaring something ‘inadequately contested’. The judge who prepares for a hearing thus finds himself struggling with a file filled with details of contradictory versions of what happened and lengthy elaborations of all thinkable legal standpoints. One judge described the hearing as a process of repair: ‘During the hearing, our main focus is to repair the damage that was caused by the written documents.’

### **6.2. Barriers on a professional level**

Many judges mentioned barriers on a professional level. These barriers all refer to a certain belief of what judges should (or should not) do. They vary from ‘JDR is not a judicial task’, to ‘I am not a psychologist or social worker’. Some of the judges we spoke to consider this as a matter of principle: ‘Judges should stick to what they do best: make decisions on legal issues.’ Others mentioned a fear of losing authority as a consequence of applying JDR in court. While doing so, they referred to the growing numbers of cases on recusal because the independence or impartiality of the judge is contested. According to some judges, asking questions on the needs and concerns creates an atmosphere that is conducive to a request for the recusal of the judge.

During the expert meeting, it was also mentioned that judges have individual, personal styles related to the way a case is handled.<sup>51</sup> This was mentioned as another barrier on a professional level. Some judges do seem to have a preference for a court decision instead of a settlement or a referral to mediation. A court decision is an end-product that leaves the judge with the satisfied feeling of having done his job. At the same time, other judges prefer settlements over court decisions, because of a general belief that settlements are, regardless of the needs of litigants, better outcomes than court decisions. Both visions in which the ‘style preference’ of the judge is leading instead of the litigants’ needs are, according to the frontrunners, barriers to the application of JDR.

### **6.3. Barriers on a personal level**

We have also identified barriers on a personal level. Some judges feel that they have already been applying techniques similar to JDR for many years and so they do not see the necessity to change their court behaviour. Although this statement may be (partly) true, such a defensive posture, according to the frontrunners, can still be considered as a barrier, because of a lack of sufficient introspection. If these judges are not in contact with peers about their working methods, there is no opportunity to know and to learn.

Another barrier on a personal level is a fear of dealing with emotions. Questions like: ‘What is most important to you?’, and ‘How is it for you to be here in court before a judge?’ may prompt strong emotions like anger and grief. Many judges we spoke to were afraid that a more problem-solving approach would lead to emotional outbursts. ‘We do not want to remove the cork from the bottle; if that happens, the end is nowhere near’, one of the judges said. Judges are trained to make all sorts of decisions, rather than to deal with emotions, as was mentioned by several judges who we interviewed.

## **7. Can these barriers be overcome? Opportunities for change**

We also asked the judges whether they felt that these barriers could be overcome. And, if so, how?

Our respondents expressed rather different views on the measures and the time path needed in order for concrete changes to occur in judicial practice. Some expected that the natural process of young judges gradually replacing the older judges would be enough to overcome the barriers. Others expressed a less optimistic view: only more drastic measures could lead to real changes in judicial practice and

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<sup>51</sup> See also Van der Linden, *supra* note 10, p. 3.

a widespread change of attitude among judges towards their role and task. Nevertheless, the judges mentioned a number of opportunities for change.

### 7.1. Digitization and the use of internet facilities

The opportunity for change mentioned most often is the digitization of court procedures, or, more precisely: the use of internet facilities. Internet facilities offer the opportunity for judges to communicate more directly, more informally and more often with the litigants and their lawyers in the phase prior to the court hearing (which may even be no longer necessary). This improves the chances for meaningful judicial case management. Also, it increases the opportunities for judges with communicate with litigants (in particular the claimant) about their expectations at the earliest phase of the procedure.

### 7.2. Early intervention, judges on call, differentiation, simplification

The idea that courts are the last resort for those who see, after years of struggling, no other option to resolve disputes is being increasingly questioned.<sup>52</sup> Early interventions by judges may turn the tide before a severe escalation of the conflict. Also, judges may be asked to decide only on very specific and legal aspects of the conflict (instead of a transition of the entire conflict into a legal dispute). This is sometimes referred to as ‘judges on call’. With a decision on the core legal issues, the litigants may be able to resolve the remainder of the conflict themselves. Finally, judges mentioned procedural differentiation as a promising development (different procedures for different kinds of disputes, for different parties with different needs). Part of this differentiation could be to offer ‘fast-track procedures’ which are substantially more simplified than the recently proposed simplified procedure with a clear understanding by the litigants of what can be expected (and not expected) from this fast-track procedure. These ideas are in line with research on judicial reform across countries. A review of the evidence on judicial reforms shows that simplifying procedures and increasing their flexibility are promising reforms.<sup>53</sup>

Simplifying procedures also means looking critically at our procedures from an incentive perspective. We already mentioned the ambiguous incentives that stem from the rigid structure of identifying and challenging (in Dutch: ‘*stellen en betwisten*’). Failing to mention or respond to all issues (facts, legal standpoints) means running the risk of losing the procedure because an issue was inadequately contested. This structure can lead to needless escalation and a lack of focus on the most essential aspects of the dispute.

### 7.3. Pilot projects and experiments: ‘The neighbour judge’

Pilot projects and experimental procedures provide opportunities for change. Nowadays, intelligent systems are being developed through which parties are stimulated to exchange information that might help them to resolve the conflict without judicial intervention. If this does not work, a judge might be asked to ‘join the process’ at a later stage. This is exactly what the pilot project called ‘the neighbour judge’, starting in mid-2014, is about. Neighbours having a dispute are invited to engage in an online dialogue supervised by a judge. If they do not succeed in resolving the problem in this way, a judge will visit them at their homes and try to find a solution that works for both parties so that the problems are really solved. The new procedure is expected to take three to four months, whereas at this moment in time these cases take about a year.<sup>54</sup>

### 7.4. Improving the skills of judges related to a more problem-solving approach

Another opportunity brought forward is training and peer supervision. It was stressed that dealing with emotions in the courtroom should be included in the training of judges. ‘Judges feel they need to respond to emotions, but they only need to make room for emotions to be expressed’, as was mentioned by one of the frontrunners. This is in line with earlier research on the role of the judge in divorce cases.<sup>55</sup> One

52 H. Genn, ‘What is Civil Justice For? Reform, ADR, and Access to Justice’, 2012 *Yale J.L. & Human* 24, no. 1, pp. 397-417.

53 J.C. Botero et al., ‘Judicial Reform’, 2003 *The World Bank Research Observer* 18, no. 1, pp. 61-88.

54 See <<http://www.hiil.org/news/nos-reviews-burenrechter>> (last visited 13 August 2014).

55 De Hoon & Verberk, supra note 47, pp. 96-97.

of the outcomes was that judges with less experience in applying problem-solving techniques struggled more with drawing the line between diagnosing and solving problems. The more experienced judge discussed the options of what could be the next step, considering the strong emotions that stood in the way of coming to terms. The less experienced judge, on the other hand, found himself more and more lost in a non-constructive discussion between the litigants. One judge formulated this as follows: 'Judges still need to learn that they are not responsible for solving the conflict.'

### *7.5. Client's perspective as a leading perspective?*

'It is the client that matters', as was mentioned by one of the judges. Nowadays, it is not unusual to use questionnaires to provide feedback from litigants (and professionals) to judges and court administrators on various aspects.<sup>56</sup> Court organizations are aware of the value of this type of information. In particular the research on procedural justice can function as guidance in evaluating judicial performance. Obviously, applying the notions of JDR brings new opportunities as well as challenges related to the elements of the procedural justice research. 'Voice' and perhaps also 'trustworthy consideration' (in the sense of sincere consideration) are elements that may flourish in JDR, while neutrality (and perhaps also respectful treatment if JDR is in the hands of inexperienced judges) may become more problematic.<sup>57</sup> The structural measuring of the litigant's and professional's perspective on how they value their experience in court offers relevant feedback on how to improve judicial performances.

## **8. Conclusion**

At the end of our article we can conclude that we have found corroboration for our hypotheses: Indeed, during the last ten years, judges have started to think differently about their role in dispute resolution and yet, as we assumed, they do not always find it easy to translate their new-found understanding to the courtroom. We feel that the most important change that took place in the thinking of judges is the understanding that the legal definition of a conflict as it is presented in court is often only a part of a more encompassing problem. The idea that non-legal issues matter as well and that they can stand in the way of a legal solution to the case has become more and more commonplace. In addition, the importance of procedural justice has generally become accepted among judges.

Yet, applying the needs-based approach in everyday practice is not always easy. We have identified barriers on an organizational, professional and personal level. We are quite optimistic, though, about the chances of judges overcoming these barriers and have presented 'supporting evidence' in describing various opportunities for change. For us, the most interesting and exciting opportunity lies in the fact that 'the new judge' is now looking for opportunities to better serve the needs of the litigant not just *during* the hearing, but also in the process *prior* to the hearing. Better case management and early intervention (assisted by new technology) hold the promise of faster and more tailor-made interventions and less escalation as well as a better resolution of the conflict. The fact that these and similar developments have been designed 'bottom-up' is proof that judges are willing and able to face the obstacles that have been brought forward by some of their colleagues. ¶

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56 *Klantwaardering rechtspraak 2011, Eindrapport*, available at <[www.rechtspraak.nl](http://www.rechtspraak.nl)> (last visited 13 August 2014); see for an overview of the questionnaires used in the USA Welsh et al., *supra* note 31, pp. 70-72.

57 W.M. van Rossum et al., *Wraking bottom-up. Een empirisch onderzoek*, Research Memoranda 2012-6, available at <<http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Researchmemoranda/Pages/Research-Memoranda-2012.aspx>> (last visited 25 September 2014); see also Dijkstra, *supra* note 18, for critical remarks on the client's perspective.