

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.¹ 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.² 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

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1 M.A. Loth, ‘Rechtspraak en mediation; een *liaison dangereuse*’, in A.F.M. Brenninkmeijer (ed.), *De taakopvatting van de rechter*, 2003, p. 39.

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

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 encountered 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 American legal culture being considerable.³ The way in which specific aspects 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 in the comparative analysis of questions of judicial organization⁴, 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 (Section 2). Following this, attention will be given to the quantitative paradigm, in the first place by referring to relevant figures (Section 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 (Section 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 (Section 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 Section 3 mean for the possible effects given in Section 4? In Section 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 (Section 6).

3 Concerning specific aspects of the Dutch legal culture, see E. Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany', 1998 *American Journal of Comparative Law*, pp. 1-41.

4 In the European context, see M. Fabri *et al.* (eds.), *The administration of justice in Europe: Towards the development of quality standards*, 2003; M. Fabri *et al.* (eds.), *L'administration de la justice en Europe et l'évaluation de sa qualité*, 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 the number of cases as well as the 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 viewpoint 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 for this paradigm.⁵ 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 is given 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 fulfils 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.⁶ 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.⁷

Both of these paradigms lead to a better understanding of the scenarios for the Dutch judicial system out of *Justitie over morgen II*.⁸ In order to show this it is worthwhile to first summarize shortly the different scenarios for the judicial system's domain. From two variables

5 D. Luban, 'Settlements and the erosion of the public realm', 1995 *The Georgetown Law Journal*, pp. 2619-2662.

6 P. Ricoeur, *The just*, 2000, pp. 127-133.

7 S. Hampshire, *Justice is conflict*, 2000, and A.M. Hol & M.A. Loth, 'Iudex mediator, naar een herwaardering van de juridische professie', 2001 *Rechtsfilosofie en Rechtstheorie*, pp. 9-57.

8 Ministry of Justice, Direction AJS, January 2006.

– the demand for security and the degree of internationalization – four scenarios will be distinguished: *Forza Europa* (a big demand for security, further internationalization), *Netherlands Afraid* (a big demand for security, a 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, 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 striving towards greater security, which is to say a 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.⁹ 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 legal order is seen as the normative structure of society. There is no mention of a repressive society, but of a normative society. The

9 P. Nonet & P. Selznick, *Law and society in transition; toward responsive law*, 1978, pp. 115-119.

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 the number of cases. First of all we will give a short sketch of the judicial system's domain (Section 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 (Section 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.¹⁰

The Dutch judicial system's domain is divided unequally into three segments. The division in the 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 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 afterwards. 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. A total of 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 remark-

10 The figures relating to the Netherlands are derived from the Jaarverslag 2005 (Annual Report 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*, 2004, p. 184.

able. Despite the Duisenberg regulation¹¹ – 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 databank and appointed a coordinator per jurisdiction.

The sub-district sectors heard 18% of the *criminal cases* (32% of the total) (offences, Mulder (road traffic) 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 programme did not materialize. The most remarkable development was the redivision of criminal cases by the National Coordination Centre for Mega Cases, set-up in 2004, where 68 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) experienced 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 by Marc Galanter, regarding the development of the judicial domain in a quantitative sense in the United States,¹² can be used as a point of reference for that research. Galanter comes to the – surprising – observation that the number of proceedings ending with a judicial decision¹³ 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.¹⁴

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

11 Cf. *infra*, p. 92.

12 M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', 2004 *Journal of Empirical Legal Studies* 3, pp. 459-570.

13 Galanter is starting from the concept 'trial', which is defined as 'a contested proceeding before a jury or court in which evidence is introduced' (Galanter, *supra* note 12, 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.

14 Galanter, *supra* note 12, p. 460.

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* 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 ‘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.¹⁵

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’) (from 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 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.¹⁶ 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 the abandoning of proceedings because of increased complexity, costs and the 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’¹⁷) 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’,¹⁸ 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

¹⁵ *Ibid.*, pp. 499-500.

¹⁶ *Ibid.*, pp. 515 *et seq.*

¹⁷ *Ibid.*, p. 520.

¹⁸ *Ibid.*, p. 525 and the literature quoted in note 122.

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 subsection.

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 participants and activities. Sometimes the boundaries are a result of conscious acts, sometimes of autonomous developments. The most important neighbouring 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'¹⁹ 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 (Civil Code)) 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.²⁰ Moreover the judge has regularly gone further himself by making clear standards vague.²¹ A helping hand from the legal profession has further helped the judge to steer jurisdiction down

19 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', 1991 *Acta politica*, pp. 1206 *et seq.* and by the same author 'De rechter als politieke macht', in M.G. Rood (ed.), *Recht en politiek. Nationale en internationale beschouwingen*, 1993, pp. 25-40.

20 N.J.H. Huls, 'Grenzen van rechterlijke domeinuitbreiding', in N.J.H. Huls & M.A. Loth (eds.), *Het domein van de rechter*, 2004, p. 82.

21 *Ibid.*, p. 84.

new roads.²² Demands from society also make it difficult for the judge to say ‘no’.²³ 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.²⁴ 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 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.²⁵

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.²⁶ 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 it²⁷). 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 Koopmans²⁸), 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 already been reached? 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 be given the scope to solve conflicts between citizens and the administration through consultation and conciliation.²⁹ 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’.³⁰ This point of view rests on a double justification. On the one hand the citizen’s own responsibility is foremost

22 See *infra*, p. 87.

23 See *infra*, p. 88-89.

24 Huls, *supra* note 20, p. 82.

25 The prohibition of Article 120 of the Constitution has recently been extensively brought up for discussion in the private member’s bill by 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, nos. 2 and 3.

26 M.A. Loth & A.M.P. Gaakeer, *Meesterlijk recht*, 2005, pp. 39-42.

27 A. Pitlo, *Evolutie in het privaatrecht*, 1972, p. 58. Cf. *supra* concerning the consequences of the increased number of ‘open norms’ in legislation.

28 T. Koopmans, ‘De rol van de wetgever’, in H.C.F. Schoordijk *et al.* (eds.), *Honderd jaar rechtsleven*, 1970, p. 223.

29 Werkgroep-Van Kemenade, *Bestuur in geding. Rapport van de Werkgroep inzake terugdringing van de juridisering van het openbaar bestuur*, 1997, pp. 49-51. Cf. *Kamerstukken II* 1994-1995, 24 236, no. 3 (MvT Wet rechtstreeks beroep), p. 3, and *Kamerstukken II* 1999-2000, 27 024, no. 3 (MvT Kosten bestuurlijke voorprocedures), p. 5.

30 *Kamerstukken II* 2003-2004, 29 279, no. 9 (Rechtsstaat en Rechtsorde, Nota Bruikbare rechtsorde). Cf. M.A. Loth, ‘Met openbaar gezag bekleed; over het publieke karakter van rechtspraak’, in N.J.H. Huls & M.A. Loth (eds.), *Het domein van de rechter*, 2004, p. 45.

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 law, self-regulating systems can use alternative dispute settlement’.³¹ 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;³² and (iii) the setting up of ‘court-annexed mediation’.³³

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 advocates the abolition of the criminal law enforcement system.³⁴ 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.³⁵ We have already seen above that Galanter also pointed to this risk (see Section 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.³⁶ 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 a judicial review in 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.³⁷

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

31 *Kamerstukken II* 2003-2004, 29 279, no. 9 (Rechtsstaat en Rechtsorde, Nota Bruikbare rechtsorde), p. 12.

32 *Kamerstukken II* 2005-2006, 29 849 (Wet OM-afdoening); ‘OM mag zelf straffen opleggen’, *NRC Handelsblad*, 5 July 2006, p. 2.

33 *Cf. infra*, p. 86.

34 About that theory, see, among others, L.H.C. Hulsman, *Afscheid van het strafrecht: een pleidooi voor zelfregulering*, 1986; J.R. Blad, *Abolitionisme als strafrechtstheorie: theoretische beschouwingen over het abolitionisme van L.H.C. Hulsman*, 1996.

35 Loth, *supra* note 30, pp. 50-51.

36 Thus Koopmans. See G.J. Wiarda, *Drie typen van rechtsvinding*, fourth edition, revised by and provided with an epilogue by T. Koopmans, 1999.

37 T. Koopmans, *Courts and political institutions. A comparative view*, 2003, p. 182; Wetenschappelijke Raad voor het Regeringsbeleid, *De toekomst van de nationale rechtsstaat*, Rapporten aan de regering, no. 63, 2002, p. 28.

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.³⁸ The ECJ is charged in this way with guaranteeing an 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’,³⁹ 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.’⁴⁰ 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.⁴¹ 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 (as the Scientific Council for Government Policy (*WRR*) put it)?⁴²

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 its national system than is the case in the Netherlands.⁴³ Also a factor that plays a part in the Dutch system is the possibility of a judicial review in respect of treaty provisions, which – in the

38 Article 234 EC Treaty.

39 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>.

40 G. Canivet, ‘The practice of comparative law by the supreme courts: brief reflections on the dialogue between the judges in French and European experience’, 2006 *Tulane Law Review* 4, p. 1391.

41 Concerning European civil law, see among others M.W. Hesselink, *The New European Private Law. Essays on the Future of Private Law in Europe*, 2002 (the publication contains among other things the inaugural lecture of the author about ‘the New European Legal Culture’); A.S. Hartkamp *et al.* (eds.), *Towards a European Civil Code*, 2004.

42 WRR, *De toekomst van de nationale rechtsstaat*, 2002, p. 32 and p. 81 (‘...blijft de nationale staat vooralnog het belangrijkste ankerpunt van de rechtsorde, ook de internationale...’).

43 This applies in particular to the dualistic systems of the United Kingdom and Germany. C.A.J.M. Kortmann, *Constitutioneel recht*, 2005, p. 183.

absence of a mechanism for the constitutional review of laws – has gained a prominent place in the national judge’s administration of justice.⁴⁴

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 internationalized⁴⁵ as well as the question of 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.⁴⁶ 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.’⁴⁷

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’.⁴⁸ This development can have several consequences as we have already seen in Galanter’s analysis. In the first place it leads 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 with this is the possible ‘loss of rights’⁴⁹ 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 arbitra-

44 See among others L.F.M. Besselink, ‘Rode draad “Constitutionele toetsing”’: Constitutionele toetsing in internationaal perspectief’, 2003 *Ars Aequi*, pp. 89-95.

45 See the scenarios in *Justitie over Morgen*, *supra* note 8.

46 Report *Geschiedbeslechtingdelta 2003*, *supra* note 10, p. 184.

47 ‘Contourennota modernisering rechterlijke organisatie, *Rechtspraak in de 21^e eeuw*’, *Kamerstukken II 1998-1999*, no. 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.

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

49 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*, 2001, pp. 241-255.

tion. 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.⁵⁰ 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.⁵¹ We have already pointed out that the legal profession can bring new ideas to the judge concerning decision making in concrete cases.⁵² Further developments within the Bar have recently been mapped out by the Van Wijmen Commission and in the position paper of the legal sociologist Nick Huls.⁵³ 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.⁵⁴ The current discussion in the Netherlands focuses on, among other things, the question of ‘no cure, no pay’.⁵⁵ 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 to be delivered 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 aspects, by the court that is easiest to reach for the person subject to trial, but rather by the court that from a functional point of view is the best equipped to reach a correct and quick judgment. There is a development from territorial to functional jurisdiction. Thus another organization arises in the domain demarcation between the various courts: no longer courts with similar task packages spread out over the State’s territory but courts with their own specialized area and size.⁵⁶ This idea was recently confirmed in the report published by the Van der Winkel Commission. That

50 Loth 2004, *supra* note 30, 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 no. 3, Raad voor de rechtspraak 2005.

51 Cf. Huls, *supra* note 20, p. 83 and p. 87.

52 See *supra*, p. 82.

53 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*, 2006.

54 Cf. in this respect the report *Geschildbeslechtingdelta 2003*, *supra* note 10, pp. 189-192.

55 Report Van Wijmen Commission, *supra* note 53, pp. 44-48. See also ‘Donner tegen “no cure, no pay” in advocatuur’, press report of June 24th 2004.

56 See among others 2004 *Trema* 10, special issue ‘Wettelijke concentratie van rechtsmacht’; R. Albers *et al.*, ‘De territoriale verdeling van rechtsmacht in Nederland: bevindingen naar aanleiding van de CEPEJ expertmeeting van de Raad van Europa op 6 oktober 2003 te Den Haag’, 2004 *Trema*, pp. 16-23.

Commission had the task ‘to make an inventory of what actual forms of cooperation (organization models) are available and to what extent these different models form an answer to the problems identified within the legal system (diagnoses) in the light of the dominant developments within and outside the judicial system (trends)’.⁵⁷ In the final report there was a case put forward for durable cooperation between courts on a regional setting.⁵⁸

Besides the discussion at the institutional level it occurs more frequently that substantive agreements are made between courts on the ways of settling cases. It concerns both the application of substantive law and the rules of procedural law. Agreements in this respect fall under the denominator ‘legal cooperation’. The reason for these constructions can be found in the following developments: (i) capacity problems (the demand on the judicial system grows even more than the production increase in company processes as a result of rationalization); (ii) the clamour for more legal uniformity (particularly in bulk cases, where agreements are made on the use of discretionary powers such as fixing of sentences and alimonies).⁵⁹ Forms of legal cooperation are: (i) agreements between courts; (ii) directives (originating from, for example, the Council for the Judiciary and the Circle of Sub-district Courts); (iii) the application of ‘soft law’ (codes of conduct etc. which are not legally binding). In this respect care must be taken that the interpretation of the law is not denatured to an ‘administrative function’. Another problem is formed by the position of the Supreme Court and its influence on the lower courts. The judicial system was criticized, for example, in the case of the execution of the Debt Redevelopment Act for legal persons (*WSNP*), because the judges at first instance leaned too much on the reasoning demands made by the Supreme Court concerning the dismissal of applications. Because of this the courts were threatened with being swamped by *WSNP* cases.⁶⁰

Another judge-related variable in the domain scope is the expertise of the judge (versus arbitration: if the required expertise cannot be found within the judicial organization then the parties will choose for dispute settlement by an arbitration court) and legal activism. At the end of the day the question here is also: what role does the judge play in society/the legal order?

E. Democratization of the judiciary (relation between the judicial system and the citizen)

The relation between the judicial system and the citizen is in several ways of influence on the size of the judicial domain. Two aspects are important in this respect. In the first place the legitimacy of the judicial system for the citizen plays a role. On an institutional level the judicial system must give such an ‘input’ (for example, the guarantee of judicial independence) and ‘output’ (for example, reasoned judicial decisions) so that the citizen continues to have confidence in the judicial system.⁶¹ In the second place there is a changed attitude towards the judicial system by the citizens themselves following developments in society. On the one hand, this leads to a changed ‘input’ in the judicial organization: individualization in society leads to the creation of a ‘claim culture’ (civil law)⁶², a growing need for legal protection (administrative law)⁶³, and a

57 *Goede rechtspraak door sterke regio's*, final report of the Van der Winkel Commission, 14 September 2006, p. 32.

58 *Ibid.*, pp. 5-7.

59 About the compatibility of such constructions with constitutional law and treaty law, see H.U. Jessurun d’Oliveira, ‘Rechtens die afstemmen en affhouden. Vragen over de verenigbaarheid van coördinatiestrategieën met art. 17 Grondwet en art. 6 EVRM’, 1999 *NJB*, pp. 377-384.

60 Huls, *supra* note 20, p. 90.

61 Cf. M. de S.-O.-L’E. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, 2004. Research has shown that trust in the judiciary in the Netherlands is quite high, in contrast to, for instance, trust in the legal profession. Report *Geschilbeslechtingdelta 2003*, *supra* note 10, pp. 188-189.

62 About this development: Loth & Gaakeer, *supra* note 26, pp. 335-343. Research of the WODC shows, however that the amount of claims at the courts between 1997 and 2000 has not increased, whereas an increase of the claimed sums can be observed. See R.J.J. Eshuis, *Claims bij de rechtbank*, 2003. Critical with respect to the blowing over of the American claim culture to the Dutch legal system: T. Hartlief, *Leven in een claimcultuur: wie is er bang voor Amerikaanse toestanden?*, inaugural lecture Maastricht University, 2005; M. Faure & T. Hartlief,

greater demand for security (criminal law).⁶⁴ On the other hand, the attitude of the citizen is also important for the ‘output’ of the judicial organization: for the preservation of the citizen’s confidence in the functioning of the judiciary, it is not only required that the judicial system is for the citizen, but also of the citizen. In connection with this the problem of representation of (different groups) of citizens in the judicial system plays a role⁶⁵ as does the clamour for a lay judicial system.⁶⁶ The citizen does not only demand the possibility to participate in the judicial system, but sees himself more and more as a client of the ‘judicial system’ service. The metaphor ‘from citizen to client’ has a positive side to it (customer service, improvement of the judicial system service), but also a negative one (citizenship without duties⁶⁷). Citizenship brings certain responsibilities with it for the citizen: an active attitude is demanded for maintenance of the legal order, and respect for institutions that ensure the proper functioning of the legal order.

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 the 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;
- dejuridification of dispute settlement through the availability of alternatives;

‘Het kabinet en de claimcultuur. Over de (onbezonnen) Hollandse vrees voor Amerikaanse toestanden of het Hollands medicijn voor Amerikaanse ziektes’, 1999 *NJB*, pp. 2007-2015.

63 H.D. van Wijk, W. Konijnenbelt & R.M. van Male, *Hoofdstukken van bestuursrecht*, 2005, p. 48.

64 Cf. among others the ‘stream of new legislation’ within the scope of combating terrorism; H. de Doelder, *Terrorisme en de rol van de rechter*, winter lecture Erasmus University Rotterdam, 2006, p. 6.

65 B.P. Sloot, ‘Moeten rechters lijken op de Nederlandse bevolking? Over de wenselijkheid van descriptieve representatie door de rechterlijke macht’, 2004 *Trema*, pp. 49-62.

66 Cf. the discussion started by the member of the Dutch Lower House Joost Eerdmans about this subject, and the public hearing which was held as a result of this on June 19th 2006 in the Dutch Lower House. About this ‘Burgers in toga kosten tijd en geld, nut onzeker’, *NRC Handelsblad*, 20 June 2006, p. 1. The point of view of the NVvR of June 23rd 2006 is available at <http://www.nvvr.org/nl-NL/Content.aspx?type=opinion&id=538>. See further, among others, the letter of the Minister of Justice of February 23rd 2006 concerning the administration of justice by laymen; *Kamerstukken II* 2005-2006, 30 300 VI and 29 279, no. 120 (Rechtsstaat en Rechtsorde).

67 H.D. Tjeenk Willink in his Machiavelli lecture from 1995, *Overheidscommunicatie, element of instrument?*, <http://www.stichtingmachiavelli.nl/default.asp?id=00066&curid=00056&site=&type=prijspagina>. See also the report of the Werkgroep Burgerschap en politieke partijen, part of the National convention, *Burgers en politiek[e partijen] in de 21^e eeuw*, available at <http://www.nationaleconventie.nl/contents/pages/65925/politiekepartijenburgerschap1404.pdf>.

- decrease in the 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 the 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 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 Section 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 in 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.

4. The qualitative paradigm: The domain as the role of the judicial system

While describing the judicial domain the underlying question of the judicial system's social role was relevant every time. To get more insight into the judicial domain in terms of the role played by the judge we should highlight the connection between the influence of the judge and the impact of his judgments. We will first make some remarks below on each of these variables separately, and afterwards discuss the connection between them. Much has already been written about the influence of the judge and his attitude, especially in terms of judicial activism or judicial restraint. Judicial restraint is called legal minimalism by Cass Sunstein, and by this he means the attitude of making as few judgments as possible, or otherwise formulated, leaving as much open as possible. The obvious advantage to minimalism is that the burden of forming a judgment is limited and the risk and impact of mistakes are kept to a minimum. Such a 'constructive use of silence' is noted when questions of principle and of great complexity are in a lawsuit, upon which people have strong and divided opinions. Minimalist judges look, in such situations, towards finding their way through 'incompletely theorized agreement', sometimes in abstract form, sometimes in the form of judgments linked to facts. They would rather not work deductively but prefer to look for a connection in the specific facts of a case.⁶⁸ Minimalists, one could say, are contextualists.

Sunstein distinguishes between wide and deep judicial judgments in order to get a better picture of judicial judgments. The width has to do with the consequences of a judgment for other cases; wide judgments have the value of precedent, narrow judgments only very little. The depth

68 C.R. Sunstein, *One case at a time, judicial minimalism on the supreme court*, 1999, Chapter 1.

of a judgment has to do with the degree to which the reasoning is specified; deep judgments are exhaustively reasoned, shallow judgments not. Sunstein combines both categories with each other resulting in four categories: (i) wide and deep, (ii) wide and superficial, (iii) narrow and deep, and (iv) narrow and superficial. Of course both the width and depth of a judgment are relative; the one judgment is relatively deep with respect to another judgment. When we translate the defined categories into the Dutch situation we can demonstrate them with some examples:⁶⁹

- (i) *Wide and deep*: examples are the judgments *IZA-Vrerink* and *Van Wijngaarden-State*. They offer general rules with a large value of precedent and are moreover exhaustively reasoned. The judgment *IZA-Vrerink* (HR (Supreme Court) 28 February 1992, NJ 1993, 566) had to do with the refinement by the Supreme Court of the statutory regulation concerning traffic liability. The minimum liability for the owner of an automobile who is involved in an accident with a non-motorized adult partaking in the traffic was fixed at 50%. In *Van Wijngaarden-State* (HR 24 April 1992, NJ 1993, 643) the Supreme Court fixed the moment on which it should have been clear for entrepreneurs that serious ground pollution caused by companies would entail a capital loss for the State. The choice for fixing that date (eventually decided for 1st January 1975) was reasoned by the demand for clarity with regard to the citizen.
- (ii) *Wide and superficial*: a good example is the classic judgment *Lindenbaum-Cohen*. This judgment offers a general ruling with a large value of precedent, but is strikingly poorly reasoned. In the judgment of 31st January 1919, NJ 1919, p. 161, the explanation of the term ‘tort’ was discussed. The Supreme Court gave a wide explanation of this term for the first time. ‘Tort’ was not only to be understood as ‘all actions or omissions to act which are in opposition to the law’ but also ‘all actions or omissions to act that go against good morals or against the care that social dealings aim to provide towards other people or things’. The range of the judgment is great, but a detailed argument underlying the judgment is missing;
- (iii) *Narrow and deep*: examples are the judgments *Wrongful birth* and *Wrongful life*. The range of these judgments is limited to very specific situations, but they are extensively reasoned. *Wrongful birth* had to do with the claim for damages by a parent of an unwanted and unplanned baby against the doctor who caused the pregnancy by prescribing wrong medicine. In the judgment of 21st February 1997, NJ 1999, 145 (*Wrongful birth*) the Supreme Court ruled that the costs for the care and education of the child were seen as damages which qualified for compensation. The judgment was extensively reasoned, the underlying motivation behind this being to legitimize the judgment for society. In the judgment *Wrongful life of Kelly* (HR 18 March 2005, LNJ: AR5213, C03/206HR), the Supreme Court ruled that the obstetrician who had failed in the circumstances of the case to carry out the required antenatal diagnostics was liable to the parents of the heavily handicapped child and the child itself. Besides legal arguments, arguments of principle and pragmatic arguments were brought forward to explain the judgment⁷⁰;
- (iv) *Narrow and superficial*: an example is the judgment *Ontvanger-Hamm*. This was a unique case without any precedent effect and the motivation was not deep. In the judgment (HR 5 September 1997, NJ 1998, 437) the Supreme Court ruled that in the event of undue

⁶⁹ See also Loth & Gaakeer, *supra* note 26, Chapters 1 and 2.

⁷⁰ See M.A. Loth, “‘Engaged in a Search for Justice’: over grenzeloze aansprakelijkheid en de moeizame integratie van een moreel principe”, in M. Buijsen (ed.), *Onrechtmatig leven? Opstellen naar aanleiding van Baby Kelly*, 2006.

payment in a bankruptcy case, the trustee had an obligation to cooperate in undoing the mistake. The reasoning behind this was not repeated in later cases, which brought Vranken to make the following comment: ‘Ontvanger/Hamm does not reach further than itself (...). When, despite many, many attempts it is not possible to determine a rationale of a judgment that reaches further than a concrete (type) of case, then the conclusion can be none other than that the rationale does not exist. Ontvanger/Hamm is *Einzelfallgerechtigkeit*, a judgment that is completely one of a kind.’⁷¹

Those were a few preliminary features on the influence of the judge and the impact of his judgments. When we compare both variables – activism/minimalism and wide/deep – with each other we can demonstrate some consequences for the judicial domain.

Domain enlargement in the width. When we have an activist judge who (often) makes wide judgments, we can talk of domain enlargement in the width. There are enough examples to be found in primary jurisdiction. The Commissioner-judges in *WSNP* cases have shown themselves to be activist, and by mutual cooperation have given their judgments a large precedent working. Sometimes it is the legislature which has facilitated the domain enlargement, like in the regulation of ‘class actions’ and in the declaration of the binding force of regulations (*Dexia*).⁷² Sometimes it is the judge himself who has paved the way to domain enlargement through directives and other forms of legal cooperation. A concrete lawsuit is used by the judge as an excuse to solve a social problem. The image of the judge 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 Section 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 (the task of the legislature), and for pragmatic reasons (the consequences are not calculable). The motto is literally ‘one case at a time’, as the title of Sunstein’s book 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 their control (‘small is beautiful’).

The question of choosing for domain enlargement or a decrease in the width is a repeating dilemma for the Dutch Supreme Court: to either to 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

71 Annotation Vranken at HR 7 June 2002, NJ 2002, 608.

72 The case of many thousands of duped investors was settled by Dexia in 2005 with two nonprofit organizations, the Consumentenbond and the Vereniging van Effectenbezitters, for the sum of about 1 billion Euro. The negotiations were conducted by the former president of the Dutch and European Central Bank Wim Duisenberg. The case was the first to be dealt with under the new *Wet collectieve afwikkeling massaschade* of June 23rd 2005, coming into force on July 27th 2005. This law gives the judge the possibility to declare a settlement about the compensation between the person responsible and the victim organizations applicable to all victims. See *Kamerstukken II*, 29 414; *Stbl.* 2005, 340 and 380; E. Jorritsma, ‘Rechters zijn niet blij met deze wet’, *NRC Handelsblad*, 19 May 2006, p. 13.

uniformity with broader judgments.⁷³ 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 who delivers (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 reason their judgments somewhat 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’).

Domain restriction in depth. When we have a minimalist judge who delivers (many) superficial judgments, then we can talk of domain restriction in ‘depth’. In the recent past the solution to the capacity problem of the judiciary was sought in this direction. In criminal law the unreasoned acquittals and the heads-and-tails judgments are a result of this development. The judge becomes a production worker in accordance with his legal assignment, without having to worry too much about the strength or conviction of his judgments. Although this development clashes with the judicial tradition, it has still been seized without too much fight or resistance. For the first time, in the recent past, the downside has become visible and the question whether this has been such a beneficial development is being asked. Superficial judgments are legally unsatisfactory and not convincing for society. On the other hand it is likewise nonsensical and moreover impractical to provide exhaustive reasoning for simple judgments. The attention to reasoning in simple civil cases does not always stand in proportion to the relatively simple importance of the case. ‘Tailor-made jurisdiction’ is therefore the device; every case has its own depth.

The question of the desirability of a domain enlargement or a domain decrease in ‘depth’ is a recurring dilemma for the Dutch Supreme Court. Barendrecht makes some sound remarks on this in his *De Hoge Raad op de hei (The Supreme Court getting away from it all)*. A distinction must be made between the depth of reasoning that the judgments by the Supreme Court can make itself and the reasoning requirements that the Supreme Court places on the lower judges. As far as the judgments of the Supreme Court are concerned the general principle that applies is that ‘the reasons for a judgment (...) (raise) the particular case to a more general level’.⁷⁴ For the

73 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*, 1998, pp. 92-98, and Sunstein, *supra* note 68, pp. 46-60.

74 Barendrecht, *supra* note 73, p. 107.

reasoning demands on lower judgments generally lower demands are made – in civil cases that the reasoning is not incomprehensible and does not pass by the essential propositions of the parties – which in particular cases can be increased or decreased. ‘The trick seems to be to adjust the reasoning demands so that the judge is stimulated to justify in-between steps’, according to Barendrecht, but the extra monitoring of the reasoning could easily cost hundreds of extra cases per year.⁷⁵

It applies to both the reasoning of the Supreme Court itself as well as to the lower judges that they should concentrate more on their surroundings, and less on the audience of lawyers and fellow colleagues. Judgments of the Supreme Court are caught in a procedural straight-jacket of appeal resources and the judgments of lower judges are often written to survive in a later appeal or review. The result is that they are less comprehensible for the parties concerned or society in a broader sense. This has less to do with the use of professional jargon than with their choice of audience.⁷⁶ Witteveen has argued for a reorientation of legal transfer, from method consciousness to society consciousness, from the ‘context of discovery’ and the ‘context of justification’ to the ‘context of education’. In terms of rhetorical theory it will weld the different parts together through interaction with the public to a complete whole, and with that dig up new sources of authority.⁷⁷ That argument can be subscribed to here, with a small adaptation. Among the public sections that have to be welded is also that of the professional colleagues and lawyers. The task is thus 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 a 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 Section 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 Section 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 Section 3 have on the consequences of the role of the judge highlighted in Section 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

⁷⁵ *Ibid.*, p. 111.

⁷⁶ J.B.M. Vranken & I. Giesen, *De Hoge Raad binnenstebuiten: verslag van een experiment*, 2003.

⁷⁷ W. Witteveen, ‘De ontdekking van de rechtsoverdracht: een terreinverkenning’, in E.J. Broers & B. van Klink (eds.), *De rechter als rechtsvormer*, pp. 271-289.

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 a 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, as 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 dejuridification 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 'lightning 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, which also transpired in the last section. 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 heads-and-tails 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 themselves. The negligence of lower courts in substantiating their decisions correctly, which was brought to light last year by the Advocate-General with the Supreme Court Jörg, is ominous of what is to follow.⁷⁸ The criticism, of a more principled nature, is that the retraction by the judge leads to crucial public interests being disregarded, like the contribution to law making ('legal loss'), the protection of third parties and weaker parties, the control of the administration and politicians, and also the necessary confidence of the citizen in the judicial system itself. Domain reduction is a risky scenario, not only from society's point of view and that of the legal order, but also for the judicial system itself.

This theoretical conclusion is supported by empirical research. In its report *Toegang tot recht (Access to the Law)* the *Raad voor Maatschappelijke Ontwikkeling* (Council for Social Development; *RMO*) has examined in particular the question whether the legal equipment of certain groups of citizens is in keeping with the outlined 'giving back of responsibilities'.⁷⁹ The research workers concluded, amongst other things on the basis of the study into the 'dispute

⁷⁸ Conclusion of the A-G in HR January 25th, NJ 2006, 411. See also 'Rechters maken te veel fouten', *NRC Handelsblad*, 29 January 2005.

⁷⁹ *RMO, Toegang tot recht*, advice 32, The Hague, December 2004.

settlement delta'⁸⁰, that not all citizens are able to claim their position in the judicial process. The weak are particularly vulnerable: people with little education, with a different cultural background, old people and illiterate people. This can have a negative impact, such as social aversion, less participation and undesirable forms of taking justice into one's own hands. In order to prevent these developments the Council recommended better access to the law and a better equipping of the citizen, in order to, amongst other things, strengthen the problem-solving capacity of society (better infrastructure for negotiation and dispute settlement, cooperation with legal aid counters and social counsellors, better positioning of dispute commissions), to strive towards a more client-friendly legal system (better communication, mediation, other approachable forms of dispute settlement, better participation of the legal profession in financed legal aid), and the promotion of confidence in the legal climate (cheaper, predictable dispensing of justice, consistent compliance, depolarization). It remains an open question if these proposals – however valuable they may be in themselves – arm the citizen sufficiently against a retracting judge. Moreover, the proposals imply a certain development of the legal order, more about that below.

Finally, the impact of domain reduction, with the retraction of the judge, also radiates through asylum law. Recently the *Raad van State* (Council of State) limited its criteria test for granting asylum arrangements to the vital questions – the credibility of the asylum seeker's declarations and the risks in returning – to a marginal test. In terms of the administration's expertise and the complexity of the test the Council of State is taking a step backwards from the full test carried out by the Council and lower judges before 2001 to marginal testing now. That is a domain reduction in another sense of the term; not only through a restriction to the case at hand (in width), or through superficial reasoning (in depth), but through a combination of both: through a restriction on the scope of the review resulting in a domain reduction for the administration. Recently Essakkili and Spijkerboer asked themselves if this development fits in a broader trend of a withdrawal of the administrative judge. The domain enlargement of the administrative judicial system in the seventies and eighties, as a counterbalance to advancing government authorities, seems to be going in the opposite direction now. 'It seems that thorough legal protection from government authorities was particularly necessary in a time of social democratic revamping when interventionist government was being constructed. Now that the government is more neo-liberal and is said to be withdrawing, it apparently earns more confidence and an active administrative judge is seen less as a useful counterbalance and more as a burden.'⁸¹

Scenario 3: 'Not more or less, but different'; domain movement through a reappraisal of the judicial system's role

A different choice for the role of the judicial system can be made from the same social background as described just above; not more or less, but different. In line with the last paragraph this could be a development in 'width', or a development in 'depth'. For domain enlargement or reduction in 'width' considerations of the judge's social role are of importance. In this domain movement the (first) paradigm of the judge's domain as a work terrain is recognizable. Of course it is not exclusively the width of individual judgments that counts but rather the social access of the judicial system. Considerations such as relevance and responsiveness are central, how relevant does the judiciary want to be for social developments? To what extent does it want to

80 Report *Geschildbeslechtingdelta 2003*, *supra* note 10. See also N.J.H. Huls, with the cooperation of A. Klijn, *Over rechtshulpgolven en andere dingen die voorbijgaan...*, 2004, available at <http://www.adviesorgaan-rmo.nl/downloads/standard/Onderzoek%20Rechtshulpgolven.pdf>, and 'Over rechtshulpgolven. De geschilbeslechtingdelta en juridische problemen', 2005 *NJB*, pp. 1-17.

81 S. Essakkili & T.P. Spijkerboer, 'De marginale toetsing in asielzaken', 2006 *NJB*, p. 1889.

give an answer to social needs and requirements? And what price is it willing to pay for this, taking into consideration the restrictions that go with it? More security through criminal law, or preferably no further damage to individual freedom rights? More ADR instead of civil law adjudication, or more protection for the weaker party? A more decisive administration, or one that holds on tight to the citizen's legal protection? A relevant and responsive legal system is important, but it can become strained because of the consideration it has to give to the rule of law that the judicial system also serves.

For domain enlargement or reduction *in depth*, considerations of particular importance are those surrounding the role played by the judge in the *rule of law*. In this domain movement the (second) paradigm of the domain as the role played by the judge is recognized. Here too it is not the depth of the reasoning of individual judgments that is central, but the degree to which the judicial system contributes to law making. Central to this therefore are considerations around the public function of the judge; what is his contribution to law making? What public interests are served by the involvement of the judge compared to other dispute settlers for example?⁸² How does the contribution of the judge to law making compare to that of other state powers like the legislature? Do we choose for a strong judicial system with a clear role in law making and with that the maintenance of the legal order? Or does the judge step back in favour of the national legislature, the international and supranational treaty legislature, or international and supranational courts? Of course the internationalization of our law has left its mark, but where do we ultimately want the centre of law making to lie? There are good reasons to plead for a strong role for the Dutch judicial system, of course in transnational dialogue with other (international or supranational) judges abroad and one of the reasons for this is – besides the classic advantages of judicial development of the legal order with 'case by case' situations – the preservation of national input into law making. A strong role for the national judge as an anchor point in the different legal orders that our legal order forms a part of would serve the national interest. For this reason the judge should not hasten to give up his role in the legal order.

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;

82 See Loth, *supra* note 30.

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, lightning 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 (the 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 a state of 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 at parties to 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 an 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.