Occurrence of Disruptive Behaviour in Dutch Civil Procedures

An Empirical Study

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Abstract

In 2002, the civil procedure in the Netherlands was reformed. A fairly simple system of positive and negative stimuli was set up in order to ensure that the civil process develops in an efficient and timely manner. In this article, we explore the prevalence of process-disturbing behaviour as well as the response of the judges to such behaviour. Ninety eight civil cases were observed. We also conducted interviews with judges, lawyers and parties involved in these cases. The main finding is that in almost all cases there is at least one process-disturbing behaviour. On average there are 3.4 instances of such behaviour per case. Most often the disturbing behaviour is part of the categories communication problems. As it concerns the reaction of the judges, we see patterns of various strategies. Judges are not immediately responding actively to disturbing behaviour. However, when a certain threshold has been reached, the judges tend to take active steps and apply the tools they have. Most often, judges use different sorts of communication interventions. Procedural instruments for counteracting disturbing behaviour are used vey rarely. Our interpretation is that judges in the Netherlands are concerned about process efficiency but are also aware of the procedural justice and particularly interpersonal justice aspects of the process. We recommend that initial and ongoing legal education and training pays more attention on the communication and interpersonal skills and abilities involved in dispute resolution.

Keywords: civil procedure, case management, procedural justice, procedural sanctions, procedural rules.

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A. Introduction

I. Dutch Civil Law Procedures

During the past decades, several reforms of civil litigation law took place in various European countries. In 1996, English civil litigation law was changed because of the Woolf report.[1] In short, some of the main objectives of the Woolf reform in England were to achieve more efficiency in civil litigation law by improving courts' case management, development a fast track procedure for small claims and introduction of a fixed costs system for several of those tracks. Furthermore, courts were given more instruments to impose sanctions on parties who initiate frivolous litigation. Following the recommendations of the report, these sanctions were deemed to prevent, rather than to punish, non-compliance to rules and timetables.[2] Furthermore, the courts should intervene and impose sanctions on parties who conduct litigation in an unreasonable or oppressive manner even if they have not breached specific rules, orders or directions.[3]

Other European countries also reformed their civil litigation rules to establish more efficient procedures. In the Netherlands, since 2002, the *personal appearance* of parties was made a central moment in the civil dispute resolution procedure.[4] In most cases, this personal appearance is the first and last opportunity for the parties to face each other and address in person the court. The personal appearance has two main objectives. First, it gives the judge the possibility to inquire in detail the parties and their lawyers about the facts of the case. Second, at that stage the judge can explore whether the parties could settle the conflict instead of pursuing a third-party judgment. Most importantly, with the reform the judges were given tools to make sure that the civil procedures develop in a timely and cost-efficient manner. The parties and their lawyers were not only granted procedural rights but also made responsible for behaving in such a way which promotes procedural fairness and efficiency. A fairly simple system of positive and negative stimuli was set up in order to reward compliance and respectively punish non-compliance with the procedural rules. In that respect, since 2002, judges in the Netherlands have been given more tools to control parties' behaviour. For instance, in order to control the overall time of the proceeding, a judge can sanction a party for his continuous requests for delay. Another tool given to judges isto require lawyers to obey certain legal terms on the content of the writ, as well as to sanction parties if they do not obey these requirements.[5]

1 Lord H.K. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice in England and Wales*, DCA, London, 1996.

2 Recommendation 52.

3 Recommendation 54. Courts were also given more power to assess the costs of an application. For empirical data on the use of cost shifting *see* P. Sluijter, *Sturen met proceskosten. Wie betaalt de prijs van verstorend procesgedrag?*, Kluwer, Deventer, 2011.

4 W.D.H. Asser, H.A. Groen & J.B.M. Vranken, *Uitgebalanceerd. Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, Boom Juridische uitgevers, Den Haag, 2006, Ch. 4-5; J. van der Linden, *De civiele zitting centraal: informeren, afstemmen en schikken*, Kluwer, Deventer 2010.

5 Other examples are the introduction of the *substantieringsplicht, volledigheidsplicht* and the *waarheidsplicht*.

Overall, these tools grant judges a more active role but expects from the parties to meet more procedural rules.[6] It is believed that these measures will contribute to the efficiency and dynamic of the procedure.[7]

The importance of court hearings still increases and many studies have shown that they leave room for the judge to apply *case-management* tools as well as allow her to solve conflicts on a more individual basis.[8] This leads to another development after the 2002 reforms: civil law procedures have developed from traditional court hearings, where judges were acting as rather passive observers of the case development, into procedures in which the judge is positioned as an active case-manager. Case management approaches to legal processes and judicial dockets are not a new phenomenon. In essence, the core of this approach is that the individual cases, as well as the parties and lawyers involved, may require individual attention and application of a specific set of measures. For example, in court hearings regarding domestic matters, such individual approach is required. Case management also emphasises the need for the judges to focus not only on the merits but also on the time and costs aspects of justice. Individual planning and organization of the cases is believed to decrease time of disposition and reduce the costs for the parties and the court.

II. Procedural Justice and Process Behaviour

Since the eighties of the 20th century, *procedural justice* has taken a central part in the research of dispute resolution processes. The procedural justice theories posit that the *fairness* of the process is a very important part of how people experience justice. Tyler identified several elements of a procedure that make it seem fair to the parties.[9] He focused on four main dimensions: *voice/participation,*[10] *trustwor-*

6 Also *see* the 'Handleiding regie vanaf de conclusive na antwoord'.

7 R.J. Verschoof, H.M.M. Steenberghe & Y.E. Schuurmans, *De regiefunctie van de rechter*, Boom Juridische uitgevers, Den Haag, 2008; P. Vlaardingerbroek & M.W. de Hoon, 'Emotions in court and the role of the judge: Results from experimental hearings in divorce proceedings', *International Family Law*, 2010(4), 319-332. In general: W.D.H. Asser, H.A. Groen & J.B.M. Vranken, *Uitgebalanceerd. Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, Boom Juridische uitgevers, Den Haag, 2006; Verschoof, Steenberghe & Schuurmans 2008. Zie ook de verschillende publicaties rondom de pilot Conflictoplossing op maat (note 84).

8 For instance P. Vlaardingerbroek & M.W. de Hoon, 'Emotions in court and the role of the judge: Results from experimental hearings in divorce proceedings', *International Family Law*, 2010(4), pp. 319-332.

9 T.R. Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform', 45 *The American Journal of Comparative Law* 1997, 45, pp. 871-904, pp. 887-892.

10 If parties can participate in solving the conflict they feel more fairly treated during the procedure. In this respect parties also wish to express their views to the decision-maker(s).

thiness,[11] *interpersonal respect,*[12] *and neutrality.*[13] Experimental and survey research consistently finds that parties find the fairness of the process important and sometimes even more important than the outcome of the procedure.[14] Other inquiries, however, show that the importance of procedural justice is being overestimated and that the outcome of the procedure has greater significance than the fairness of the procedure.[15] Nevertheless, it is certain that fairness and particularly the perceived fairness of the trial are of utmost importance for the people who follow justice processes. Connecting to the topic of this article, the dimensions of trustworthiness and interpersonal respect are of particular importance. They both emphasize the relationship between the interactions that take place among parties, lawyers and judge(s) during the personal appearance, on the one hand, and the acceptance of the outcome, on the other hand. A deeper study of these relationships will provide insights about how judges apply the case management tools they were given and how this affects procedural justice.

1. *Process-Disturbing Behaviour*

There is a great variety of *behaviour* in court hearings and it is therefore difficult to describe how parties and lawyers behave. What can be distinguished is behaviour that, in a way, is disturbing the procedure, or behaviour that contributes to the procedure in a positive way. Obviously, in each individual procedure, *disturbing behaviour* may occur. To the best of our knowledge, disturbing behaviour in Dutch courts has not been empirically studied before. Therefore, we know little about the manifestations and consequences of process disturbing. How frequently does this disturbing behaviour occur? What is the exact meaning of disturbing behaviour and what is its influence on the procedure? What judges do or want to do to respond to it? Neither process-disturbing behaviour nor its antonym *cooperative behaviour*[16] has legal meaning. It covers many behavioural acts of

11 Parties wish to be treated in a fair way by the third party. According to Tyler, a key precursor for trustworthiness is that the third party (either judge, lawyer or mediator) makes clear to the parties that he has listened to the parties' statements and considered the arguments presented. Trust is an essential aspect in the willingness of the parties to except the outcome of the procedure.

12 Being treated politely, with dignity and respect, leads to parties feeling being treated fairly. Respect of one's rights and status within society also brings on feelings of fairness, according to Tyler. Interpersonal respect seems even unrelated to the outcome of the procedure.

13 People are influenced by judgments of the neutrality of decision-making procedures. Keynotes within this neutrality element are honesty, impartiality, and the use of impartial facts in decision-making.

14 For an overview of these inquiries *see* J.M. Barendrecht & A. Klijn (eds.), *Balanceren en vernieuwen, Een kaart van sociaal wetenschappelijke kennis voor de Fundamentele Herbezinning Procesrecht*, Raad voor de rechtspraak, Den Haag, 2004, pp. 10-11.

15 At a symposium in the Hague in 2012, Tyler once more argued that the procedure itself is more important than its outcome. According to Tyler, the judge's authority strongly depends on his level of listening to the party. For an overview of different analysis *see* Barendrecht & Klijn, 2004, pp. 10-11.

16 S.S. Gensler, 'A Bull's-Eye View of Cooperation in Discovery', *Sedona Conference Journal*, 2009, p. 363, p. 364. (Cooperative behaviour in its broader definitions encompasses all types of behaviour exposed in a process.)

the parties in a procedure that can be qualified as conflicting with the fundamental principles of a due process. We qualify process-disturbing behaviour as 'procedural acts that hamper the efficiency[17] of the procedure and do not contribute to the quality of the outcome of the procedure'.[18] These procedural acts can be formal such as late handing of procedural documents. They can also be factual such as annoying acts during a court hearing, for instance constantly interrupting another party during the hearing. Sluijter defines disturbing behaviour as procedural actions that: "despite the extra time and costs do not lead to a better outcome and/or procedural quality."[19] In his research, Sluijter focuses on the use of cost orders as response to negative behaviour. Cost sanctions are relatively rarely used to correct non-compliance with procedural rules. His qualitative research (based on in-depth interviews with 18 judges from various types of courts) on various instances of behaviour that disturbs the normal development of the process shows that the most frequent instances of disturbing behaviour are late depositions of motions and evidence and frivolous inquiries.[20]

2. Process-Cooperative Behaviour

Although *cooperative behaviour* does less frequently occur in court proceedings compared to disturbing behaviour (cooperative behaviour in 20% of all observed hearings; compared to 94% process-disturbing behaviour), it is important to map its frequency and influence. Knowledge about positive process developments will add to the legal and social understanding of procedural law and dispute resolution processes. It is important to know when and why parties show cooperative behaviour. In this way, the policy makers can better device policies and rules which increase cooperation and compliance. Furthermore, it enables us to analyze more comprehensively the case-management tools applied judges.

Cooperative behaviour can be qualified as 'acts of parties or lawyers that facilitate the procedure to develop in due time and which improves the quality of the outcome of the procedure'. Examples of frequently occurring cooperative behaviour are, for instance, handing in on time procedural documents or having a cooperative attitude towards the other party when agreeing on the progress of the process. It is difficult to find a legal basis for this behaviour. However, in the dispute resolution literature, it is commonly accepted that the likelihood of settlement increases if parties act cooperatively, are willing to listen to the other parties' statements, try to communicate clear and accurate and try to prevent

17 In this respect a proceeding is inefficient when parties or the court have to deal with costs that are unnecessary, avoidable.

18 Lindijer, 2006, p. 503 defines process disturbing behaviour as "behaviour which causes more disadvantages for the other party or for the society that is necessary.....". Sluijter, *Sturen met proceskosten*, 2011, p. 93.

19 Sluijter, 2011, p. 93.

20 *Ibid.*, pp. 30, 93, 106. The reason that is most often provided for this seemingly passive behaviour is the insignificance of the problem as well as the need for legal certainty. The judges also imply that there are other, more appropriate methods to respond to react to procedural behaviour than simply using the system of sanctions (pp. 132-135).

escalation of the conflict.[21] Obviously, such behaviour helps to improve the efficiency and outcome of the proceeding.

Due to space limitations in this article we will mainly focus on the occurrence of disturbing behaviour in Dutch civil proceedings. Cooperative behaviour will be discussed in detail in a forthcoming article.

III. Research Question and Methodology

The 2002 reform of Dutch civil procedure gave judges more instruments to award parties' compliance and reprimand non-compliance to procedural rules. For further development of the legal and social meaning of procedural law, it is important to examine the particular behaviour of parties and lawyers, on the one hand, and the reaction of judges on the other hand. How do judges actually cope with their new position and whether or not they make use of their new tools to respond to the behaviour of parties and lawyers during court hearings? According to the UK's Civil Ligitation Costs Review, judges seem reluctant to apply the tools they have to sanction parties.[22] There is little existing research on this topic, however.[23] Therefore in this article, we will focus on the central question: *What negative behaviours occur in Dutch civil procedures and how do judges apply the available instruments tools to respond to such behaviour?* Subsequently, we will address the question whether additional procedural tools and instruments are required to enable judges to exercise more control over the development of the civil procedures?

To answer this research question, in 2010, 98 court hearings of two Dutch District Courts[24] were observed in order to record and understand how much process-disturbing behaviour takes place, who is involved in it and what judges do as response. It was expected that in interlocutory proceedings more disturbing behaviour might take place,[25] compared to court hearings in normal civil proceedings. Therefore, we distinguished our observations into 'normal' court hearings (hereafter: court hearings; in Dutch – *comparities*) and these interlocutory proceedings (in Dutch – *kort gedingen*). In total, 46 interlocutory proceedings and 52 court hearings were observed.[26] All of these hearings were randomly selected

21 M. Pel, *Verwijzen naar mediation*, Sdu, Den Haag, 2004, pp. 32-34; F. Glasl, *Help! Conflicten: heb ik een conflict of heeft het conflict mij?*, Uitgeverij Christofoor, Zeist, 2001.

22 Zuckerman, 2009; Jackson, 2009.

23 R.L. Denyer, 'Non-compliance with case management orders and directions', *Criminal Law Review*, 2008, p. 784. (At this point it is worth bearing in mind what Sir Robin Auld said: "I have anxiously searched here and abroad for just and efficient sanctions and incentives to encourage better preparation for trial. A study of a number of recent and current reviews in other commonwealth countries and in the USA shows that we are not alone in this search and that, as to sanctions at any rate, it is largely in vain.")

24 In the Disctrict Court of Breda 46 court hearings were observed, in Den Bosch 52.

25 In interlocutory proceedings parties are under more pressure of time to hand in writs and other documents. This may cause higher frequencies of disturbing behaviour for instance.

26 During the observations it turned out that many of the interlocutory proceedings were being cancelled short before the commencement of the hearing. As a result, we were not able to observe as many interlocutory proceedings as court hearings given the timeframe of the research project.

for observation from the court register. One of the selection criteria was that the hearings should not be part of the same procedure, thus they were unrelated to each other. The actual observations were conducted by law students who were trained to fill out standardized observation protocols. In total, 98 court hearings were observed. Complementary to these observations, we sent questionnaires to the involved judges, lawyers and parties. Judges returned 46 usable questionnaires, parties 62 and lawyers 110.

In order to be able to perform the analysis, we looked for frequently occurring examples of disturbing and cooperative behaviour in existing literature and we presented these examples to a group of experts (practicing lawyers, judges and researchers) who provided feedback. The list of behaviour that resulted from this inquiry was used in the observation protocols and questionnaires. Table 1 indicates the different categories of process-disturbing and process-improving behaviour of parties and lawyers we identified and used during our research.

IV. Outline of the Article

First, we discuss the behaviour of parties and lawyers in Section 2.1. In Section 2.2, we present the data from our study. In Section 3, are discussed the major findings and policy recommendations are outlined policy recommendations. Section 4 concludes the article.

B. Empirical Data

I. Behaviour of Parties and Lawyers

1. Facts and Figures

As mentioned before, 46 (47% of all observed hearings) of the observed court hearings were interlocutory procedures, the rest being 'normal' court hearings. Regarding the duration of the hearings, on average the observed hearings lasted a little bit over two hours (124 minutes). In most of the observed hearings the two parties were present together with their lawyers. Both plaintiffs and defendants were present in nine out of ten cases. Their attorneys were present even more frequently. In 98% of the observed hearings, the plaintiff's counsel was present and in 96% of the cases, the defence attorney was in attendance.[27] In terms of subject matter, about one third (33%) of the observed hearings are classified as general contractual law cases. The second most frequent category is commercial cases (22%), followed by family cases (13%) and rights of seizure and execution (9%).

27 It should be noted that in the court hearings that were observed it is compulsory to have legal representation of the plaintiff.

Table 1 Categories Case-Disturbing and Case-Improving Behaviour of Parties and Lawyers

Categories	Behaviour
Behaviour related to the commencement of the proceedings	*Disturbing:* No show Be late Without reason applying for delay Absent interpreter No mandate Other person than plaintiff or defendant shows Not prepared Handing in files during the hearing Party is insufficiently informed about the purpose of the hearing *Improving:* Agree to an interval after files were handed in too late by the other party
Behaviour related to finding the truth	*Disturbing:* Continuously not (clearly) replying to the judges question Lawyer replies to the question instead of the client Continuously not (being willing to) understand(ing) the question Telling lies *Improving:* Replying briefly and clearly Spontaneously providing useful information
Behaviour related to the structure of the case files	*Disturbing:* Raising irrelevant matters Insufficient knowledge regarding the content of the case Inferior preparation Plea differs (substantially) from the files Incomplete files Irrelevant files Irrelevant statements or statements without any chance to success *Improving:* Clear files Being cooperative in agreeing on the progress of the case Pre-consultation
Behaviour related to communication interaction with others	*Disturbing:* Directly turn to the other party Constantly interrupting another Constantly talking/discussing with the client Disorderly talking Interference from the public gallery Taking more time than admitted Continuously asking for making a record Continuously repeating ones position statement Per se wanting to plea

Table 1 (continued)

Categories	Behaviour
Interpersonal communication and attitude	*Disturbing:* Negative attitude To be impolite towards the other party Negative, non-verbal reactions towards the other party Negative, verbal reactions towards the other party Dominate the hearing Flirting, claiming attention Disrespecting professional distance
	Improving: Positive attitude To be polite towards the other party Non-verbal positive reactions towards the other party Verbal positive reactions towards the other party
Other	

There is an interesting relationship between the type of case and the *gender and age* of the presiding judge. More often, male judges were presiding over interlocutory proceedings, whereas female judges significantly more often chaired court hearings. Interlocutory proceedings are specifically challenging matters due to their strict time limits. Interlocutory proceedings often have to be scheduled and settled in a limited time frame with relatively little preparation from the court and the lawyers. This difficulty may have certain relationship to the mean age of the judges presiding over these proceedings, which was 55 years, whereas the mean age of the judges dealing with court hearings was 49 years.[28] Shortened proceedings may require more procedural experience and focused managerial approaches which are likely to correlate with the overall experiences of the judges. Therefore, as a result of the gender imbalance, we see that interlocutory proceedings are decided by relatively more experienced judges who are also predominantly male.[29]

2. *Differences between Court Hearings and Interlocutory Proceedings*

One of the most sober questions during the discussions at the design phase was whether within a sample of 98 hearings there will be sufficient number of instances of process-disturbing behaviour. At the initial stages of this research, some experts were of the opinion that these are extremely rare events and samples as small as this will not capture the phenomenon. The results from the research, however, show convincingly that virtually in every observed hearing there is at least one incidence of disturbing behaviour. In 94% ($n = 92$) of the hearings the observers recorded one or more occurrence of disturbing behaviour. In total, 340 discrete cases of process-disruptive behaviour were identified, which means that on average there were 3.5 disturbances per hearing. If we exclude the

28 Difference is statistically significant, $F = 22, p < .00$.

29 It is beyond the scope of this research to study the relationship between gender and judicial experience in more detail.

hearings in which no disturbing behaviour was observed, the mean number of disturbing behaviour sets at 3.7 per hearing. In three hearings, the observers recorded the maximum possible number of 10. With hindsight of the results, we also can say that to a certain extent the expectations of the experts materialized. Only 5% of all observed disturbances can be classified as serious instances of non-compliance with procedural rules. The vast majority of the identified disturbances were relatively 'low-level disruptions', which occur one or more times virtually in every hearing.

There is a significant difference between the occurrences of disturbing behaviour in interlocutory proceedings and in court hearings: on average, there are four disruptions in court hearings and about 2.9 disruptions in interlocutory proceedings. This difference is substantively and statistically significant.[30] The finding suggests that both types of hearings are structurally different and that this difference affects the behaviour of the parties. In interlocutory proceedings, the parties exchange fewer papers at the pre-trial stage and have less time to prepare. Initially we suspected that these limitations would lead to more disruptions due to opportunistic behaviour or simply because of mistakes due to limited time to prepare. The finding suggests that the opposite might be true. Non-compliance to procedural rules happens more often in court hearings where, in fact, the parties have more time to prepare for the hearing than in interlocutory proceedings.

How can we explain this finding? First, we have to acknowledge that the somewhat less formalistic and results-oriented approach in interlocutory proceedings drives the attention of the participants and the judge towards the swift resolution of the dispute. With less attention to formal requirements there is less ground for disturbing behaviour. Indeed, the data shows that in court hearings there are much more disruptions referring to the categories of 'structure of the case files' and 'finding the truth'. With more emphasis on exchange of documents and discovery and validation of evidence comes more disruptive behaviour. Thus, in the less structured interlocutory proceedings we see relatively more disruptions related to the development of the process. On overall, however, disruptions take place more often in court hearings.

Considering the fact that court hearings last longer than interlocutory proceedings, it should not be surprising that there is a positive correlation between the number of disruptions and the duration of the hearings.[31] Also hearings in procedures which are more complex factually and legally last longer but also exhibit more opportunities for disturbing behaviour. Third, in hearings that last longer there is simply more time for more disruptive behaviour by the parties.

3. *Frequency and Type of Process-Disturbing Behaviour*

What kind of disturbing behaviour occurred most frequently? As is presented in Table 2, communication problems are the most frequently occurring category of disturbances in the observed hearings. About 27% of all registered disruptions belong to this category. Within communication problems, the most frequent dis-

30 Difference is statistically significant, $F = 7.5$, $p < .01$.

31 $r = .33, p < .00$

Table 2 Frequency of Process-Disturbing Behaviour

Categories of Case-Disturbing Behaviour	**Number**	**%**
Behaviour related to communication interaction with others	91	27
Interpersonal communication and attitude	71	21
Other	65	19
Behaviour related to finding the truth	47	14
Behaviour related to the structure of the case files	39	11
Behaviour related to the commencement of the proceedings	27	8
Total	**340**	**100**

turbing behaviour is when one of the parties addresses directly the other party.[32] Interruption of the other party or the judge is another instance of a behaviour that interrupts the orderly development of the hearing. Talking to others when not allowed is another illustration of disturbing behaviour that affects the normal development of the hearings.

Below are a few concrete examples of situations that were identified by the observers as disruptive behaviour of this particular category.

> "The claimant and her lawyer were talking to each other while the lawyer of the defendant was talking to the judge."
>
> "During the hearing a mobile phone rung and the defendant left the court room to talk."
>
> "The claimant addresses the lawyer of the other party directly during the pleadings."

Problems regarding interpersonal communication and attitudes refer to the content of the communication processes that took place during the hearings. This is the second most frequently occurring category of problems accounting for 21% of all registered disruptions. Examples of behaviour belonging to this category are verbal or non-verbal expression of negative attitudes; conducting rudely towards the other party; dominant behaviour, etc.

> "The two lawyers were literally angry at each other."
>
> "The lawyer of one of the parties perturbed the process through irrelevant arguments which were tangentially related to the case."
>
> "One of the lawyers reproaches the other side in a very direct way. Seems that he is not taking distance from the case and reacts personally."

32 In the continental civil procedure, the general rule is that the parties interact only through the court. Direct communication is considered to be a breach of the procedural rules.

In continental civil procedures, the judge is responsible for establishing the material truth. About 14% of the observed disruptive behaviour relate to behaviour which obstructs the court in its attempts to discover and validate the facts of the case. In this category, the observers were looking for instances of repeated vague answers to the questions of the judge or failure to understand the question; lawyers giving answers instead of their clients; and providing information which was not true.

> "One of the parties repeatedly provided ambiguous answers to the questions of the judge."
>
> "The judge finds that the claim is incomplete and that the plaintiff is not encouraged by his lawyer to provide clear answers."
>
> "It looked like the defendant did not tell the truth."

To a large extent, the timely and uninterrupted development of court hearings is contingent on the documents exchanged between the parties. Even in interlocutory proceedings, the parties exchange documents before the actual hearing.[33] About 11% of the registered disruptions refer to the category "Structuring of the content of court documents". Some of the instances in this category are: documents presented to the court are insufficiently prepared or irrelevant; parties are not well prepared; irrelevant or unmerited requests.

> "The judge reacted when the plaintiff presented irrelevant material in the case files."
>
> "According to defendant's lawyer there were unnecessary requests made in the case files."
>
> "There was an argument regarding a leased car. The presented facts concerning the details were not correct."

The lowest number of occurrence of disturbing behaviour ($n = 27$, 8%) was recorded in the category summarising behaviour which disturbed the normal commencement of the observed hearings. In this category, the observers were looking for disruptive behaviour, such as party is not showing up or coming too late; party asks for unmerited adjournment; attorney is not properly authorised to represent the party; or during the hearing the party presents papers that had to be presented earlier.

> "First, there were documents that were presented too late."
>
> "Defendant's lawyer did not receive the documents submitted by the lawyer of the plaintiff. Because most documents and requests were known by the

33 *See* Linden, 2010.

defendant, at the end of the hearing the judge decided to treat these documents as being handed in during the court hearing and therefore the documents needed to be sent on."

People initiate justice procedures to enforce, acknowledge or challenge rights and legitimate interests. Thus the parties and their counsel are (boundedly) rational agents who are trying to attain identifiable goals. Extending the assumption of goal-seeking behaviour to the actual development of court procedures, we can reasonably expect that the parties are motivated and driven by the prospect of achieving certain goals and strategies. Procedural behaviour is one of the main tools in the pursuit of these strategies. Hence, we can conjecture that procedural behaviour and particularly disturbing behaviour does not happen randomly or at least is not completely random. Some portions of disturbances are probably triggered by individual circumstances but to a large extent the behaviour of the parties in civil law procedures is directed by the goals which are underlying their aspirations and actions. Thus we presuppose that in some occasions, the parties deliberately get involved in disruptive behaviour. Therefore, part of the disturbances should also be seen as dimensions of one or more procedural strategies directed towards achievement of utilitarian goals. In the next section, we look at the occurrence and co-occurrence of disturbances in an attempt to disentangle the procedural strategies of the parties.

In most hearings, there were more than one instances of disturbance. We also find that often different types of disturbances occur in the observed hearings. What this means is that the observers report various types of problems per case. In essence, our question here is whether there is a relationship between the different categories of disturbances or we can say that disruptive behaviour occurs more or less randomly. In order to explore the relationship we conducted a hierarchical cluster analysis[34] on the first three occasions of disruptive behaviour per hearing. Two clusters were identified meaning that based on the similarities between the registered disruptions, we can group the cases into two sets based on similarity. Thus each case was classified as belonging to one of the two clusters.

There are significant differences in the types of disturbing behaviour reported in the two clusters. In cluster 1, the two most frequently occurring disturbances are from the categories *Orderly development of the hearing* (39% of the responses) and *Interpersonal communication and attitude* (24%). Different picture emerges from the analysis of the second cluster. *Finding the truth* (21%) and *Structuring of the content of the court documents* (19%) are the most prevalent instances of disturbing behaviour in the second cluster. What might explain this difference? We find that the clusters differ by type of procedure. Most of the court hearings (63%) are classified in cluster 2, whereas most summary procedures (82%) make part of cluster 1.[35] What this means is that in summary procedures there is significantly more PDB which relates to the process whereas the PDBs which are more prevalent in the second cluster might potentially affect the outcome. As discussed

34 Describe the procedure and the results.

35 Difference is statistically significant, Chi-square = 13.3, $p < .00$.

Table 3 Parties Involved in Process-Disturbing Behaviours

	N	Percentage
Plaintiff	113	25
Lawyer plaintiff	130	28
Defendant	103	22
Lawyer defendant	101	22
Other	14	3
Total	**461**	**100**

above in another context, we see that the structural differences in the two types of procedures are related to different types of non-compliance with process rules.

4. Who is Involved?

All parties in the observed hearings are relatively equally involved in performing disturbing behaviour. Our data, however, does not indicate which party has triggered the particular disruption and which was involved in a way of responding actively or passively to the event. On average the plaintiffs and their lawyers were slightly more frequently reported as implicated in performing disruptive behaviour (see Table 3).

Our observers were instructed to record the first ten disruptions. The gathered data do not suggest that there is a clear pattern in the way in which the different parties are becoming involved in behaviour which delays or otherwise disturbs the observed hearings. Thus we do not see indications in the data that some parties are more active at certain point of the hearing. What we see, however, are interesting trends in the ways in which the parties get involved into specific types of disruptive behaviour. For instance, when the first disruption concerns the initiation of the proceedings, it is more likely to see that it is caused by the plaintiff (21% of all disruptions in which the plaintiffs were involved) or his lawyer (32%). For comparison, the defendant (9%) and his lawyer (9%) were much less frequently engaged with this type of disruption during the first recorded instance of disturbing behaviour in the particular hearing. These dynamics shift, however, during the second disturbance when the defendant (19%) and defendant's lawyer (19%) are more often involved in PDB related to the commencement of the hearing. Clearly, the data suggests that there is a sort of an order in which both parties are engaged in the process. We can see how the procedural dynamics shift from the plaintiff's side to the defendant's side when the court is taking the first steps to ensure the normal development of the hearing.

Similarly, we see that PDBs connected to finding the truth at the beginning are more frequently conducted by claimants. Later (third recorded PDB) during the hearing, the involvement dynamics alter again. The observations show that after the first round of actions, the defendants conduct more PDBs from this particular category. Interestingly, behaviour that obstructs the process of arriving at

the material truth is mostly caused by the lay parties in the hearings – plaintiffs and defendants. Lawyers are significantly less often involved in that sort of PDB. The implication here might be that the exchange of statements, deposition of evidence and in general the procedural rules are not that clear for the non-professional participants in the process so their behaviour is more likely to be seen as disruptive. On the other hand, lawyers as repeat players are much more knowledgeable and better prepared to participate in the process of collecting, challenging and assessing evidence.

The plaintiff and her lawyer are also more likely to get involved early on into PDBs from the category of interpersonal communication and negative attitude. Again, this finding reflects the general development of the procedure in which the claiming party is more active at the beginning after which the initiative shifts to the defence side.

Here, it should be noted that the sequences do not necessarily mean that they occurred at the beginning of the procedure or at any specific time. For many cases, there were less than three occurrences which might have happened towards the beginning of the hearing. It is possible that in other cases PDBs occurred at the end of the hearing. Nevertheless, we see that the four main process participants are relatively equally participating in the most frequently occurring PDB – orderly development of the hearing. There is some variation, but in general, the trend is that all four participants in the hearings are evenly involved in PDBs of this category.

Lastly, it should be noted that the lawyers on both sides were significantly more often implicated in activities from the *Others* category. Between 20% and 30% of the PDBs conducted by lawyers were not categorized in any particular group of behaviours. Apparently, despite the trainings, it was not easy for the observers to classify the procedural actions of lawyers. It is also demonstrating how difficult it is to isolate and classify a single event from the overall strategy of the lawyers representing their clients in court hearings.

II. Responses of Judges to Process-Disturbing Behaviour

1. Facts and Figures

Above, we discussed that observers recognized process-disturbing behaviour in almost all of the observed hearings. If there is a lot of disturbing behaviour, can we expect similarly high rate of counteraction on behalf of the judges? We are also interested to find out more about the tools they use. In view of the 2002 reforms, we are particularly interested whether and to what extent judges use the procedural instruments to guide the process and ensure compliance with the rules of procedure.

Judges have different options when a PDB occurs. First, they can select a passive strategy and do nothing. Such response might look contradictory but it may be also very rational reaction to the multitude of small interruptions which occur in the court room during hearings. Had the judges paid attention and responded to every single interruption it would have been likely that the time of disposition and invested resources significantly increases. More responses also mean more

Table 4 Categories of Responses to PDB

Category	Number	%	% without 'Doing nothing'
Communication interventions	225	59	79
Doing nothing	94	25	–
Other	47	12	16
Procedural instruments	9	2	3
Maintenance of order during hearing	5	1	2
Total	**380**	**100**	**100**

confrontation in the court room – something that the continental civil procedures and particularly the Dutch civil procedure do not tolerate. It should be noted that it is also possible that what looks like a passive strategy is actually a measurement error. What an observer perceives and reports as PDB might not be always perceived in the same way by a judge. As repeat players, in court procedures, judges know well the consequences of different types of behaviour and can distinguish important from unimportant occasions. It is also possible that two judges might perceive a behaviour in disparate ways. Personality traits, affective states, professional and personal experience, sometimes even physical capabilities or constraints are among the countless factors that might affect how a judge perceives and labels procedural behaviour.

If an active strategy is used the judge takes some action and moves further with the hearing. It is also possible that the judge responds to a PDB with multiple actions. Below we explore how observers saw the actions of judges when a PDB was spotted and recorded.

In total, there are 380 reactions registered to the 340 instances of PDB in the observed hearings. However, 94 of these reactions were classified as "doing nothing" so effectively there are 286 active responses by the judges to PDBs (Mean = 0.84, less than one reaction per PDB). This means that there were more recorded PDBs than active responses to these occasions.

Large proportion of the instruments used by the judges to respond to the observed PDBs fall in the category 'Communication interventions' (Table 4). When the category 'Doing nothing' is excluded, the communication interventions account for about 4 out of every 5 active (79%) responses to PDBs. The most frequently used communication tool used by the judges is to talk to the parties or their lawyers about the particular disruptive behaviour. Another frequently occurring response from the communication category is verbal expression of discontent with the behaviour of the parties. Judges could show discontent implicitly (direct verbal – examples) or explicitly (indirect verbal – jokes, ironic comments, etc.). Direct or indirect verbal communication was used in 15% of the PDBs. Nonverbal communication, another tool from the Communication interventions tools, is used less often – in 11% of the instances of disturbing behaviour.

Procedural instruments or tools to preserve the order during the hearing are used very rarely. The former category accounts for 3% (*n* = 9) and the latter for 2% (*n* = 5) of all active responses to PDBs. Obviously, judges rarely rely on such instruments and perhaps in the most aggravated occasions of disturbances. As we discussed above, in the vast majority of observed PDBs the judges prefer not to respond to the behaviour or simply to deal with the issue addressing the party/ies verbally or non-verbally.

2. *Responses per Category Instruments*

When do judges use one or another category of response? We can reasonably expect that different types of PDBs are countered with different instruments. As discussed above, procedural sanctions and maintenance of order measures rarely take place so we will not include these two categories in the cross-tabulation with the observed types of PDBs.

In general, the data shows that there is a relationship between the categories of PDBs and the types of interventions.[36] Some of the response instruments occur more often in particular categories of PDBs. For instance, judges rarely assume passive strategy when the PDB relates to finding the truth or structuring of the content of the case file (Table 5). Apparently, when there is a behaviour which imperils the decision on the merits, the judges in the observed hearings undertake rather active strategies and use tools from their procedural arsenal. Again, these strategies rarely involve procedural instruments such as cost-related sanctions but rather emphasise on some sort of communication interventions. On the other hand, judges are much more likely to do nothing when the particular behaviour disturbs the orderly development of the hearing or the interpersonal communication between the actors in the hearing. Such interruptions affect the development of the procedure but are unlikely to affect negatively its outcomes. While still having control on the procedure, the judges are reluctant to react with harsh measures to seemingly petty procedural disruptions.

Of particular interest is the category of interpersonal communication and attitude. Judges were found to use frequently communication tools to counteract disturbance of the orderly development of the hearing (27%).

3. *Differences between Interlocutory Proceedings and Court Hearings*

The structural differences between summary proceedings and court hearings inevitably affect the ways in which judges counteract non-compliance to procedural rules. As we discussed above, in court hearings there is more structure and also perhaps higher expectations about the process behaviour. Alternatively, in interlocutory proceedings the process is expedited and simplified.

There are clear differences between the two types of procedures in terms of responses to PDBs (Table 6). In court hearings, there are much more often occurrences of PDBs of the categories of arriving to the truth and structuring of the content of court documents. Assuming that arriving at the truth and the structuring of the content of court documents facilitates the decision on the merits, this

36 Chi square = 78.34, $p < .00$.

Table 5 Responses per Process-Disturbing Behaviour

	Communication Interventions	Doing Nothing	Other
Behaviour related to the commencement of the proceedings	5% (8)	11% (10)	5% (2)
Behaviour related to finding the truth	22% (38)	5% (4)	3% (1)
Behaviour related to the structure of the case	13% (22)	1% (1)	31% (12)
Behaviour related to the interaction with others	27% (47)	37% (32)	13% (5)
Interpersonal communication and attitude	15% (25)	38% (33)	10% (4)
Other	18% (31)	8% (7)	38% (15)
	100% (171)	100% (87)	100% (39)

is not surprisingly to find that judges use communication tools more frequently than in interlocutory proceedings when they are under more time-pressure. Assuming higher level of legal and factual complexity in court hearings it is understandable why judges are cognizant about behaviour which might obstruct the process of deciding on the merits of the case. Conversely, in interlocutory proceedings, judges are much more likely to do nothing when the PDB concerns the interpersonal communication between the parties in the proceedings or the orderly development of the case. This may be caused by the fact that the parties but also the court are under more stress to deal with the issue in a limited time frame.

4. *Passive Strategies of Judges*

Responses of judges to PDBs can also be seen in a dynamic perspective. In many hearings, there are more than one PDB so we are interested to find out if there are patterns in the ways in which judges respond to these behaviours. Specifically we are interested to observe the distribution of passive response strategies across the development of the case. Two hypotheses are possible here: one stating that judges are using passive strategies evenly during the process and the second is that there are actual differences in the response patterns during the procedure. The proposition might also mean that some judges are more reluctant to get involved into active response whereas others take more active stance.

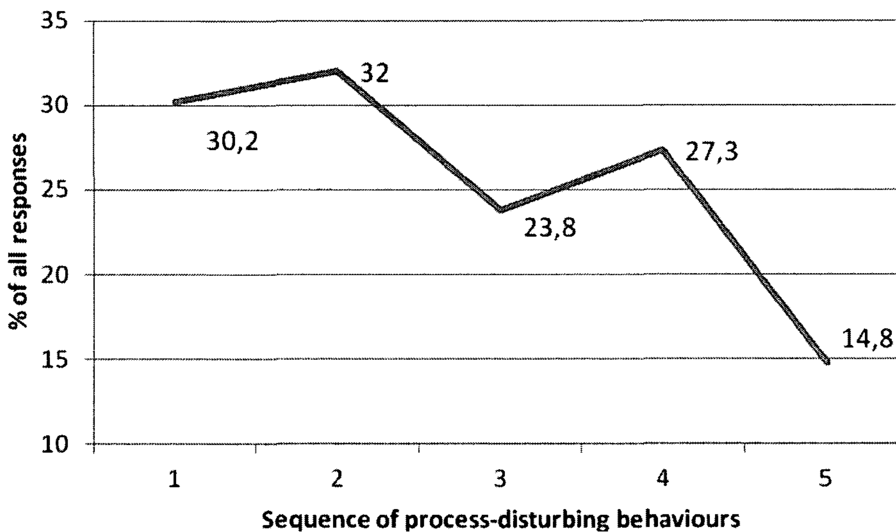
In order to inspect the relationship we plot the chronological number of a PDB on the horizontal axis and the percentage of 'doing nothing' on the vertical axis (Figure 1). What we see is a non-linear but noticeably decreasing line meaning that with more PDBs observed in a case the proportion of passive strategies tends to diminish. During the first two PDBs per case we see that almost a third of the responses are passive. When the fifth PDB occurs we see that about 15% of the responses are classified by the observers as 'doing nothing'.

One possible interpretation of Figure 1 is to suggest that there is a threshold above which judges become more assertive in terms of ensuring control over the procedural development. When this threshold occurs is difficult to say. Very likely

Table 6 Differences between Types of Procedures

	Court Hearings			Interlocutory Proceedings		
	Communication Interventions	Doing Nothing	Other	Communication Interventions	Doing Nothing	Other
Behaviour related to the commencement of the proceeding	5% (6)	13% (5)	11% (2)	4% (2)	10% (5)	0% (0)
Behaviour related to finding the truth	26% (31)	11% (4)	6% (1)	14% (7)	0% (0)	0% (0)
Behaviour related to the structure of the case	15% (18)	3% (1)	39% (7)	8% (4)	0% (0)	24% (5)
Behaviour related to the interaction with others	23% (27)	34% (13)	17% (3)	39% (20)	39% (19)	10% (2)
Interpersonal communication and attitude	13% (15)	32% (12)	6% (1)	20% (10)	43% (21)	14% (3)
Other	19% (23)	8% (3)	22% (4)	16% (8)	8% (4)	52% (11)

Figure 1 Passive strategies during the process



it depends directly on the type of process and dispute as well as predispositions of the parties. With so many factors it is difficult to objectify in any meaningful way this threshold which triggers judges to abandon passive strategies and embrace active responses.

C. Analysis and Recommendations

Our main finding is that in almost every hearing, there is one or more instance of process-disturbing behaviour. On the other hand, relatively rarely these occurrences are so serious that they might jeopardize the normal development of the hearing and ultimately the delivery of justice. So, is the glass half full or half empty? We think that this finding has significant practical and policy implications in two dimensions – (a) the importance of interpersonal communication skills, and (b) strategic use of approaches to steer the adjudication process and guarantee procedural justice.

Our observers identified PDB in 98% of the hearings. Vast majority of these events are relatively minor and have relatively negligible impact on the normal development of the procedure and the public and private resources consumed by the process. What is important, however, is that if left unattended, the minor instances of PDB might lead to more serious encroachments on the procedural rules. We see that the judges in the observed hearings are not rushing with sanctions but, when certain threshold has been reached they are much more likely to take active steps and impose their control on the procedure. In a way, they allow for certain fluctuation but also are alert about the possibility that too much non-compliance might put the normal development of the process as well as its outcomes at risk. In this way, judges are much more active than has been suggested in literature.

Judges have to deal with disturbances of the process, but they face frequently trivial and humdrum situations. Disputants are talking to their lawyers, interrupting each other, or making inappropriate suggestions. There is little sign of grand schemes of complicated patterns of procedural actions which benefit one party at the expense of the other party, the court and the general public interest. There should not be a problem with findings like this if judges are equipped to identify and respond properly to such behaviour. In fact, we see that the judges in the observed cases employ subtle but perhaps well crafted strategies to respond to such PDBs. Mostly, they use communication tools to influence deliberate or accidental gaps which lead to non-compliance to procedural rules.

What is important from practical and policy perspective is that apparently most of the interactions regarding PDBs in civil procedures do not involve only legal skills and knowledge. These are mostly matters of interpersonal and communication skills. Traditionally, the curriculums of law schools in the Netherlands and also in most other countries are rarely paying close attention to the interactions that take place during legal procedures. What the current study pinpoints is that just teaching future lawyers and judges how to apply the procedural instruments to disturbing process behaviour will help them in about 5% of the hearings but will not tell them what to do in the remaining 95%. Another aspect is that the policy developments and legislative amendments around the world are usually preoccupied with these 5% of cases which are being solved with standard methods and overlook the bulk of cases in which disruptive behaviour can effectively be addressed with the various tools of interpersonal communication. It should be emphasised again that the importance of interpersonal justice applies

equally to judges and lawyers. In the Dutch context for instance, we can claim that the lawyers need much more training in interpersonal instruments than judges who are introduced to the topic during their post-graduate trainings.

With accumulation of personal and professional experience as well as during the mentioned professional trainings, judges are supposed to develop and refine their strategies to deal with process disturbances. Such strategies, however, can hardly be unified and codified. Inevitably, different judges and courts develop their own approaches towards application of soft tools that guarantee procedural compliance and efficiency. The lack of unified approach, however, raises challenges for the legal certainty as well as the principle of equal treatment. Our research also showed that judges with more experience are actually assigned to cases with less procedural non-compliance. Hence, younger and less experienced judges have to deal with hearings in which there are more PDBs. The caveat here is that there might be some sort of reverse causation at hand – that is, more experienced judges know better how to prevent PDBs so there is less occurrence in their hearings. Our sample of cases, however, is rather limited and therefore the relationship between judges' experience, type of cases and prevalence of PDBs should be considered cautiously. Our recommendation is to clarify the hypotheses in further research.

Our second general point refers to the nature of the responses of judges to procedural disturbances. Even though there are procedural/legal mechanisms and tools, judges are using significantly more often array of soft instruments. Indeed, they have to respond to not very serious events but a rational observer might ask why they do not use the heavy procedural tools to fix the problem and send a message?

We think that judges restrain from using disproportionate procedural sanctions because they are embedded in a larger social set of interactions. As 'repeat players', the judges are part of a judicial eco-system that involves numerous people, organisations, interests and expectations. Overuse of procedural powers might be seen as danger for the systemic balance. Deliberate or not, with their behaviour the judges in the observed hearings provide confirmation for the procedural justice theory and particularly for the group-value model.[37] According to this theory, procedures are not only instrumental for achieving outcomes and solving problems. The group-value model of the procedural justice theory posits that people assess procedures to derive cues about their social place and weight. Furthermore, the theory predicts that when treated in a polite and respectful manner by a judge the people involved in procedures assess how the society values them.[38]

Our data shows that often judges respond passively to PDBs in their court rooms. We believe that what might look like indecisive behaviour is in fact a deliberate strategy to maintain a balance in a court procedure, which reflects pro-

37 T.R. Tyler, *Why People Obey the Law*, Princeton University Press, Princeton, 2006.

38 *See also*: T.R. Tyler & E.A. Lind, *A Relational Model of Authority in Groups* (American Bar Foundation ed., American Bar Foundation. 1990);T.R. Tyler, 'The psychology of procedural justice: a test of the group-value model', 57 *Journal of Personality and Social Psychology*, 1989, p. 830.

cedural justice. Judges have the mechanisms to impose strict control but rather opt for a much more nuanced approach. These choices send strong signals to parties involved and inevitably affect the development of the procedure. Even when judges seemingly 'do nothing' in many cases, they actually apply well-defined strategies to make sure that the process achieves its goals at certain level of efficiency. There is a lot of interaction between the different parties and sometimes problems arise. Judges carefully monitor the situation and take care that it does not escalate. The threshold of escalation depends on numerous factors that interact in complex ways – nature and value of the dispute, interests and affections of the parties, etc. If, before the escalation, threshold has been reached the judges tend to be more observant and intervene less. Contrary to the popular notion we believe that this is not passive behaviour but part of a well-crafted strategy, which aims to achieve procedural efficiency and compliance.

D. Conclusions

Disturbing behaviour takes place frequently in Dutch court rooms, but it is rarely of such proportions as to endanger the procedure. Despite the reforms from 2002, judges are not rushing to use the new procedural instruments. Instead, during our research, only in two instances it was observed that the judge imposed a sanction to a party/lawyer.[39] This does not imply that Dutch judges are passive or inactive during the court hearing. On the contrary, Dutch judges seem very active case-managers who use subtle but tangible methods to make sure that the procedural rules and values are respected.[40] The time of the judge being a passive sphinx is over. Furthermore, not one of the judges indicated that there is need of more (legal) instruments to manage the court hearings. Instead, some of the judges interviewed observed that there should be more room in court proceedings to discuss underlying problems or conflict issues as this would help judges to come to a decision that is supported by both parties. The legal instruments that were given to judges after the reform in 2002 seem to play a more complex role than just a sanction. Procedural sanctions are used to guarantee procedural compliance but just as a last resort. Before considering the sanctions, the judges use numerous strategies and tools that are not based on legal rules. In that sense, the procedural sanctions provide the necessary 'shadow of the law' for a host of strat-

39 This outcome is in line with other international examinations: judges use their procedural instruments only rarely. *See* A.S. Zuckerman, 'Litigation Management under the CPR – A Poorly used Management Infrastructure', *in* D. Dwyer (Ed.), *The Civil Procedure Rules Ten Years On*, Oxford University Press, Oxford, 2010; J. Normand, 'Bijlage: Observations on Sanctions Against the Abuse of Procedural Rights', *in* M. Taruffo (Ed.), *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness*, Kluwer Law International, Den Haag, 1999, pp. 245-248; J.R. Jackson, *Review of Civil Litigation Costs: Preliminary Report*, Judiciary of England and Wales, London, 2009, pp. 395, 417, 421, 431.

40 M. Barendrecht, S. van Gulijk, M. Gramatikov, P. Sluijter, *De goede procesorde in beeld. Over gedrag van procespartijen en de regiefunctie van de rechter*, *in* Research Memoranda Raad voor de rechtspraak, nummer 1-2011, Jaargang 7, pp. 106-107

egies and tools which facilitate procedural effectiveness without sacrificing the notion of procedural justice.

In summary, procedural sanctions are important but rarely used because judges have different strategies. Preferences for this softer approach might be a result of the complex interaction of different factors. First, it could be linked to the specifics of the civil law procedure in its continental version. Unlike the adversarial process known in the common law countries, the continental civil law procedure is more relational, there seems to be less distance between judge and parties/lawyers compared with that in common law countries. This means that instead of confrontation, the main norm is a (complex) pattern of cooperation with the court while promoting own interests. Moreover, the court in the continental procedure has much more procedural functions, which in fact can be used softly to affect parties' behaviour.[41] As Kötz puts it, in the continental civil law procedure "the gathering of the facts was entrusted to, and controlled by, the judge".[42] We are not saying that the court requests procedural concessions using its procedural and substantive powers. What might take place is that the parties and the court enter into complex array of interactions which in their entirety produce interdependence between the parties and the court. These subtle interdependencies are carefully used by Dutch judges to guide civil procedures in the direction they believe is right.

Another explanation might draw arguments from the broader notion of social culture. According to the Hofstede's classification Dutch social culture is feminine meaning that social norms are more relationship oriented and conflicts are rather solved through negotiation than forced by judges.[43] In fact, only 4.9% of the conflicts are being brought before court and the other 95.1 % of conflicts are either solved by mediators, the police, trade unions, legal aid bureaus, lawyers, or they even remain unsolved.[44] On the other hand, civil procedures are key legal institutions and as such are deeply embedded in the overall social culture.

Third, as we discussed above, the case management approach seems closely related to procedural justice considerations. Judges are part of dynamic equilibrium in which neither non-compliance nor procedural sanctions fit well. In this context, judges try to achieve a balance between the need to manage their caseload effectively while trying to reinforce procedural justice values.

Our main policy recommendation drawn from the research findings is in the direction of reassessing the curriculum of law schools. As we discussed above, interpersonal communication skills and abilities play a huge role in legal processes and namely in civil procedures. Instead of focusing exclusively on the utilitarian model of negative and positive motivations, policy makers and law schools should pay more attention to the soft elements of procedures. This does not

41 For example regarding divorce of other domestic matters.

42 H. Kötz, 'Civil Justice Systems in Europe and the United States', 13 *Duke Journal of Comparative and International Law*, 2003, p. 69.

43 G.H. Hofstede, *Culture's Consequences : Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (2nd ed.), Sage Publications, 2001.

44 B.C.J. van Velthoven & C.M. Klein Haarhuis, *Geschilbeslechtingsdelta 2009, Over verloop en afloop van (potentieel) juridische problemen van burgers*, Boom Juridische uitgevers, Den Haag, 2009.

mean that procedural tools that discourage disruptive behaviour are not important. They are, however, needed in only 5% of the cases whereas the vast majority of court procedures require different approaches which are not exactly in the spotlight of legal educators, legal practitioners and policy makers. Although we recognise that judges are continuously being trained to apply communication skills in their daily practice, it seems wise to focus more on these skills in law schools as well.