

**THE JUDICIAL DOMAIN IN VIEW;**  
Figures, trends and perspectives

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## 1. Introduction

Where will the Dutch judicial system be in 2015? One of us answered a similar type of question elsewhere with a sketch of two frightening scenarios.\* In the first scenario the judicial system will have insufficiently adapted itself to its surroundings. The judicial system will become more intensively involved in a decreasing amount of cases that gradually carry less weight. The judicial system, as a social phenomenon, will be marginalized even though the traditional standards of constitutional legitimacy and professionalism of the administration of justice are kept up. Interesting or big cases will be handled outside the judiciary by special courts or through arbitration, mediation or other forms of “alternative dispute resolution” (ADR). The large amount of bulk cases will be transferred to other legal areas or authorities where the involvement of the judge will decrease (for example the Mulderizing of criminal cases, or settlement by the Public Prosecutor). With the decrease in jurisdiction the authority of the judicial system will decline and eventually prise itself out of the market. In the second frightening scenario the judicial system will have adapted itself too much to its surroundings. Van Gunsteren once sketched a picture of the court as a dynamic centre for settling conflicts, a place where the experts fall over each other with seminars, workshops, courses, and new methods. Instead of settling conflicts they get copied within the judicial organization itself.† The judicial system, with its well-meaning efforts at being responsive, will have distanced itself from its core duties: settling disputes through binding judgments. While the judicial system has lost touch with its surroundings in the first scenario, it has lost its own self in the second scenario.

The Dutch judicial system’s domain in 2015, to be understood as “the size (number of court pleadings) of the judicial system and the composition of the legal fields within the judicial system” is the central theme of this paper, where the basis for binding decisions in the form of enforceable judgments play a pivotal role. What are the most relevant social tendencies that can influence the judicial system’s domain in the medium-term? What are the possible effects, of the tendencies sketched, on the components of legal fields? These questions are central here. While it is possible to take a sociological approach to these questions, we are going to concentrate on the development of jurisprudence. However, we must immediately point out that a strict division between these two approaches is not possible. In our attempt to get a view of the development of the judicial system’s domain we have come upon a mine of influences that sometimes support and sometimes contradict each other. It transpired that it was just as complicated to indicate in which legal fields the effects manifested themselves. For these reasons it is good to record up front a disclaimer that it is not possible to fully predict the development of the judicial domain. What we can do is sketch some trends and perspectives and give some figures that result in a view of the judicial domain and deliver a few possible scenarios for its development.

The research’s focus is on the development of the judicial domain in the Netherlands. In order to describe the influences in this context and mark out some plausible future scenarios, we have sought to evaluate the role of courts in the Dutch legal system in the light of models of analysis developed in American academic writing on this subject. It is true that this choice of research method demands to be used with precaution, the differences between Dutch and

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\* M.A. Loth, ‘Rechtspraak en mediation; een *liaison dangereuse?*’, in: A.F.M. Brenninkmeijer (ed.), *De taakopvatting van de rechter*, Den Haag: Boom Juridische uitgevers 2003, p. 39.

† H.R. van Gunsteren, ‘De strijd tussen politiek en rechterlijke macht’, *Trema* 1998, p. 280-283.

American legal culture being considerable.<sup>‡</sup> The way in which specificities of the legal culture affect issues of judicial organization in each of the legal systems has to be taken into account when applying American models to the Dutch situation. Bearing in mind this restriction, we think that the analysis of the Dutch legal system in the proposed frame of reference can yield some valuable results for the deliberation on policies for the Dutch judicial organization in the years to come. In the light of the growing academic interest for the comparative analysis of questions of judicial organization<sup>§</sup>, the analysis may also offer some useful starting points for the evaluation of developments in other (European) legal systems.

The following subjects will be handled one after the other in the text below. First a distinction will be made between two different paradigms in thinking and speaking about the judicial system's domain. These will dominate the rest of the argument: a quantitative paradigm (description), and a qualitative (normative) paradigm (par. 2). Following this, attention will be given to the quantitative paradigm, in the first place by referring to relevant figures (par. 3.1), and further by the demarcation of the judicial system's domain from other state powers, other legal orders, other forms of conflict solving, the needs of the citizens, and internal domain divisions (par. 3.2). Further the judicial system's domain will be approached from the second paradigm by examining the question of the judicial system's social role in terms of the influence of the judge and the impact of his judgments. That results in an exploration of the possible effects: domain expansion in width, domain expansion in depth, domain reduction in width and domain reduction in depth (par. 4). Finally the two paradigms will be connected to each other and on the basis of this a few scenarios on the development of the judicial system's domain will be sketched. What do the developments sketched in par. 3 mean for the possible effects given in par. 4? In par. 5, as an answer to this question, three possible scenarios for the development of the Dutch judicial domain will be sketched. A few conclusions will round off this investigation (par. 6).

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<sup>‡</sup> Concerning the specificities of the Dutch legal culture, see E. Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany', *American Journal of Comparative Law* 1998, p. 1-41.

<sup>§</sup> In the European context, see M. Fabri, P.M. Langbroek & H. Pauliat (eds.), *The administration of justice in Europe: Towards the development of quality standards*, Bologna: Lo Scarabeo 2003; M. Fabri, J.-P. Jean, P.M. Langbroek & H. Pauliat (eds.), *L'administration de la justice en Europe et l'évaluation de sa qualité*, Paris: Montchrestien 2005. See also the projects of the Council of Europe's Committee on the Efficiency of Justice (CEPEJ), <http://www.coe.int/t/dg1/legalcooperation/cepej/>.

## 2. Two paradigms

Before we begin describing the judicial system's domain it is a good idea to first justify the scope of such a description. For this purpose it is useful to make a distinction between two paradigms that control the thinking and writing on the judicial system's domain. The question presented in this vision paper is the product of a way of thinking; the judicial system's domain is approached as the scope and demarcation of the judge's work terrain, both in number of cases as well as types of cases. For obvious reasons we call this the quantitative or descriptive paradigm; the judicial system's domain is a factual, even quantifiable subject that can more or less be objectively described. A view-point on the judicial system – called the “problem solving conception” by David Luban – where the judicial system is pragmatically seen as a duty of the government to solve conflicts acts as a foundation to this paradigm.\*\* It is only a short step from this vision to the conclusion that the judicial system is there to solve conflicts that cannot otherwise be solved in society. This is the new liberal view of minimal government and maximum free-market thinking, everything at the service of the citizen's freedom. The personal responsibility of the citizen is emphasized and the judicial system gets a subsidiary role. The most important extra significance of the judicial system compared to all the other forms of solving conflicts is that it – as a product of the government's monopoly on violence – can make the solution to conflicts binding. Judicial thinking and conduct is looked upon as rather instrumental in this way: it is at the service of conflict solving. The aim of the judge's intervention between disputing parties is to end the conflict and with that return the peace between them.

The judicial system's domain in the second paradigm is not seen so much as a demarcated work terrain, but rather as a function or role that it fulfills in society. Considering that that is a qualitative or even normative fact – in the sense that every description is based on values – we will refer to it further as the qualitative or normative paradigm. In this vision - called the “public life conception” by Luban – the judicial system is seen as a necessary result to political decision-making in society and in this way an indispensable link in the public debate. The judicial system has in this communal idea –above its conflict solving function– a community forming function, through its contribution to the development of public values and with that to the self-image of a political society. The freedom of the citizens is not confined to the private sphere or the free-market but exists in the self-realization of the individual citizen in that political community. The most important additional value of the judicial system is not only that it facilitates continuation with the strong arm of the law, but also that it contributes through law making to the legal order. Every conflict is seen, in principle, as a possibility to develop the law further. The focus here is not the tackling of rights or interests, but a value-orientated interpretation of the conflict. Legal thought and action stands in this approach primarily as a recovery sign to the consensus in the political community of its public ideals.†† The function of the judge can be typified as a mediating function; not only between the disputing parties, but also between the parties and the community, and with that between a diversity of interests, roles and values that typifies a plural society.‡‡

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\*\* D. Luban, ‘Settlements and the erosion of the public realm’, *The Georgetown Law Journal* 1995, p. 2619-2662.

†† P. Ricoeur, *The just*, Chicago: University of Chicago Press 2000, p. 127-133.

‡‡ S. Hampshire, *Justice is conflict*, Princeton, New Jersey: Princeton University Press 2000, and A.M. Hol & M.A. Loth, ‘Iudex mediator, naar een herwaardering van de juridische professie’, *Rechtsfilosofie en Rechtstheorie* 2001, p. 9-57.

Both of these paradigms lead to a better understanding of the scenarios for the Dutch judicial system out of *Justitie over morgen II*.<sup>§§</sup> In order to show this it is worthwhile to first summarize shortly the different scenarios for the judicial system's domain. From two variables – the demand for security and the degree of internationalization – four scenarios will be distinguished: *Forza Europa* (big demand for security, further internationalization), *Netherlands Afraid* (big demand for security, backlash from the internationalization), *The European Way* (limited demand for security, further internationalization), *Together.nl* (limited demand for security, limited internationalization). Each of these scenarios has consequences for the judicial domain.

- (i) *Forza Europa*: leads to an extension of the judicial system across the board. The increased demand for security and the call for heavier punishments lead to more (repressive) criminal law. The decrease in willingness to take risks stimulates the claim culture and pursuance of lawsuits and contributes, in this way, to a growth in civil law adjudication. Finally the domain of the administrative law judge also shows a tendency to expand because of, amongst other things, the transfer of parts of the overloaded criminal law workload to administrative law.
- (ii) *Netherlands Afraid*: also leads to an expansion of the judicial domain. The greater demand for security here also leads to more (repressive) criminal law. Moreover, the progressive demand for lawsuits and the claim culture pressurizes civil law. Administrative law does not grow; through a defensive administration the expected growth in demand for the administrative judge does not materialize.
- (iii) *The European Way*: primarily results in the judicial system becoming more European, with double consequences: on the one hand a domain expansion with European law for the national judge, and on the other hand a domain loss to the European judges (the European Court of Justice and the European Court of Human Rights) for the national judicial system.
- (iv) *Together.nl*: more social control and more peaceful solutions to conflicts leads to a domain decrease for the judicial system (and also to a “numbing of the judicial system”), with perhaps the aliens department as an exception (greater pressure on the national borders through failing European immigration policy).

These scenarios need to be analyzed in terms of both paradigms. Characteristic of the first two mentioned scenarios is the strife towards greater security, which is to say greater emphasis on the instrumentation and responsiveness of the law. The law wants to give an answer to the social call for more security (responsiveness) and offers suitable means (instrumentation) towards reaching this goal, in one scenario from international sources (*Forza Europa*), and in the other one from national sources (*Netherlands Afraid*). In both cases the judicial system is faced with a domain expansion and consequently capacity problems. Society as a whole is confronted with law that is more repressive (especially criminal law). There is a fine line that divides the promise of responsive law from the risk of repressive law, just as Nonet and Selznick have already shown.<sup>\*\*\*</sup> Law offers the promise of more security, but implies at the same time the risk of returning to repressive law. These scenarios can be analyzed excellently in the quantitative, descriptive paradigm of the judicial system's domain. The development in the last two scenarios is completely different. It is not so much the ambition for a greater social role that has priority, but an ambition to re-evaluate the rule of law, with great emphasis on the legal protection of the citizen and the legal values that make-up the legal order. The

<sup>§§</sup> Ministry of Justitie, Direction AJS, January 2006.

<sup>\*\*\*</sup> P. Nonet & P. Selznick, *Law and society in transition; toward responsive law*, New York: Harper & Row 1978, p. 115-119.

legal order is seen as the normative structure of society. There is no mention of a repressive society, but of a normative society. The judge's task is not primarily to guarantee more security, but to provide a contribution to the shaping of the law. In these scenarios that is precisely the judicial system's domain, in a more qualitative sense of the word. These developments can therefore be better analyzed in terms of the qualitative, normative paradigm of the judicial system's domain. When we speak of a domain decrease – like in the report *Justitie over Morgen II* – we do not do it complete justice. It is true that in quantitative terms there is a domain decrease, but in qualitative terms the role of the judicial system has not diminished. The judicial system's domain here has neither grown nor decreased, but has a new definition; not in terms of the work terrain's size, but in terms of the nature of the contribution to the rule of law. The conclusion is therefore that both paradigms give completely different perspectives to the judicial system's domain. It is good to keep this in mind as we go along.

### 3. The quantitative paradigm: the work terrain of the judicial system

The work terrain of the judicial system will be looked at in the quantitative paradigm. In this approach that work terrain will preferably be represented in terms of number of cases. First of all we will give a short sketch of the judicial system's domain (par. 3.1). Such a "basic" description does not give much insight, because the judicial system is a result of a demarcation with respect to other relevant activities and/or participants. When we show this demarcation the judicial system's domain gets more emphasis. (par. 3.2)

#### 3.1. The judicial system's domain in figures; the present situation

What does the judicial system's domain look like? The following sketch can be drawn in terms of the quantitative paradigm.<sup>†††</sup>

The Dutch judicial system's domain is divided unequally into three segments. The division in amount of cases is: civil proceedings (59%), criminal proceedings (32%), and administrative law proceedings (9%). The workload is divided differently (51%, 22% and 26% respectively), because the amount of time spent per case is different. The judicial domain has grown by 2% in the period from 2004 to 2005. The growth is primarily to be found in administrative cases (5%) and appeal cases (4%).

In *civil matters* 44% of the cases are dealt with by the Sub-district Court and 15% by the District Court. The biggest growth is to be found in insolvency pronouncements (5%) and family cases (4%). That last has to do with an increased number of supervision orders in child cases (10%). The first has to do with the economic situation, after an economic recovery the insolvencies follow quickly after. That has contributed again to a growth in the number of civil appeal cases for the courts of appeal (11%). The most remarkable development in the civil sector during the past year is the institutionalizing of referrals to mediation by nine law courts and one court of appeal. 720 mediations took place in 2005, of which 357 (50%) were finalized by the end of the year. While this is a nice result in itself, it is only a fraction of the total amount of cases that were eligible for this. Finally, the number of share lease case settlements is remarkable. Despite the Duisenberg regulation<sup>†††</sup> – where the order declaring a collective agreement in a procedure is pending at the Amsterdam court of appeal – there are 1400 cases pending. In order to streamline the settlements the sector chairmen have set-up a list of points for consideration, a data bank and appointed a coordinator per jurisdiction.

The sub-district sectors took 18% of the *criminal cases* (32% of the total) (offences, Mulder cases) and the law courts 14% (police judge, three judge panel). There was a decrease of 6% to report here in the number of cases, which can principally be explained by changes in law regarding the length of pre-trial detention (90 days), as a result of which the amount of *in camera* proceedings decreased. Also the expected growth of new cases based on the security program did not materialize. The most remarkable development was the re-division of criminal cases by the National Coordination Centre Mega Cases, set-up in 2004, where 68

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<sup>†††</sup> The figures relating to the Netherlands are derived from the "Jaarverslag 2005 *De Rechtspraak*, of the "Raad voor de Rechtspraak". However it must be emphasized that the majority of the civil and administratieve law problems are not brought to court. Research into the "dispute settlement delta" has shown that only in 11% of the cases official proceedings will be started, court proceedings are only instigated in 5% of the total amount of legal problems. B.C.J. van Velthoven & M.J. ter Voert, with the cooperation of M. van Gammeren-Zoetewij, *Geschilbeslechtingdelta 2003: over verloop en afloop van (potentieel) juridische problemen van burgers*, Den Haag: WODC/Meppel: Boom Juridische uitgevers 2004, p. 184.

<sup>†††</sup> Cf. *infra*, p. 20.

cases were registered of which 24 were referred to a judge other than the formally authorized judge.

Of the *administrative cases* (9% of the total) 5% were related to alien cases and 4% to general administration cases. There was a 9% increase to be noted over the whole sector (administration cases, aliens' cases and tax cases). This was chiefly attributed to the growth in cases concerning the *WOZ* (tax law) by 65% because of the *WOZ* assessments in 2005. A new addition in 2005 was the introduction of appeal adjudication in tax cases; one court per area of jurisdiction, and five courts of appeal for appeal cases. No extra workload was attracted by the new first line regulations.

When we take a global look we can conclude that the judicial domain has (once again) made a small growth (2%) in 2005, and the explanation can be found in incidental factors like economic growth (for insolvencies and dissolution of employment contracts), large scale administrative regulations (the *WOZ* assessments 2005), and a change in the law (for pre-trial detention). Are there also developments of a less incidental nature at work here? In order to investigate this question we must look differently at the judicial domain.

The analysis of Marc Galanter, regarding the development of the judicial domain in a quantitative sense in the United States,<sup>§§§</sup> can be used as a point of reference for that research. Galanter comes to the – surprising – observation that the number of proceedings closed with a judicial decision<sup>\*\*\*\*</sup> and the number of proceedings in general in the United States have decreased in the last forty years. No “litigation explosion” at all – as the legend would have us believe – but in reality a “trial implosion”. While almost every other form of legal activity has increased in size, the amount of proceedings has decreased not only in comparison to the total amount of cases pending at the courts but also in comparison to the population and size of the economy.<sup>††††</sup>

The federal courts handled almost 10% fewer *civil cases* in 2002 than in 1962, the absolute number of *civil proceedings* came to 60% less than in the mid-eighties. Not only the number but also the contents of the judicial domain for civil cases have changed. In 1962 proceedings in the field of contracts – and liability law – accounted for most of the civil proceedings (74%), in 2002 this percentage had been reduced to 38%. In contrast to this there was a rise in proceedings for the protection of citizens' rights: from 1% of the total number of civil cases in 1962, to more than 33% in 2002 (and 41% if you only look at “jury trials”). Also the number of “prisoner petitions” (including *habeas corpus*) has increased enormously, despite a decrease as a result of regulations to limit the amount of cases. Proceedings of this type amounted to 12.7% of the total number of proceedings in 2002. The percentages and absolute amounts of federal criminal proceedings show the same picture. Even though the total number of *criminal cases* has risen somewhat (from 33,110 in 1962 to 76,827 in 2002), the number of *proceedings* has decreased by 30% in the period from 1962 to 2002 (from 5,097 to 3,574). As far as *insolvency cases and insolvency proceedings* are concerned a similar development has taken place. The justice system for *administrative cases* in the United States is entrusted to

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§§§ M. Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’, *Journal of Empirical Legal Studies*, vol. 1, issue 3, 2004, p. 459-570.

\*\*\*\* Galanter is starting from the concept “trial”, which is defined as “a contested proceeding before a jury or court in which evidence is introduced” (*op. cit.*, note 2). In one “trial” several cases can be dealt with (for example collective claims for damages in civil liability law). It is also possible that in one case several proceedings take place, in which various aspects of the case are taken into consideration.

†††† Galanter, *op. cit.*, p. 460.

“administrative tribunals” and other forums that do not belong to the judicial system. However, the trend of a decreasing number of cases is also to be seen there.<sup>††††</sup>

The development does not limit itself to the Federal courts: also at the “State courts”, where the majority of proceedings take place, there was – both for civil proceedings and for criminal proceedings – a decline in the number of proceedings taking place. The decline in *civil cases* was for both cases which are settled by a “jury trial” (from 1.8% of the total amount of cases in 1976 to 0.6% in 2002), as well as cases settled by a professional judge (“bench trial”) (of 34.3% in 1976 to 15.2% in 2002). The absolute number of jury trials has declined by a third in the period researched and the absolute number of “bench trials” by 6.6%. Concerning *criminal cases* the number of proceedings at the State courts between 1976 and 2002 has declined from 8.5% to 3.3%. In evaluating these figures one must also be aware of the fact that the character of the average proceedings during this period of time has also changed, in the sense that they have become more long-term and complex.

What are the root-causes of this “trial implosion”? Galanter observes a shift in ideology and practice by the parties involved in the proceedings, the lawyers and the judges.<sup>§§§§</sup> As a result of media portrayal the parties involved in proceedings have changed their strategies (take for example the dangers involved in “jury trials”). The decline in the number of proceedings can be explained (in any event for civil cases) by a reduced supply of cases, cases being diverted to other forums (ADR), and abandoning of proceedings because of increased complexity, costs and length of time involved. A change in ideology and practice can also be observed on the institutional side of the judicial system. “Managerial judging” aimed at arranging cases and getting rid of the caseload (Galanter speaks of a “turn to judges as promoters of settlement and case managers”<sup>\*\*\*\*\*</sup>) has grown considerably since the sixties. A consequence of this is that both judges and lawyers have less experience in proceedings and possibly because of this are less inclined to allow cases presented to them to develop into proceedings. Galanter emphasizes the impact that the developments just described can have on the role of the judicial system in (American) society. If the number of judgments from proceedings decreases then the legal framework for other forms of dispute settlement will decrease in number and importance. Adapting is then no longer “bargaining in the shadow of the law”<sup>†††††</sup>, but threatens to become a negotiation process where legal standards get swallowed up.

With that last remark we are anticipating the observations on the judicial domain viewed by the qualitative paradigm. Before we are ready to research the role of the judicial system in society we should first complete the quantitative paradigm research. Are the same tendencies and root-causes perceptible in the Netherlands as they are in the United States? What factors actually influence the scope and composition of the judicial system’s work terrain here? The answers to these questions demand that we broaden our perspective. Some steps, to this end, will be taken in the next paragraph.

### 3.2. *The judicial domain on the move: long-term developments*

The boundaries of the judicial domain will be examined below as being a result of the demarcation between adjacent domains, namely, the judicial domain and the domains of other

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<sup>††††</sup> Galanter, *op. cit.*, p. 499-500.

<sup>§§§§</sup> Galanter, *op. cit.*, p. 515 ff.

<sup>\*\*\*\*\*</sup> Galanter, *op. cit.*, p. 520.

<sup>†††††</sup> Galanter, *op. cit.*, p. 525 and the literature quoted in note 122.

participants and activities. Sometimes the boundaries are a result of conscious acts, sometimes of autonomous developments. The most important neighboring boundary domains are:

- A. other state powers (legislature and government administration);
- B. other legal orders (international and European)
- C. other forms of dispute settlement (particularly ADR) and legal advice
- D. the citizen

Besides the external boundaries there are also the internal domain boundaries that affect the relationship amongst courts and amongst judges. These will also be discussed below. It should be kept in mind, while reading this, that the term “the judicial domain” can be interpreted in several ways, that is to say in legal terms (authority, powers, jurisdiction), in economic terms (supply and demand, markets), in sociological terms (social developments), or in a combination of all three (like in this paper). In this context some developments will be discussed below that meet the following criteria: (a) legal/social developments, which (b) are of influence on the size of the judicial domain, and (c) are significant for the composition of the legal fields, and (d) concern one or more of the aforementioned external relations (or the mutual internal relations between courts and judges). We are going to investigate the different relations that constitute the judicial domain in this context.

#### *A. Conflicting powers (the relation to other state powers)*

A hundred years of legal developments in the Netherlands has led to a judicial domain enlargement as regards the legislature and government administration. This “enlarging scope”<sup>††††</sup> of the judge’s domain is a result of the interaction between the legislature and the judge. In the first place the legislature has given away part of its domain to the civil judge through the setting-up of “open norms” and Framework Laws. “Open norms” give more scope to the judge in applying legislation. The Supreme Court has played a decisive role in the use that has been made of this freedom. Assessment standards such as “reasonableness and fairness” (article 6:2 and 6:248 BW) and “sufficient interest” (article 3:303 BW) have been seized upon to direct legal developments, sometimes probably in another direction than the legislature had in mind.<sup>§§§§</sup> Moreover the judge has regularly gone further himself by making clear standards vague.<sup>\*\*\*\*\*</sup> A helping hand from the legal profession has further helped the judge to steer jurisdiction down new roads.<sup>†††††</sup> Demands from society also make it difficult for the judge to say “no”.<sup>†††††</sup> In the second place the enlargement of the discretionary competence of the state administration which goes with the framework legislation has led to more demand for legal control of the governing administration’s actions.<sup>§§§§§</sup> Finally the judicial domain has been extended by the rise in cases concerning the respect of provisions of treaty law, in particular testing the regulations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). With

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<sup>††††</sup> That term has been introduced by J. van den Berg with regard to the ECHR. See J.Th.J. van den Berg, ‘Politieke wetenschap en derde macht’, *Acta politica* 1991, p. 1206 ff. and by the same author ‘De rechter als politieke macht’, in: M.G. Rood (ed.), *Rechters en politiek. Nationale en internationale beschouwingen*, Zwolle: W.E.J. Tjeenk Willink 1993, p. 25-40.

<sup>§§§§</sup> N.J.H. Huls, ‘Grenzen van rechterlijke domeinuitbreiding’, in: N.J.H. Huls & M.A. Loth (ed.), *Het domein van de rechter*, Kluwer: Deventer 2004, p. 81-92, here p. 82.

<sup>\*\*\*\*\*</sup> Huls, *op. cit.*, p. 84.

<sup>†††††</sup> See *infra*, p. 15.

<sup>†††††</sup> See *infra*, p. 17.

<sup>§§§§§</sup> Huls, *op. cit.*, p. 82.

that development the gap in legal protection as a result of the prohibition on constitutional review by article 120 of the Constitution could be counteracted.\*\*\*\*\*

The domain conflicts between the state powers form the institutional translation of domain shifts between legal institutions, politics and morality. Elsewhere one of us has described the shift as a contextualizing of the law that has made its claim during the 20th century.††††††† While the legal order in the 19th century had strict lines between law and politics (law-making versus law enforcement) and between law and morality (public minimum standards versus aspired ideals), those borders blurred during the 20th century. Private law showed a blurring of the borders between law and morality, that can be typified as a moralization of the law (the increased importance of unwritten standards in the law) and on the other hand as a juridification of morality (an extension of the legal domain to a relationship of trust). In short the judicial domain has become larger, but at the same time legal standards have been diluted with social standards and moral conceptions (“the flow of ethics into the law”, as Pitlo called it†††††††). Public law, for its part, has shown a dimming of the borders between law and politics, that have the same two sides; on the one side a politicization of the law (“from codification to modification”, in the famous words of Koopmans§§§§§§§§), on the other side a juridification of politics (“good governance”, the general principles of proper administration). Here also a blurring of the domain has occurred; an increase in the judicial domain is accompanied by a dilution of the law. It is these broad social developments which underpin the border conflicts between the different state powers, as we have described above.

Where does the tendency towards domain enlargement end? Have the limits been reached already? In the evaluation of the relations between the judicial system and the administration an objection has been made against the “juridification of the public administration”. The interest of the administration to increase power to solve conflicts has been pointed out. The administration should not be limited to the implementation of a legitimacy test for basic decisions, but should get the scope to solve conflicts between citizens and the administration through consultation and conciliation.\*\*\*\*\* From the political side of the fence the policy of the Balkenende III cabinet has been aimed at pushing the judge back to “the second line”.††††††† This point of view rests on a double justification. On the one hand the citizen’s own responsibility is foremost according to the government. On the other hand the policy aims to contribute to the capacity problems of the judicial system. In order to “improve legislation”, “criminal law (...) can pull back to the benefit of administrative law or liability

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\*\*\*\*\* The prohibition of article 120 of the Constitution has recently been extensively brought up for discussion in the private member’s bill of Femke Halsema of 11 April 2002, in which a plea was made for a partial abolition of the prohibition of article 120 of the Dutch Constitution. See Kamerstukken II, 2001-2002, 28 331, nr. 2 and 3.

††††††† M.A. Loth & A.M.P. Gaakeer, *Meesterlijk recht*, third edition, The Hague: Boom Juridische uitgevers 2005, p. 39-42.

††††††† A. Pitlo, *Evolutie in het privaatrecht*, second edition, Groningen: Tjeenk Willink 1972, p. 58. Cf. *supra* concerning the consequences of the increased number of “open norms” in legislation.

§§§§§§§§ T. Koopmans, *De rol van de wetgever*, in: H.C.F. Schoordijk et al. (ed.), *Honderd jaar rechtsleven*, Zwolle: W.E.J. Tjeenk Willink 1970, p. 221-235, here p. 223.

\*\*\*\*\* Werkgroep-Van Kemenade, *Bestuur in geding. Rapport van de Werkgroep inzake terugdringing van de juridisering van het openbaar bestuur*, Haarlem: Provincie Noord-Holland 1997, p. 49-51. Cf. Kamerstukken II, 1994-1995, 24 236, nr. 3 (MvT Wet rechtstreeks beroep), p. 3, and Kamerstukken II, 1999-2000, 27 024, nr. 3 (MvT Kosten bestuurlijke voorprocedures), p. 5.

†††††††† Kamerstukken II, 2003-2004, 29 279, nr. 9 (Rechtsstaat en Rechtsorde, Nota Bruikbare rechtsorde). Cf. M.A. Loth, ‘Met openbaar gezag bekleed; over het publieke karakter van rechtspraak’, in: Huls & Loth 2004, p. 43-59, here p. 45.

law, self-regulating systems can use alternative dispute settlement”.<sup>††††††††</sup> Measures taken in this respect are: (i) the “Mulderizing” of bulk cases and generally the shift of criminal law to administrative law; (ii) the settling of criminal cases by the Public Prosecution Service<sup>§§§§§§§§</sup>; and (iii) the setting-up of “court annexed mediation”.<sup>\*\*\*\*\*</sup>

This withdrawal of the judge from the public domain brings dangers with it. The setting-up of a “punishing administration” and the settling of criminal cases by the Public Prosecution Service can lead to a loss of legal protection for the citizen. This objection was already invoked in the debate concerning the theory of abolitionism, which pleads for the abolition of the criminal law enforcement system.<sup>††††††††</sup> The citizen loses the guarantees for a fair trial (article 6 paragraph 1 ECHR) that apply to judges for settling cases. The possibilities for domain restriction reach their limits when the public character of the judicial system comes into play. The settlement of cases by the judge contributes to the accessibility of the judicial system, the legal protection of the citizen and the authority of the judge. For complex cases the development of the legal order is best served when performed in public.<sup>††††††††</sup> We have already seen above that Galanter also pointed to this risk (see par. 3.1).

The judicial domain acts like a shuttle that moves from domain enlargement to domain reduction in relation to the legislature and the governing administration. Which way should the movement go? Insofar as the answer to this question is dependent on policy and choice – and not autonomous developments – it depends on the role of the judicial system in the legal order: what criteria and public interests determine the limits? The qualitative paradigm raises its head again, more to follow below.

### *B. Internationalization (the relation to other legal orders)*

The development of the international and European legal orders forms a second factor influencing the Dutch judicial domain. This development characterizes itself through the increased stream of legislation with an international and supranational legal source. Plurality or a pluralism of legal sources has arisen as a result of the increased influence of international and supranational law on the national legal order.<sup>§§§§§§§§</sup> The national judge has got “competition” from new courts on an international and supranational level. In the Dutch legal system, the jurisdictions of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have acquired a particularly large influence. However, the possibility of judicial review of the respect of treaty provisions offers the Dutch judiciary the possibility of testing provisions made by laws in a formal sense against higher rules. The legal protection of the citizen can, in this way, be better guaranteed.<sup>\*\*\*\*\*</sup>

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<sup>††††††††</sup> Kamerstukken II, 2003-2004, 29 279, nr. 9 (Rechtsstaat en Rechtsorde, Nota Bruikbare rechtsorde), p. 12.  
<sup>§§§§§§§§</sup> Kamerstukken II, 2005-2006, 29849 (Wet OM-afdoening); ‘OM mag zelf straffen opleggen’, *NRC Handelsblad*, 5 July 2006, p. 2.

<sup>\*\*\*\*\*</sup> Cf. *infra*, p. 14.

<sup>††††††††</sup> About that theory, see, among others, L.H.C. Hulsman, *Afscheid van het strafrecht: een pleidooi voor zelfregulering*, Houten: Het Wereldvenster 1986; J.R. Blad, *Abolitionisme als strafrechtstheorie: theoretische beschouwingen over het abolitionisme van L.H.C. Hulsman*, doctoral thesis EUR, Deventer: Gouda Quint 1996.

<sup>††††††††</sup> Loth 2004, p. 50-51.

<sup>§§§§§§§§</sup> Thus Koopmans. See G.J. Wiarda, *Drie typen van rechtsvinding*, fourth edition, revised by and provided with an epilogue by T. Koopmans, Deventer: Tjeenk Willink 1999.

<sup>\*\*\*\*\*</sup> T. Koopmans, *Courts and political institutions. A comparative view*, Cambridge: Cambridge University Press 2003, p. 182; Wetenschappelijke Raad voor het Regeringsbeleid, *De toekomst van de nationale rechtsstaat*, Rapporten aan de regering, nr. 63, 2002, p. 28.

New domain questions have arisen with the internationalization of our legal order. There is an overlapping of jurisdictions between the national and European courts, both from a territorial perspective as well as a functional perspective. As far as EU law is concerned the national judge has the authority to apply that law in cases that occur in the territory of the Member State. In case of doubt about the explanation of European rules the European Court of Justice can be asked a prejudicial question, this is even obligatory for the highest national judges.<sup>††††††††††</sup> The ECJ is charged in this way with guaranteeing uniform application of EU law in all Member States. The ECJ has thus a functional authority to explain the rules under EU jurisdiction, while its territorial authority covers the whole territory of (the Member States of) the Union. The national judge gets an extra functional authority – concerning the application of European legislation – whereas his territorial authority stays the same and at the same time coincides with (a part of) the jurisdiction of the ECJ.

The advancing internationalization is of influence in another way on the sources that the national judge uses. In an internationalizing world there is room for a “transnational dialogue of judges”<sup>††††††††††</sup>, in the sense that the highest national courts often consult the case law of the highest courts in other countries to see how a solution was found to a certain case. In a comprehensive overview, Guy Canivet (President of the French *Cour de cassation*) has indicated when this can occur: “The resort to comparative law is found, for example, each time that the national law has the need to be completed or modernized; when the judge rules on great societal issues; when a question is common to several countries; when the solution has an economic dimension that exceeds the limits of the legal system in which it applies; and, finally, when it is a question of deciding purely technical matters”.<sup>§§§§§§§§§§</sup> This development, as well as academic projects focused on the harmonization of legal areas, lies at the base of the development of “transnational law” and the harmonization or unification of law between the different countries.<sup>\*\*\*\*\*</sup> The internationalization of the national legal order has a double impact on the national judge’s domain: on the one hand he has an extended stock of legal sources that he can use, on the other hand the internationalization leads to a restriction of the autonomy for law-making by the national legislature and by the judge. Is there a marginalizing of the national judge (for example the Supreme Court, which only considers legal questions, against the European Court of Human Rights that also takes the facts into consideration), or does the national judicial system form the point of reference for both the national and international legal order, as a result of which its domain is only enlarged (like the Scientific Council for Government Policy (*WRR*) put it)?<sup>††††††††††</sup>

In the Netherlands the debate on internationalization is a step further than in the surrounding countries, where constitutional law allows a less far-reaching impact of international law on

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<sup>††††††††††</sup> Article 234 EC-Treaty.

<sup>††††††††††</sup> Witness the remarks of G. Canivet et al. During the Hiil congress, ‘Second Hague Colloquium on Fundamental Principles of Law. Supreme Courts in an internationalised world: challenges for the *trias politica* and the coherency of law?’, The Hague, June 30th and July 1st 2006. The report of the congress is available at <http://www.hiil.org>.

<sup>§§§§§§§§§§</sup> G. Canivet, *The practice of comparative law by the supreme courts: brief reflections on the dialogue between the judges in French and European experience*, *Tulane Law Review*, volume 80, nr. 4, 2006, p. 1377-1400, here p. 1391.

<sup>\*\*\*\*\*</sup> Concerning European civil law, see among others M.W. Hesselink, *The New European Private Law. Essays on the Future of Private Law in Europe*, The Hague/London/New York: Kluwer Law International 2002 (the publication contains among other things the inaugural lecture of the author about “the New European Legal Culture”); A.S. Hartkamp, M. Veldman and others (eds.), *Towards a European Civil Code*, third edition, Nijmegen/The Hague: Ars Aequi Libri/Kluwer Law International 2004.

<sup>††††††††††</sup> WRR, *De toekomst van de nationale rechtsstaat*, The Hague: Sdu Uitgevers 2002, p. 32 and p. 81 (“...blijft de nationale staat vooralsnog het belangrijkste ankerpunt van de rechtsorde, ook de internationale...”).

its national system than is the case in the Netherlands.<sup>††††††††††</sup> Also a factor that plays a part in the Dutch system is the possibility of judicial review of the respect of treaty provisions, which – in the absence of a mechanism for constitutional review of laws – has gained a prominent place in the national judge’s administration of justice.<sup>§§§§§§§§§§</sup>

The final conclusion is that the internationalization of our legal order can lead to both a judicial domain loss as well as to a judicial domain gain. There is a domain loss in the sense that the national judge gives away part of his jurisdiction – final judgments amongst other things – to the international and European judges. At the same time there is a domain gain, the national judge has more legal sources to call upon and gets an additional (functional) jurisdiction in the application of European law. For this last point a remark needs to be made that the increase in the amount of sources has consequences for the judge’s autonomy. In 2015 will there be talk of domain gain or domain loss for the national judge as a result of the internationalizing tendency? The answer is dependent on the question whether our legal order becomes more internationalized<sup>\*\*\*\*\*</sup> as well as the question what role the national judge will play in the European legal order. Here – on another level – the qualitative paradigm surfaces again.

### *C. Juridification (the relation to other forms of dispute settlement)*

The question of juridification raises its head again when we cast a glance at the relations within the national legal order. Can a domain enlargement or domain restriction be observed in the relation of the law with other forms of dispute settlement? The boundary of the judicial domain in relation to alternative ways of settling disputes (like arbitration, mediation, rehabilitation, neighborhood justice projects (*JIB*)) is especially relevant. The choice citizens make for a certain solution strategy to their legal problems can be considered as an assessment of costs and benefits. On the one hand the possible choices are stipulated by the problem, on the other hand by the offer of help that is available.<sup>††††††††††</sup> Does the greater offer of “aid” – in the form of more methods for settling disputes – lead to a less busy judicial system, or does it only create extra demand? In the Outline Policy Document on the modernization of the judicial organization the concept of “tailor-made justice” was introduced, which offers opportunities for the judicial system:

“Accessibility, approachability, cost-efficiency and reduction of the long waiting time, in short a judicial system that is tailor-made, self-regulating and with a strong focus on its social surroundings.”<sup>††††††††††</sup>

What applies to this tendency is to “strive for the correct type of dispute settler (judge, mediator, etc) to solve the correct type of disputes”.<sup>§§§§§§§§§§</sup> This development can have several consequences as we have already seen in Galanter’s analysis. In the first place it leads

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<sup>††††††††††</sup> This applies in particular to the dualistic systems of the United Kingdom and Germany. C.A.J.M. Kortmann, *Constitutioneel recht*, fifth edition, Deventer: Kluwer 2005, p. 183.

<sup>§§§§§§§§§§</sup> See among others L.F.M. Besselink, ‘Rode draad “Constitutionele toetsing”’: Constitutionele toetsing in internationaal perspectief’, *Ars Aequi* 2003, p. 89-95.

<sup>\*\*\*\*\*</sup> See the scenarios in *Justitie over Morgen*.

<sup>††††††††††</sup> Report *Geschilbeslechtingdelta 2003*, p. 184.

<sup>††††††††††</sup> Contourennota modernisering rechterlijke organisatie, *Rechtspraak in de 21<sup>e</sup> eeuw*, Kamerstukken II, 1998-1999, nr. 26 352, p. 17. Central points to chapter 6 dedicated to “tailor-made justice” are the procedural and financial accessibility to the administration of justice and the ease of contact with it.

<sup>§§§§§§§§§§</sup> Commissie Evaluatie Modernisering Rechterlijke Organisatie, Referentiemodel *De modernisering van de rechtspraak*, p. 4. Available at <http://www.evaluatiero.nl/publicaties/referentiemodel/>.

to a change in the role of the judge who acts less as a “litigator” and more as a “mediator” and “case manager.” In the second place there are risks involved in offering “tailor-made justice”. One risk in connection to this is the possible “loss of rights”<sup>\*\*\*\*\*</sup> for the citizen. In California, for example, the “private justice” practice has taken off; a lot of claims in the construction sector are settled by means of arbitration. A “two tier system of justice” has arisen: “public justice” that takes place in the courts in public, and “private justice” that takes place via alternative dispute settling methods in private. The withdrawal of the judge, which is a consequence of this, can lead to a “loss of rights” and a bleaker society.<sup>††††††††††</sup> Again the question arises: which criteria and public interests determine the boundaries? Again the domain delineation in a quantitative sense is dependent on the answer to the question of the judicial system’s role in the legal order and in society (the qualitative paradigm).

Legal advice also plays a role in the demarcation of the work terrain of the judicial system. In this respect it is important that the number of lawyers constantly increases, as a result of which an extension of the legal profession’s work terrain will be sought after more inventively – for example by introducing the “no cure, no pay” system – and with that the work terrain of the judge.<sup>††††††††††</sup> We have already pointed out that the legal profession can bring new ideas to the judge concerning decision making in concrete cases.<sup>§§§§§§§§§§</sup> Further developments in the Bar have recently been mapped-out by the Van Wijmen Commission and in the position paper of the legal sociologist Nick Huls.<sup>\*\*\*\*\*</sup> There is a development to be seen of more specialization and commercialization in the upper segment of the market. The lower segment of the market characterizes itself by the creation of “legal aid counters”. In connection with access to the law there is no new gap visible with regard to the guarantee of “access to justice”. However, attention should be given to the negative image that many citizens have of the legal profession and the consequences this has for access to the law.<sup>††††††††††</sup> The current discussion in the Netherlands focuses on, among other things, the question of “no cure, no pay”.<sup>††††††††††</sup> In short: the development of the Bar forms an engine sooner than a brake for judicial domain enlargement.

#### *D. Legal cooperation (the internal relations between courts)*

Questions of domain control and domain split play a role within the judicial organization in the Netherlands. Principles of efficiency are expressed in, amongst other things, the demand in article 6 paragraph 1 ECHR for judgments of cases to be carried out within a reasonable period of time. According to these principles a new assessment should be made concerning the use of capacity and expertise. The discussion concerning judicial concentration, where by means of directives from the Council for the Judiciary a tendency towards rationalization is taking place, should be seen in this light. Cases are no longer settled on the basis of territorial

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<sup>\*\*\*\*\*</sup> The term comes from Vranken; see J.B.M. Vranken, ‘ADR en de gevolgen voor rechterlijke rechtsvorming: een verwaarloosde samenhang’, in: E.J. Broers & B. van Klink (eds.), *De rechter als rechtsvormer*, The Hague: Boom Juridische uitgevers 2001, p. 241-255.

<sup>††††††††††</sup> Loth 2004, p. 48. Concerning the jurisdiction in Californië, see also S. Verberk, *Rechter onder de mensen? Over de externe oriëntatie van de rechterlijke macht in Californië*, Research Memoranda nr. 3, The Hague: Raad voor de rechtspraak 2005.

<sup>††††††††††</sup> Cf. Huls, *op.cit.*, p. 83 and p. 87.

<sup>§§§§§§§§§§</sup> See *supra*, p. 10.

<sup>\*\*\*\*\*</sup> Van Wijmen Commission, *Een maatschappelijke Orde*, report of April 24th 2006. N.J.H. Huls & Z.D. Laclé, *Meer macht voor de consument? Een position paper ten behoeve van de Commissie Van Wijmen*, The Hague: Boom Juridische uitgevers 2006.

<sup>††††††††††</sup> Cf. in this respect the report *Geschilbeslechtingsdelta 2003*, p. 189-192.

<sup>††††††††††</sup> Report Van Wijmen Commission, p. 44-48. See also ‘Donner tegen “no cure, no pay” in advocatuur’, press report of June 24th 2004.





In what way are the developments of the relations between the judicial system and the citizen of influence on the size of the judicial domain? On the one hand a domain restriction can result from this relationship: decreasing confidence of the citizen in the judicial system – as a result of legitimacy problems or as a result of the changed attitude of the citizen – can lead to a smaller demand for the judicial system and pressure on the traditional working methods within the judicial organization. On the other hand the developments in society could be a reason for domain enlargement. The bigger demand on the judicial system “all across the board” – as a result of the individualizing of society – can lead to an enlargement of the judge’s work area. The most important question here also proves to be: what role does the judge play in the legal order and in society?

*F. Consequences for the domain: summary*

What conclusions can be drawn from the above? The developments at the various levels show opposing tendencies, which can lead to an enlargement or to a restriction of the judicial domain.

Domain restriction can be a result of:

- pushing the judicial system back to the second line by the administration;
- losing domain to international and supranational courts;
- moralization of private law and politicization of administrative law;
- standardizing of legal judgments through a stricter domain management;
- de-juridification of dispute settlement through availability of alternatives;
- decrease in confidence of the citizen leading to less demand and more pressure on the traditional working methods;

Domain enlargement can result from:

- increased scope with regard to other state powers;
- juridification of politics (control in public law) and morality (from confidence relations to legal relationships in private law);
- increase in flow of legislation from international and supranational origin;
- jurisdiction of the judge in international and European law;
- internationalization leading to a strengthening of the judiciary with respect to the political powers;
- more effective domain management leading to greater capacity;
- in spite of decreasing confidence still a growing demand for the judicial system.

What effects these tendencies have on the judicial domain as sketched in par. 3.1 cannot be said. In the first place it has to do with long-term effects, these can be negated by more incidental developments on the short-term (like economic development, amendments to laws etc.). Moreover the long-term developments described are so complex that the effects cannot be individualized (do they lead to a domain enlargement or decline?). Finally we saw that these developments are, in a number of ways, dependent on the judge’s role in society and in the legal order. To get a clearer view we will turn to the second, qualitative paradigm of the judicial domain.





that is appropriate here is that of an activist judge with an eye for the social context of his work (“social engineer”), one who addresses himself more than normal to the effective and efficient management of his “caseload” (“caseload manager”). In short, the judge is an organizer who enlarges his domain at the cost of the legislature and other judges (for future, similar cases). If this development were completed, it would mean a greater responsiveness by the judge, with all the opportunities and risks that go with it (see par.1). For the judicial power as a whole this development means growth in the direction of a different job description (“different and more”).

*Domain restriction in the width.* Minimalism as described by Sunstein leads to a domain restriction in the width. Minimalist judges avoid precedent forming both on principle grounds (task of the legislature), and for pragmatic reasons (consequences are not calculable). The motto is literally “one case at a time”, as Sunstein’s book title puts it. The traditional, old-fashioned judicial system fits this picture; the cantonal judge, the police judge, the administrative judge etc. For the judiciary as a whole these developments mean an unaltered growth, possibly in the direction of the “second line”. The idea of a useful legal order with a repositioning of the judicial system as a “last resort” fits perfectly in this development. The judiciary as a whole will hardly grow, at the most the tasks will be shifted from the forming of decisions to the control of them (“small is beautiful”).

The question of choosing for domain enlargement or decrease in the width is a repeating dilemma for the Dutch Supreme Court: to either make a judgment on nothing more than is needed for a case, or serve the legal system by making law, and forming and monitoring legal uniformity with broader judgments? \*\*\*\*\* In legal economic terms the solution is easy to formulate: it should be the lowest possible judgment costs and mistake costs. Good judges strive to reduce the judicial workload and the number of errors and the impact of errors. How this is achieved, is very much dependent on the circumstances. A broad judgment is appropriate when it concerns a frequently recurring case, or when the judge is fairly sure of his judgment, or when it is important that the parties to a case can plan their behaviour. But when circumstances change quickly or society is divided, then a narrow judgment is appropriate. Sometimes a broad judgment is simply difficult to bring about because within the court itself there is disagreement on the desirability of the chosen solution or its application in the law.

*Domain enlargement in depth.* When there is an activist judge that makes (many) deep judgments, then we talk of domain enlargement in “depth”. Especially in appeal and appeal review, judges give a lot of thought to the meaning of their judgments for law making and they are sooner inclined to motivate their judgments deeper. The case law of the Supreme Court in “wrongful life” and “wrongful birth” is a good example. These judgments not only contribute to law making but also to the public debate on controversial cases, and with that to the democratic level of society. The lawsuit is especially used as a source for law making by the judge, the cosmos in a grain of sand, so to speak. The legal image that fits here is one of an activist judge with much attention for the judicial meaning of his judgments. This judicial activism can be distinguished from the social activism of the “social engineer”. For the judiciary as a whole this development particularly implies a stronger commitment to the rule of law, the legal protection of the citizen and revitalizing the law. The result is a growth in the judicial organization within the traditional framework (“more, more, more”).

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\*\*\*\*\* See about this J.M. Barendrecht, *De Hoge Raad op de hei: kwaliteitsbewaking en leiding over de rechtspraak door de civiele cassatie: een analyse en denkrichtingen voor de toekomst*, Deventer: W.E.J. Tjeenk Willink 1998, p. 92-98, and Sunstein 1999, p. 46-60.



not to turn away from law making to legal transfer, but to combine both; it has to do with combining methods and social consciousness so that the audience of legal colleagues is reached as well as the general public audience.

The outline of four possible effects becomes visible for the development of the judge's domain (in qualitative sense: to be understood as the social role of the judge): domain enlargement or domain decrease, both wide and deep. Which of these effects is most probable, and which is more preferable? The considerations dependent on this are even more important than the answer. We will approach these questions in the form of some scenarios for the development of the judicial domain. The next section is dedicated to this.

### 5. Scenarios for the development of the judge's domain

In par. 3 a number of social developments were described that have an impact on the judge's domain, in relation to adjacent domains. Some of these developments lead to an enlargement of the judicial domain, others to a reduction. This is generally impossible to examine because they interface with other developments. Then in par. 4 the social role of the judicial system was typified in terms of the judge's influence and the impact of his judgments. We have distinguished between a domain enlargement in "width", a domain enlargement in "depth", a domain reduction in "width", and a domain reduction in "depth". All of this raises the question as to what impact the social developments described in par. 3 have on the consequences of the role of the judge highlighted in par. 4. What are the most probable consequences for the social role of the judiciary as a result of conflicting powers, internationalization of the law, the juridification of society, legal cooperation and the democratization of the judicial organization? In the Dutch context, do these developments lead to a domain enlargement – in "width" or in "depth" – or to a domain reduction, again in "width" or "depth"? These are the last questions to be dealt with here. Perhaps it should be said in advance that there are no easy monocausal links to be made, the outlined developments are far too complex for this. However, what we could do is to try to make some believable images, in the form of a few scenarios, on the connections between a number of the developments described above. The scenarios that are distinguished here do not have the pretension of being anything more or less than that.

#### Scenario 1: "More, more, more..."; domain enlargement through capacity enlargement

In this scenario the advancing internationalization of the law leads to an increasing complexity of the Dutch legal order, its sources and participants. The judicial system sees itself confronted with a plurality of legal sources, a proliferation of courts and jurisdictions, and an increasing uncertainty of its own task and function. This forces a demarcation to be made between its own jurisdiction and that of the international and supranational courts and a review of the relationship with the national legislature. The judicial system has the potential to position itself as a point of reference for the (European) legal order, as was already observed by the Scientific Council for Government Policy (*WRR*). At the same time the juridification of society leads to a greater demand on the judicial system, in civil law, criminal law and administrative law adjudication. The growing presence of ADR forces the judicial system to reflect on its own distinguishing features as a form of dispute settlement, in other words, on its public task. Between one thing and another it does not get easier because the authority of the judge is continuously under pressure, and every (real or alleged) legal mistake boosts the social clamour for transparency and justification.

In this scenario the judicial domain grows simultaneously with the stimulus from the surroundings, where distinction must be made between width and depth. In width the judicial system aspires to a meaningful social role, for which new instruments are used (legal cooperation, directives, combining similar types of cases, striving towards more precedent effect etc.). In depth the judicial system strives towards a role in law making, beside that of the national legislature and other international or supranational judges. In itself this pursuit is compatible with more modest social pretensions. It is not the *amount* of the share in the social demand for justice that counts, but the *nature* of the share (namely through law making). In this way the judicial system can choose to leave a substantial amount of civil dispute settlements to ADR, in order to concentrate on its core functions (judicial law making, protection of the weaker party, protecting the interests of third parties etc.)

This growth scenario – stimulated through efficiency and performance rewards by the judicial organization itself – has advantages and disadvantages. It is an advantage that the judicial system preserves its central role and develops further, in cohesion with other state powers, and national, international and supranational judges (the transnational dialogue between judges). With that both crucial interests in society and the legal order are served. At the same time the competence and expertise of the judiciary is preserved and grows along with developments in society and the legal order. There are a few disadvantages to this. Every offer creates a demand and it is for this reason plausible to think that the growth scenario boosts the juridification of society. Moreover this leads to higher transaction costs, capacity problems and coordination ups and downs in the judiciary and eventually results in a viscous circle of control and lawsuits in a growing volume; where does it end? Domain enlargement knows its limits, this was also seen in the last section, both in “width” and “depth”. Striving towards responsiveness has its limits as to what the judicial system can and cannot do. The judge cannot solve all social problems, he is simply not equipped or authorized to do so.

#### Scenario 2: “**Small is beautiful**”; domain reduction by withdrawal of the judge

This scenario is conceivable against a background of divergent social developments and legal developments in the Netherlands. In the first place it is conceivable that appeals to the judge increase, like was described in the first paragraph of the last scenario (more control, rules and courts of various origins, juridification, rising demand, democratization, growing criticism). Additionally it is also conceivable that domain reduction occurs in the international and supranational courts, that through the increased availability of alternative forms of dispute settlement a de-juridification occurs, that the demand for law decreases (“implosion of trials”) and that through this the judiciary can maintain its capacity and competency to concentrate on its core functions. As a result there will be less negative news in the media with the result that the confidence in the judicial system improves. It is difficult to predict which way the developments will go. But a reaction to both tendencies could be a withdrawal of the judicial system, which results in this scenario “small is beautiful”.

The policy of the Balkenende III cabinet is to strive towards a greater responsibility for the citizen himself and a repositioning of the judicial system to the “second line”. This has led to certain forms of the administration of justice being allocated to other agencies (PP settlement) or to other judges (Mulderizing of criminal cases). Other forms of this “giving back responsibilities” are the flash-divorces in family law, the dispensing of planning permission for certain types of small renovations, and the greater responsibility of the employee and employer to jointly solve their problems in the Gatekeeper Act. Reflection on the need and nature of the intervention by the judge is stimulated by these developments; actually why and when is an appeal to the judge necessary and desirable? At the same time the vicious circle of the growth scenario is broken, with all the advantages from a cost savings point of view. Yet there are also risks to domain reduction, what also transpired in the last paragraph. Domain reduction in “width” runs the risk of losing relevance, or to say it differently, marginalizing the judicial system as a social factor. Will it still be possible in 2015 to settle case after case as if the world has not changed? Will the important social questions stay outside the judicial system? And would this carefree attitude not lead to a definite “numbing” of the judicial system? Domain restriction in “depth” has other risks again. The current discussion on unreasoned acquittals and head-and-tail judgments show that reducing the judicial domain in this manner entails negative side effects. It leads to negative effects on the persuasiveness of judicial decisions and eventually to a negative effect on the competency of the judges







## 6. *A few conclusions*

The analysis in the light of models presented in American academic writing has resulted in some conclusions and additions with respect to the role of the Dutch judicial system in 2015. These conclusions may be transferable to discussions on judicial organization in other European legal systems, when taking into account the specificities of the legal culture of each system. Conclusions 1-9 are related to the social meaning of the judicial system, and 9-14 are related to its constitutional meaning (although the one cannot be strictly separated from the other). The last conclusion, 15, is of an organizational nature:

1. Two paradigms must be distinguished in order to think and speak about the judicial system's domain. In the quantitative paradigm the judicial system's domain is seen as its work terrain, in the qualitative paradigm as its role. We should be careful not to talk and think of the judicial system only in terms of social meaning, but also in terms of its meaning for the rule of law;
2. The judicial system's domain will continue to grow in the short-term in the Netherlands, especially for administrative law cases and appeal cases. This development is not at all what was expected based on the long-term developments. Despite the extra attention for security no growth in the amount of criminal law cases, despite the withdrawal of the administrative court no cases less, and despite the rise in mediation no civil cases less. The growth of the judicial system's domain seems to be a relatively autonomous development. It seems in the US – other than what the “litigation explosion” legend would have one expect – since the start of the sixties there has actually been a fall in the amount of proceedings (“implosion of trials”);
3. The developments in the long-term that we discussed here – conflicting powers, internationalization, juridification, legal cooperation and democratization – all have both a domain enlargement as well as a domain reduction impact. The influence of the judicial system and the impact of judicial decisions can be described in terms of domain enlargement or reduction, both in “width” and “depth”. Domain developments in civil law, criminal law and administrative law can be analyzed in these terms. After a continual domain enlargement up to the eighties – both in width and depth – it seems that after this there was a domain reduction for some parts;
4. The development of the judicial system should neither be determined by an uncontrolled social growth (scenario 1), nor by ideological assumptions (scenario 2), but by a clever strategic response to changing circumstances (scenario 3). More than the first two scenarios, scenario 3 is based on a reflection of the role of the judicial system (the qualitative paradigm) and deserves preference for this reason;
5. The judicial system should be so wide that it is socially relevant and responsive (or remains that way), but not so wide that it surrenders its fundamental legal goods. The balance will have to be found from case to case (compare the discussion about the criminal judge and security, the civil judge and the protection of the weaker party, and the administrative judge in relation to decisive administration);

6. Considering its social role the withdrawal of the judicial system to “the second line” is more limited than is often thought. Sometimes it is the interests of the justice seekers (loss of legal protection) that resist, other times the interests of the legal order (loss of law making), and then again sometimes the interest of the judicial organization (loss of competence);
7. Settlement of bulk cases cannot be completely delegated (compare the Mulderizing of criminal cases, PP settlements, flash divorces), without losing out on another front. In the general practitioner’s cases (work, housing, income) the few contacts that the individual citizen has with the judicial system are often the only source of confidence and legitimacy;
8. Complex cases, even more than bulk cases, cannot be completely delegated (compare agreement arbitration, *ad hoc* commissions, and other dispute settlers). The settlement of such cases often contributes to truth finding (as in the Enschedé and Volendam cases), law making (“wrongful birth”, “wrongful life”), public justification proceedings, the social debate, and – “last but not least” – the competency of the judiciary itself;
9. The judicial system should preserve a recognizable profile in the legal order as a state power that makes binding judgments (no pseudo lawmaker or controller). The core components of its task should (continue to) contain the utilization of the principle of *audite et alteram partem*, truth finding, forming judgments, the substantiation and the pronouncement of judgments, and the execution of judicial decisions;
10. The judge must substantiate judgments deeply enough for a (continued) contribution to the legal order. This implies a necessity for balance to be found between the many common simple cases (wide judgments), and the rare complex judgments (deep judgments). Besides, the boundaries of the law making task of the judge must be kept in mind, both in relation to the other judges (in future cases) and in relation to the law makers (legislature);
11. The practice of unsubstantiated acquittals and judgments should be abandoned. Not only do such judgments not contribute to law making, they leave justice seekers and society in uncertainty about the reasons that underlie the forming of a judgment;
12. The judicial system must strive towards a more interactive and communicative attitude. To this end it must not only aim at professional colleagues and lawyers, but also to parties of lawsuits and the general public (law-finding and transfer of law). It is of vital importance for the authority of the judicial system that it succeeds in integrating both forums in an acceptance of and an understanding for the judicial system;
13. The judicial system must strive for a crucial role as a point of reference for the international and European legal order, that is to say, a role where it is in a position to both contribute to the law making of international and European law, as well as the impact that has on Dutch law;

14. The judicial system should contribute, in its law-making task, to a permanent reappraisal of the legal order and renewal of the law, and with that to the normative structure of society. Through its unique position it is, more, properly equipped and legitimized than any social institution to do this;
15. Reinforcement of the judicial organization is necessary in order for it to (continue to) fulfil its social role and rule of law role, within the constitutional framework for the judicial organization. Thereby the balance should be kept between on the one hand the demands of a human scale and a recognizable judicial map, and on the other hand quality improvement and increase in efficiency. Guiding trends are specialization through concentration, region forming and legal cooperation. In the long run a development in the direction of functional jurisdictions, administrative integration and expansion of scale is inevitable.