

2 New Public Management in the Dutch criminal justice chain

the effects of stratification and automation in out-of-court proceedings

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Introduction

Public administration in many Western countries can hardly be imagined any longer without the influence of New Public Management (hereinafter—NPM). This approach was introduced in the late 1980s and early 1990s in Anglo-Saxon countries. In NPM, public institutions are considered service providers, and techniques and practices from the private sector are introduced to improve the quality of services.² This newer focus on these private sector practices has had various important implications for the organisational structure of public institutions, including increased focus on effectuating ‘output’ and establishing efficient procedures. The NPM approach also has had a considerable impact on criminal justice systems.³ While most of the literature focuses on Anglo-Saxon countries, NPM features are also notable in the criminal justice systems of other jurisdictions, such as the Netherlands.⁴

- 1 We would like to thank all of the participants in the author’s webinar on 10 December 2021 for their valuable feedback on this chapter. Our special gratitude goes to Anna Pivaty for her very helpful and detailed comments on earlier versions of this contribution. Last but not least, we want to thank the staff members at CVOM that we spoke to for their useful and informative explanation.
- 2 See, e.g., David Osborne and Ted Gaebler *Reinventing Government. How the Entrepreneurial Spirit Is Transforming the Public Sector* (Addison-Wesley 1992); Christopher Hood ‘A public management for all seasons’ (1991) 69 *Public Administration* 3.
- 3 Arie Freiberg ‘Managerialism in Australian criminal justice: RIP for KPIs?’ (2005) 31(1) *Monash University Law Review* 12; John Raine and Michael Willson (1997) ‘Beyond managerialism in criminal justice’ (1997) 36(1) *The Howard Journal* 80; Eugene McLaughlin and John Muncie ‘The criminal justice system: New Labour’s new partnerships’ in John Clark, Sharon Gerwitz and Eugene McLaughlin (eds), *New Managerialism, New Welfare?* (SAGE 2000) 169; Issa Kohler-Hausmann *Misdemeanorland* (Princeton University Press 2018).
- 4 Jan Terpstra and Willem Trommel ‘Police, managerialization and presentational strategies’ (2009) 32(1), *Policing: An International Journal of Police Strategies & Management* 128; Renze Salet and Jan Terpstra ‘Criminal justice as a production line: ASAP and the managerialization of criminal justice in the Netherlands’ (2020) 17(6) *European Journal of Criminology* 826.

NPM is recognised as affecting the Dutch justice system rather significantly.⁵ However, while its impact on the judiciary has been relatively moderate, NPM appears to have affected the Dutch Public Prosecution Service (hereinafter—PPS) more extensively in recent decades.⁶ This effect is especially apparent in the processing of so-called frequently occurring offences: these are minor infractions and crimes to which we will refer as ‘misdemeanour cases.’⁷ In this chapter, we aim to focus on the two divisions of the PPS that handle these cases: ZSM⁸ (mostly minor crimes) and CVOM⁹ (mostly infractions). The chapter presents a case study of how NPM affects the criminal justice system by revealing the way that the PPS handles misdemeanours. We are particularly interested in the effects of NPM on how the PPS work is divided among various levels of professionals and how the professionals (e.g., public prosecution officers, assistant prosecutors, and prosecution assistants) conduct their work. Previous research has shown that professionals working in public organisations find various ways to incorporate managerial approaches in their traditional professional work. We are interested in how and to what extent professionals at the PPS, who labour within an organisation that is highly automated and stratified, manage to combine professional and managerial values and techniques.

In the Dutch criminal justice system—a civil law system with a moderate inquisitorial character—the PPS has an important position. The PPS has authority over the police in criminal matters, and it oversees all criminal investigations. The so-called opportunity principle (*opportuniteitsbeginsel*) and the prosecution ‘monopoly’ (*vervolgingsmonopolie*) further contribute to the powerful position of the PPS. Public prosecutors decide whether to prosecute a case, and they can

- 5 Max Visser, Roel Schouteten and Josje Dikkers ‘Controlling the courts: New Public Management and the Dutch judiciary’ (2019) 40(1) *Justice System Journal* 39; Elaine Mak, *De Rechtspraak In Balans: Een Onderzoek Naar De Rol Van Klassiek-Rechtsstatelijke Beginselen En ‘New Public Management’—Beginselen In Het Kader Van De Rechterlijke Organisatie In Nederland, Frankrijk En Duitsland* (Wolf Legal Publishers 2008).
- 6 Nina Holvast and Joep Lindeman ‘An inquiry into the blurring boundaries between professionals and paraprofessionals in Dutch courts and the public prosecution service’ (2020) 16(4) *International Journal of Law in Context* 371.
- 7 Holvast and Lindeman (n 6) 383. The Dutch Criminal Codes distinguish offences into crimes and infractions. We refer to infractions and less ‘serious’ crimes as ‘misdemeanors.’ Crimes are the more ‘serious’ offences, whereas infractions are less ‘serious’ and are often sanctioned with only a fine. As opposed to infractions, crimes contain a so-called mental element as a precondition for criminal liability (such as ‘intent’ or ‘negligence’); Maartje Krabbe and others, ‘Substantive criminal law’ in Piet Hein van Kempen, Maartje Krabbe and Sven Brinkhoff (eds), *The Criminal Justice System of the Netherlands* (Intersentia Ltd 2019) 67, 73.
- 8 ZSM is the common abbreviation for ‘zo snel mogelijk,’ which translates as ‘as soon as possible.’ However, ZSM stands for ‘Zorgvuldig Snel Maatwerk’ (meticulous, fast, tailor-made).
- 9 CVOM stands for *Parket Centrale Verwerking OM*, Central Processing Office, www.prosecutionservice.nl/organisation/central-processing-office [Accessed: 15 August 2022].

choose to dismiss a case or to discontinue prosecution on public interest grounds (Art. 167 of the Dutch Code of Criminal Procedure, hereinafter—DCCP).¹⁰

Furthermore, the PPS has extensive discretionary powers to opt for out-of-court proceedings versus bringing a case to trial. Dutch legislation offers multiple varieties of out-of-court proceedings, of which the penal order is the most important. This entails a means of prosecution in which the prosecutor determines that the suspect has committed a criminal offence and issues the suspect an order with a sanction (most often a fine or community service).¹¹ The penal order is directly enforceable unless the suspect objects to it.

In the Netherlands, almost 50% of all criminal cases are handled out-of-court.¹² While this procedure is very efficient, a lack of judicial oversight brings the risk of citizens being confronted with penal orders, which may have been issued without sufficient judicial scrutiny.¹³ This is all the more relevant when we consider that the power to issue penal orders can (within defined limits) be mandated to prosecution assistants. ‘Mandated’ in the context of Dutch law means that the assistant acts in the name of the person that gives the mandate; however, decisions are considered to be taken by the person/authority that gives the mandate and this person/authority remains accountable. In a limited number of cases, the police and so-called special investigation officers (*Bijzondere opsporingsambtenaren*, *BOAs*) also have the power to issue penal orders for infractions.¹⁴

The processing of handling the misdemeanours for which the police and/or special investigation officers can issue a penal order has been centralised and gathered at one national division of the PPS: the CVOM. For more ‘serious’ misdemeanours that require a more tailor-made approach,¹⁵ the PPS introduced the so-called ZSM procedure:¹⁶ a strongly protocolised procedure in which prosecu-

10 Holvast and Lindeman (n 6); Masha Fedorova, ‘The main organs of the criminal justice system’ in van Kempen, Krabbe and Brinkhoff (eds) (n 7) 9, 17.

11 Sven Brinkhoff, Joeri Bemelmans and Maarten Kuipers, ‘Criminal procedure Law’ in van Kempen, Krabbe and Brinkhoff (eds) (n 7), 115–19.

12 Also, see Stavros Zouridis ‘From justice archipelago to security and justice chain: Strategy-organisation configurations in the Dutch criminal justice system’ in Annie Hondeghem, Xavier Rousseaux and Frédéric Schoenaers (eds), *Modernisation of the Criminal Justice Chain and the Judicial System: New Insights on Trust, Cooperation and Human Capital* (Springer International Publishing 2016), 79; Joep Lindeman, *Officieren Van Justitie In De 21e Eeuw: Een Verslag Van Participerend Observatieonderzoek Naar De Taakopvatting En Taakin-vulling Van Officieren Van Justitie* (Boom Juridische Uitgevers 2017); Henk van de Bunt and Jean-Louis Van Gelder, ‘The Dutch prosecution service’ (2019) 41 *Crime and Justice* 117.

13 Joep Lindeman ‘Het Openbaar Ministerie in 2018: Het zijn de magistraten die het verschil moeten maken’ (2018) (2) *Strafblad* 27, 30.

14 BOAs are not members of the police force but rather are public servants for municipalities or other public bodies. In the Netherlands, in contrast to England and Wales (see Soubise in this volume) a relatively small(er) proportion of out-of-court disposals is issued by police.

15 These are, in general, crimes that allow for police custody. That is, detention for a maximum of three days in the police station.

16 Pauline Jacobs and Petra Van Kampen ‘Dutch “ZSM settlements” in the face of procedural justice: The sooner the better?’ (2014) 10(4) *Utrecht Law Review* 73.

torial assistants process cases after initial instructions from a prosecutor based on the mandate of powers. Before making a decision, the prosecutor is provided with information regarding the case by the police, victim support and the probation service. In both the ZSM procedure and the CVOM, there is considerable distance between the professionals who are responsible and accountable for prosecutorial decisions (public prosecutors) and the persons who make the decisions and/or execute them. ZSM and CVOM are, as such, sub-divisions of the PPS in which automation, routinisation and stratification are most advanced.

The above description demonstrates that the PPS does not operate solitarily. It coordinates the cooperation with and between multiple organisations. This combination of (semi-)public organisations (often called ‘partners’) involved in the administration of criminal justice is often referred to as the criminal justice chain (*Strafrechtketen*). The PPS’s most important partners in the chain are the police, the probation services, the judiciary, victim support, the association of mental health and addiction care, agencies from the Ministry of Justice and Security (such as the Custodial Institutions Agency¹⁷ and the Central Judicial Collection Agency)¹⁸ and local authorities, such as municipalities. Streamlining the interactions amongst these partners and synchronising their activities is of pivotal importance for the criminal justice system to function effectively. The chain has become so important that it has grown to be an entity of its own, with a board of directors, a board of consultants and a dedicated website.¹⁹

In this chapter, we explore how changes in NPM have influenced the division of labour between involved professionals and the way in which professionals and other workers process individual criminal cases within the subdivisions of the PPS. In the next section, we develop our theoretical framework by building on the literature on professionalism and on front-line workers in government institutions. The third section provides information about the NPM movement within the PPS and, in particular, the changes it brought about in terms of CVOM cases. The fourth section explores the consequences that these changes have had for the daily work and the conditions in which professionals and other workers conduct their activities.

The chapter draws upon empirical research conducted by the authors as well as other Dutch researchers. We also build on participatory observations that Lindeman carried out in the course of an earlier research project²⁰ as well as on the available open sources (such as job descriptions). Finally, we conducted two informal interviews with two representatives of the CVOM division in the second half of 2021. These interviews were arranged via our professional network.

17 *DJI, Dienst Justitiële Inrichtingen*, responsible for the execution of custodial sentences.

18 *CJIB: Centraal Justitiele Incassobureau*, responsible for the collection of fines.

19 Lindeman (n 13) 35. Also see its website (in Dutch only): www.strafrechtketen.nl [Accessed 15 August 2022].

20 Lindeman (n 11).

Theory on professionals dealing with New Public Management

Changing values of hybrid professionalism

NPM is noted for its particular effect on the autonomy of professional workers.²¹ In the initial literature on the changing role and position of professionals, NPM, or managerialism, is essentially presented as a threat to professionalism. This literature emphasises that NPM principles can conflict with the principles of ‘pure’ or ‘traditional’ professionalism. In that regard, it is not surprising that, in its early days, a fair amount of resistance towards the NPM movement was detected amongst professionals.²² More recent literature has demonstrated how professional and managerial principles can, and are, combined within professional occupations.²³ Professionals have had to become accustomed to working in managerial environments, and resistance is no longer a suitable strategy for dealing with managerial influences on their occupation. Moreover, newer professionals have never had the experience of operating in a non-managerial setting.

This evolution has resulted in professionals having to adjust their working methods to a new environment, in which there is increased organisational control of front-line professionals. NPM introduced managerial structures to organisations in which professionals traditionally operated with a great deal of autonomy, with little control being exercised over them. In the new managerial setup, managers are granted powerful positions as well as tools to assess and control their ‘subordinate’ professionals. While initially there is often some resistance to this new style of organisation, some senior professionals are typically favourable towards it. On the one hand, this favourable position can be interpreted as professionals who see ‘the appeal to “get on with what really matters” instead of being held back by inappropriate forms of organization.’²⁴ However, on the other hand, this can also be interpreted as these professionals seeing it as a way to leverage or enhance their power and create new career prospects.²⁵ Regardless of the attitudes towards the changes, with NPM being here to stay, managers and other professionals have to adapt to the new managerial reality.

Various researchers have examined the questions of whether and how the NPM movement has changed the organisational culture of public service organisations

21 Julia Evetts ‘The sociological analysis of professionalism: Occupational change in the modern world’ (2003) 18(2) *International Sociology* 395; Peter Langbroek *Quality management and autonomy for court organisations* (EGPA paper 2001 Studygroup on Management and Delivery of Justice) 6.

22 Philippe Bezes and others ‘New Public Management and professionals in the public sector. What new patterns beyond opposition?’ (2012) 54(1) *Sociologie du travail* 1.

23 Evetts (n 21); Mirko Noordegraaf ‘From “pure” to “hybrid” professionalism: Present-day professionalism in ambiguous public domains’ (2007) 39(6) *Administration & Society* 761.

24 Ian Kirkpatrick, Stephen Ackroyd and Richard Walker *The New Managerialism and Public Service Professions* (Hampshire, Palgrave Macmillan 2005) 73, citing Clarke, 1998, 242.

25 Kirkpatrick, Ackroyd and Walker (n 24).

and whether it has incorporated new values into these organisations. They have argued that NPM would result in a replacement of a traditional public service ethos (which emphasises the values of welfare and care) and a professional ethos (of partnership, collegiality, discretion and trust)²⁶ with that of a free market ethos (which focuses on values of efficiency and effectiveness).²⁷ However, it transpired from subsequent empirical research that certain values were not simply replaced by others. Rather, the process of introducing and incorporating managerial principles proved to be a complex transition in which professionals adhered to a combination of 'old' and 'new' values.²⁸

It is by no means obvious that the new values predominate. In fact, several examples have been observed of professionals who, in adjusting to a new managerial structure, used traditional professional and public service values to give substance to their new role within the managerial organisation. For this reason, some authors have highlighted the benefits of the new hybrid setup.²⁹ This has also been observed in the way that judges and their judicial subordinates deal with NPM changes they have faced within their institutions.³⁰ In an earlier study, we found that, depending on the situation, judges and judicial assistants adhered more to either 'pure professional' norms or to 'new professional' ones. However, we also found that, in the frequently occurring offences workstream at the PPS (see also the section 'Managerialism at the PPS'), professionals who tried to meet professional standards were hindered by the restrictions of the managerial setup. One important element in this process, on which we focused in a previous publication, is the increased stratification and the growing reliance on paraprofessionals.³¹ In this contribution, we show that the increased stratification cannot be separated from the automation within the CVOM division of the PPS.

The role of automation and stratification in professional provision of public services

Automation and, relatedly, stratification, have significantly changed the work of public service professionals. Automation has resulted in public service professionals—who previously acted as street-level bureaucrats with a great deal of discretion in their work—turning into screen-level or system-level bureaucrats.³²

26 Evetts (n 21) 406.

27 Gerard Hanlon 'Professionalism as enterprise: Service class politics and the redefinition of professionalism' (1998) 31(1) *Sociology* 43; Evetts (n 21).

28 Kirkpatrick, Ackroyd and Walker (n 24) 73, 99; with regard to the Dutch judiciary see also Mak (n 5).

29 Mirko Noordegraaf 'Hybrid professionalism and beyond: (New) forms of public professionalism in changing organizational and societal contexts' (2015) 2(2) *Journal of Profession and Organization* 187.

30 Visser, Schouteten and Dijkers (n 5); Holvast and Lindeman (n 6).

31 Holvast and Lindeman (n 6).

32 Mark Bovens and Stavros Zouridis, 'From street-level to system-level bureaucracies: How information and communication technology is transforming administrative discretion and constitutional control' (2002) 62(2) *Public Administration Review* 174.

The traditional street-level bureaucrat is described as a public service worker who directly interacts with individual citizens and has substantial discretion in allocating services or imposing sanctions.³³ These public service professionals enjoy a great deal of autonomy and room for discretion in their work. Street-level bureaucrats interpret policy rules and apply them to concrete cases on a daily basis. In doing so, they influence the manner in which policy is implemented.

According to Snellen and Bovens and Zouridis, the shift to more automated service provision reduced the powerful position that front-line workers previously had in policy implementation.³⁴ The room for discretion that street-level workers have is minimised by controlled IT systems,³⁵ and certain public service workers may even be replaced by computer systems.³⁶ A new group of employees simultaneously gains power: Information Communications Technology (hereinafter ICT) experts and legal staff members who design the automated systems.³⁷ At the same time, work that could previously only be performed by 'fully certified' professionals can now be conducted by paraprofessionals or non-professionals.³⁸

Hence, these authors point out, when automation increases, it reduces the discretionary power of public service front-line workers and results in more rule-oriented decisions, in which para/non-professionals perform a large part of the work that has now become 'routine.' Buffat referred to this as the 'curtailment thesis' and pointed out that this thesis is challenged by authors who construct what she referred to as an 'enablement thesis.'³⁹ In line with the latter thesis, Jorna and Wagenaar found that the existence of artefacts increases the number of blind spots in how street-level workers operate and thereby reinforces discretion.⁴⁰ After all, when the automated system does not generate a result, the street-level worker has to fall back on solutions beyond the system. Buffat examined the impact of NPM and ICT in a Swiss unemployment fund and found that, on the one hand, managers obtained much more information about the workers' decision-making.⁴¹ On the other hand, they operated at a greater distance and lost a

33 Michael Lipsky *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service*. (Russett Sage Foundation 2010).

34 Ig Snellen 'Street level bureaucracy in an information age' in Ig Snellen and Wim van de Donk (eds) *Public Administration in an Information Age: A Handbook* (IOS Press 1998) 497; Ig Snellen 'Electronic governance: Implications for citizens, politicians and public servants' (2002) 68(2) *International Review of Administrative Sciences* 183; Bovens and Zouridis (n 32).

35 Snellen 2002 (n 34).

36 Bovens and Zouridis (n 32).

37 Bovens and Zouridis (n 32).

38 Herbert Kritzer 'The professions are dead, long live the professions: Legal practice in a post-professional world' (1999) 33(3) *Law & Society Review* 713.

39 Aurélien Buffat 'Street-level bureaucracy and e-government' (2015) 17(1) *Public Management Review* 149.

40 Frans Jorna and Pieter Wagenaar 'The "iron cage" strengthened? Discretion and digital discipline' (2007) 85(1) *Public Administration* 189, 212.

41 Buffat (n 39).

refined vision of decisions that were made. Furthermore, their time and resources for controlling workers remained limited. In a recent study based on a survey of Dutch food safety inspectors, de Boer and Raaphorst also found no evidence for the curtailment thesis.⁴²

Beyond the results of such research, it has been widely emphasised by authors adhering to either of the above-mentioned theses that the effect of automation differs in varying organisational setups and that routine work is easier to automate than other types of work. Hence, while the literature predominantly warns of the risks of automation and the related stratification of work, the evidence of restraining consequences for professionals is also contested and nuanced.

Most recently, the large-scale childcare benefits scandal in the Netherlands can be regarded as an example of how the dependence on algorithms in handling legal cases, with few professional checks, can have devastating effects. In this affair, a large group of financially vulnerable victims was falsely accused of social benefits fraud by the Dutch tax authority based on indicators built into the largely automated system. The ensuing reclamation—later found to be illegal—of benefits by the tax authority financially ruined many of these people. This affair, which resulted in the resignation of the cabinet, also put the discussion about automated decision systems, implementation of professional checks and their benefits to the political and social fabric of the nation back on the agenda.

Managerialism at the PPS

History of dealing with ‘small crime’ at the PPS

Since 1999, the Board of Prosecutors General has been the central governing body of the PPS in the Netherlands. The heads of all PPS offices⁴³ are hierarchically subordinate to the Board, which sets priorities and formulates policies. The Board of Prosecutors General is not a completely autonomous entity; it can receive instructions from the Minister of Justice and Security.⁴⁴ Its aim

42 Noortje de Boer and Nadine Raaphorst, ‘Automation and discretion: Explaining the effect of automation on how street-level bureaucrats enforce’ [2021] *Public Management Review* 1.

43 There are ten regions, each with a PPS office, and three national PPS offices. For appeal cases, there is another national office with four subdivisions (one for each Court of Appeal).

44 This relationship is complicated, because the PPS is formally part of the judicial organisation, and all public prosecutors (including procurators general) are judicial officers (although judges enjoy more absolute independence than prosecutors). There has been a lot of debate regarding whether the Minister of Justice may issue instructions to the Board of Prosecutors General because this would impair the independence of PPS. Van de Bunt and Van Gelder (n 12) elaborate on this to a greater extent. In practice, the Minister hardly uses this authority, but it is likely that he uses informal consultations to induce the Board of Prosecutors General to follow up on his wishes (Lindeman, n 11). Recently the debate has flared up again, leading to a private members’ bill in parliament to repeal the Minister’s power to give instructions (Joep Lindeman and Eelke Sikkema, ‘De aanwijzingsbevoegdheid (niet) ter discussie?’ (2021) (6) *NJB* 697.

is to improve unity in both criminal and prosecution policy, especially regarding the practice of the opportunity principle and out-of-court settlement of criminal cases. To achieve this unity, policy regulations issued by the Board of Prosecutors General have become important instruments. This body of regulations (*beleidsregels*) consists mainly of prosecution guidelines (*richtlijnen voor strafvordering*) and instructions (*aanwijzingen*). The regulations aim to attain a uniform approach in similar cases, and they facilitate the preparation of these cases being made to a large extent by prosecution assistants.⁴⁵ At the same time, these regulations constrain the discretionary power of individual prosecutors: prosecution guidelines define which circumstances are determinative for the decision to prosecute a suspect before a trial judge or to settle a case out-of-court. There are also guidelines regarding the amount of penalty used in out-of-court proceedings and/or regarding the amount of penalty to be demanded before the trial judge.

Dealing with misdemeanours in out-of-court proceedings has been a strategy of the PPS for decades. Already in the 1980s, the activities of the police, the PPS, the judiciary and other actors began to be viewed as a process akin to that of a production line. Within this ‘criminal-law concern’ (*strafrechtelijk bedrijf*) for law enforcement, the PPS was to be the ‘spider in the web’ in battling crime.⁴⁶ Crime policy, defined by the government, was increasingly regarded as a means to proactively fight crime. Part of that policy was a bifurcation between ‘small crime’ (misdemeanours) and ‘big crime.’ To deal with misdemeanours, out-of-court proceedings became increasingly common, at first by means of a transaction,⁴⁷ and, from approximately 2012, primarily by so-called penal orders (*strafbeschikking*).⁴⁸ Changes in the PPS management structure (which entered into force in 1999) widened the possibilities to officially shift significant parts of prosecutors’ work to assistants, including the power to issue penal orders.⁴⁹ The police have had limited powers to issue so-called police transactions from as early as 1983, mainly regarding traffic offences. These powers have gradually increased since then and, today, the police (including so-called ‘special enforcement officers’) are authorised to issue penal orders for an exhaustive list of misdemeanours.

From 2000 to 2015, the PPS extensively used various types of assistants with different educational levels (starting with senior secondary vocational education)⁵⁰

45 Holvast and Lindeman (n 6).

46 Dato Steenhuis ‘Strafrechtelijk optreden; stapje terug en een sprong voorwaarts (I) and (II)’ (1984) 14 (5, 6) *Delikt & Delinkwent*, 395 (I), 497 (II); also see Dato Steenhuis ‘Coherence and coordination in the administration of criminal justice’ in Jan Dijk and others (eds), *Criminal Law in Action. An Overview of Current Issues in Western Societies* (Kluwer Law and Taxation Publishers 1986) 229.

47 From the 1980s up until ca. 2010, the PPS made extensive use of transactions: in clear-cut cases, the prosecution would offer suspects a so-called ‘transaction’ (*transactie*), which allowed them to avert prosecution, in exchange for which they would have to undergo certain sanctions (such as paying a sum of money or completing community service).

48 Brinkhoff, Bemelmans and Kuipers (n 10) 115–19.

49 Holvast and Lindeman (n 6).

50 *Administratief Juridisch Medewerkers* who received *Middelbare Beroepsopleiding* (MBO).

to process the simplest criminal cases.⁵¹ This was facilitated by an ever-increasing, intricate structure of policy regulations (guidelines and instructions) and ICT systems, which allowed assistants to work independently while still being monitored. The ICT system guided them through the decision-making process while logging the steps taken. The ICT system would also make sure that the decisions fit within the boundaries of the regulations.⁵² Assistants decided whether a case would go to trial or would be dealt with out-of-court. They decided for what offence a suspect would be prosecuted and (in cases of transactions or penal orders) the type and amount of the sentence. The importance of this mode of operations cannot be underestimated: as mentioned above, almost 50% of cases registered by the PPS are dealt with out-of-court.⁵³ It is safe to assume that the vast majority of these cases have been processed by prosecution assistants.

These assistants used to work at regional offices. From approximately 2005, an increasing number of minor (often traffic-related) misdemeanours (in which penal orders, and before that, transactions were issued by the police or special enforcement officers) are processed in a national office designated to deal with the true bulk of the cases. At the time, a more efficient work process was the main reason for this centralisation.⁵⁴ This office is called the Public Prosecution's Central Processing Office (*Parquet Centrale Verwerking OM, CVOM*) and processes hundreds of thousands of cases on a yearly basis.⁵⁵

Beginning at the time of the 2008 financial crisis, budget cuts have been a rule rather than an exception, compelling the PPS to function as efficiently as possible without losing sight of its primary objectives. The newly introduced penal order allows prosecutors to impose non-custodial sentences without the intervention of a judge. The introduction of the penal order aimed at streamlining the process of extra-judicial administration of justice. However, an evaluation of this new instrument revealed that the quality of the decision-making process leading to the penalty was substandard. Individuals who challenged the penal order before a judge were acquitted in 20% to 25% of cases.⁵⁶ Simultaneously, the Netherlands Court of Audit published a highly critical report on the performance of the criminal justice chain. The report highlighted that too many cases fell by the wayside,

51 Holvast and Lindeman (n 6).

52 Van de Bunt and Van Gelder (n 12).

53 This figure has been quite consistent since 1980s.

54 Joep Lindeman, 'Criminaliteitsbestrijding' in Jan Crijns, Erwin Muller and Rick Robroek *Handboek Openbaar Ministerie* (Kluwer forthcoming).

55 Lindeman (n 52); Morena Lam, 'Razendsnel schakelen en een weergalozе werkdrυk. Parquet CVOM blikt terug op twee jaar coronacrisis,' (2022) 28 (3) *Opportuun*. <https://magazines.openbaarministerie.nl/opportuun/2022/03/parquet-cvom-en-de-coronacrisis> [Accessed 15 August 2022].

56 Procureur-Generaal bij de Hoge Raad der Nederlanden, *Beschrift En Gewogen. Over De Naleving Van De Wet Door Het Openbaar Ministerie Bij Het Uitvaardigen 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).

leading to sanctions not being executed or prosecutions being stalled due to undue delay.⁵⁷

In the wake of these developments, the PPS decided to invest more in extra-judicial proceedings by introducing the ZSM procedure for serious misdemeanours (see the section ‘Handling of cases in ZSM’) and streamlining the processing of the bulk of misdemeanours by the CVOM (see the section ‘The CVOM: Processing cases in bulk’). The PPS also introduced the function of ‘assistant prosecutor’ for ZSM cases. These are assistants who received academic schooling and who are trained to perform the basic tasks of a public prosecutor. These consist of preparing for the hearing, representing the PPS at the hearing, pleading the case and demanding a sentence (as well as requesting an acquittal when the evidence is not conclusive). The use of prosecution assistants with no specific legal training has diminished. Higher professional education or (for assistants who are assistant prosecutors) university education has become the norm (with the notable exception of the CVOM—see below).

This background information demonstrates that NPM influences are clearly visible within the administration of criminal justice in general and, more specifically, within the PPS. Strict hierarchy, policy regulations and mandated paraprofessionals have contributed to an efficiency-driven organisation that operates within a network of partners. As stated above, these characteristics are mainly visible in the ZSM procedure and in the CVOM division. In the following section, we briefly elaborate on ZSM, which has already been the topic of extensive research.⁵⁸ We then elaborate in more detail on the CVOM because this is a division of the PPS that has received little academic attention.

Handling of cases in ZSM

A branch of the PPS in which bureaucratisation of criminal justice is very much present is the so-called ZSM procedure.⁵⁹ The procedure, aimed at ‘serious’ misdemeanours,⁶⁰ is strongly protocolised. Mandated assistants process cases after initial instructions from a prosecutor. Within a framework of strict protocols (i.e. regarding time frames, categories of offences, policy regulations, communication and decision-making), partners in the criminal justice chain⁶¹ cooperate in order to come to a swift yet ‘meaningful’ intervention as a reaction to the committed offence.⁶²

57 Algemene rekenkamer, *Prestaties In De Strafrechtketen* (2012).

58 Jacobs and Van Kampen (n 16); Salet and Terpstra (n 4).

59 ZSM is the common abbreviation for ‘zo snel mogelijk,’ which translates as ‘as soon as possible.’ However, the PPS states that ZSM stands for ‘Zorgvuldig Snel Maatwerk’ (meticulous, fast, tailor-made).

60 These are, in general, crimes that allow for police custody. That is, detention for a maximum of three days in the police station.

61 Police, the PPS, probation services and victim support.

62 For more detail, see Jacobs and Van Kampen (n 16); Salet and Terpstra (n 4).

ZSM can be compared to a system of ‘triage’ of patients, as used in hospitals. A prosecutor considers all relevant information that is available before giving an indication concerning further processing (a trial or a penalty order). Assistants execute this initial decision unless they encounter unexpected issues (such as a case turning out not to be as clear-cut as initially expected). Depending on certain factors—the gravity of the crime, whether the suspect is a repeat offender, whether the victim seeks compensation, and/or specific aggravating or mitigating circumstances—regulations prescribe a decision to either bring the case to trial or to deal with it by way of penal order. If the case goes to trial, an assistant prosecutor represents the PPS. This demonstrates the level of stratification that comes with the ZSM approach. Automation also plays a significant role in this approach, as nearly all casefiles are handled digitally, and the use of automated policy guidelines is widespread.

The top-down implementation of this new procedure, the importance of national guidelines in the decision-making process and the existence of protocols suggest strong NPM influences. Several of these influences are already visible in the former practice. However, as mentioned in the section ‘History of dealing with “small crime” at the PPS,’ possibly as a response to ‘too much’ managerialism, more prominent supervision by a public prosecutor was introduced. This somewhat mitigated the excesses of NPM. Nonetheless, standardisation and time-restricted procedures remain important factors in the ZSM procedure.

The standardised approach of ZSM has been criticised: penal orders were found to have been issued for casefiles containing insufficient evidence against the suspect (due to the pressure on the police to draft their reports too speedily). Also, the decision-making has been criticised for being remote, with not enough attention paid to specific and personal information regarding the victim and/or the suspect.⁶³ This is problematic from a rule of law perspective: a suspect can be denied due process, or decision-making is based on incomplete casefiles. This problem has been extensively debated in the Netherlands in the past decade. It is questionable whether the way that the ZSM procedure works is in line with the original policy objectives behind ZSM, in which efficiency was supposed to go hand in hand with ‘meaningful interventions.’⁶⁴ Other criticism has pointed to the rather uniform selection of cases which, in turn, was caused by the traditional way of policing in the Netherlands. Typically, misdemeanour suspects are caught in the act, which usually leads to easily ‘processable’ cases. The police’s predisposition towards these ‘easy pickings’ results in a practice in which other misdemeanours may be disregarded, such as cyber fraud through online marketplaces.⁶⁵

63 Salet and Terpstra (n 4).

64 Salet and Terpstra (n 4).

65 Lindeman (n 10); Lindeman (n 54).

The CVOM: Processing cases in bulk

While the ZSM approach aims to provide ‘meaningful interventions’ that consider the interests of various involved parties, the CVOM aims to process cases in the most efficient way. These cases are considered the most minor and the simplest offences, such as misdemeanours in traffic or in public space. Recently, the CVOM also processed misdemeanours in relation to COVID-19 measures (such as not respecting a safe distance or violating the curfew).⁶⁶ The essence of the CVOM approach is that responses to these generic misdemeanours can be standardised.

The CVOM has two main branches: a branch that deals with administrative fines (mainly traffic infractions that have been ‘decriminalised’)⁶⁷ and a branch that deals with fines under criminal law (serious traffic misdemeanours that cause no bodily harm or significant damage, misdemeanours relating to public order and misdemeanours defined by municipalities, amongst others). For this chapter, we focus on the criminal law branch.

Under the DCP, police officers have the power to issue penal orders (which impose a fine) for specified infractions (art. 257b, section 1) and a very limited number of crimes (section 2). A government decree⁶⁸ and a sentencing guideline from the Board of Prosecutors General⁶⁹ contain more details on this particular competence. It follows from these regulations that the CVOM works with a system based on ‘offences with a misdemeanour code.’⁷⁰ An exhaustive list of offences, each with a misdemeanour code, is published each year. Offences can have multiple *modus operandi*. Each mode has a unique code. In many of these codes, the fines have a fixed tariff. All of these codes and their tariffs are collected in one bundle that police officers can carry with them.⁷¹

Once a police officer establishes an offence and issues the penal order to the suspect, the case will be processed promptly by the Central Judicial Collection Agency (*Centraal Justitiele Incasso Bureau*). However, this does not occur for all cases with a misdemeanour code. Some offences with a misdemeanour code require more scrutiny. After all, a penal order can only be issued when it has been determined that the suspect was guilty of the criminal offence. Some offences require more than a mere observation by a police officer to justify the conclusion

66 Lam (n 55).

67 The Traffic Regulations Administrative Enforcement Act (*Wet Administratiefrechtelijke Handhaving Verkeersvoorschriften, WAHV*) came into force in 1990 and decriminalised a large number of traffic offences: for these offences, an administrative fine would henceforth be applicable.

68 Besluit OM-afdoening, art. 3.3.

69 Richtlijn voor strafvordering feitgecodeerde misdrijven en overtredingen, latest issue: *Strc.* 2022, 4166.

70 Aanwijzing feitgecodeerde misdrijven, overtredingen en muldergedragingen, *Strc.* 2017, 70942.

71 This booklet can be downloaded from the PPS website: www.om.nl/onderwerpen/feiten-en-tarieven [Accessed 15 August 2022].

that an actual offence was committed. Therefore, in some instances, the police will only give a notification of an impending penal order rather than issue the order itself. The fines still have fixed tariffs, but the penal order is issued by a public prosecutor (in practice, a mandated assistant) at the CVOM. Occasionally, even the amount of the fine is determined at a later stage, using different guidelines. These cases that require an extra check are called ‘asterisked’ cases: in the guidelines, the offences are marked with an asterisk. Some examples may illustrate this:

- Public intoxication (Art. 453 Criminal Code (hereinafter - CC)). It carries the code ‘p D 530’ and a fixed fine of €100.⁷² The ‘p’ indicates that the police can issue a penal order, which will be executed by the Judicial Collection Agency.
- Wanton behaviour (Art. 424 CC) carries the code ‘* D 505’ and a fixed fine of €250. The * means that the police will give notification of a penal order and that the prosecutor (in practice, a mandated assistant at CVOM) will have to assess the case before issuing the penal order.
- Damaging (a part of) the *main railway* infrastructure (Art. 22.1 Railroad Act) carries the code ‘* E 148’ and has no fixed fine (the tariff is also marked ‘*’). Again, the police will notify of an impending penal order that is to be determined at the CVOM. Due to the wide variety of possible damages,⁷³ different types of outcomes may be considered (a sanction of community service or perhaps a summons for a court trial, where a sentence of imprisonment can be requested by the prosecutor).
- Damaging (a part of) the *local railway* infrastructure (Art. 15.1-b) carries its own code: ‘* E 162 d’ and, again, tariff *.

If the suspect objects to the fine, the casefile is always sent to the CVOM, where an assistant is mandated to assess it on behalf of the public prosecutor. The prosecutor or the assistant can decide to revoke the penal order, to change it, or to take the case to court in order to have a judge rule on the case at trial. In practice, the latter option is most often used.

If the suspect does not object but refuses to pay, the Judicial Collection Agency will execute the fine. The Agency has a variety of enforcement measures, including attachment (seizure) or coercive detention. In practice, a rather large portion of cases proves to be non-executable, which ultimately leads to the cases being sent to the CVOM.⁷⁴ In turn, the CVOM will summon the sentenced person to

72 Even when the CC stipulates that a fine up to €435 is possible, as well as detention for up to twelve days.

73 Railway infrastructure consists of a wide variety of items, from fences up to engineering structures and, of course, the actual tracks; see Annex I to Directive 2012/34/EU establishing a single European railway area.

74 According to the 2020 Factsheet Strafrechtketenmonitor, in 2020, 52,400 cases were sent back due to the failure to execute the sentence (Factsheet Strafrechtketenmonitor 2020,

court. A complete trial then takes place. Hence, CVOM cases are intended to be out-of-court proceedings, but a trial is held when the suspect objects to the penal order or when execution of the penal order is impossible.⁷⁵

Managerialism, stratification and automation in the practice of the CVOM

Characteristics of the CVOM

The CVOM procedures clearly show stratification, managerialism and automation. The Board of Prosecutors General determines which cases fit within the system of misdemeanour codes, thus providing the selection of offences that are deemed appropriate to be dealt with in a largely automated manner.⁷⁶ Police officers can only issue penal orders by following a rigid procedure in which they have little discretion. Execution is ‘outsourced’ to the Judicial Collection Agency, while processing is the responsibility of the CVOM via substantially automated workflows. In case of a trial, the ‘traditional’ judicial way of handling cases suddenly comes into play. Limited research is available on the CVOM, and public information on the functioning of the organisation is scarce. In recent job vacancies, the organisation is described as follows:⁷⁷

The CVOM Prosecutor’s Office is a young and dynamic working environment, which intensively cooperates with other PPS units and partners. CVOM Office’s work concerns many citizens and is regularly scrutinised by the media ... The employees assess (fact-coded) criminal cases that fall in the realm of frequently occurring crimes. These include speeding, fare evasion, violations of local laws and regulations, but also driving under the influence of alcohol or drugs. The assessor evaluates a case for evidence, independently formulates a penal order, formulates a sanction based on guidelines, prepares a notice of charges and, where necessary, a short explanatory document for the Public Prosecutor. There is a wide diversity of cases. This means that we ask a lot from our assessors. They must be able to switch quickly between

p. 43). In the same year, the PPS and police issued 317,000 penalty orders (including a small number of transactions) (Factsheet Strafrechtketenmonitor 2020, p. 50). However, we have been informed by a representative of the CVOM that these numbers may not include all cases that the CVOM processed in 2020. Also, non-executable penal orders are likely to have been issued earlier than 2020.

75 In 2020, 80% of the cases that were sent back to the PPS were sent back due to a failure to execute the penal order (Factsheet Strafrechtketenmonitor 2020, p. 43). Again (see previous footnote) we are not sure about the extent to which CVOM cases are incorporated in these numbers, but we have no reason to believe the numbers would be significantly different.

76 The Board is advised by a committee in this regard, see the section ‘The drivers for decision-making at the CVOM.’

77 <https://securitytalent.nl/jobs-internships/teamleider-straf-beoordelen-en-zitting> [accessed 15 August 2022].

various types of offences and crimes. In addition, they are expected to generate a high output while remaining accurate.

Another job vacancy reads:⁷⁸

you will find yourself in a young and dynamic working environment in which we cooperate intensely with the other PPS units and chain partners. The next few years will be characterised by the further development of CVOM. The focus will be on professional quality, culture and leadership, process optimisation and digitisation. Our goals are firm and time pressure is regularly high.

A third job vacancy describes an organisation in which dozens of assistants work as ‘assessor’ (*beoordelaar*), a position that demands senior secondary vocational education.⁷⁹ The vacancy is for a team manager of reviewers. For this position, one is not required to be a lawyer.

Via informal interviews with senior staff members of the CVOM, we learnt that assistants work in standardised procedures, in which the majority of ‘sub-decisions’ in a so-called decision tree can be predicted—therefore, the assistants are trained to follow pre-defined lines of reasoning. While there are perhaps as many as 1,000 ‘misdemeanour codes’ for all types and varieties of CVOM cases, most cases relate to a small percentage (20%) of these codes. This suggests a practice in which most of the assistants perform comparable tasks. Nevertheless, the interviews with CVOM officials revealed that, as the CVOM deals with hundreds of thousands of cases each year, the portion of less common cases still consists of a rather wide variety.

Decision-making by police officers and special investigating officers

The processing of cases—the core business of the CVOM—is only one side of the criminal justice chain for offences with a ‘misdemeanour code.’ No processing can occur without input from police officers and special investigating officers. As we have already indicated, the cases that are processed would not exist without the police recording the offenses. Police officers can issue penal orders, a competence that is limited to specific offences. Once an issue is ordered, the procedure is rigid. Nonetheless, the police have a wide margin of discretion in deciding whether to issue a penal order. It should be emphasised that there is no obligation for the police to order penalties for each observed offence.

78 <https://vacaturedata.nl/kwartiermaker-en-afdelingshoofd-strafoverheidsadministratie-8016> [accessed 15 August 2022].

79 Vacancy for ‘Teamleider beoordelaars strafzaken/Operationeel manager’ (vacaturenummer OM-4271), as published at the time on <https://werkenbijhetom.nl> [accessed 15 August 2022].

While in the early 2000s a system was used in which police officers had to achieve certain targets (so-called ‘ticket quotas’), this practice was abandoned in 2010.⁸⁰ The decision to write a ticket is up to the individual assessment of the police officer. Sometimes the national and/or local police will focus on certain behaviour, which may result in special arrangements (such as a zero-tolerance policy) and a higher chance of a fine. However, in general, receiving a penal order from the police is often conceived by the offender as having been in the wrong place at the wrong time: ‘bad luck.’

There is little (if any) debate in the Netherlands about the fact that the police *de facto* apply the opportunity principle when deciding on a penal order. This is problematic, because there is little room for the judiciary to scrutinise the discretion of police officers: judges can test the decision to prosecute only marginally.⁸¹ This means that, indeed, getting a ‘ticket’ for a certain offence can be ‘bad luck.’

The Dutch police organisation itself has also become more stratified. The so-called ‘special investigating officer’ is increasingly employed in law enforcement. These officers are not members of the police force, but public servants for municipalities or other public bodies. They are increasingly entrusted with surveillance of parts of the public domain. They are appointed as investigating officers with limited powers (e.g. no or limited authorisation to use violence) and often are only allowed to use their powers within a certain area and/or within a certain legal domain (e.g., only maintaining public order and checking the validity of tickets on trains).

Various factors, such as local policy or budgets, determine how many of these special investigating officers are on the street and where their attention is directed. Like regular police officers, special investigating officers are increasingly empowered to issue penal orders. When they perform tasks related to criminal justice, the ‘law in the books’ is that special investigating officers fall under the supervision and authority of the PPS. The ‘law in action’ is that they are employed by another public body (e.g., a municipality). Special investigating officers, thereby, operate at a significant distance from public prosecutors. There is no personal relationship or noticeable structure of accountability between prosecutors and these officers.

Decision-making within the system of the misdemeanour codes is not always as straightforward as it may seem. As previously explained, damaging *national* railway infrastructure has a different misdemeanour code than damaging *local* railway infrastructure. There are also different codes for *interfering* or *tampering*

80 See the coalition agreement for the first cabinet of Prime Minister Rutte: *Vrijheid En Verantwoordelijkheid* 2010, <https://open.overheid.nl/repository/ronl-archieff-4e7b0c5c-dd87-4c73-9799-01e0894ac9ba/1/pdf/regeerakkoord-vvd-cda.pdf> [Accessed 15 August 2022].

81 Judges cannot assess the reasonableness of the decision to prosecute, but they can only test whether it is not contrary to the fundamental principles of justice such as the rule of law or non-discrimination (Toetsing Vervolgingsbeslissing, HR 2012, NJ 2013/109).

with national or local railway infrastructure. This means that the special investigating officer or police officer who observes the offence has to pay close attention to certain important details: using the wrong code will make the penal order void. Another example is driving while one's license has been suspended or revoked. This is qualified in a different manner than driving without having previously obtained a licence, to which different codes apply. Mistakes are easily made, which can lead to the PPS having to revoke the penal order.

Hence, paradoxically, the front-line workers have discretion on the one hand while they operate within rather strict decision-making structures on the other hand. As such, our analysis was in line with more recent studies that questioned whether automation inevitably curtails front-line workers.⁸² The system of misdemeanour codes is one possible filter in their decision-making. This system is the result of policymaking: national policy thus influences decision-making on a primary level. Another possible filter in their decision-making is *local* policy, for example, when wanton behaviour is a particular problem in certain areas. These filters are complemented by the discretion of police and special investigating officers. The officers are not legally obliged to issue a penal order for all observed offences.

The CVOM has no direct influence on the decisions that law enforcers make on the street. Evidently, the CVOM assesses the asterisked cases before issuing a penal order and, as such, there is room for interaction with the police and/or special investigating officers. However, there is quite a distance between the police on the street and the public servant in a remote office building. As the name of the division implies, processing cases in large volumes is the main target. In the interviews with CVOM staff members, we were given the impression that, after a long time of rather negative publicity, the CVOM is striving for work processes to meet both quantitative and qualitative goals. However, all checks and procedures are incorporated internally and, as such, for a bystander, it remains unclear how quality checks on the work of the front-line workers (police and special investigating officers) are performed, if and how feedback is given to these front-line workers, and whether the CVOM staff have the discretion to question the possibly indiscriminate nature of a penal order issued or announced by the police.

The drivers for decision-making at the CVOM

At the CVOM, in contrast to ZSM, there appears little room for 'triage:' all cases eventually lead to a conviction. If there is room for exceptions (such as a hardship clause), this room is very limited, and the organisation's characteristic of working with high volumes of cases is likely to diminish intrinsic motivation to discuss possible exceptions. Professionals with higher education levels (i.e., assistant prosecutors) work as trainees, which means that they have to leave the

82 Buffat (n 39); Jorna and Wagenaar (n 40); De Boer and Raaphorst (n 42).

CVOM after a certain number of years (or even months). Hence, the circulation of staff is high.

We wonder if there is a meaningful connection between these professionals and the prosecutorial assistants. How do professional values that are intrinsically connected to decision-making by prosecutors⁸³ ‘trickle down’ to the bulk of workers (the assistants) who operate under mandated powers? Our informants at the CVOM explained that this is an issue of concern for the organisation. There is a national committee that decides what offences are eligible for the system of ‘convention codes.’ This committee⁸⁴ comprises representatives from the PPS, the police and Central Judicial Collection Agency. Codes that are rarely used can be removed from the catalogue. When a certain offence too often leads to discussion, this is seen as a signal that the offence is not suitable for the system. Additionally, codes are divided between assistants, so that people can focus on a cluster of codes rather than having to master all codes. Six teams of assistants work on the misdemeanours, and each team has a quality assurance assistant. However, because there are no official data available, we are unsure about how all of this functions in practice.

An ‘elephant in the room’ is that there is little transparency regarding the collaboration between policymakers, police officers, special investigating officers, officers at local government bodies (such as municipalities), processors (PPS/CVOM) and (last but not least) the suspects in the cases. Some of these partners in the criminal justice chain are represented in the committee that decides what cases are to be included in the ‘misdemeanour code’ system, but little is known as to the specific mode of operation of this committee.

The possible shortage of collaboration between the ‘links of the chain’ is also relevant when we look at the process of designing the criminal justice chain. What is the philosophy behind the ambition to process hundreds of thousands of criminal cases each year? Who are the people who decide which offences fall under the different ‘misdemeanour codes’ and what the ‘decision tree’ (with which assistants work) looks like? What parameters are relevant in those decisions, and how does changing these parameters affect the final decisions? Are there checks and balances for these designers?⁸⁵ And, if managers must manage dozens of decision-makers, how do they do that? Having access to all their decisions alone does not provide them with the tools to perform a meaningful check as to the quality of the workers’ decisions.⁸⁶

An example: COVID-19 infractions

In recent years, the CVOM was confronted with a significant caseload of so-called COVID-19 offences. In the first wave of COVID-19 outbreaks, the government

83 Lindeman (n 11).

84 Commissie Feiten en Tarieven Openbaar Ministerie, see www.om.nl/onderwerpen/feiten-en-tarieven [accessed 15 August 2022] and *Stcr.* 2022, 6346.

85 See also Bovens and Zouridis (n 32).

86 Buffat (n 39).

suddenly announced that neglecting some of the necessary precautions (eg keeping distance, no group gatherings) was considered a criminal offence (infraction) with a so-called asterisked misdemeanour code. From one day to another, special investigating officers (and, to a lesser extent, the police) were instructed to give notice of penal orders of €390 for each offence. Of course, there had not been time to assess whether these officers were up to this task (think, for instance, of the question how to establish the distance that two people have between them?).

Also, the CVOM was suddenly inundated with an extra caseload of what eventually turned out to consist of 100,000 cases in 2020 alone.⁸⁷ The organisation was simply flooded. In the summer of 2020, the government realised that the fines were too high, which led to significant mitigation at a later stage. Also, up to 40% of the initial cases had to be sent back to the police (or were summarily dismissed) because they lacked proper substantiation. To this day, there is a discussion regarding the legitimacy of some of the infractions that were enacted in a rush.

Conclusion

It is no secret that the Dutch PPS has been influenced by NPM in recent decades.⁸⁸ This is visible in a wide variety of organisational changes and in the introduction of standardised procedures to process frequently occurring offences, notably ZSM and CVOM. Managerialism and stratification have undeniably taken place, visible in sometimes comprehensive use of protocols and facilitated by automation. This development changed the work processes and division of work. The formerly central role of (legal) professionals—most notably the public prosecutors—has been largely diminished in these processes. In the 1980s, all decisions were taken by public prosecutors. Currently, a large proportion of cases is decided through mandate by police officers or public servants. While police officers and prosecution assistants are also professional workers, their more limited knowledge of the legal framework around prosecuting and their more restricted general oversight raise questions as to the validity of this consideration. Traditional police work (writing tickets) has been outsourced to special investigating officers, while legal assessment has been standardised to a degree where senior secondary vocational education is sufficient to perform this assessment.

From a managerial point of view, it may make sense to entrust local public servants with the basics of the administration of criminal justice. However, the organisation of their powers and the structure of accountability do raise concerns. Offences recorded by police officers are processed by prosecution assistants, while these assistants are operating under the authority (and by mandate) of the PPS, an institution that is—by law—represented by judicial officers. These findings are all

87 Numbers provided by our contacts at the CVOM. In a later stage, Lam stated that, including 2021, a total of 180,000 cases were added to the already existing caseload (Lam (n 55)).

88 Holvast and Lindeman (n 6).

the more concerning when we bear in mind that decisions to issue a penal order may have a significant impact. Criminal records can have severe implications for the citizens involved. Citizens who do not pay their fines can face coercive measures. The seemingly strict protocols and procedures do leave discretionary room for the front-line workers to make tailored decisions. However, we wonder on what grounds these decisions are made and if professional, ethical, and legal values are adequately considered. Our contacts at the CVOM assured us that this is an organisational concern, and various checks and balances appear to be incorporated into the work processes. Nonetheless, the deficiency of public information and transparency into how the ZSM and CVOM divisions work make it difficult to convincingly overcome our concerns.

To conclude, managerialism that results in a combination of stratification and automation can be problematic. Professional values and the rule of law are under pressure when case workers engage with elaborate sets of detailed protocols and automatised systems, while there appears to be little room for more fundamental considerations regarding the handling of certain cases. The risk is that no single person feels responsible any longer. This can result in a situation in which the system is a goal rather than a means. In the Netherlands, we have seen the potentially devastating consequences of such a situation in the childcare benefits scandal, in which thousands of citizens were crushed by a system intended to prevent tax fraud.

We do not reject the concept of ‘smart’ adjudication of justice, and we welcome the idea of having one national office that deals with most of the run-of-the-mill cases. However, it is important to increase the transparency about the way the PPS systems work and about the checks and balances that are in place in all parts of the criminal justice chain.