

Problem-Solving Initiatives in Administrative and Criminal Law in the Netherlands

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1. Introduction

In the 1970s, Nonet and Selznick introduced a theory of justice in which three types of law are distinguished: repressive law (in which law is primarily used to maintain order), autonomous law (in which law primarily functions as a counterbalance for the government's powers) and responsive law. The ultimate aim of responsive law is to enhance societal justice and the focus lies on the effects of the law.¹ Related to this theory is a more 'practical' approach of what has been termed 'problem-solving justice'. Problem-solving justice is a concept developed in the practice of adjudication in the United States, as an effort to solve the causes of recurring crimes by the same persons – also known as 'revolving door justice'. Problem-solving justice focuses on the conflict behind the legal dispute and aims to solve the underlying problems in order to reach long-term effects. Key elements of problem-solving justice are (1) a tailor-made response to the underlying problem, (2) close cooperation with other institutions such as social services, (3) informed decision-making (providing courts with more information about the cases brought to them, such as specific information on the dynamics of intimate abuse), (4) intensive offender monitoring and (5) a focus on effectiveness.² Concepts associated with problem-solving justice are sustainable justice, negotiated justice, alternative dispute resolution (ADR), mediation and restorative justice.

In the United States, this concept has evolved from drug courts, to home violence courts, divorce courts, veteran courts and home-lease courts. It is mainly practiced in criminal law contexts. The idea is that cases are selected for special processing. The method may be to halt ordinary procedures in order to create opportunities for the suspect or parties to show their willingness to change the problem-creating patterns in their life and give them help to achieve that. The prospect of not cooperating is that of continuation of ordinary proceedings, with negative consequences like incarceration, or eviction from their home. Other ways are to halt execution of the judgment when convicts cooperate with a programme or the threat of reversal of probation to incarceration if they do not. Research shows that the effects of drug courts especially on defendants' recidivism have been beneficial.³

In Europe, this 'USA'-concept of problem-solving justice has been applied so far only in some courts in England and in the Ghent courts' drug chamber, in Belgium.⁴ Why this is so for the different jurisdictions included in this special issue will be explained in the different contributions. The continental legal systems

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1 P. Nonet & P. Selznick, *Law and Society in Transition: Toward Responsive Law* (1978).

2 Berman & Feinblatt, *Good Courts, the case for problem solving justice* (2015).

3 Berman & Feinblatt, *ibid.*, pp. 124-126; Mitchell et al. 2012, p. 60 and pp. 69-70; West Huddleston et al. 2004, p. 1.

4 F. Vander Laenen et al., *Het pilootproject drugbehandelingskamer te Gent: Een uitkomstevaluatie* (2013).

in Europe certainly do allow consideration for the societal implications of recurring crimes by the same persons, such as drugs abuse, of legal divorce fights, of neighbour quarrels or of the underdeveloped conflict resolution capacities in administrative proceedings.

Efforts to deal with these issues can sometimes be found in different stages and – in criminal law contexts – with different actors of the criminal justice system, compared to the USA problem-solving courts.

Justice administration in the Netherlands is a joint responsibility of various actors: the Ministry of Justice, the Public Prosecution Service, the judiciary and others. Responsive justice therefore is not only a matter for the judiciary, but also for other actors who can adapt policies to perceived societal needs. Therefore, it is not surprising that a lot of the conflict resolution capacity is organised outside of the courts, with a dominant role for the Public Prosecution Service in criminal law cases, and – quantitatively – a limited role for the courts in efforts for conflict resolution in administrative law cases (more than 1,000,000 administrative objection proceedings⁵ versus about 100,000 administrative court cases).⁶

In the different fields of law, the idea that judges can do more than adjudicate has received increasing attention in the Netherlands.⁷ This comes for example to the front in two recent strategic documents of the Council for the Judiciary: the Agenda for Courts and Judges 2011-2015 and the Vision for Courts and Judges 2020.⁸ In both documents it is stressed very explicitly that law administration should be closely connected to the needs of society.

For this article, we will describe how efforts to solve problems of litigants, suspects and victims are organised in the Netherlands' justice administration. We focus on efforts to make the administration of justice more responsive in two different sectors of the justice system, administrative law and criminal law. Although interesting developments are also running in other sectors of the law, e.g. family law, we decided to restrict ourselves to that part of the justice system that aims to protect public interest, also because of our expertise. Policies based on austerity and efforts to enhance the effectiveness of the administration of justice led to diversion of cases from the courts to other types of conflict resolution and to the Public Prosecution Service in criminal cases, just as for efficiency reasons administrative sanctions have replaced criminal sanctions, because their imposition does not require judicial intervention beforehand.

In the next sections we will first describe what the position of the courts is in contemporary society for the two areas of law, how their role is discussed in relation to problem-solving justice and what their actual role is with regard to this phenomenon. Next, we will describe for both areas what types of problem solving are actually being practiced, what organisations are involved in it, how far these initiatives have been researched and what the results are. We will discuss what can be seen as the main advantages and drawbacks of problem-solving initiatives outside the courts and how far initiatives to introduce court-based problem solving in the Netherlands would have potential and should be encouraged.

2. Administrative law

2.1 Regulating relations between citizens and the administration

Administrative law has not been part of the development of the problem-solving/restorative justice movement in the United States and elsewhere. Administrative law governs the relationships between government and the citizens, especially where the government and the legislator try to organise order

5 Lower administrative bodies not included, see C.M. Klein Haarhuis, WODC, *Factsheet 2018-7, Buitengerechtelijke procedures civiel en bestuur 2016, De buitengerechtelijke behandeling van geschillen en bezwaarschriften* (2018).

6 *Jaarverslag Rechtspraak* (2017), p. 21.

7 A.F. de Savornin Lohman & J. van Straalen, 'Sustainable Justice, A Social Responsible Focus on Innovation in Justice', in T. Sourdin & A. Zariski (eds.), *The Responsive Judge, International Perspectives* (2018), pp. 143-171; M. Barendrecht et al., *Menselijk en Rechtvaardig, Is de rechtsstaat er voor de burger?* (2017) <<http://www.hiil.org/data/sitesmanagement/media/Hiil%20Menselijk%20en%20rechtvaardig%20Launch%203%20mei%202017%20def.pdf>> (last visited 15 August 2018); M. Barendrecht & T. Verheij, *Het ergste hanteerbaar, Ruimte voor menselijk strafrecht* (2018); D.A. Verburg & B.J. Schueler, 'Procedural Justice in Dutch Administrative Court Proceedings', (2014) 10 *Utrecht Law Review* 4; M.W. de Hoon & S. Verberk, 'Towards a More Responsive Judge: Challenges and Opportunities', (2014) *Utrecht Law Review* 4, pp. 27-40; A. Breninkmeijer et al., 'Zes Suggesties voor de Verbetering van de Toegang tot het Recht' (2015), <<http://www.advocatie.nl/prominenten-doen-zes-suggesties-ter-verbetering-van-de-toegang-tot-het-recht>> (last visited 27 August 2018); L. Combrink et al., 'Op maat beslecht, Mediation naast rechtspraak (1999-2009)', (2009) *Research Memoranda, Number 2*.

8 F. van Dijk et al., '*Visie op de Rechtspraak in 2020*' (2010); Raad voor de Rechtspraak, 'Agenda voor de Rechtspraak 2011-2015' (2011).

in public life. The basic aim of administrative law is to enable the administration to achieve order whilst respecting citizens' rights and also implementing public policies by means of (administrative) law. The function of administrative law presupposes both an active government and the means for citizens to legally resist against government measures;⁹ therefore, in a way one can view administrative law as an enabler and as a restraint in administrative activities. An example would be the actions of a mayor of a town to reduce neighbour nuisance. The mayor has to respect the inviolability of the residence causing the hindrance, but also has to take care that such behaviour ends.¹⁰ Dealing with conflicting interests in decision-making is an essential part of public administration. In that way, problem solving is the task of public administration, and administrative law provides the competences and procedures for the administration to achieve that aim, as it provides for rights and competences for citizens to protect their interests. However, in the Netherlands, the public interest, not individual citizens, are the primary focus of administrative law, even although everybody has to deal with it from time to time.¹¹ The innovation of the General Administrative Law Act (GALA) was that it incorporated the general principles of proper administration in legal rules, thus acknowledging that individual citizens may have an interest in administrative decision-making.¹² But somehow, after the introduction of GALA, administrative law practices have moved away from the citizens.

The development of GALA in the Netherlands, in conjunction with the development of highly complex legislation for spatial planning and environmental risk management, has turned rules that were intended to arrange relations between government and citizens into a highly technical legal domain for specialised lawyers. Together with European legislation, administrative law and its various specialisations (aliens, environment, social security, taxation, administrative law enforcement, grants) demands a special training. As lawyers tend to focus on the legal aspects of the case, problem solving, conflict resolution or reconciliation of concerned interests has not been an aim of administrative lawyers for a considerable time.¹³

Typically, administrative bodies find themselves in between different interests, similar to the position of a judge in civil proceedings. A formal approach in this position may stimulate affected parties to start administrative proceedings: objections, possibly followed by an appeal to a court. It should be noted that addressees and third-party interests here have a disadvantaged position compared to the administration. Rules for administrative decision-making have become very complex;¹⁴ apart from that, most citizens lack adequate information¹⁵ and the time to object or appeal is limited to six weeks.¹⁶ Several evaluation studies showed citizens' severe discontent with administrative (court) proceedings, especially with the rigid and formal attitude of civil servants.¹⁷ The attitude of administrative bodies focusing on diminishing legal (and political) risks, leading to mainly formalised relations between citizens and the administration, had better be replaced by a more reliable approach for citizens, in order to regain their trust in the government.¹⁸

9 Van Wijk et al., *Hoofdstukken van Administratief Recht* (2014), p. 1; H.E. Bröring & K.J. de Graaf, *Bestuursrecht deel 1 - Systeem; Bevoegdheid; Bevoegdheidsuitoefening; Handhaving* (2016), p. 27; J.B.J.M. ten Berge & F.C.M.A. Michiels, *Besturen door de Overheid* (2001), pp. 7-10.

10 I. Tappeiner, 'Buurman, gedraag je!', 2017/29 *Nederlands Tijdschrift voor Bestuursrecht*, pp. 258-274.

11 The explanatory memorandum with the Bill for the General Administrative Law Act shows a predominantly internal focus. The aims of the legislation are: 1. promoting unity within administrative law; 2. to systematise and, where possible, simplify the administrative law legislation; 3. codifying developments that have been signed off in administrative law case law; 4. making provisions with regard to subjects that by their nature do not lend themselves to a special law. *Kamerstukken II 1988-1989*, 21 221, no. 3, p. 4.

12 Explanatory memorandum, *Kamerstukken II 1988-1989*, 21 221, no. 3, pp. 12-13.

13 The majority of the publications of the Administrative Law Association in the Netherlands (<<https://verenigingbestuursrecht.nl/>> (last visited 15 August 2018)) during the last 20 years show a focus on technical legal details. For example, Van Ommeren and Huisman wrote about the definition of the concept of a 'decision' in GALA and the consequences of this definition for the access to legal protection against actions of the administration. F.J. van Ommeren & P.J. Huisman, 'Van besluit naar rechtsbetrekking: een groeimodel', *VAR reeks 150, Het Besluit Voorbij*, pp. 16-29. Many more examples are possible.

14 Nationale Ombudsman, *Annual Report* (2012).

15 L.J.A. Damen, 'De autonome Awb-mens?', AA juli/augustus 2017; L.J.A. Damen, 'Is de burger triple A: alert, argwanend, of raakt hij lost in translation?', in *Vertrouwen in de overheid. VAR-preadviezen* (2018), pp. 9-99.

16 Art. 6:7 GALA.

17 L. van der Velden, 'Wat betekent een oplossingsgerichte, pro-actieve, oplossingsgerichte aanpak van conflicten in de publieke dienstverlening?', in Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, *Eindrapportage pioniertraject mediationvaardigheden, resultaten, analyses & aanbevelingen* (2010), pp. 12-25.

18 R. van Zutphen, 'Zoals de waard is vertrouwt hij zijn gasten (one measures another man's foot by one's own last)', in *Vertrouwen in de overheid. VAR-preadviezen* (2018), p. 247. It is questionable if the legal list of dos and don'ts for citizens, the administration and judges produced by Damen will bridge the gap. Damen, *supra* note 15, pp. 92-96.

For citizens, decision-making sometimes is very complex, and the same holds for legal protection against the administration. As the administration is quite often distrusting and sometimes negligent of citizens, it sometimes is the administration that causes large troubles for citizens. This is usually caused by a lack of coordination between different agencies. For example, the government is the largest debt collector, often the Central Fines Collection Agency, the Tax Service and the Employee Insurance Agency. Van Zutphen, the National Ombudsman, wrote an essay for the Netherlands' Administrative Law Association, with the title: 'One measures another man's foot by one's own last'.¹⁹ The National Ombudsman has repeatedly reported on those issues.²⁰

2.2 Managing relations between citizens and the administrations case of disagreement

The development of administrative law in the Netherlands has been somewhat centred on the administration, and there is quite some discontent about its functioning. Nevertheless, several procedural elements have evolved that also take the perspectives of citizens into account. Below we describe several administrative procedures that were introduced to help the administration and citizens to get a final outcome in their case more efficiently, which also leaves some room for problem solving. We also give some information on how they perform.

2.2.1 Objection proceedings

One of the oldest efforts to introduce out-of-court solutions into administrative proceedings is the objection procedure. This entails that an addressee of an administrative decision or an affected third party can file an objection at the administrative authority responsible for the decision at hand. This authority then has to reconsider the contested decision at hand. The intention is that the objection procedure gives the administration the possibility to check and, when necessary, repair their first effort. From the perspective of the administrative courts, the idea is that mistakes are shifted and repaired by the administration, so that appeal to the courts can be avoided.

Most administrative authorities have installed advisory committees to deal with the procedure. Their competence is to reconsider the decision subject to the objection both from legal and policy perspectives. The decision following the objection is an administrative decision that can be appealed against in court. Logistically, the scope of the administrative courts therefore is limited. They can review decisions only on legal grounds, with limited competences for the court to add to the judgment if the appeal was justified. A successful appeal leads to quashing of the decision resulting from the objection procedure. The consequence is that this decision in the objection procedure should be taken anew by the administrative authority taking the courts' judgment and the actual facts of the case (*ex nunc*) into account. That is safe from a separation of powers perspective, but from a problem-solving perspective that is not always a satisfactory outcome. Parties risk winning their case in court but losing their case in the new administrative decision.²¹ The GALA allows the court to take additional measures if the contested decision is quashed by the court, but only as far as no administrative discretion exists in the case at hand (Article 8:72 GALA), and the courts seek not to transgress the discretionary competences of the administration as that would be contrary to separations of powers doctrine.

Evaluation research commissioned by the Ministry for Security and Justice showed that citizens were quite dissatisfied with their treatment in objection proceedings, because in their experience civil servants representing the administrative authority tend to take rigid and defensive stands during hearings in objection proceedings and because they felt misinformed about the entire decision-making process.²² As a result,

19 van Zutphen, *ibid.*, fn. 19.

20 2016/050 *Burgerperspectief op schuldhulpverlening Den Haag*, 11 May 2016; Rapportnummer: 2014/159, *Onderzoek naar de uitvoering van de Fraudewet*, 4 December 2014.

21 P.M. Langbroek et al., *Designing Administrative Pre-Trial Proceedings* (2012).

22 M. Scheltema, 'Nederland gidsland in bezwaar', 2011/33 *NTB*; also see B.W N. de Waard et al., *Ervaringen met bezwaar* (2011), pp. 179-180.

objection proceedings have become a lawyers' affair, with a lot of attention for detail and risk avoidance by the administration, and missing the opportunity to relate to interested parties responsively.

2.2.2 Summary proceedings

Summary proceedings are one of the most successful procedures in administrative protection against the government. Article 8:81 GALA opens the possibility to request for a preliminary injunction, if an objection procedure or an appeal against an administrative decision has been filed. With such a request, the judge 'may, on request, grant a provisional remedy where speed is of the essence because of the interests involved'. This means there must be some kind of urgency. If the request has been filed during appeal, the judge can, if s/he considers that further investigations cannot contribute to the solution of the case, take a final decision in the ordinary procedure (Article 8:86 GALA). This happens quite often, as the administrative courts strive for finalisation of the conflict with a final decision.

The GALA prescribes connectivity between the ordinary proceedings, either objection procedure or ordinary procedure, and summary proceedings. This means that formally, after the decision on the injunction, the procedure on the merits continues, and that the judgment or the decision on objection will replace the preliminary injunction. In other words, if an injunction is granted, it will be temporary, usually until the decision in the procedure on the merits has been taken. A preliminary injunction can also be asked during secondary appeal. In practice, once an injunction is granted, parties have a good prognosis of what the outcome of ordinary proceedings will be, and often the ordinary proceedings are discontinued.²³ Effectively, the procedure following a request for a preliminary injunction is the fastest way to a judicial decision on the content of the case. And because it is relatively fast, it contributes to conflict resolution.

2.2.3 Administrative loop

Normally, after the quashing of a decision by a court, the administrative authority must take a new decision on the objection. If the quashing is based on formal errors, the new decision may be appealed against *again*. In 2010, competences were given to the administrative courts to give the administration the opportunity to repair mistakes in a decision whilst the appeal against that decision is pending.²⁴ This is called the 'administrative loop' (*bestuurlijke lus*). The administrative loop was installed in order to prevent interested parties to bounce ('yo-yo') between appeal and objection proceedings. Before those instruments were created in 2010, administrative judges sometimes applied the so called 'informal loop', by adjourning the court hearing and asking the administrative authority to repair the contested decision. Afterwards the hearing could be reopened. Recent research shows that the formal loop is quite successful. On average it is used in about 7% of the administrative court cases and in most of those cases (80% of the 7%) this leads to final conflict resolution. Judges are reluctant with the use of the formal administrative loop, because (unknown) third interests may be affected by the new decision. Some judges indicated they prefer the informal loop, because it gives them more flexibility. Although originally intended to speed up proceedings concerning infrastructural projects, in land use planning cases the administrative loop is very rarely used.²⁵ Other research shows that administrative courts have no instruments to influence the behaviour of parties after the annulment of the administrative decision by the court, when stakes are high enough they may appeal the revised decision again, anyway.²⁶

23 Th.G.M. Simons, 'De voorlopige voorziening in het Nederlandse bestuursrecht', (2006) *Var preadvies*, pp. 9-88; A.T. Marseille, 'Voorlopige oordelen, verstrekende beslissingen', (2006) *Var preadvies*, pp. 87-165.

24 Arts. 51a-51d GALA.

25 Ch.W. Backes et al., 'Vier jaar bestuurlijke lus – succes story of teleurstelling?', (2014) 4 *JB plus*; Ch.W. Backes et al., WODC, Ministerie van Veiligheid & Justitie, *Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking* (2014).

26 A.T. Marseille and I.M. Boekema, 'Administrative Decision-Making in Reaction to a Court Judgment, Can the Administrative Judge Guide the Decision-Making Process?', (2013) 9 *Utrecht Law Review*, no. 3, pp. 51-61.

2.3 Further efforts to improve connections between the administration and citizens

2.3.1. Mediation

During the past 20 years mediation has received a lot of attention in the Netherlands, inspired by the movement engaged in the USA. This has led to the development of a mediation training market and court experiments and programmes to support ADR in civil and administrative cases. Following several experiments in the courts about a decade ago, court-related mediation practices have developed and are standardised right now.²⁷

Based on evaluation reports the government started a project to improve relations between citizens and the administration, also dropping back on the original aims of the administrative pre-trial proceedings to have informal relations between citizens and the administration with a view to inform citizens and solve problems. The project is called 'nice contact with the administration' (*Prettig contact met de overheid*) and has its own website.²⁸ The project offers people working in public administration a wealth of information and training on how to have a more cooperative interaction with citizens when preparing policies, and when handling complaints and objections. Next to that the project also has mobilised the National Ombudsman and coryphes in the field of procedural justice like Alan Lind and Tom Tyler, in order to convince civil servants that giving people a voice in affairs that touch their interests is much more likely to lead to outcomes that are acceptable for them.²⁹ In this context, the research of Hilke Grootelaar amongst litigants in Dutch courts shows that perceived procedural justice does matter for the trust in judges.³⁰ The 'nice contact with the administration' project is still ongoing and supports innovation in administrative law practice in the Netherlands, furthering an informal, responsive approach to citizens by the administration. This project is strongly supported by the Ministry for the Interior and Kingdom Relations, but it appears too difficult to implement the 'informal approach' in local administrations.³¹

2.3.2 The 'New Approach'

Another important recent development associated with innovation in court proceedings in the Netherlands is called the New Approach.³² The New Approach has three central themes: (1) early stage hearings, approximately in the fourth month after proceedings have started, (2) final dispute resolution, i.e. trying to reach real problem-solving decisions, not only focusing on the legal merits of the case, and, perhaps even more importantly, not confining the rulings to the examination of an administrative decision made in the past and (3) tailor-made approaches in which the judge gives each case the kind of attention, direction and intervention the case needs.³³ During the last decade, administrative judges have tried to discover the real-life conflict underlying the legal dispute and to guide parties to a solution of their real problems (in order to avoid a legal judgment). These judges try to narrow the gap between the court proceedings and legal decisions on the one hand, and the conflict as experienced by the parties themselves on the other.³⁴ The GALA does not lay down any rules of evidence, not even on the way judges should decide which party bears the burden of proof. Schueler and Verburg hold that this lack of clarity in matters of evidence forced

27 M.A. Pach, 'Mediation in het bestuursrecht, Het kan, het mag en het werkt', in van Ettehoven et al., *Alternatieven van en voor de bestuursrechter, Vereniging voor bestuursrecht* (2001), pp. 99-143; also Combrink et al., *supra* note 7.

28 <<https://prettigcontactmetdeoverheid.nl/>> (last visited 6 December 2018).

29 E. A. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (1988) and the research they have published since then. In the Netherlands: K. van den Bos et al., 'On the role of perceived procedural justice in citizens' reactions to government decisions and the handling of conflicts', (2014) 10 *Utrecht Law Review*, no. 4, pp. 1-26.

30 H.A.M. Grootelaar, *Interacting with procedural justice in courts* (diss.) (2018), pp. 50-57.

31 *Kamerstukken* 2015-2016, no. 34300 VII 60, *Brief van de minister van binnenlandse zaken en koninkrijksrelaties*, 9 March 2016.

32 D.A. Verburg & B.J. Schueler, 'Procedural Justice in Dutch Administrative Court Proceedings', (2014) 10 *Utrecht Law Review*, no 4, pp. 56-72. See for more information also E. J. Daalder, 'Observaties en gedachten over de nieuwe zaaksbehandeling', in A.T. Marseille & L. van der Velden (eds.), *Vertrouwen verdient. Verdient vertrouwen. Visies op geschilbeslechting door de overheid* (2014), pp. 163-164; J.-P. Heinrich & H. den Herder, 'Ook gemachtigden van bestuursorganen zijn aan de slag met de Nieuwe Zaaksbehandeling', (2013) *JB Plus*; A.T. Marseille & P. Nihot, 'Regie in de rechtspraak: de bestuursrechter', (2013) *Rechtstreeks* no. 1; Y.E. Schuurmans & D.A. Verburg, 'Bestuursrechtelijk bewijsrecht in de jaren '10: opklaringen in het hele land', (2012) *JBplus*, pp. 117-138; D.A. Verburg, 'De nieuwe zaaksbehandeling van de bestuursrechter', (2013) *Tijdschrift Conflicthantering*, no. 3, pp. 19-23.

33 Verburg & Schueler, *ibid.*, p. 71.

34 *Ibid.*, p. 72.

the administrative law judges to start paying attention to the insights from procedural justice research.³⁵ Following these findings from the third evaluation of GALA, the administrative law judges made the choice to meet the need for enhancing procedural justice with the following five elements: (1) respect, (2) voice and due consideration, (3) some influence on how proceedings will continue, (4) an explanation of how proceedings will continue and (5) direct interpersonal contact.³⁶ Schueler and Verburg expect that if the judge manages to cover all elements of the New Approach, a tension or collision between procedural justice and legally right outcomes is unlikely to occur.³⁷ Thus, the New Approach may help judges to reach fair outcomes, both from a procedural perspective and from a material perspective.³⁸ However that may be, the New Approach is still ‘under construction’.³⁹ Apart from that, it should be noted that the New Approach takes place in administrative courts, in a phase of the conflict that would have better been prevented in the administrative decision-making phase. In so far, the New Approach seems also to be a ‘next best’ solution for conflicts administrative bodies were not able to prevent from arising or reconcile. Nevertheless, the New Approach so far has been quite successful, also because it is supported by the judges.⁴⁰

2.4 Partial conclusion

Wrapping up, objection proceedings and the administrative loop in practice have evolved into tools that have furthered the administration perspective more than that of the citizens. The legislator apparently considered that, given the administration’s tasks and competences, citizens would be helped foremost by speeding up proceedings. Summary proceedings are a speedy alternative for proceedings on the merit, giving a good indication of parties’ legal position in conflicts. The ‘nice contact with the government’ project tries to stimulate a de-judicialisation and responsiveness in relations between administration and citizens. The New Approach has incorporated mediation techniques in administrative court proceedings and shows some success in achieving settlements between parties when legally possible. As routines in public administration are difficult to change, continuous efforts will be necessary to help public administrations in the Netherlands respond to citizens’ need for open and informal contacts with citizens whilst coping with everyday legal risks. It is peculiar that judges seem more prone to adopt this approach than public bureaucracies.

3. Criminal law

3.1 The role of the courts

In contrast to the common law countries mentioned in the introduction, problem-solving justice in the Netherlands is far less developed in the criminal justice system as far as involvement of judges is concerned.⁴¹ You could characterise the juvenile criminal justice courts as more problem-oriented, since the juvenile criminal justice process is predominantly focused on protection and re-education of the juvenile offender. For this reason the different parties involved in the procedure work closely together to reach an optimal solution, both for the juvenile offender as well as society in general.⁴² Monitoring the effects of the measure or intervention is not an essential part of the juvenile criminal justice system either however, in particular not by the judge. Also in adult criminal law the need for a more responsive attitude of the criminal judge has often been debated, for example by Van de Bunt and colleagues who understand a responsive judge to be aware of societal expectations and needs, to take these into account and to be able to adequately explain

35 Ibid., p. 72. Commissie Evaluatie Awb III. Toepassing en effecten van de Algemene wet bestuursrecht 2002-2006, (Commissie IJssink), 2007.

36 Verburg & Schueler, supra note 32, p. 72.

37 Ibid.

38 Ibid. Also see Grootelaar, supra note 30.

39 B.J. van Ettehoven & A.T. Marseille, ‘Afscheid van de klassieke procedure in het bestuursrecht?’, (2017) *Preadvies NJV*, pp. 139-265.

40 A.T. Marseille et al., ‘De praktijk van de Nieuwe zaaksbehandeling in het bestuursrecht’, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (2015), p. 158.

41 M.W. de Hoon & S. Verberk, ‘Towards a More Responsive Judge: Challenges and Opportunities’ (2014) 10 *Utrecht Law Review*, no. 4, p. 32.

42 J. uit Beijerse, *Jeugdstrafrecht. Beginselen, wetgeving en praktijk* (2017).

his/her judgment.⁴³ Responsiveness is as understood by Nonet and Selznick.⁴⁴ Societal needs that are being stressed in particular are the high recidivism rates of offenders and the insufficient position of victims in the criminal justice process. Also the need for an administration of criminal justice that is understandable for a broad public has been an important topic of academic debate,⁴⁵ a debate that has resulted in the introduction of a system to improve the substantiation of decisions.

A more problem-oriented attitude of the judge as described in the introduction is however approached with caution. No specific problem-solving judges exist in adult criminal law. Research even shows that judges have only very scarce knowledge of the future effects of the sentences and measures they impose and do not consider it to be part of their job to study these possible effects and include this knowledge into their decisions.⁴⁶ This may have to do with the objections towards adopting a problem-solving or responsive approach to criminal justice as raised in particular by some legal scholars. A first objection regards the essential retrospective character of criminal law. Criminal law responds to offences that have been committed and is therefore primarily oriented towards the past. The argument was originally raised by Constantijn Kelk.⁴⁷ He points to a growing interest of judges in what he calls a 'prospective responsibility', in particular with regard to the imposition and execution of sentences. In the context of this 'prospective responsibility', conditions are imposed on people suspected of or convicted for a criminal offence which are directed to the future, e.g. paying compensation, reaching behavioural change, improving living conditions. Although Kelk is not particularly negative towards these developments, he has doubts with regard to the potential of the criminal justice system to encourage certain behaviours or exclude others. Van Stokkom acknowledges these limitations of the criminal justice system and therefore rejects problem-solving courts in so far as they integrate help or therapy with decision-making in criminal cases.⁴⁸ Closely related to arguments with regard to the retrospective character of the criminal justice systems are objections that point to the lack of expertise of the judge to heal the shortcomings that caused the offence or the risk of disproportionate sentencing. In his review of the dissertation of Verberk, Franken points with some reluctance to a youth judge quoted by Verberk who states that the severity of the underlying problems rather than the severity of the offence is decisive with regard to the judgment and who, for pedagogical reasons, objects to legal assistance.⁴⁹ Verberk, who wrote her dissertation on problem-solving courts, lists some additional objections in an article dedicated to the American drugs courts.⁵⁰ Judicial independence could be threatened because judges no longer function as *le bouche de la loi*⁵¹ (which relates to his/her independence vis-à-vis the legislator) and because s/he is too intensively involved in executive tasks, such as the provision of care. This responsibility also weakens his/her independence vis-à-vis the other partners involved in the court proceedings, such as public prosecutors, defence lawyers and social workers.⁵² Verberk also points to the weakened rights of the defence as a potential danger of problem-solving courts. She questions the voluntariness of participating in a problem-solving court, taking into account that the alternative can easily result in a (severe) prison sentence. Moreover, offenders participating in problem-solving courts need to waive certain rights, such as the right not to incriminate oneself and the right of protection against being strip-searched (*onderzoek aan het lichaam*),⁵³ while the different position of the defence lawyer in the procedure in fact weakens his/her position towards the offender, because s/he is also supposed to be loyal to the other actors.⁵⁴

43 H. van de Bunt et al., 'Responsieve rechters', (2004) *Rechtstreeks*, pp. 8-9; Eradus (2010), p. 12.

44 Supra note 1.

45 M. Malsch & N. van Manen, *De begrijpelijkheid van de rechtspraak* (2007).

46 M.M. Boone et al., *De tenuitvoerlegging van sancties: rechterlijk maatwerk* (2008); J.M. Harte et al., *De voorwaardelijke straf: stok achter de deur of vrijbrief voor verdachte* (2014).

47 C. Kelk, 'Individuele verantwoordelijkheid en herstel', in B. van Stokkom (eds.), *Straf en herstel. Ethische reflecties over sanctiedoeleinden* (2004), pp. 257-271.

48 B.A.M. Van Stokkom, 'Actieve verantwoordelijkheid in het strafrecht. Naar een brede opvatting van recht doen', (2013) *Justitiële Verkenningen* (1), pp. 100-101.

49 S. Franken, 'Probleemoplossende rechtspraak als alternatief voor strafrechtelijke repressie?', (2013) *Recht der Werkelijkheid*, pp. 70-71.

50 S. Verberk, 'Resultaatgericht recht: de Amerikaanse "drug courts"', (2012) *Bestuurswetenschappen*, pp. 52-63.

51 For instance, judges operating in the American drug courts went directly against the legislator's punitive policy towards drug offenders. See Verberk, *ibid.*, p. 58.

52 *Ibid.*, pp. 57-59.

53 *Ibid.*, pp. 59-60.

54 *Ibid.*

3.2 Problem-solving approaches outside the courts

A problem-oriented approach towards handling criminal offences is more visible outside than inside the courtroom. Below we will describe three developments within the field of criminal justice that can be partly explained by the search for more effective remedies towards the problems underlying criminal offences: the Dutch pilots regarding offender-victim mediation, the development of so-called ‘Community Safety Partnerships’ (*Veiligheidshuizen*) and the introduction of the ‘As Soon as Possible’ (*ZSM – Zo Spoedig Mogelijk*) approach. These developments have some of the characteristics of problem-solving justice in common. Different parties work closely together to come to a solution for the problems underlying the criminal behaviour. The offender will normally have confessed, at least not resisting a solution beyond the courtroom, giving up his/her right to an impartial and independent judge. In the conclusion we will evaluate these three developments in the light of their effectiveness and compatibility with some of the legal arguments that were raised against a more problem-oriented judge.

3.2.1 Mediation

In the 1970s and 1980s victim-offender mediation was strongly promoted by Herman Bianchi, critical professor of criminology and the critical criminal law professor Louk Hulsman. Their way of operating has probably had an opposite effect, since until several years ago, mediation – although common practice in other areas of law – had not gained ground in the field of criminal justice. Another explanation for the late reception of mediation in Dutch criminal law can be the rather imperious character of Dutch penal culture, in which little room exists for the input of lay-persons.⁵⁵ In 2010 a first pilot called ‘Mediation Next to Criminal Law’ (*mediation naast strafrecht*) started in the district court of Amsterdam.⁵⁶ The aim of the pilot was to examine the effects of mediation in an early stage of the proceedings without delaying the prosecution. The pilot ran until summer 2011 and involved 26 cases.⁵⁷ As can be understood from the name of the pilot, mediation was not offered as a substitute, but as a possible addition, after the conviction of the offender. Both victims and offenders generally evaluated the *mediation naast strafrecht* proceedings as positive, which is also (partly) explained by the fact that participants voluntarily joined the pilot. From 2013 to 2015 a larger experiment was run in the Netherlands in which other variants of victim-offender mediation were piloted, namely mediation as an alternative to criminal proceedings and mediation as part of the criminal proceedings. 716 cases were referred to mediation of which 367 actually resulted in mediation. The authors of the evaluation report describe that:

(...) more than three quarters of these cases were successful, meaning that mediation either resulted in a settlement agreement or – as in a few cases – even in absence of an agreement the mediation is viewed as successful by the parties involved.⁵⁸

Such an agreement may involve, for instance, an ‘explanation regarding the source of the crime’ (half of the cases) or acknowledgement by the offender of his/her culpability (one third of the agreements). Moreover, ‘[i]n 40% of the agreements parties have made arrangements regarding future interaction and in 20% a promise is made to the counterparty’.⁵⁹ Most often, successful mediation turned out to result in conditional or complete dismissal of the case (75%).⁶⁰

Despite the positive evaluations of the pilots, a policy decision was made in 2013 to stop the victim-offender mediation pilots, because of financial reasons. This decision was not politically accepted, however, so victim-offender mediation is increasingly being applied now, both as an out of court settlement or by the judge.⁶¹ Still, in quantitative terms, it remains a rather marginal intervention in the criminal justice system.

55 J.H. Crijns & R.S.B. Kool, ‘Afscheid van de klassieke strafrechtelijke procedure?’, (2017) 147 *Pre-advies Nederlandse Juristenvereniging*, p. 287.

56 ‘Mediation naast strafrecht in 400 strafzaken’, (2013) *Rechtspraak*, no. 4, p. 8.

57 I. Cleven et al., WODC, Intervict, Tilburg University, *De rol van herstelbemiddeling in het strafrecht* (2015).

58 *Ibid.*, p. 229.

59 *Ibid.*, p. 236.

60 *Ibid.*, p. 232.

61 Crijns & Kool, *supra* note 55, pp. 287-288.

The focus of mediation has increasingly shifted to the interests of the victim, while diversion and solving the problems of the offender that caused the offence have become less important.⁶²

In 2012 a legal arrangement for penal mediation was introduced in the law (Section 51h of the Criminal Procedure Code). This section states that the Public Prosecutor must promote that the police, at the earliest possible stage, informs both victim and defendant of the possibility of mediation in penal matters; if a mediation leads to an agreement between victim and defendant, a judge takes this agreement into account when s/he imposes a penalty or measure; the Public Prosecution Service promotes mediation between victim and offender, after consent of the victim.

The section was created under the pressure of the European Framework on the Position of the Victim in the Criminal Procedure⁶³ and is further implemented in lower regulation.⁶⁴ No legal obligation exists, however, to investigate the possibility of a mediation trajectory. Only when the victim gives his/her informed consent and the suspect/offender admits the offence a mediation trajectory can possibly start. Besides the positive results, mentioned earlier, the evaluations of the pilots also show some bottlenecks, in particular with regard to legal protection. Suspects sometimes feel pressured to cooperate with mediation and the question is raised if enough legal evidence was available in all cases that were nominated for participation.⁶⁵

3.2.2 Community Safety Partnerships

A third development within the field of Dutch criminal law which can be regarded as an instance of problem-solving justice is the introduction of Community Safety Partnerships (*Veiligheidshuizen*). The foundation for these Community Safety Partnerships was laid in the 1980s and 1990s, partly in the shape of *Justitie in de Buurt (JiB)* offices, similar, but smaller forms of cooperation between parties involved in the criminal justice system. In 2005, the first official Community Safety Partnerships were introduced (although some organisations had already been operational under that name in the preceding years).⁶⁶ Currently, there are 33 Community Safety Partnerships operational throughout the Netherlands.⁶⁷ Recently, the management of the Community Safety Partnerships rests with the municipalities. To help Community Safety Partnerships find their place in the complex field (involving many different organisations) in which they operate, and to stimulate them to focus on more complex cases, in 2013 a nation-wide policy framework (*Landelijk Kader Veiligheidshuizen*) was introduced.⁶⁸ Cases can be referred to Community Safety Partnerships by, for instance, the Public Prosecution Service or by another involved (care) institution.⁶⁹ Cases can be referred at the beginning of a penal trajectory, but also when the case is already in a later stage of a criminal procedure. Community Safety Partnerships aim to prevent criminal behaviour, to decrease reoffending and to enhance (perceived) safety within society. They adopt a problem-oriented approach, which is apparent from their case eligibility criteria: only so-called multi-problem cases are handled by Community Safety Partnerships, meaning that the person or family needs to have problems on multiple aspects of their lives (*leefgebieden*), which requires a coordinated approach by multiple organisations.⁷⁰ Parties involved in the Community Safety Partnerships' collaboration networks include the Public Prosecution Service, the police, the probation service, Youth Care (*Jeugdzorg*), the Council for Youth Protection (*Raad voor de kindbescherming*), the municipality, and care institutions, victim support services (*Slachtofferhulp Nederland*) and addiction treatment organisations. The idea is that Community Safety Partnerships combine the knowledge,

62 Ibid., p. 290.

63 Framework Decision of 15 March 2001, 2001/220/JBZ.

64 Order in Council: 'Besluit Slachtoffers strafbare feiten', *Stb.* 2016, 310, Ministerial Regulations.

65 See Crijns & Kool, *supra* note 55, p. 305.

66 B. Rovers, 's Hertogenbosch: Bureau voor Toegepast Veiligheidsonderzoek, *Resultaten van veiligheidshuizen. Een inventarisatie en evaluatie van beschikbaar onderzoek* (2011), pp. 13-15.

67 B. Rovers & C. Hoogeveen, Bureau voor Toegepast Veiligheidsonderzoek, *Landelijk kader voor de veiligheidshuizen. Invoering, ontwikkelingen en knelpunten* (2016), p. 11.

68 Ministerie van Veiligheid en Justitie, *Landelijk Kader Veiligheidshuizen. Vóór en dóór partners* (2013), pp. 11-12.

69 Ibid., p. 20.

70 See Rovers, *supra* note 66, pp. 7-17; Rovers & Hoogeveen, *supra* note 67, pp. 11-12, 21-23 and 11-20.

experiences and means of these organisations to be able to effectively deal with complex offenders in a tailor-made way.⁷¹

In 2011, Rovers wrote an extensive report evaluating Community Safety Partnerships, based on an analysis of previously conducted (empirical) research. He concludes that they have achieved positive results on many aspects, including a decrease of reoffending linked to improvements regarding clients' *leefgebieden*. Professionals are generally of the opinion that the collaboration in the context of the Community Safety Partnerships enhances the quality of interventions as their execution is more coordinated and coherent. On the other hand, he concludes that knowledge about Community Safety Partnerships' results is very limited, as most research projects focus on internal procedures and actors rather than results. He therefore recommends that further research into Community Safety Partnerships focuses more on internal validity, working with control groups or control conditions.⁷²

3.2.3 The ZSM approach

The Dutch Public Prosecution Service has adopted a new, widely-used approach to dealing with frequently occurring crime: the ZSM approach. The roots for this approach can be found in 2010, in 2011, several pilots took place and in 2013 this new method was completely implemented in Dutch legal practice.⁷³ The main connotation of the name of this approach is 'as fast as possible', since the Dutch abbreviation *zsm* (*zo spoedig mogelijk*) has the same meaning as the English term 'as soon as possible/asap'. Indeed, speed is one of the most important elements of the ZSM approach. The aim is to speed up the case processing times of criminal cases by means of early selection and faster disposal of relatively simple cases. The underlying presumption is that a quicker response to criminal behaviour enables the criminal justice system to respond more effectively to frequently occurring crimes.⁷⁴ This strive for effectiveness – and thus the focus on the law's effects on society – can be regarded as one of the ways in which the ZSM approach fits within the paradigm of problem-solving or responsive justice. Another way in which ZSM can be conceived of as an instance of responsive law – that is, a system which takes societal needs and expectations into account and strives to meet these – lies in its aim to show society that the criminal justice system offers an adequate response to criminal behaviour and that victims' needs are met.⁷⁵ Providing a responsive (*samenlevingsgerichte*) reaction to criminal behaviour is explicitly mentioned in the prosecution service's policy document *Perspectief op 2015*, in which responsiveness is described as problem-solving, meaningful for victims and visible. Mevis remarks that this strive, in turn, creates expectations among the public (i.e. victims and society at large).⁷⁶

However, the 's' in the abbreviation stands for more than just as 'soon' as possible: other important elements of the ZSM approach are selectiveness, simplicity, offering a smart response to criminal behaviour and collaboration with relevant partners in that regard (*zo selectief, simpel, slim en samen mogelijk*). Here, too, some overlap with problem-solving justice is apparent, for instance in the emphasis on collaboration with relevant partners, which is one of the characteristics of problem-solving courts. Partners with whom the prosecution service collaborates in the ZSM approach include the probation service, victim support and the Council for Youth Protection. A widely recognised weakness of the ZSM approach is that defence lawyers are excluded from the collaboration, while these defence lawyers complain at the same time that they are insufficiently informed about the case by the Public Prosecution Service. In fact, this results in a unilateral decision-making by the prosecutor.⁷⁷

71 N.J.M. Kwakman, 'Snelrecht en de ZSM-aanpak', (2012) *Delikt en Delinkwent*; see Rovers, supra note 66, pp. 15-16.

72 See Rovers, supra note 66.

73 P.A.M. Mevis, 'Versnelde afdoening in het strafrecht/ZSM: buitengewoon, buiten, gewoon; tijd voor reflectie en voor een ZSM-blik op berechting door de versnellende rechter', (2015) *Delikt en Delinkwent*, pp. 215-216.

74 E. Sikkema & F.G.H. Kristen, 'Strafbeschikking en ZSM: verschuivingen binnen de strafrechtshandhaving', in F. de Jong & R.S.B. Kool, *Relaties van gezag en verantwoordelijkheid: strafrechtelijke ontwikkelingen* (2012), p. 179 and p. 183.

75 See introduction and Sikkema & Kristen, *ibid.*, p. 179 and p. 190.

76 See Mevis, supra note 73, p. 220 and p. 223.

77 See Crijns & Kool, supra note 55, p. 295.

The 'selectiveness' aspect is apparent from the process adopted in ZSM cases. ZSM works with three (physical) 'tables': a 'selection table', a 'disposal table' and an 'execution table'. All arrested defendants are registered at the police office. Upon arrival a decision on the preferred route is taken at the selection table; in this stage, considerations with regard to for instance the evidence and the victim's needs are important. Subsequently, the case is forwarded to the disposal table, where a sanction is imposed (for instance, a fine or community service) in dialogue with partners such as the probation service and care institutions. Finally, the imposed sanction is executed, which means that the offender, for instance, can immediately pay the fine, compensate the victim or make an appointment with the probation service. Cases which are not suited to be disposed of by the prosecution service are forwarded to the 'back office', where one can decide, inter alia, to prosecute the case or refer the case to one of the Community Safety Partnerships; here, too, the aim is a fast handling of cases. All in all, in the ZSM approach the stages of selection, sanctioning and execution are integrated, with a public prosecutor (i.e. a professional) deciding at an early stage how to deal with the case and whether or not to bring the case into the criminal justice system, which speeds up the entire process.⁷⁸ It is important to emphasise that in the ZSM approach, the aim is to dispose of as many cases as possible without going to court. Thus, the emphasis is on enhancing the efficiency of the criminal justice system, not the effectiveness in terms of solving underlying problems that result in criminal offences. Nevertheless, in a recent evaluation of the ZSM approach it is firmly stated that ZSM is also successful in offering responsive interventions to criminal offences which can contribute to the problems of the suspect, help to solve conflicts and prevent further recidivism. A strong characteristic of this approach is that cooperation between partners leads to the availability of information that make a responsive intervention possible.

There are also critical remarks. The evaluation mentioned above makes visible that many cases that were not registered before the introduction of the ZSM approach or were dealt with in the social field instead of the penal field are now pulled into the criminal justice system.⁷⁹ Research published in 2017 also shows that the introduction of the ZSM procedure has not resulted in a decline of the cases that are brought before a judge,⁸⁰ which means that one of the main objectives of the introduction of the procedure has not been reached. Even more important is that there are serious concerns about the legal guarantees under which the penal order, the main sanction that can be applied in the context of the ZSM approach, is applied. Knigge and De Jonge van Ellemeet came to the conclusion that in 8% of the 375 cases they studied, the legal evidence was insufficient.⁸¹ And in 20-25% of the cases in which the litigant appeals against the decision of the prosecutor to impose a penal order, the judge decides there should be an acquittal.⁸²

3.3 Partial conclusion

Summarised, it can be concluded that the need for a more responsive approach in the criminal justice system in the Netherlands is clearly recognised. The problems that are recognised in particular are the need for a reduction of the recidivism rates of offenders and a better position of the victim in the criminal justice system. Resistance exists against a more extensive intervention of the judges in these matters, partly because this would be at odds with their impartiality and independency, partly because they are not educated for such a role. Outside the criminal courts several initiatives exist for a more responsive approach, although this objective goes together with the aim of a more efficient handling of criminal cases. Compared to other countries and other fields of law, mediation is still a rather marginal phenomenon in criminal cases.

78 Sikkema & Kristen, supra note 74.

79 M. SimonThomas et al., *Snel, betekenisvol en zorgvuldig: Een tussenevaluatie van de ZSM werkwijze* (2016).

80 S.N. Kaladien, Centraal Bureau voor de statistiek, *Criminaliteit en Rechtshandhaving 2017* (2017).

81 G. Knigge & C.H. de Jonge van Ellemeet, *Beschikt en gewogen. Over de naleving van de wet door het openbaar ministerie bij het uitvoeren van strafbeschikkingen: Een rapport van de procureur-generaal bij de Hoge Raad in het kader van het in art. 122 lid 1 Wet RO bedoelde toezicht* (2014).

82 F.P. van Tulder, 'Het oordeel van de rechter over de strafbeschikking', (2016) 2 *Trema Straftoemingsbulletin*, pp. 35-37.

4. Final discussion

It is clear from our contribution that the importance of a justice system that responds more adequately to the problems of parties involved in a legal conflict is recognised both in administrative and criminal law in the Netherlands. In administrative law, litigants urge for less bureaucratic, more informal and timely solutions for their legal problems. In criminal law, more attention is paid to the needs and procedural rights of the victim, while on the offender side it has been recognised that a more problem-oriented way of working is a necessary condition to reduce high recidivism rates. In both fields of law, however, debates surrounding the need to enhance the responsiveness of the justice administrations were held in a context of an overload of cases and a lack of resources. The need for more effectiveness of the demand side of the justice systems has therefore permanently been confused with or at least gone hand in hand with the urge for more efficiency on the supply side.

What we see in the Netherlands is that conflict resolution in administrative and criminal law is put for a large part in the hands of administrative authorities and a variety of agencies in the criminal justice organisation, under the ultimate responsibility of the Public Prosecution Service and the Ministry of Justice. The possibilities for judges to actually solve litigants' problems are small, at least in administrative and criminal law. This is related to the lack of expertise and training, but also to time pressure and the lack of involvement of non-judicial expertise in the courts. It is a long-standing policy that the government tries to divert conflict resolution away from the courts. Mediation and conflict resolution methods are being addressed in administrative law, and the public prosecutions office has substantial power to take final decisions in criminal cases.

This approach can be quite successful if it comes to 'keeping cases out of court',⁸³ and, to a certain extent, this approach helps solve actual problems of parties and of persons situated in a criminal law context. Achieving timely decisions and outcomes, however, seems the most important motive for the government. On the negative side, the position of interested parties in administrative decision-making is quite weak, and the same is true for suspects in the criminal justice domain.

The outstanding question is how can the administrative courts and the criminal courts actually play a more visible role in conflict resolution, considering the government policies, the reduction of funds for the judiciary and the working pressures in the courts? Would Dutch society be better off with a more prominent role for the courts in conflict resolution? Apart from the empirical issues – the timeliness of judgments is an issue in conflict resolution – there are also principled considerations considering the roles of judges. As long as the judiciary does not know how to reconcile a more forward position in conflict resolution with their professional and constitutional values, the reinforcement of conflict resolution mechanisms without involvement of the judiciary will continue. Efforts to innovate criminal proceedings, recently launched by Hiil, show only a limited role for the courts, restricted to criminal accountability and no role in establishing the facts and in reconciliation.⁸⁴ We consider that more attention should be paid to how the rule of law should be guarded in different ways of problem-solving justice.⁸⁵

83 Although, as we explained in section 3, the ZSM approach has not resulted in fewer cases brought before the court.

84 Barendrecht & Verheij, *supra* note 7.

85 P.J. van den Hoven & J. Plug, 'Naar een verbetering van strafmotiveringen. Een onderzoek naar de effectiviteit van het PROMIS model', (2008) 3 *Tijdschrift voor Taalbeheersing*, no. 30, pp. 249-267; M. Malsch et al., 'Van kop tot staart. Helpt de motivering bij het begrijpen van schriftelijke strafuitspraken?', (2006) *NJB*, no. 7, pp. 365-366.