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**Third Dutch Japanese Law Conference
Procedural law in the 21st Century Compared
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**THE IMPACT OF CIVIL PROCEDURE REFORMS ON THE OPPORTUNITIES OF
SUBSTANTIVE JUDGE-MADE LAW**

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1. In this speech I would like to give some thought on the combination of two aspects of the administration of civil justice. The two aspects are usually discussed separately, but in my opinion they belong together. The first aspect concerns the efforts to improve and reform civil procedure. The second aspect concerns the importance of judge-made law for the development of substantive law. The contribution of the judges to the development of substantive law has been denied for a long time, but fortunately it is now openly recognised in most countries. My opinion is that certain aspects of the civil procedure reforms which have been implemented lately or are in progress worldwide affects the opportunities of substantive judge-made law, both positively and negatively.

2. Let me start with the civil justice reforms. We all know Charles Dickens' novels Bleak House and The Pickwick Papers. Bleak House is a satire on the judicial system of England in the middle of the 19th century, more specifically on the Chancery Court. Dickens, who once was a junior clerk at Lincoln's Inn, mocked the vicissitudes of a trivial case: lawyers and judges who do not know what the case is about, but nevertheless discuss it at length; litigants who already died long before the judgment could possibly be expected (if ever); heirs who are not aware the case is pending. Dickens' warning, "Suffer any wrong that can be done to you rather than go to Chancery Court!", has undoubtedly influenced the reform of the English judicial system in 1873. But was this reform successful? Given the reports on the vices of civil litigation in England and Wales before the enactment of the new, almost revolutionary, Civil Procedure Rules in April 1999, the answer must be an emphatic no.

3. In this respect, England and Wales do not differ from most other countries. The calls for drastic civil procedure reforms sound worldwide and are very loud and persistent. As far as the calls are seriously dealt with, they have sometimes led to more or less rigorous reforms, e.g. in Germany, Austria, USA, Finland, England and Wales, South Africa, and Canada. Nevertheless, in most countries, the complaints still remain. We can learn this from comparative law, as laid down, for instance, in the book *Civil Justice in Crisis, 1999*, edited by the Oxonian Adrian Zuckerman. The book contains accounts of the civil justice systems of thirteen countries, both common law and civil law countries, Japan and the Netherlands among them. The accounts are written by local civil procedure experts. The reporters describe their national system, assess its strengths and weaknesses, and analyse the steps to improve civil litigation, not only the already implemented steps, but also the attempts in the past which were not carried out, as well as the plans for the near future. The overall picture of civil litigation is one of darkness: inefficient and unable to meet the requirements of a modern service organisation.

4. Interesting for your country and mine is that, according to Zuckerman, Japan and the Netherlands, together with Germany, are the three notable exceptions to the gloomy picture of civil procedural law. Zuckerman presented this statement at the conference of the International Association of Procedural Law in Vienna in August 1999. It raised a storm of protest among the Dutch participants of the congress. They esteemed the account of the Dutch situation far too optimistic. Be it as it may, it is revealing that a draft for a new Dutch Civil Procedure Code, which was submitted to Parliament two months after the congress, has been strongly criticized in and outside Parliament, precisely because it did not propose changes. The opinion is that the current complaints about civil litigation requires a drastic renewal. With an overwhelming majority, Parliament insisted on such an approach. The Ministry of Justice has already given in and so the Netherlands may face discussions about a fundamental reform of civil litigation in the coming years.

5. It is remarkable that, despite Zuckerman's statement that German civil procedure is doing relatively well, a similar dissatisfaction with the current CPC also exists in Germany. Members of Parliament have taken the initiative to prepare a draft to reform the code in a fundamental way. The draft was introduced into Parliament some months ago, in July 2000. The relevant issues are almost the same as those expected in the Netherlands and elsewhere. Civil litigation should become more transparent, less adversarial, more efficient, and better accessible to the general pu-

blic. Specific for Germany is the ample attention for the renewal of appeal and revision. This is due to the fact that for some reason, Germany has the highest appeal and revision rate in the world and it is desperately uncomfortable with this ranking.

6. As far as Japan is concerned, I am not sure whether Zuckerman justifiably argued that the administration of civil justice in this country is generally considered to be satisfactory. The reporter on Japanese law in Zuckerman's book, prof. Hasebe of Gakushuin University, the university hosting this conference, criticizes the trend to informality, more specifically the trend that judges hold hearings and conferences in private, outside the courtroom. He wrote that this practice was introduced by the courts in the 1980s and has been codified and even extended in the new 1998 Japanese CPC. It is imported that the new Japanese code has not ended the struggle for a better civil procedure. New adaptations may be forthcoming. I have recently read about a commission, set up last year, to prepare the reform of the Japanese judicial system. The commission is supposed to submit its report to the Cabinet as early as next year. Consequently, Japan is no exception to other countries in which attempts to reform and improve civil litigation are permanent processes. When a reform has been carried out, its successor is usually already waiting in the wings.

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7. Back to the overall gloomy picture of procedural law. A comparative tour of the countries represented in Zuckerman's book *Civil Justice in Crisis*, but in other countries as well (e.g. Finland, South Africa, New Zealand, Austria, and Canada) shows that the 'vices' of civil procedure are commonly defined in the same terms: complexity, duration, and costs.

- (a) Civil procedure is too complex - e.g. the rules are generally tuned to hard cases, whereas an estimated 70 to 75% of all cases are (relatively) uncomplicated.
- (b) There are too many delays - e.g. in many countries, courts of first instance on average need two or more years to render judgment.
- (c) People are often discouraged to start proceedings because it is too expensive - e.g. in most Western European countries, lawyers will advise clients to refrain from court proceedings if the claim is less than \$ 10,000 - 15,000 (i.e. about 1 - 1.5 million yen).

8. *The communis opinio* is that complexity, high costs, and/or many delays violate both the fundamental right of access to justice and the fundamental right of equality. No society can afford to accept this situation. This is the actual reason for the worldwide civil procedure reforms that are carried out or are still in progress. Obviously, doing justice is the ultimate goal of civil procedure, but doing it as expeditiously and inexpensively as possible have become part of it. Read, for instance, Art. 1 of the US Federal Rules for Civil Procedure: the objective of the Rules is 'to secure the just, speedy and inexpensive determination of every action'. Another striking example are the new Civil Procedure Rules England and Wales, which entered into force in April 1999. The overriding objective of this code is 'enabling the court to deal with cases justly'. 'Justly' includes preventing delays and saving costs, both for the litigants and for the judiciary itself. Art. 1 holds that only an appropriate share of the court's resources shall be given to each case, taking into account the need to allot resources to other cases. In other words: uncomplicated cases shall be dealt with swiftly in order to save time, money, and manpower for the more difficult claims.

9. The three main elements of the present discussion on civil procedure reforms - doing justice, reasonable time, and reduced costs - are not entirely complementary. On the contrary, there is an inherent tension between them, first, because the resources governments are willing to invest are limited and, second, because carefulness resists expediting litigation beyond a certain limit. Moreover, whichever way you look at it, even the most speedy litigation takes time and money. Reforms of civil procedure have to seek a balance between the competing elements of justice, time, and costs. This speaks for itself, but nevertheless I bring it up here, because I sometimes have the impression that, nowadays, everything is sacrificed to the cause of reducing costs and avoiding delays.

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10. Balancing competing elements always means compromising. There is no such thing as one perfect compromise, which applies to all societies and all legal systems. Each compromise has its own strengths and weaknesses. Which solution fits in best with a society and its legal system as a whole depends on a lot of circumstances, both legal and general in nature. Exactly because of these legal and general differences between societies and their legal systems, some comparatists take the position that civil procedure reform is merely a matter of national concern. Procedural

law is considered to be too closely attached to the culture of a society to be open to comparative perspectives. I will not go into this methodological debate among comparatists. I simply state that, although I do not believe in the need for transnational civil procedure rules - in my opinion the swift, mutual recognition and enforcement of foreign judgments would be adequate -, I am strongly convinced of the utility of a comparative perspective. Comparing the many, often different, attempts in many countries to overcome the deficiencies of civil procedure, makes one aware of ideas, legal developments, their underlying principles and reasons, and their consequences. That is a very inspiring or at least useful exercise.

11. The proof of the pudding is in the eating. The worldwide civil justice reforms show many interesting common and comparable perspectives. In this speech, I will briefly mention and discuss four important ones:

The first is a movement towards more 'managerial judges', often referred to as the need for active judicial case management. In England and Wales, the courts' case management powers are listed in full detail in Rule 3. In short, they impose a duty upon the court to 'take any step or make any order for the purpose of managing the case in furthering the overriding objective'. That overriding objective was, as already said, to deal with cases justly within a reasonable time and as inexpensively as possible.

The same development, although less drastically, has taken place in the US. The Civil Justice Reform Act 1990 contained a list of twelve case management principles and techniques. Marcus, an expert in the field of discovery, wrote about 'the rise of managerial judging' in the US. He concluded that judges can bring about improvement by taking more interest in their civil cases. He expects the courts to remain active in trying to control litigation. The objectors are lawyers who formerly had unrestrained latitude to control their cases, but, according to Marcus, by and large, many of them welcome and support the involvement of the judge (the expanding role of the court, judicial supervision). Compared to traditional opinions, this is a drastic change because fundamental characteristics of US civil litigation (are) were, first, a party's control over the pre-trial stage of litigation, and, second, a judge who must be passive and enter the trial completely ignorant of the dispute. According to Geoffrey Hazard Jr, until recently President of the American Law Institute, both characteristics are as nearly constitutional in nature.

12. The second common or comparable perspective is the party's duty to inform and to cooperate. The duty to inform means that, at the earliest possible stage of the proceedings, each party has to make a concise statement of all relevant facts on which the claim or defence relies, the disputed issues, and the evidence. The defendant cannot simply deny a statement of the claimant. He must give his reasons for doing so and must put forward his different version of the relevant facts and issues.

A controversial point is how to sanction the duty to inform. In its strictest form the penalty is striking out (excluding) each issue or piece of evidence that is raised or produced belatedly. In this form, the preclusionary rule is applied in Austria. In Germany, the rule was introduced in 1977, but it was more or less made ineffective by the German Constitutional Court almost immediately. The new German draft of July 2000 proposes to follow the Austrian example. Whether the proposal will be adopted is questionable, however, since the meeting of the Association of German Lawyers last September - two months ago - vehemently opposed it. Japan has chosen a relatively mild form of the preclusionary rule (at least to the best of my knowledge, i.e. what I read in articles and books about the new 1998 Japanese CPC): the relevant facts, issues, and evidence shall be raised and produced at the appropriate time in accordance with the progress of the proceedings. The appellate court is allowed to set a deadline for raising and producing any new fact, issue, or evidence, but, again, the sanction is mild. The litigant who exceeds the period will have to explain the delay. The new draft CPC in the Netherlands is even less strict than in Japan: from the very beginning of the proceedings, litigants must give all necessary information about the dispute, including the production of evidence, but there is no sanction, neither in first instance nor on appeal.

The duty to cooperate means that parties must help the court in achieving a just, timely, and inexpensive judgment. No tricks, no quibbles, no unnecessary delays, no money-wasting activities, less adversarial litigation and less space for tactical considerations and behaviour.

The duties to inform and to cooperate are answers to the worldwide major annoyance of civil litigation: it takes too much time to frame and to determine the relevant issues and evidence. In my experience as a judge, it rather often occurs that only on appeal it becomes clear what the dispute is really about. This is amazing, because one may expect that it is not difficult to describe in plain words what happened

between the parties, but this seems to be asking too much. However, I admit that it also is a matter of legal culture: I remember that when I started as a junior solicitor, I was told to keep my powder dry, at least in the statement of claim, and to wait for the opponent. He, for his part, was told the same. It goes without saying that, as a result, proceedings did not progress swiftly.

To cope with this problem, most countries have introduced conferences, hearings, or informal meetings at an early stage of the litigation. This has happened both in common law and in civil law countries. In these conferences, it is the judge's responsibility to try, together with the parties, to frame and narrow down the relevant issues, to iron out irrelevances, and to identify and examine the evidence. The attempts are sometimes successful, sometimes they are not. Nevertheless, a comparative tour shows that most countries continue following this path.

13. The catchword of the first and second comparable perspective is: increasing activity. The civil justice reforms all over the world point to a tendency that both the judge and the litigants are made responsible to further the fair, speedy, and inexpensive handling of the case. It is regarded as a common responsibility. The extent to and the way in which the common responsibility has been or will be given shape will of course differ per country, but the need for more activity is the essential thing. It is quite different from the traditional approach in civil litigation: traditionally, the fundamental rights of proper litigation were (a) guarantees only to the parties, and (b) the guarantees were to be fulfilled and observed by the courts. The new approach still guarantees the traditional parties' fundamental rights. New is that it also imposes duties on parties as well as judges to actively promote proper and just litigation.

From an assessment of the reform in England and Wales one year after its implementation, it appears that the adversarial culture is in decline and that, in its place, a new degree of cooperation, a kind of partnership between the parties, their advisors and the court, is emerging. Of course, this assessment is rather risky and partly speculative on the basis of only a year's practical experience, but the first indications of the reform are promising.

14. The third comparative perspective is the need for different proceedings for different cases. One of the vices of civil procedure is that, generally, the rules are tuned to hard cases, whereas approximately 70 to 75% are (relatively) uncomplicated and/or concern small claims which only justify a limited allotment of manpower and resources. The 1990 Civil Justice Reform Act in the US tried to reach this aim by

inviting, not compelling the courts to develop different tracks for different cases, but this did not work out quite well. The Rand Corporation evaluated this part of the American reform and concluded that it should not be made the judge's concern to differentiate after the claim is filed. It should be the legislator's responsibility to establish and prescribe different tracks in advance. It would overload the case management powers of the court if it had to look into each claim in order to determine which track would fit best.

A comparative tour shows that most countries have introduced some kind of summary proceedings, small claims courts, fast tracks, or money debt collection proceedings. The procedure rules are generally kept simple: one hearing, no counterclaim, simplified evidence, no prohibition of representation by a lawyer, but it is assumed that parties will represent themselves, rendering judgment as soon as possible after the hearing, and no appeal or only on very limited grounds. One of the big problems to deal with in this context is that, although the summary proceedings, small claims courts, fast tracks, and money debt collection proceedings are meant to make things easier for ordinary citizens, statistics reveal that most claimants/plaintiffs are professionals, such as money lenders or debt collection agencies. It is quite difficult to avoid this kind of, what is called, improper use. I read that Japan tries to exclude professional plaintiffs by allowing them to file a claim with these courts only ten times a year. An original approach.

The differentiation of tracks can be most helpful to decide the bulk of cases within a short time, without keeping litigants from exercising their fundamental right to present and defend their case properly and on an equal footing. They only know that they have to exercise their rights within the framework of a standardized procedure that forces them to act promptly. An important advantage of a system in which the bulk of cases are swiftly handled is that it creates time, manpower, and resources to give full attention to complicated and substantial cases, which often require hand-tailored management, more hearings, and more conferences.

15. The fourth and last comparative perspective of the worldwide civil justice reforms is Alternative Dispute Resolution (ADR). ADR means the friendly settlement of cases, by judges in or out of the court, or by neutral third parties. The goal is to assist the parties in achieving a solution to the dispute on a negotiated basis: not a top-down decision by an independent judge, but seeking for a bottom-up solution that fits both parties as much as possible. The range of potential solutions in ADR is

broader than in litigation. To put it briefly: litigation is not aimed at solving the problem in a way which meets the needs of both parties, but is aimed at deciding the conflict on the basis of the law, regardless of whether the judgment affects the relation of the parties negatively or positively. In particular for business disputes, the preservation of the relationship is sometimes more important than to win the suit.

There are many of ADR-techniques, such as mediation, conciliation, negotiation, mini-trial, early neutral fact-finding or expert determination, but it is beyond the scope of this speech to discuss them here.

ADR seems to have started an almost sensational victory march through many civil justice reforms. The courts must try more often to reach friendly settlements or to encourage the parties to use an ADR procedure if they considers it appropriate (e.g. at hearings and conferences). As part of the civil justice reforms in many countries the establishment of ADR institutions is being facilitated. It is the obvious y that if the courts must refer parties to ADR, the government is responsible for the establishment of an an adequate ADR infrastructure.

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16. So far on the civil justice reforms all over the world and on the four common or comparable perspectives: active judicial case management, a duty to inform and to cooperate, different tracks for different claims, and ADR. Of course, more interesting and important perspectives could be brought up, such as appeals, costs, and multi-party litigation, but I will not do that. Instead, I would like to discuss my opinion that certain aspects of the civil justice reforms affect the opportunities of substantive judge-made law, both positively and negatively. The positive aspect I am alluding to is the duty to inform, the negative aspect is the introduction of ADR on a large scale. I will not challenge the many advantages of ADR, but only draw attention to a possible negative impact it may have on the development of substantive judge-made law, which may require forward-looking changes.

17. Let me first tell you something about judge-made law and its increasing importance. Most developed societies, Japan and the Netherlands included, recognise the judge's role as a lawmaker. This goes especially for the highest courts of justice and for the international courts of justice, such as the ECHR in Strassbourg,

the Court of Justice of the European Union in Luxembourg, the Benelux Court of Justice, and the International Court of Justice in The Hague. Although the way in which the courts carry out their law-making task is different, the question of whether they should be occupied with law-making activities, at least to a certain extent, is not under discussion. The ECHR, for instance, even revolutionised civil procedural law. Art. 6 ECHR is the central provision. It guarantees the right to a fair trial and reads as follows: 'in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. More applications to the ECHR concern Art. 6 than any other provision. The ECHR has rendered many judgments in which it specified the meaning of the several elements of Art. 6 (fair, independent, public hearing, reasonable time). One of the most important fair trial safeguards in civil proceedings is the principle of 'equality of arms' as developed by the court. The principle implies 'that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'. The court's judgments are binding upon the national courts. In the Netherlands, the decisions in which Art. 6 is quoted, implicitly or explicitly, are innumerable.

18. According to the current opinion, law-making by the highest courts follows naturally from their specific task to control, secure, and intensify the unity of law and the legal protection of citizens. No written basis in the Constitution or in any other statute supports the idea, but it is regarded simply as a matter of fact that judge-made law is indispensable in the modern age. This conviction is common among practitioners as well as among academic writers on law and jurisprudence. To the best of my knowledge, it is also shared by the public in general and by the legislature (Government and Parliament). Legislature and judiciary have become partners in law business. Both are needed for the development of law. In many countries, much substantive law is judge-made.

19. In a report about 'The Role of the Supreme Court at the National and International Level', which contains accounts of the situation in about forty countries, I read that most supreme courts are overloaded, the best possible solution being the establishment of some kind of leave to appeal system. Japan took this step two years ago. Appeal to the Japanese SC is, to the best of my knowledge, only open to cases which involve important matters of interpretation of the law and cases in which the lower court decided contrary to a precedent of the SC. In the Netherlands, the

discussion on this topic still has to start, but I think that the conclusion will not differ from that in Japan or elsewhere: some kind of leave to appeal system is necessary.

20. Another shortcoming of the supreme courts in performing their law-making function, is the role coincidences play. It is often a matter of coincidence which case gets through to the supreme court. It depends on the willingness of the parties to continue proceedings and to pay the lawyer's bills. Important legal questions sometimes do not get through. Moreover, to a certain extent it is also a matter of coincidence that the plaintiff and defendant raise the relevant facts and legal issues, produce the correct evidence, and do not make so many procedural mistakes that the substantial heart of the legal issue becomes obscured. It depends on the skills of the lawyers and the lower courts judges whether these coincidences prevent the supreme courts from performing their law-developing function satisfactorily. In the US it is called the need for 'good vehicles' cases. The US Supreme Court refuses appeal if the case is not a good vehicle to decide the issue.

21. I expect that the new procedural landscape I have drawn before - a landscape in which parties have a stricter duty to inform and in which courts carry out extensive managerial functions - will create a situation in which the real questions come up and in which procedural proliferation will be decreased. Therefore, I expect that the new landscape will be a better guarantee that if an important legal question is at stake in a lower court, the case can develop into a 'good vehicle' to be decided by the supreme courts. In this sense, the civil procedure reforms may positively affect the law-making function of the supreme courts.

22. However, the introduction on a large scale of ADR most probably will not. The reason is obvious: the way the supreme courts contribute to the development of law is by deciding cases. Therefore, courts need cases, but ADR limits the number of cases getting through to the supreme courts. The limitation takes place regardless of whether some kind of leave to appeal system exists, because even then the court will have to wait until one of the parties submits an application. I do not know of any legal system in which the supreme court can choose its cases without an application by the parties or their representatives. If ADR is successful - and that is what is aimed at -, parties will be no longer interested in applying to the supreme courts. I expect that this will worsen the present situation in which a random selection of legal questions gets through to the supreme courts. Urgent problems, arising from new developments in society, may be left over and remain unsolved. The probable

consequence is an imbalance between areas of law in which the supreme court can render judgment and develop the law and areas in which it cannot do so because of a lack of cases. Judging by the situation that judge-made law is indispensable in modern society, this seriously endangers the contribution of judge-made law and therefore the position of the judiciary as a partner of the legislator in the business of law.

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23. What can be done about it? A new and extended balance is required. Until now, the discussion on civil procedure reforms has focused on seeking a balance between justice, costs and speed. I have already said this more than once. But so far, I have not indicated the presupposed unilateral meaning of justice in this discussion. Justice is generally regarded as aiming to secure and protect the individual rights and interests of the disputing parties. From this point of view, it is quite understandable and justified to emphasize that the real conflict must be on the table as soon as possible and also to acknowledge that, for the sake of protecting individual rights, ADR is sometimes preferable to an action in law. However, this approach does not take into account the law-making function, i.e. does not include the notion that judge-made law is unavoidable and has become indispensable for the development of law in modern society. Judges, in deciding cases, often do not merely determine, secure, protect, and enforce existing substantive rights and interests of the individual disputing parties, but also create substantive law in many cases. The present discussion on reforming civil justice has not sufficiently taken into consideration this latter, creative, function of litigation. Only when dealing with the position of the supreme courts, the law-making function is highlighted, but it is mostly forgotten that, to carry out this function, the supreme courts need cases (and in an ADR system fewer cases will get through).

24. How can a new balance be struck between ADR and litigation, between protecting individual rights and the importance of judge-made law? That is the question to be answered. For obvious reasons, it is no solution to advocate a move back from ADR to litigation. That would be a denial of the possible advantages of successful ADR, such as party's control, flexibility, confidentiality, speed, and reduced costs (provided the solution is swiftly found). Therefore, promoting ADR is a good idea and deserves our support in cases in which it makes sense, although it may ultimately

result in a partial loss of judge-made law. Taking into account the huge importance of judge-made law in modern society, the partial loss will have to be compensated, but how? Not by reverting to legislation as the only means to fill the gap. We all know that this is almost impossible and would lead to excessively detailed and therefore impractical legislation. Consequently, other means to compensate the loss will have to be found. I think they exist, provided we are prepared to accept forward-looking changes in the way of organising our process of law-making and in redefining the mutual positions of the law-making powers in a country. Let me conclude this speech with a brief specification of three forward-looking reforms I have in mind.

25.

A. The first proposal still remains within the framework of the existing allocation of functions between legislator and judiciary. Access to the supreme courts should become less dependent on the (financial) willingness and perseverance of the parties to pursue a case. It is neither quite fair to impose the financial burden of judge-made law on individual parties, nor an appropriate system to do justice to the importance of judge-made law, because it is too open to coincidences. If a society values judge-made law as highly as is generally accepted nowadays, it must take the logical steps: first, to reorganise access to the supreme courts in cases which involve important legal questions or violate a precedent - to stick to the criteria in Japan, which are rather similar to the criteria in most countries with leave to appeal system -, and secondly to bear the financial consequences of it, at least partly.

26. I distinguish three options:

- a. the introduction of cassation in the interest of the law (reference on a point of law). This system exists in several Western-European civil law countries, in the EU and in some common law countries such as England and the US. It applies to judgments of lower courts in which a controversial legal question has been decided, but which parties have not appealed against. If it is desirable to get the opinion of the SC on the legal question, the court itself or the Attorney-General, the Solicitor-General or another person or body may refer that point to the SC or make an application for leave to appeal. The SC shall, after awarding the application, consider the point and give its opinion on it. Its decision cannot affect rights and duties of the parties in the judgment.

Cassation in the interest of the law is not only used to decide legal questions which are important for the development of the law, but also in cases in which a

quick ruling of the court is required before a potentially false decision of law has too wide a circulation in the courts. An example in the Netherlands was the question of whether divorced parents could continue joint parenthood. The SC answered in the affirmative, avoiding large numbers of negative or contradictory decisions in lower courts on this point.

Cassation in the interest of the law can be seen as an attempt to bridge the gap between the two aspects of the judicial function - the resolution of disputes on an individual basis, on the one hand, and creating rules and principles for future cases, on the other. It is an instrument to bring controversial points of law before the court as quickly as possible, less dependent of the parties. The costs of the proceedings should be borne by the government.

- b. Whereas cassation in the interest of the law is a post-judicial decision - a decision after a final judgment between parties has been rendered -, another means to promote judge-made law is to allow the lower courts in a pending case to ask the SC to give a prejudicial opinion on a point of law which is controversial and important for society to be decided. Again, the costs of these prejudicial proceedings should be defrayed by the government. The prejudicial system exists between the courts of the EU member states and the EU Court of Justice.
- c. A third means to improve the law-making function of the supreme courts is to allow the SC to decide an important legal question which has arisen in practice, but has not led to a concrete dispute before a court. Why do we have to wait until a dispute emerges if it is certain that the question will be brought before a court some day anyway? The proposal is to authorise organisations of consumers and/or branches of trade to apply to the SC and ask for a decision on the disputed point of law. A good example is whether a standard condition in a certain type of contract is in conflict with the law. The review of the SC is more abstract, but as far as review on points of law is concerned, I do not regard this as problematic. Moreover, in a leave to appeal system, the supreme court can take into consideration whether or to what extent the point of law can be decided regardless of the concrete circumstances. If not, the court can deny the application.

B. The second forward-looking reform to overcome the negative consequences for judge-made law caused by large scale introduction of ADR is the development and furthering of ADR-made law. This seems contrary to the individual approach of ADR, seeking to assist the parties in achieving a solution on a negotiated basis which fits both. The individual approach, however, will inevitably result in different solutions in similar cases. This will not cause problems as long as parties deliberately accept such inequalities, e.g. because they consider the preservation of the business relation more important. However, especially in non-business relationships - e.g. cases on defamation, clinical negligence and debt claims -, inequalities violate the most fundamental notion of justice. I do not think many people can stand the idea that they got less than someone else in a similar case because of their lack of negotiating power, because the mediator pushes them too hard to reach a settlement, because the other party was assisted by a lawyer, because the other party had more resources to do inquiries, because the mediator seemed biased, and so on and so forth. In short, in so far as ADR cannot guarantee an open and equal communication between parties on a completely equal footing - and of course it cannot, because such equality does not exist anywhere -, it will not take long before ADR will need regulation. ADR is an informal way of resolving disputes, but it is a quite usual process that, as soon as informality has been established, the call for regulation - and consequently for a certain degree of formality - will sound louder and louder. I expect this to happen all the sooner as ADR becomes mandatory. The regulations will be concentrated on procedural aspects in order to protect parties against uncontrolled behaviour of the mediator and to make clear some procedural safeguards about the way ADR is conducted. But that is not enough. In my opinion, already after a short time provisions on substantive law will be needed as well. The substantive provisions will have to be neither very strict nor numerous, but should contain indications of the range of ADR-solutions in order to avoid huge and unjustified differences in similar cases.

28. The next step after regulation is easy to predict. The rules will give rise to interpretation, to differences in interpretation, and to complaints about mediators who allegedly do not act according to the rules. Besides that, the rules will prove to be incomplete, because new social problems will arise which are not covered by these rules. The approaches and outcomes of mediators in these cases will differ and will cause inequality. Even forumshopping of mediators may become possible, because, although ADR is confidential, I do not expect and at least I do not hope that ADR will be completely carried out behind closed doors. I would even consider this to be a

serious mistake and a waste of experience and knowledge. Why not share the experience and knowledge with others and exchange information, perhaps with the help of IT? That seems far better than asking every mediator in every ADR to re-invent the wheel. Exchanging information will positively contribute to the quality of mediation and, will also be of great help in training programmes for new mediators.

29. Therefore, as soon as ADR is governed by rules - and that will happen - the situation will be similar, at least to a certain extent, to the system of governmental civil litigation. What is required is a body or organisation which, first, monitors the equality and fairness of ADR, both procedurally and substantively. Of course, in ADR, the ranges of justified inequalities and differences are broader than in official litigation, but they are not endless. The need will arise not only to monitor what happens, but also to harmonise the different rules, interpretations and outcomes, to cut knots and to solve uncertainties (within the said broader limits). This will, inevitably, lead to ADR-made law, perhaps less extensive and strict than judge-made law, but nevertheless, just like judge-made law, ADR-made law will also need an effective organisation to make the result as independent as possible of coincidences and the subjectivity of the mediator. I am inclined to fear nothing more than to be ruled by informalities.

30. Extremely interesting in this context are the pre-action protocols in the new CPR, 1999 of England and Wales. The rationale behind these protocols is that, as soon as a dispute arises, parties immediately tend towards making it a legal dispute. The discussion between the parties is about their legal rights and their opponent's legal obligations, not about other possible solutions on a negotiated basis. Therefore, the pre-action protocols provide a system in which the immediate juridification of the dispute can be avoided. The system consists of many rules and that is the reason to mention it here: pre-action protocols can be regarded as regulated forms of ADR. Unfortunately, they differ in certain aspects and the first calls for harmonisation have already been made.

31. Pre-action protocols generally operate as follows. A party who knows a claim is likely to inform the proposed defendant as soon as possible. The information shall contain a clear summary of the facts and the damages and an invitation to the proposed defendant to give his version of the dispute. The purposes of the pre-action protocols are to focus the attention from the very beginning on the opportunities of resolving the conflict without litigation and, secondly, to exchange information in

order to give both parties a better insight into which side has the stronger case and to raise doubts about the strengths of a party's case. It is often said that many lawsuits would not have been started if both parties had known both versions of the dispute. Until now, pre-action protocols have been in force for personal injury claims, for defamation, for construction and engineering disputes and for clinical negligence. A further twenty protocols are currently either in the development stage, in draft, or under consultation (e.g. protocols on road traffic accidents, debt claims, defamation, professional negligence, police malpractice, holidays, housing disrepair). Compliance with a protocol is not obligatory in England and Wales, but the court may impose severe sanctions if it is of the opinion that non-compliance with the protocol had led to the commencement of proceedings which otherwise would not have been needed or which otherwise would have been less expensive. The first results are positive: there is more demand for ADR and ADR is more successful.

32.

C. My third and last proposal to overcome the negative consequences for judge-made law caused by a large scale introduction of ADR implies the most forward-looking reform, because it exceeds the existing allocation of the law-making function between legislation and judiciary. Our frame of mind is inclined to overestimate the importance of official (i.e. state-made law). Law is often restricted to statutory law, enacted by central or local governmental bodies and meant to rule/influence the behaviour of people and organisations in society. This approach is top-down. At present, the tendency in jurisprudence and in legislative theory is towards more horizontalization of law-making: not top-down, but bottom-up. The idea is to sit around the table with private organisations at an early stage in the decision-making process and to discuss which way of ruling would fit best, official legislation or some kind of legally conditioned self-regulation. The latter alternative is the result of better insight into the opportunities of more private and dynamic kinds of social ruling. The underlying idea is the expectation that, as soon as citizens and organisations are involved in the process of ruling from the very beginning, they will be stimulated to obey the rules and act according to them.

33. Horizontalization can be applied in civil procedural law, more in particular to supplement or replace the ways of solving disputes I have mentioned so far: official litigation and ADR techniques. Let us take the example of small claims. Even in the Netherlands, hundreds of thousands of small claims arise each year. Many of these claims are rather similar. The claims are too numerous to be filed with the courts,

because it would overload the judiciary. To refer such claims to ADR would cause the same problem and completely block the potential of ADR of solving disputes swiftly. Therefore, another way of dealing with mass-claims is required. One of the alternatives works particularly well in well-organised countries, such as the Netherlands and, if I am not mistaken, Japan, in which most small claims probably will have to be paid by insurance companies. The small claimants are generally 'one shooters' who lack the experience and the knowledge to operate on an equal footing with the professionals of the insurance branch. They are in the same position as consumers twenty/thirty years ago who either had to accept standard forms as part of their contract with professional parties or to give up the contract. We all know that equalizing the position of the consumers has led to protective legal provisions against unjustified standard conditions. Well, a similar system for dealing with small claims would be welcome in civil procedure, by way of supplementing official litigation and ADR. I strongly promote the idea, therefore,

(a) to develop standard procedural forms for the protection of 'one shooters' with a claim for compensation of small damages against insurance companies. The pre-action protocols, already mentioned, could be taken as a model;

(b) to standardize the amounts to be paid for often occurring small claims or parts thereof. Insurance companies and organisations of small claimants (victims of crime or of road traffic accidents, and consumers) should be obliged to negotiate the exact conditions and amounts, supervised by the government. It would be going too far to work out this proposal in detail, but the bottom line is sufficiently and clear: the proposal appeals to the responsibility of the social partners.