

Problem-Solving Justice: European Approaches

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1. Introduction

Two years ago, the Montaigne Centre of Utrecht University organised a seminar on the theme of problem-solving justice, following an initiative of Alexander de Savornin Lohman under the flag of ‘sustainable justice’.¹ Starting from the observation that most literature on problem-solving justice² comes from outside Europe, the seminar’s aim was to explore the application and further possibilities of this approach in Europe. We searched intensively for scholars who had been publishing on this topic in Europe and, based on this search, we invited colleagues from Denmark, England & Wales, Finland, France, Hungary, Italy, Poland and Portugal. With the term problem-solving justice, we also imply the possibilities of problem-solving approaches in the justice domain but out of court. The underlying idea of this approach was that even if problem-solving courts did not exist in many European countries, the legal systems were undoubtedly confronted with similar issues that caused the origin of problem-solving courts in, for example, the United States and Australia. Our main curiosity was therefore: how did these systems respond to these problems, if not with problem-solving courts? We asked the participants of the seminar to make an inventory of the different variants of problem-solving justice that occurred in their country, to examine to what extent this topic has been researched and to identify issues for further research.

This special issue of the *Utrecht Law Review* is the outcome of that exploration. With contributions from Poland, England, Finland, Italy, France and the Netherlands, this exploration, of course, is far from an overview of European approaches. The collection of contributions, however, gives a good impression of the different problem-solving strategies that are used in European countries from East, West, North, South and Anglo-Saxon Europe. It also shows how different fields of law respond to problems underlying the legal disputes that are brought before the judge.

In this introduction we describe briefly some of the legal theories that connect with problem-solving justice and connect them with current states of affairs in the countries reported upon. We will summarily describe the different contributions and connect the findings of the authors with possible themes and questions for research in the fields of criminal, civil and administrative law.

We start with the theory of justice introduced by Nonet and Selznick in the 1970s.³ Nonet and Selznick’s theory of justice distinguishes three types of law: repressive law (in which law is primarily used to maintain order), autonomous law (in which law primarily functions as a counterbalance for the government’s powers) and responsive law. The ultimate aim of responsive law is to enhance societal justice and the focus lies on the

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1 <<http://www.sustainablejustice.org/>> (last visited 31 October 2018).

2 Therapeutic jurisprudence, sustainable justice, negotiated justice, alternative dispute resolution (ADR), mediation, restorative justice.

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

effects of the law.⁴ The focus on the effects of the law is also a central element of Wexler and Winick's theory of 'therapeutic jurisprudence', which was introduced in the 1980s. Therapeutic jurisprudence denotes the (empirical) study of the – intended and unintended, therapeutic and anti-therapeutic – consequences of the law in action, that is, the consequences of legal rules, trials and behaviour of legal actors on the emotional life and psychological well-being of legal subjects.⁵

Related to both theories is the more pragmatic approach of what has been termed 'problem-solving justice'. Problem-solving justice originated in the United States, filling gaps where ordinary criminal justice was not able to effectively address crime as it was rooted locally. Ordinary prosecution, trial and conviction did not help to reduce crime in large cities like New York and in Florida.⁶ Courts and lawyers found themselves in a case processing mill, mainly focusing on speed and efficiency.⁷ In a reaction to this circumstance, judges, prosecutors and others set up court proceedings that had the intention to both provide justice and offer criminals a way out of crime. Key elements of problem-solving justice are (1) a tailor-made response to the underlying problem, (2) close cooperation with other institutions such as social services, (3) informed decision-making (providing courts with more information about the cases brought to them, such as specific information on the dynamics of intimate abuse), (4) intensive offender monitoring and (5) a focus on effectiveness.⁸ Concepts associated with problem-solving justice are sustainable justice, negotiated justice, alternative dispute resolution (ADR), mediation and restorative justice. In criminal law, problem-solving justice has aspired to transform criminal law as repressive law into a more responsive approach.

Problem-solving courts are a large phenomenon in the USA. In 2012, the USA counted 3,032 problem-solving courts.⁹ The principles of problem-solving justice can be implemented into existing legal procedures, but they have also been applied by specialised, problem-solving courts. The first problem-solving court came into existence in 1989 in Florida in the shape of the drug court. Since then, several other variants have come into existence. Examples are community courts, housing courts, re-entry courts, mental health courts and domestic violence courts.¹⁰ This approach has been deployed in Australia¹¹ and has drawn wide attention and effort in Canada and England.¹² Somehow, this approach is predominantly connected with common law legal systems, and not so much with civil law legal systems. To our knowledge, there is only one example of a similar approach in continental Europe, and that is in the drug court of Ghent, Belgium.¹³

We know, of course, that problem-solving approaches also exist in civil and family law. Diversion of cases away from courts is a policy shared by many governments, and one may consider that approach also an element of the Scandinavian legal culture. For us, from the Netherlands, on the crossroads between common law and civil law traditions of France, Scandinavia and Germany, we wondered how far the Anglo-Saxon approach of problem-solving justice is already present, albeit in different ways, in criminal, civil and administrative justice of several European countries. This special issue is the result. Below we briefly describe those contributions and reflect on how far and how continental justice systems may enable problem-solving justice methods.

2. Problem-solving justice in civil law

Giuliana Romualdi describes how the inefficiency of the Italian legal system and the length of proceedings has resulted in a search for alternative dispute resolutions (ADR), both in the civil justice system as in the

4 H.G.E. Verberk, *Probleemoplossend strafrecht en het ideaal van responsieve rechtspraak* (2011), pp. 39 and 302-303. Available at <<http://repub.eur.nl/pub/26117/probleemoplossend%20strafrecht%20proefschrift%20compl%20zs.pdf>> (last visited 22 March 2016); English summary on pp. 301-313.

5 Verberk *ibid.*, pp. 36 and 302; see also <<https://law2.arizona.edu/depts/upr-intj/intj-o.html>> (last visited 22 March 2016).

6 Verberk, *supra* note 4, pp. 21 and 301.

7 G. Berman & J. Feinblatt, *Good Courts. The Case for Problem-Solving Justice* (2015), p. 16.

8 *Ibid.*, pp. 15-17.

9 S.M. Strong et al., U.S. Department of Justice, Office of Justice Programs, *Census of Problem-solving Courts*, September 2016, NCJ 249803.

10 *Ibid.*

11 E. Richardson et al., 'The Evolution of Problem-Solving Courts in Australia and New Zealand: A Trans-Tasman Comparative Perspective', in R.L. Wiener and E.M. Brank, *Problem Solving Courts* (2013), pp. 185-210; T. Haslett, 'Using System Dynamics to Develop Organizational Learning Process; the Neighbourhood Justice Centre', in (2010) Yarra. *International Journal for Court Administration* 3(1), pp. 13-29.

12 P. Bowen & S. Whitehead, Centre for Justice Innovation, *Problem-solving courts: An evidence review* (2015); J. Ward, 'Are Problem-solving Courts the Way Forward for Justice?', (2014) *Howard League What is Justice? Working papers* 2/2014, <<https://howardleague.org/>>.

13 F. van der Laenen et al., *Het pilootproject drugbehandelingskamer te Gent: Een uitkomstevaluatie* (2013).

criminal justice system. She explains that Italian civil procedure is predominantly adversarial. Arbitration is expensive, and therefore often not an attractive alternative to court proceedings. The huge backlogs in the Italian courts make ADR an attractive alternative for policy makers in Italy, but it appears difficult to overcome the adversarial legal culture. For lawyers, court proceedings also are a part of their income, and either mediation or assisted negotiations between parties have become mandatory in civil proceedings, but considering many special procedures exist where these obligations do not apply, most lawyers and parties prefer judicial decisions and avoid mandatory mediation and negotiations when possible.

Ludovic Pailler analysed the civil law practices in France. He explains that the legal perspective is still very dominant both in French legal literature as in legal practice. Court proceedings are about settling the *legal* dispute only. So, even if the sociological perspective on law is not contested, and the societal functions of the judges are recognised, they are still considered secondary to the legal function of the courts. Besides cultural reasons, Pailler also mentions some legal reasons for this attitude. A problem-solving justice attitude can raise questions about the impartiality of the judge in the French context. The strong emphasis on the '*principe du dispositif*', the principle that the parties determine the scope of the dispute, restricts the possibility of the judge to include facts into his or her decision that were not submitted by the parties and a problem-solving attitude of the judge can conflict with privacy rights according to the French legal system and culture. Those limitations make ordinary civil proceedings not really fit for problem-solving approaches, also, because especially in these approaches, unlike in civil law cases, parties cannot dispose freely of their rights. But in family law, judges can follow an informed mediating approach. Therapeutic jurisprudence is underused in French law, even although the criminal code allows for victim-offender mediation, and in civil law, special committees exist for over-indebted persons, in order to assist them in dealing with the situation.

Kaijus Ervasti describes the Nordic legal culture as conflict resolution oriented. He shows through many examples that different types of mediation are integrated in civil procedure in Finland. In civil cases both mediation outside courts in various shapes and court-connected mediation do exist. Mediation outside courts regards, for example, business, communities, divorcing, schools, engineers, advocates and the workplace. Court-connected mediation is a judicial affair. In ordinary civil proceedings the judge is required to try a settlement. When parties agree with a mediation effort, another judge will be appointed as a mediator. In effect, in civil justice, the courts have a role in establishing negotiated or contextual justice, and this is quite different from the more formal approaches in the rest of Europe.

3. Problem-solving justice in criminal law

According to Giuliana Romualdi, the constitutional principle of legality of prosecution in Italian criminal law precludes a more problem-solving approach in general. The recently adopted code of criminal procedure for minors, however, can be seen as a breach of this principle. According to the new legislation, a trial can be suspended and the juvenile can be given the opportunity to participate in projects with the purpose of promoting his or her rehabilitation. When successful this may have a positive influence on the eventual sentence. An experiment is ongoing in offender-victim mediation, either in this period of suspended trial or after serving the sentence during probation.

Jennifer Ward gives a description of the newest developments concerning problem-solving justice in the UK. She shows that problem-solving justice is not a general phenomenon in the UK justice systems, which she explains by the adversarial character of court proceedings and, surprisingly, by the more than 16,000 magistrates in magistrates' courts. They are lay judges, and hold little power over court management. After describing the general theoretical framework of problem-solving courts and therapeutic justice, she presents the results of her research during the past few years, indicating that there is a positive climate towards problem-solving justice in the UK amongst policymakers. There are several local initiatives throughout the UK. Still, a general implementation of problem-solving courts in criminal and youth court proceedings has not been established. Apart from the factors mentioned above, Ward points to policies to enhance efficiency in the courts but these do not favour the more person-centered approach of problem-solving justice. Moreover, policy-making efforts in the UK are currently interrupted by the dominance of 'Brexit' as a priority political issue.

Stanislaw Burdziej describes how in Poland the criminal law system is predominantly traditional. Whilst the number of crimes is decreasing, also because of an ageing population, the incarceration rate in Poland is still high, due to an overburdened probation bureaucracy and a large number of suspended sentences. The high incarceration rate is also due to approximately 1/3 of the offenders failing to live up to the conditions of suspended sentences. Recently introduced legislation encourages the use of fines and community service orders for minor offences, which has led to a substantial reduction of the number of suspended sentences. Mediation in criminal cases was introduced in the law in 1997. Since that time the number of cases addressed by mediation has remained stable, but low, although the relative number is growing as a result of the decreasing number of criminal cases. The use of other forms of problem-solving approaches is low. Obstacles to developing problem-solving justice in Poland are the efficiency culture in the courts and the absence of information about suspects (e.g. mental health issues) provided by the courts. Outside the realm of criminal law, ADR has been recently introduced in civil, family and administrative proceedings.

Kaijus Ervasti states that the Finish criminal justice system takes the offence as a starting point for the sentencing process, not (characteristics of) the offender. The sentencing system place high value on consistency and uniformity in sentencing, therefore it is also characterised as 'humane neoclassicism'. Despite the dominance of the principle of 'the same punishment for the same act', the system itself includes problem-solving elements. Problem-solving courts in the Anglo Saxon sense do not exist in Finland, but the justice system in general is oriented on creating outcomes that takes social contexts of offenders and societal interest at large into account. In particular for juvenile offenders, child protection services often precede criminal justice interventions. Victim-offender mediation is quite a large phenomenon in Finland. Each year, approximately 15,000 cases of victim-offender mediation are sent to the victim-offender mediation office in Finland, which is high considering that there are about 60,000 criminal cases in the courts per year. Normally a prosecutor will not press charges in case the victim and the offender reach an agreement.

Miranda Boone and Philip Langbroek describe the state of problem-solving in criminal justice in the Netherlands. Unlike in the USA, problem-solving in a criminal law context is not primarily applied in the courts in the Netherlands. The reluctance of the judiciary to do so is based on reasons to not jeopardise judicial impartiality in any way. The arguments used are that judges are not trained to deal with suspects in an educational fashion, that criminal proceedings have a retro perspective and are not prospective, and that there is a risk that emotions get the upper hand, leading to disproportionate outcomes. Efforts for problem-solving have been deployed in victim-offender mediation. This has resulted in several pilots with positive outcomes. Next to the preliminary prosecution proceedings, victims and suspects were given the opportunity for a mediation trajectory. This has resulted in changes in the Code of Criminal Procedure, however without much use so far. Another initiative are the community safety partnerships. In a complex setting with the police, the prosecutions service, youth care, the child protection board, municipalities and victim support services, they aim at increasing the viability of neighborhoods and decreasing the number of offences, quite successfully for about 30 years. Last but not least is the 'as soon as possible' (*zsm*) approach, where offenders are offered a fast and responsive procedure either out of court or for ordinary trial if they do not plead guilty or do not want to cooperate. In many cases this approach leads to responsive interventions to criminal offences which contribute to solving the problems of the suspect, help to solve conflicts and prevent further recidivism. Several studies show, however, that there are also serious problems with guaranteeing legal rights, e.g. the involvement of a defence lawyer and insufficient legal evidence.

4. Problem-solving justice in administrative law

Caroline Expert-Foulquier describes the state of affairs for administrative law in France from a problem-solving justice perspective. Traditionally, administrative courts can only assess the legality of a legal act of an administrative body. Separations of powers between the courts and the administration limit the powers of the courts. However, led by the French Council of State, case law has evolved that enables the administrative courts to contribute to solving problems underlying court cases. This was possible because French administrative judges take part in (mostly local and regional) committees whose tasks concern

addressing individual issues, for example with taxes, contracts under public law or compensation for mistakes in healthcare. Those committees are composed of different functionaries and citizens, usually with the judge as chair. Furthermore ADR has become institutionalised in French administrative law. Next to that, administrative law judges can substitute both the legal basis and the grounds of a decision, and can ignore legal deficits of a decision as long as the interested citizen is not negatively affected by it. French administrative courts can interfere in building projects, in order to maintain both legality and progress of these projects. Apart from that, administrative courts can impose preliminary injunctions against the administration, concerning administrative acts in combination with a conditional fine. With those possibilities, a limitation to a more comprehensive problem-solving approach is that dialogues between the administration, interested parties and the courts are limited so far. Effective problem-solving in French administrative justice depends on the improvement of these dialogues whilst maintaining procedural rights of interested parties.

Miranda Boone and Philip Langbroek also describe the developments in Dutch administrative law, involving summary proceedings, administrative pre-trial proceedings and the new approach in administrative court proceedings. Either during complaints or during court proceedings, a preliminary court decision may be given where the execution of an administrative decision is suspended for a limited amount of time. Usually this is an adequate indication of the legal tenability of the contested decision, and this then prevents parties from further contestations in court. Administrative pre-trial proceedings enable interested parties to ask the issuing administrative body to reconsider the decision. This procedure is usually dealt with by an advisory committee, hearing both the parties and a representative of the administrative body. The so called 'new approach' is part of administrative court proceedings, where judges try a mediation approach within the limitations of the legal competences of the defending administrative authority. This is not always successful, but it sometimes leads to a solution parties can agree with.

5. Conclusion

It is interesting to observe that the need to address social problems underlying legal disputes is to a greater or lesser extent recognised in all three domains of law, and not only in the penal legal field where the concept of problem-solving justice has been reserved for so far. This is not to say that problem-solving justice, in the way we understood and defined it, is not developed in civil and administrative law in the United States and Australia, the countries where the concept derives from, just that it was not developed and researched yet under the same concept. It is remarkable though that in the European countries included in this special issue, most restraint seems to exist to apply problem-solving strategies in the criminal field. Problem-solving courts that are modelled to the examples in the United States and Australia do not exist, with the exception of England & Wales and the Ghent drugs court. Legal values and guarantees are observed as the main obstacles to replace classical ways of processing criminal cases with more problem oriented ones.

In general in civil law, problem-solving is not primarily a court activity, but takes shape in mediation or arbitration efforts next to courts, especially in France and Italy, whereas in Scandinavia mediation efforts have been integrated in court proceedings. In France and Italy a formal legal approach dominates the discourse, whereas in Scandinavia the social aspects are also considered and problem-solving is at least one of the aims of proceedings. Especially in family law, problem-solving may be tried by the courts.

In criminal law problem solving is also not a primary aim in Europe, but especially for young offenders approaches do exist within court proceedings that predominantly stress problem-solving and rehabilitation. As far as there is a way out of criminal court proceedings, it is administered by instances out of the criminal court, such as the prosecutions office and community safety partnerships. Victim-offender mediation is introduced in all criminal justice systems described in this special issue, but huge differences exist in the extent to which it is used and how far it replaces or adds to criminal prosecution and conviction.

Also in administrative law, formal approaches within formal court proceedings, with a focus on the assessment of the legality of administrative actions, dominate the scene. Mediating or conciliatory

approaches, or even pre-emptive negotiation approaches as in France, are predominantly organised outside the context of formal court proceedings.

Considering the dominance of formal traditions in courts in Europe, most problem-solving or responsive approaches have been developed outside the courts. An interesting first question is therefore what societal, cultural or legal aspects can explain this difference with the American and Australian approach? Next, the research on responsive law and problem-solving justice in Europe therefore need not only focus on the courts, but on initiatives in other parts of the justice domain as well. In order to find out what approaches are successful and why and in how far legal values and guarantees are threatened or compensated, more research is necessary on the way that cases are processed, what the results of problem-solving initiatives are, and which mechanisms explain these results. ■