A New Balance. A summary of the Interim report Fundamental review of the Dutch law of civil procedure
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1 Introduction

1.1 Worldwide dissatisfaction with the civil procedure

The call for revision of the law of civil procedure has been sounding for a very long time already\(^2\), and not only in the Netherlands\(^3\). There is an almost worldwide complaint that the law of civil procedure is inefficient and only very partially fulfils what is expected of it. There is a striking unanimity about its deficiencies: proceedings take too long, lawyers cost too much, the scarce resources available are wrongly distributed, the procedural law is too formalistic so that even specialists make mistakes unnecessarily often, and the legislation is geared too much to the most complicated cases, while an estimated three quarters of these are relatively simple as regards procedural law.

Of course there are degrees of dissatisfaction in the different countries and there are positive exceptions, but there is a recognisable pattern to the complaints. A new point of criticism that has increased significantly in recent years, in the Netherlands too, is the idea that there are different forms of conflict-handling, which can be briefly summarised under the term Alternative Dispute Resolution, that may be better than the dispute conciliation that is offered in the public administration of justice.

In many countries the law of civil procedure is being constantly worked on. Sometimes one revision has hardly been put into effect before a start is made on preparing another.

In this article we want to give a summary of the interim report that we have written on behalf of the Dutch Ministry of Justice on a fundamental review of the


\(^2\) In the Netherlands from as long ago as shortly after the introduction of the present code in 1838. In England and Wales, for example, since 1851 over sixty reports have been published urging a revision of the law of civil procedure, according to Lord Woolf 1995, p. 4, para. 2.

\(^3\) Zuckerman 1999 has described and analysed the situation in 12 countries (United States, England and Wales, Austria, Germany, Japan, Italy, France, Brazil, Greece, Portugal, the Netherlands and the Swiss canton of Zürich).
Dutch law of civil procedure. Before we do that however, for the benefit of the reader who is not familiar with the Dutch civil procedure, we shall outline a few developments that may help him understand our argument. At the end of this introduction we shall give a brief profile of the main civil procedure models known by Dutch procedural law.

1.2 The development of the Dutch law of civil procedure up to 1 January 2002

1.2.1 Origin

Jurisdiction in civil matters in the Netherlands, has since the beginning of the nineteenth century, on the French model, been entrusted in the first instance to cantonal judges and district courts, on appeal to the courts of appeal and in cassation to the Supreme Court.

The Dutch civil procedure belongs to the ‘civil law’ family. It originates from the continental European romano-canonical procedure and hence has the same origin as for example French and German procedural law. If these two are again distinguished from one another within the family – for which there is reason – one has to say that, historically and as regards its content, Dutch procedural law belongs to the French subfamily. Dutch procedural law was greatly ‘Frenchified’ in the early 19th century. With the introduction in 1838 of its own legislation, including the current Code of Civil Procedure [Wetboek van Burgerlijke Rechtsvordering], Dutch procedural law has however undergone further independent development and so has gradually taken on a character of its own.

1.2.2 Modernisations of the law

After an attempt half-way through the century to completely update the code, the first major modernisation took place at the end of the 19th century. The main objective of this was better enforcement of the law by simplifying and speeding up the procedure. The civil procedure was stripped of a number of factors that could have a considerable delaying effect. The procedure was as it were defragmented and simplified. Notably the choice was expressly not made at that time to change the

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4 From the end of the eighteenth century until 1813 the Netherlands was a French vassal state (from 1811 actually a group of departments in the French empire) and French legislation was introduced.

5 A government bill was put before parliament in 1865, but was never discussed. A bill for the partial change of the law was introduced in 1877 but also did not become law.
relationship between judge and parties in favour of greater control by the judge but to intervene in the structure of the procedure and the way in which the parties conducted the case. The modernisation of procedural law in Germany with the introduction of the Zivilprozessordnung [Law of Civil Procedure] twenty years beforehand in 1877 did attract attention at the time, but was not followed up.

At the beginning of the twentieth century a fresh attempt was made in vain to completely renew the code. Then, in the course of that century sections of the code were further revised and modernised. In part this was in connection with the introduction of the new Dutch Civil Code. This meant that new extended regulations were introduced for bringing action by petition because there was a need for this in family cases (book 1 of the new Civil Code, introduced in 1970). We will come back to this procedural model below (1.3.3). Later the family procedural law was further modernised.

Furthermore the introduction in 1992 of the new Civil Code required changes to the law on enforcement and preliminary attachments and garnishments [beslag-en executierecht]. Also the very outdated law of evidence – that on the French model was partly regulated in the Civil Code and partly in the Code of Civil Procedure - was updated and fully incorporated in the latter code. This update, however, brought hardly any fundamental changes to the existing law of evidence system.6

1.2.3 Towards faster and more efficient proceedings

In the last three decades of the last century, the call for simpler, more transparent, faster and more efficient proceedings became louder again. The provision of Art. 6 of the European Convention for Human Rights, that the citizen has a right to a judicial decision within a reasonable time, doubtless and increasingly contributed to this. Now the situation in this respect was and is not dramatically bad in the Netherlands, as is already apparent from the virtual absence of Strasbourg case-law at the expense of the Netherlands in this respect. However, the length of the ordinary civil procedure was and is generally criticised in our country too. The fact that, as we shall still see, the Netherlands has a very speedy alternative of its own for the ordinary civil procedure, namely the summary procedure [kort geding], makes no difference to these complaints. The ordinary procedure could also be speeded up.
A minor change to the law in the middle of the eighties of the last century, as it was later found, had a great future. In the ordinary proceedings, which in the great majority of cases took place entirely in writing, the judge was given the option to interrupt the normal written round that consisted of the exchange of statements of claim and defence, reply and rejoinder, by arranging a sitting immediately after the defendant’s statement of defence at which the parties had to appear to give information and to try to reach an amicable settlement (the ‘comparitie na antwoord’). The possibility of an appearance for these purposes had already long existed and was also regularly used, but as a rule that only happened after the rejoinder. The new feature was that this could now take place at a much earlier stage in the proceedings and the normal pattern of two written rounds could thereby be broken. The aim was to bring things quickly to an end by a settlement and, if that did not succeed, to make arrangements with the parties about the further course of the proceedings, in particular the furnishing of evidence. This would reduce the case-load of the district courts and procedures could run more swiftly. This change in the law was based on successful experiments in a number of district courts. It was the beginning of a trend to reinforce the oral hearing in the ordinary proceedings.

An important step in the development was that in the nineties an accelerated procedure was introduced in various district courts in which the so-called ‘comparitie na antwoord’ always took place and only to a very limited extent were the proceedings adjourned. For this the law did not have to be changed because it now offered a sufficient basis for the above-mentioned changes in practice.

The developments described above were supported by the advent of the courts starting to regulate the proceedings themselves in detail in published rules of procedure. That happened first in individual courts, but due to cooperation between courts of the same type (cantonal courts, district courts and courts of appeal), after consulting the bar, ultimately extra-statutory model rules came into being at national level, in which the course of the proceedings was further regulated. Here for example one finds the regulations and dates for carrying out legal proceedings, the adjournment regulations etc. The legislator and the government stand outside this. The legal basis for this lies in the code that gives the judge the authority to set dates etc. in a case himself. By carrying out ‘policy’ on that point that is set down in rules

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6 The most revolutionary part was the introduction of the power of parties to be heard as witnesses in
notified to the local bar, the courts have been able to set in motion this extra-statutory form of legislation.

All these developments relating to the structure of the proceedings became the basis for the legislation introduced in 2002. Furthermore there were developments to which we must now pay attention in this 'prolegomena' to the summary of our report. We shall mention in particular the growing international influence of the European Convention for the Protection of Human Rights (ECHR) and other conventions.

1.2.4 The growing influence of the ECHR

Just as in the other member states of the Council of Europe, the principles of Art. 6 ECHR and the case-law that the European Court for Human Rights in Strasbourg has developed on this, will exert an increasing influence on the Dutch law of civil procedure. That applies for legislation and the administration of justice.

As a result of the fact that the fundamental principles formulated in Art. 6 ECHR and the judgments of the European Court developed on this, largely already belonged and still belong to Dutch procedural law, the influence of Art. 6 ECHR on the developments has often not been spectacular. They were and are however important as a catalyst in the background and as a basis for the stricter articulation of these principles and the resultant procedural rights and obligations. That also applies in those fields that formally lie outside the scope of the convention, namely the proceedings where there is no question of ‘the determination of (…) civil rights and obligations’. In Dutch procedural law there is for example a growing awareness and articulation regarding the ‘fair trial’, such as the adversarial principle and the principle of equality of arms, the principle that both parties must provide evidence, the principle of giving grounds, the principle of ‘orality’. The latter does moreover go hand in hand with the aim for efficiency in the proceedings, because the idea is gaining ground that the oral hearing – which is not the same as the ‘trial’ on the common law model – can increase the efficiency of the proceedings by the directness of the judge’s influence and the short communication lines with the parties at the sitting. Hence the idea behind the principle of the right to oral proceedings, namely that everyone has the right to his ‘day in court’ is in no way stifled; on the contrary,
because the Supreme Court has for the civil law also expressly acknowledged the fundamental right to an oral hearing with reference to Art. 6 ECHR. The proceedings in the Netherlands are therefore moving in the direction of the German and related procedural law (such as that of Austria). This does not however appreciably reduce the distance from the proceedings of the common law tradition, for the difference between the two systems is largely determined by a number of other factors, such as the sharing of roles between judge and parties both with regard to the facts and the law and with regard to the way in which the evidence is handled. In our report we say more about these aspects and we therefore come back to this below.

Of course other international developments have also exerted an influence on Dutch procedural law. We mention as an example of this the conventions and regulations of the European Communities in the field of procedural law.

1.3 The changes in 2002

On 1 January 2002 a limited but fundamental change to the code came into force.\(^7\)

The background to this was the initial plan to combine the two courts of first instance that had existed until then, namely the cantonal courts (for small cases and labour and lease disputes) and the district courts (for the rest of the cases in the first instance).\(^8\) This merger formed part of a much greater reorganisation of the administration of justice that – in phases – has already been in preparation and introduced since the seventies of the last century.\(^9\) It should mean that the separate procedural model, further updated in 1991, for the procedure at the cantonal courts should lapse and that there should be one procedural model for the first instance that would also have to be updated. The focus has therefore in particular been on renewal of the procedural law of the first instance. The cantonal courts were abolished as of 1 January 2002, but the cantonal judges working in them have been maintained such that they now form part of the district court as the sole court of first instance. Within the district court they form a separate sector for the same matters.

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\(^7\) Law of 6 December 2001.
\(^8\) A similar division of cases in the first instance is also found elsewhere, such as in Germany between the ‘Amtsgerichte’ and the ‘Landgerichte’ and in France between the ‘tribunaux d’instance’ and the ‘tribunaux de grande instance’.
\(^9\) Sharp criticism in the sixties of the functioning of the judicial power has led to this modernisation. As a result this has led to justice integrated in the ordinary judiciary (district courts) in administrative law cases (1994) and the “merger” mentioned in the text between the cantonal judges and the district courts.
that they previously dealt with: small cases with a value up to € 5,000, as well as labour and lease cases. The procedural model mentioned for instituting proceedings before the cantonal judge has disappeared.

The change in the law in 2002 contains mainly technical and practical improvements in the law of civil procedure. That was done intentionally, because it was not wanted to weigh down the progress of the reorganisation of the administration of justice with fundamental discussions in parliament about the law of civil procedure. As stated the emphasis lies on the proceedings in the first instance, but a few other important changes were also made. For example a rule has been included relating to the competence of the Dutch judge in international cases (for cases that do not fall under one of the European regulations on this point)\textsuperscript{10} and a section has been added that is dedicated among other things to fundamental principles of procedural law.\textsuperscript{11}

The changes have focussed on simplification and harmonisation of the rules of procedure as well as encouraging speed and efficiency in the proceedings. A simpler and faster basic procedure and less formal obstacles should allow the procedure to meet the requirements of the time more. The earlier developments that we have already described above have been substantially followed. The two procedural models to be discussed below (1.4.2 and 1.4.3) have been brought further into line with one another. The oral element in the ordinary proceedings has been strengthened, following the example of the experimental accelerated version mentioned above, by giving the \textit{comparitie na antwoord} an important part to play. The plaintiff in the ordinary proceedings must already in the summons indicate the points in dispute with a description of the defendant’s defence and name the evidence. The latter also applies for the defendant in his statement of defence. The principle here is that the parties have less opportunity to keep their powder dry. The role of the court has been strengthened although no fundamental changes have been made on the point of the division of roles between the parties themselves and in relation to the court. It has however in essence remained the classic civil-law procedure characterised by the absence of a ‘trial’.

\textsuperscript{10} Book 1, title 1, section 1.
\textsuperscript{11} Book 1, title 1, section 3.
1.4 The present civil procedure

1.4.1 Three procedural models

Dutch procedural law differs from other legal systems due to the existence alongside one another of two fully-fledged procedural models: the ordinary model that begins with a summons and the model introduced for cases specially assigned by the law that begins with a petition sent to the court. The characteristic feature is not so much that the latter model exists – it is also found in the other civil law countries – but that it is not, as elsewhere, limited to ex parte petitions. It is in fact assigned for large groups of cases that, certainly where they relate to disputes, could perhaps just as well be settled in the ordinary model (and formerly also were), such as divorce cases. A further characteristic of Dutch procedural law is the summary procedure [kort geding], that as an informal and fast procedure has acted as an alternative to the ordinary procedure.

1.4.2 Proceedings initiated with a summons

The 'ordinary' procedure for civil cases is that in which the proceedings start with a summons issued on behalf of the plaintiff to the defendant. It is a classic form of initiating proceedings that is known in many other countries. The summons is issued to the defendant, without involving the judicial authorities, on request of the plaintiff through a process-server. In addition to the known function of summoning the defendant before the court, it is also the document in which the plaintiff formulates his claim and indicates the grounds for it. In addition the plaintiff must state what defence the defendant has against the claim (at least if that is known to the plaintiff) and he must mention his evidence, including the available witnesses. The proceedings then run in accordance with the civil law system:

- the defendant’s defence via the ‘cause list’ [rol] and if necessary a further second written round of statement of reply and rejoinder;
- the ‘comparitie na antwoord’ already mentioned above where the judge talks to parties to see whether the proceedings can be brought to an end with a settlement, to obtain the information that he needs from parties or to reach agreements with parties about the way in which the proceedings will continue to run, for example with regard to the furnishing of evidence; this sitting is not recommended in all cases, but in practice at present does happen in most;
- a subsequent phase of evidence based on an interlocutory judgment by the judge in which he has instructed one of the parties or each of them to provide evidence of certain facts; the judge can also in this phase appoint one or more experts to give him information on certain questions;
- a final phase in which written comments are exchanged on the evidence furnished;
- the final judgment.

The oral element can, in addition to the sitting mentioned above, also take the form of a separate sitting (as a rule before the evidence phase) at which the parties get their lawyers to plead.

One of the most striking features of this model is the separation between the judge who deals with the case and the administration of the progress of the proceedings (the ‘cause list’) which lies in the hands of the clerk of the court under the supervision of ‘cause-list judge’ appointed for this purpose. The result is that the progress of the legal proceedings will largely take place out of the sight of the judge entrusted with hearing the case, who thus holds the appearance and talks to the parties there, listens to their pleadings, hears the witnesses and gives the decision.

1.4.3 Proceedings initiated with a petition to the judge

The second main model is that in which the procedure begins with a petition to the judge in which the claim (technically: the petition) and the grounds for this are explained. This procedure is prescribed for virtually all family cases and a few other special procedures. If there is a defendant the court is responsible for calling him and any other third parties who have an interest in the proceedings. A characteristic here again is the written round, because the defendant can submit a pleading to the district court. This is followed by an oral hearing of the case, where the parties can have their points of view explained by their lawyers and the court asks questions for clarification and to obtain the further details he considers necessary. This hearing can also be used to hear witnesses, but furnishing of evidence by witnesses can also be ordered in an interlocutory decision after the first oral hearing. If there are too many witnesses to hear immediately or in one sitting, the hearing can be continued at a later time. The procedure ends after closure of the hearing with a judgment by the court in which a decision is taken on the petition.

In this procedural model there is no official ‘cause list’ (see end of the previous paragraph) but the progress of the proceedings is monitored by the clerk of
the court, so that here too the judge hearing the case cannot be regarded as the case manager.

Clearly the two models have much in common. This has developed, and in particular the change in the law in 2002 has contributed to this, by increasing the oral element in the first model and harmonising the two models on a number of technical points.

1.4.4 The ‘kort geding’

The Dutch kort geding is characterised among other things by the great variety of cases that can be tried in this way. The law is in fact formulated in very broad terms for it provides that ‘in all urgent cases in which, in view of the parties’ interests, an immediate provisional remedy is required’ the deciding judge (a judge in the district court) is authorised to give this. The kort geding judges are quick to see themselves authorised and do not interpret the requirement that an immediate decision is required, too strictly. Furthermore the kort geding is procedurally separate from any proceedings on the merits of the case (bodemprocedure) insofar as it is not accessory to it. Parties therefore do not have to have begun any proceedings on the merits of the case or begin them afterwards\(^\text{12}\) and usually (around 95%) refrain from doing so.\(^\text{13}\) For these reasons and because all kinds of claims can be brought before the judge in kort geding these proceedings will act as a short and informal alternative to the bodemprocedure. The kort geding is therefore more than just a procedure for obtaining one or more ‘interim remedies’. A judgment is obtained within a couple of weeks, where otherwise proceedings would take a couple of years to achieve virtually the same result.\(^\text{14}\)

The decision in the kort geding strictly speaking only has provisional legal force, but that means only that it loses its legal force as a result of a different decision of the judge in the bodemprocedure. If no proceedings as to the merits are brought,

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\(^{12}\) According to the EC Court of Justice there is an exception to this in accordance with Art. 50 of the TRIPs Agreement; C 53/96 Hermès International v. FHT Marketing Choice, ECR 1998, p. I-3603.

\(^{13}\) This is partly because there is the possibility of full-dress appeal and appeal in cassation against a kort geding judgment.

\(^{14}\) In 2001 almost 15,000 kort geding cases were brought. That is 8% of the total of 187,000 civil cases brought to the district court (cf. the number of 473,000 civil cases that were brought in that year to the cantonal courts that still existed). Source: CBS 2003, p. 22 and 28.
which as mentioned does not usually happen, then the judgment remains in force. It is enforced like any ordinary legal judgment.\textsuperscript{15}

The procedure is simple. The plaintiff requests a time for the court hearing from the deciding judge before whom he wishes to bring his claim. After he has obtained this he has the defendant summoned to appear on that date. At the court hearing the plaintiff (via his lawyer) further explains the claim orally and the defendant (via his lawyer) brings an oral defence. The deciding judge then asks questions, looks at whether he can settle the case and after closure of the hearing in most cases the judgment follows within a week or two. There is no evidence phase (apart from one exception). The judge does not have to apply the statutory law of evidence. Parties therefore usually limit themselves to submitting written evidence that can be freely assessed by the judge. As a rule no third parties are heard as witnesses, but sometimes are heard as ‘informants’. It is in particular this ‘summary’ way of dealing with the facts, that from an international point of view does not make the position of the Dutch \textit{kort geding} an obvious alternative to the proceedings on the merits of the case (\textit{bodemprocedure}).

1.5 Lawyers in the proceedings

In the Netherlands, as in other countries on the European continent, there is one bar. A lawyer is registered with one of the nineteen district courts. There are over 12,000 lawyers registered which, for a total Dutch population of something over 16 million inhabitants, means seven to eight lawyers per 10,000 inhabitants.\textsuperscript{16}

From a procedural point of view the lawyer fulfils a special function because to bring an action in the district courts, courts of appeal and Supreme Court a lawyer is needed to conduct the proceedings. This therefore involves compulsory representation in the proceedings. In addition there is the restriction that only a lawyer who is registered with the district court of the administrative district in which the court before which the action is being brought is located (that also applies for the court of appeal and the Supreme Court), can act as representative in the

\textsuperscript{15} Because of this hybrid nature of the \textit{kort geding} it was initially uncertain whether it fell under the scope of Art. 24 of the Brussels (Lugano) Convention – cf. Art. 31 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1 regarding provisional, including protective, measures.

\textsuperscript{16} NOvA 2003, p. 32.
proceedings. Dutch procedural law does not differ here from what applies for the
German *Anwaltsprozess* and the French proceedings before the *tribunaux de grande
instance* and higher instances.

In this system, as in other countries, there are a few exceptions, the most important
of which is that representation in the proceedings is not compulsory in proceedings
before the cantonal judge. There citizens can therefore bring actions themselves, but
very often, particularly if they are appearing as plaintiff, they have themselves
represented by a specialist, by a lawyer or another person, such as a process-server
[deurwaarder].

2 Towards a fundamental review
2.1 The assignment

During the parliamentary discussion of the bill that has led to the above-mentioned
law of 6 December 2001 it was found in the Lower House of the Dutch parliament, in
addition to support for the proposed improvements and changes, that there was an
almost general need for a complete and radical review of the fundamentals,
principles and basic assumptions of the law of civil procedure. The government also
considered that such a review was advisable. In consultation with the parliament it
was decided to carry out the review with close cooperation between academics and
practice, where a researcher or a small group of researchers will carry out the role of
initiation and coordination. In a tendering procedure in accordance with European
tendering regulations the research assignment was awarded to the three
organisations to which we respectively belong.

2.2 Three research phases

We started work on 1 November 2001. The work is being carried out in three phases.
The first phase is devoted to producing a guiding memorandum with analyses and
recommendations. It was completed in May 2003 with the publication of our interim
report that we summarise in this article. In the second phase, continuing up until 1
April 2004, discussions are being carried out about the views set out in our interim
report. This involves among others the judiciary, the legal profession, the process-
servers’ organisation, legal assistance insurers, trade unions, consumer and
employer organisations and the universities. The discussion is carried out by means
of congresses, symposia, discussions in specialist journals, consultation, etc. In this
phase it can be determined whether and how far there is support for the changes in the procedural law that we are provisionally aiming for. In this phase we can also look at whether there is a need for further research of a social-scientific nature. In the third phase, ending on 1 April 2005, we write our final report. In this report on the basis of the findings of the first and second phase we will present a specific, elaborated and broadly-based opinion for changes to the law of civil procedure. This final report will serve as a basis for a legislation program in the field of the law of civil procedure.

3  A framework for testing choices

In this interim report we are not giving a blueprint of a future organisation of the civil procedure. We are however choosing guidelines for thinking about a renewed procedure from a framework within which the different alternatives that present themselves can be checked. This framework is formed by fundamentals, principles and basic assumptions that fit in with the way in which, in a constantly changing society, people are thinking about dispute conciliation and conflict resolution, and the responsibility of the government in this. In part, this involves the re-evaluation of existing fundamentals, principles and basic assumptions, in part, they are new. They must act (a) as indicators when thinking about the reorganisation of the law of civil procedure and (b) as touchstones in the discussion about problems and questions that will unavoidably be raised here. There will after all often be various options open in the specific model here, which in themselves can (also) be defended. The framework devised offers the criteria for weighing up the advantages and disadvantages of the various options against one another. This also makes it possible to implement the required cohesion between the different components of procedural law in a better way.

In our report we identify the following ten areas for attention, covered in chapters 3 to 12:

Three perspectives: professionalism, constitutional state and service provision
Objectives of the civil procedure
Public administration of justice and mediation
Division of tasks between judge and parties
The forgotten preliminary phase of the procedure
Differentiation
Increase of scale
The three-stage system of first instance, appeal and appeal in cassation
Communication
(Re)Codification in the present time.
We will now summarise our findings that we have set out in these fields in our report by area for attention.

4 Three perspectives: professionalism, constitutional state and service provision

4.1 Professionalism and constitutional state

In the course of the discussions about and preparation for the changes in the judicial organisation, that we have already mentioned above (1.2), we have in the Netherlands seen an increase in the attention paid to the organisational and management aspects of the administration of justice. Initially only professionalism and the constitutional state played a part in our thinking about the administration of justice. By the first we understand everything that is necessary for the good expertise of the ‘professionals’ – judges, lawyers etc. – who take part in the process. For the second we think of the independence, impartiality, public conduct, equality before the law, legal unity, the adversarial principle and the duty to give grounds. As a result of Art. 6 ECHR a few requirements have been added to this – reasonable time and access to court – and the above-mentioned have been tightened up. These two perspectives do of course remain a prime focus, because they are decisive for the quality of the administration of justice.

4.2 A third perspective: service provision

This perspective looks among other things more at all the quality requirements that may be made of a judicial organisation that is focussed on service provision. In such an organisation there is an understanding present in all sections that the judiciary is also a service-providing organisation and must therefore, more than has been usual to date, be oriented towards those around it. We must immediately comment here that administration of justice is a public function and therefore can never be completely subject to the criteria of private, commercial service-providers. When thinking about the question of how the combination of the quality values referred to in the three perspectives must take shape in the law of civil procedure, this will above all involve the way in which and the degree to which the third perspective can take its
place here in relation to the other two. The Dutch government has in a memorandum sent to the parliament taken the viewpoint that the starting point is ‘customised administration of justice’, which means: administration of justice that is accessible, has a low threshold, is cost-efficient, works with modern communications resources, has an eye for alternatives, and sensible turnaround-times. We agree with this.

5 Objectives of the civil procedure
5.1 Three views
It is important that in our research we look at the objectives of the civil procedure and the changes that have taken place in the thinking about this in recent times. The views about what the objectives of the civil procedure are or may be, do in fact affect the nature and content of the law of civil procedure to be reconsidered. The reverse is also true: not everything that is desirable as an objective of the civil procedure can be achieved from a procedural law point of view. The nature and content of the civil procedure may set limits on what one can aim for in the civil procedure.

Speaking about the objectives of the civil procedure we can identify three views that we will now review.

5.2 Procedural law as a servant of substantive law
The first, most classic and widely held view is that civil procedure serves to give the litigants justice and enforcement. Procedural law therefore largely has a serving function with respect to substantive private law. Closely connected with the vision on which this objective focuses is the clear trend in the Dutch administration of justice of recent decades to interpret and apply procedural rules in accordance with their intent, as well as to provide a corresponding sanction for violation of these rules, so that as few formal obstacles as possible exist for the proceedings to take their course. The civil court is a forum before which the litigants can appear to have their rights and powers arising from substantive private law established and enforced. The compulsory enforcement legitimated in this way is exercised by the person subject to the court’s jurisdiction himself, he derives no authority from the government, but as it were borrows government authority. The forum, that has of old been made available

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17 See for example Zander 2000, p. 39-40, who from this point of view criticises the policy introduced in England in 1991 that civil justice must be ‘self-financing’.
by the government, creates a public space in which parties can carry out a
discussion of their dispute within limits as regards time and remedies. The prime
career here is not to solve an underlying conflict, this is also not always needed.
There are cases in which the only need is simply for enforcement, such as in the
case of debt collection claims. A consensus does not always have to be reached to
still bring about ‘peace’ between the parties.

The present discussion about the revision of the law of civil procedure is - in
other countries too – very much concentrated on finding a balance between reducing
the excessive length and high costs of proceedings, on the one hand, and where
possible improving the quality of the administration of justice on the other.
Compromises are unavoidable here, for example among others in Zuckerman in his
introduction to a comparative law study on procedural law revisions (or attempts to
do so) in twelve countries.\(^\text{18}\) We think this approach is too one-sided. It is based on
the unspoken presumption that the purpose of procedural law lies only or mainly in
providing the justice and enforcement just discussed. An example is article 1 of the
new English Civil Procedure Rules. These state as the ‘overriding objective’ of the
new procedural law ‘enabling the court to deal with cases justly’, whereby ‘justly’
stands for quick, not expensive, fair and of good quality.

\subsection{5.3 The proceedings as a forge for law formation}

What has not been taken sufficiently into account in the approach discussed above,
is that judges who settle disputes regularly do more than determine, assure and
protect the existing individual rights and powers of parties. Judicial decisions also
have a law-forming value and have an impact beyond the individual case. In most
western countries it is at present accepted without reservation that judges have a
law-forming task. In particular this applies for the highest judicial bodies at national
level (in the Netherlands the Supreme Court) and for the international judicial bodies,
such as the European Court for Human Rights, the International Court of Justice and
the EC Court of Justice. Their task is unquestionably partly aimed at law formation.

The contribution of the courts to the development of the law has in a modern
society to some extent become vital. As far as we can ascertain, this is a conviction

\begin{footnote}
\textsuperscript{18} Zuckerman 1999. We have listed the twelve countries in note 3. Developments have not stood still
since 1999. In many countries new initiatives of improvement and revision have been taken, for
example in the Netherlands, Germany, Austria, France, Portugal, Norway, Hong Kong and Japan.
\end{footnote}
that is generally shared by practitioners, academics, the legislator and ‘the’ public.\(^1\)

Legislation and administration of justice are partners in law formation. Each of them needs the other. The new Dutch civil code deliberately leaves a lot up to the judge: his law-forming task is as it were also codified. Also in most other western countries\(^2\) a lot of substantive private law is (codified) case law. In the development of the European Community law the EC Court of Justice has played a leading role. The European Court of Human Rights has particularly in the field of the law of persons, family and procedural law brought about revolutionary changes.

Against this background taking legal action is not particularly an evil that must be avoided as far as possible. We think that the point of view that it is a last resort\(^3\) is too oversimplified. Taking legal action also has creative, law-forming aspects that are vital in a modern society. The current discussion about the revision of the law of civil procedure and about the significance of ADR, including in particular mediation, does not do sufficient justice to these aspects.

In our opinion it follows from this that, in addition to providing justice and enforcement, making a contribution to law development and to legal unity is also an essential and vital objective of the proceedings. This view attacks the very core of the point of view discussed in the previous paragraph (5.2) about the relationship between the law of civil procedure and substantive private law. Where in that point of view this relationship is one-sided and static, in the view defended here it is, on the contrary, dynamic and reciprocal. That applies both at the highest level of administration of justice where law formation occupies a prominent place, and in the lower instances. The dynamics are, in the first place, apparent from the fact that the determination, assurance and protection of substantive law claims or powers of the one against the other (the legal relationship of parties) are in civil proceedings also subject to the effect of the proceedings themselves. Many judgments have been

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\(^1\) On the situation in almost forty countries, see Pelaya Yessiou-Faltsi 1997.

\(^2\) People are still much more reticent, if not (officially) dismissive, in various Eastern-European countries, but that is, we think, a question of time.

\(^3\) As has been demonstrated on the part of the Dutch government with regard to the revision of the judicial organisation and procedural law even recently. It assumes as the most important objective of its policy that the appeal to the judge must be a last resort and that first and foremost those involved must try to work it out themselves, by their own efforts or with the help of third parties, including out-of-court dispute conciliators. This view is expressed in the 1998 Contours Report (Contoureennota 1998), p. 2 and p. 15 ff. This idea is also found elsewhere, for example in England where the Lord Chancellor’s Department announced on 23 March 2001 that government disputes will in principle be settled using ADR. Going to court must be ‘a last resort’. See GNN 2001.
decided by procedural law. A decisive factor is the selection of the data that are submitted to the judge in the course of the proceedings and what is or is not proven. The parties choose their evidence and arguments. The judge is influenced by the force with which they are presented. The procedural rules also play a part. Mistakes are made. All these factors are assimilated in the ultimate decision. On this basis, the legal relationship between parties is determined in a binding way. This means that the judge in civil proceedings does not pronounce on what the out-of-court relationship is between parties, but that in the proceedings the relationship between parties is further developed and brought to a conclusion by the judge in the decision. The same applies for law formation. The scope of a decision partly depends on the way in which action is brought in the case, from start to end.

The above concerns the influence of the law of civil procedure on substantive private law. The influence also works in the other direction. Developments in substantive private law affect procedural law and in particular the procedural relations and the standards that govern them. There is therefore a dynamic interaction between substantive private law and procedural law. As in substantive private law people talk in this respect of a development from ‘formal’ to ‘substantive fairness’. For this reason, in our opinion, in a fundamentally revised civil procedural law it will not only be the known principles, also embodied in Art. 6 ECHR, the adversarial principle, equality of arms, public conduct, independence and impartiality, that have to apply. They are in the first place aimed at the demands that must be made of the judge in a democratic constitutional state. Room must also be made for principles and viewpoints that are aimed primarily at the procedural relationship between the parties in the proceedings, such as the duties of care and information, joint responsibility, proportion and good procedural order.

5.4 Proceedings as a place for conflict resolution

A third view of the purpose of the proceedings starts from the assumption that, in case of a dispute between parties, the underlying conflict must be resolved. There is a great need for techniques and mechanisms, such as in particular mediation, that can serve this end. The civil procedure does not provide for this, as it is not aimed at conflict resolution but at dispute settlement. It can therefore, at best, act as a big stick

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and a safety net (the latter because of the right of access to the judge guaranteed by Art. 6 ECHR). Provision of justice and enforcement, promotion of legal development and legal unity take a second place in this view. The prime concern is to resolve the actual conflict. The law of civil procedure plays no part at all in this, but rather stands in the way of it. And in the end if one is relying on civil procedure, then within this one must as far as possible work on a resolution of the conflict, unless there is none or the parties are looking to a judicial decision.

5.5 Our choice
We reject the last view discussed. The main objective of the civil procedure is not to resolve the actual conflict. The procedure is after all vital because of the function that it fulfils in providing binding law but also in forming the law. A public forum must be maintained in which all this can be achieved. The public have a right to this and need it. The fact is, conflict resolution is not always necessary to maintain social peace, but dispute settlement is in all cases. We are not of course hereby rejecting the complementary function of conflict resolution methods, such as in particular mediation. We shall now talk about this.

6 Public administration of justice [overheidsrechtsspraak] and mediation
6.1 Mediation is attracting attention
A fundamental review of the law of civil procedure must pay attention to the relationship between public administration of justice and mediation. Mediation is the form of alternative dispute resolution in which there is most interest. This is apparent among other things from the prominent place of mediation in the European Commission’s Green Paper on ADR\(^\text{23}\) and in the various Council of Europe Recommendations to promote the use of ADR.\(^\text{24}\) These discuss how and under what conditions mediation is best used.\(^\text{23}\) See Green Paper on ADR 2002 that contains an overwhelming quantity of material on the situation in the European member states and an analysis of the choices that must be made. It was possible to ask questions and make comments up to 15 October 2002. These have now been published, with a summary of the answers, and can be consulted electronically. See for this the bibliography under Green Paper on ADR 2002. In the near future a publication by the WODC (Scientific and Research Documentation Centre) is expected on Dutch research into the practice of mediation in neighbouring countries from De Roo & Jagtenberg 2003.\(^\text{24}\) Recommendations of the Committee of Ministers for the promotion of the use of ADR already exist for family law, administrative and criminal law cases. At the end of May 2002 a draft Recommendation on mediation in civil cases, with extensive notes, was published: see European Committee on Legal Cooperation document CDCJ (2002), 21. Cf. also Serverin 2001, that is also amply documented.
conditions mediation can be given a structural place in civil conflict-handling. In a number of European countries decisions have already been taken on this and mediation has in fact already been regulated by law, or at least legislation is being prepared.\textsuperscript{25} In the Netherlands there is a government-financed pilot project on mediation in addition to civil justice.

Furthermore, if it is correct that mediation is a better conflict-handling method for at least some typical disputes that are now usually brought before the court, and these disputes can be disposed of by mediation, those seeking justice are therefore helped more than by going to court and the capacity of the judiciary is also spared.

The relationship between public administration of justice and mediation is important in two phases of the proceedings: in the preliminary phase and during the proceedings. In the preliminary phase mediation is only one of the possible routes that can be taken before going to the judge. Here we focus on “court-annexed” (or: court-connected) mediation, that takes place during the proceedings.

6.2 In what ways do public administration of justice and mediation differ from one another?
Public administration of justice differs from mediation in that the judge takes a binding decision on the claim or petition of one of the parties and if necessary cuts through the knots to do so. He does this on the basis of the law and he is bound here by fundamental rules and imperative law.

Conversely, mediation differs from public administration of justice in that it focuses on bringing those involved themselves, actively and in negotiation, to resolve the conflict between them. Consequently this is done on a voluntary basis. It also involves those interests that cannot be translated into legal interests and which would not be relevant or would be less relevant in court proceedings. Mediation is also carried out in a context of confidentiality and hence not, like public administration of justice, conducted in public. In this confidential context the parties involved are expected to communicate openly with one another. The solution ultimately reached is

\textsuperscript{25} Green Paper on ADR 2002, p. 14-17 contains an extensive overview of the regulations in the European member states (whether or not still in preparation). We also refer to the preparation of an UNCITRAL Model Law on International Commercial Conciliation. This also shows the increasing importance of the subject not only in a national and European, but also in an international context (http://www.unictral.org/and-index.htm and http://www.unictral.org/english/workinggroups/wg_arb/506e.pdf).
a joint product. People talk in mediation of “disputants’ decision control”. This ultimately contributes to increased involvement and acceptance of the result achieved.

When we talk about mediation in the Netherlands, of the two forms, the facilitating and the evaluative, it is primarily the first that is used.

6.3 Advantages and disadvantages of the two
Both public administration of justice and mediation are associated with advantages and disadvantages. In the case of public administration of justice parties can ultimately obtain a verdict that can be enforced by means of government authority. Clarity, certainty and where applicable enforcement of the decision are the main advantages here. Because in principle this is a non-consensual procedure, the procedure is strictly regulated. There is strict supervision to see that the requirements of due process are fulfilled. As a result, and due to its involvement with the law, the decision can be checked by parties and third parties. An adverse effect that often occurs in the case of public administration of justice is that the dispute between parties, on which the judge must decide, has a polarising and escalating effect in the procedure itself. A lot is often lost in ‘translating’ the interests, needs, concerns and wishes of parties into claims and defences relevant in law. In addition the list of possible solutions to the dispute is not unlimited within public administration of justice, and that can detract from the value and quality of the solution achieved for parties. Furthermore, public administration of justice is experienced as slow, expensive and formal by most of those seeking justice.

Mediation has advantages compared with public administration of justice. We mention the most important. Those involved will see their dispute as a joint problem to be resolved by negotiation. They will seek to find a solution that as far as possible identifies and safeguards the underlying interests, concerns, wishes and needs of both. Those involved are themselves active in seeking a solution and the solution ultimately achieved is the result of their joint efforts. In mediation interests other than legal interests may be involved, particularly in long-term relations attention may be

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26 In the first the mediator gives an opinion on the (legal) feasibility of the viewpoints of those involved. In the second he just supports the parties in analysing their conflict, in formulating the points on which they differ, and in tracing and suggesting possible solutions. Conciliation is increasingly often seen as a form of mediation. In conciliation the independent third party is however more actively involved in searching for and finding solutions to the conflict than is the case in mediation.
paid to the future relationship between those involved. Mediation is carried out in a context of open and confidential communication between those involved and the mediator. However, comments can also be made in case of mediation. The consequence of the closed nature of mediation, entirely focussed on resolving the actual conflict, is that it makes external control impossible. No learning process takes place for anyone other than those directly involved. Another, important limitation of mediation is that its success stands or falls with the presence of an open, well-meaning and constructive attitude of the parties involved to ‘work it out’ together. This will not always be present, sometimes for legitimate reasons. This makes mediation vulnerable, susceptible to failure and in some circumstances even to abuse. For example one of the parties involved may see to it that it obtains confidential information via mediation that it then uses for unauthorised purposes, or cause the settlement of the dispute and/or of the conflict to be delayed.

A further aspect which we would like to point out is a development that is reported in the United States, which in short comes down to the fact that in court-annexed mediation there seems to be a growing natural preference for the evaluative form of this. The result is that in particular the active role of those involved and the considerable degree of ‘disputants’ decision control’ is disappearing, and hence also the creativity in reaching solutions. Ultimately this means that there is increasingly less distinction between the outcome of the mediation and the solutions provided by a judicial decision.

We can therefore assume that the advantages of court-annexed mediation are not self-evident. It is moreover, not only in the Netherlands, but also elsewhere, difficult to find adequate empirical data that show that and when mediation is a better conflict-handling method than the traditional public administration of justice, or vice versa. And where empirical data are present, they certainly do not always or in all respects support the view that mediation is better in terms of quality than public

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27 For example wanting to prevent the precedent effect or wanting to obtain clarity about a particular legal aspect.
28 For a clear explanation and analysis of this change of character in court-annexed mediation please refer to Welsh 2001, p. 794-816.
administration of justice.\textsuperscript{30} It is also not clear whether mediation is in fact as cost-saving as it is said to be.\textsuperscript{31}

\section*{6.4 The place of mediation compared with the public administration of justice}

In the light of what we have remarked in the previous paragraph, we think that the public administration of justice and mediation can best be regarded as complementary instruments for conflict-handling. They both deserve their own place.

Two questions arise. The first question is whether it is desirable and, if so, how and how far mediation objectives and procedures can be made fruitful in the exercise of the public administration of justice. The judge will, if his settlement attempt fails, be able to resume his role as dispute conciliator. He is therefore limited in the application of the mediation techniques (no ‘caucus’ technique for example). The authority that the judge radiates requires him mainly adopting a facilitating and not an evaluative attitude in settlement attempts. The second question is when and under what conditions the judge must refer a case to mediation if this method of conflict-handling seems more suitable or better in a specific case. A service-providing and professional attitude on the part of the judge involves him referring parties to mediation in a case suitable for this, but not to himself or his colleague as mediator.

An important question that, for example, is also constantly asked in the European Commission’s Green Paper on ADR is whether the implementation and style of court-annexed mediation must as far as possible be left to parties and the private sector or whether the government must act in a regulating capacity here. It is significant that the litigant, who applies to the court and is referred by the judge to a mediator, will tend to project the expectations he entertains of the judge as regards among other things professionalism, objectivity and reliability, onto the mediator and to require the same quality guarantees of him. Badly carried out court-annexed mediation harms the authority of the public administration of justice. Particularly in

\textsuperscript{30} The results of recent English research even give rise to the suggestion that if the traditional public administration of justice provided a smooth procedure, there would be much less need for mediation. Genn 2002, passim, in the interpretation of the figures, showing that the number of times that referrals are made to mediation, was reduced after the introduction of the new CPR in April 1999.

\textsuperscript{31} Genn 2002, p. 111-112 in our view rightly refers to the problem that occurs here: it is not always realistic to use as a comparative criterion the costs of a completely followed procedure with all the possible incidents. Quite often the (financial) advantage of mediation is ‘only’ that the reaching of an amicable settlement which would have happened any way, is brought forward. Also research in the United States does not unmistakably show the efficiency and the advantages of mediation over public
such a situation, that is partly attributable to the still existing lack of clarity about and unfamiliarity with the phenomenon of mediation, everything points to the government to speak plainly. Those involved will want to know where they stand before they are prepared to follow the judge in his suggestion to refer the case to a mediator, or, if they are forced to do so, to cooperate with conviction. That requires (some) regulation by or under the supervision of the government.

Another reason is also given why the government must concern itself with the regulation of mediation. As commented above, according to research there appears to be a danger that if court-annexed mediation is not supported in any way, it will quickly develop in a direction in which those elements that make mediation extremely attractive – in particular its informal nature - are in danger of being lost. Yet regulation also involves that risk. There seems to be a paradox here. However that may be: we are assuming that if court-annexed mediation is to be successful, (some) regulation by or under the supervision of the government is required.  

This choice is also made elsewhere, for example in Austria and Norway, where bills have been submitted that regulate all sorts of aspects of court-annexed mediation.

6.5 Make mediation compulsory?
As long as we are not certain whether the results of and experience with mediation in certain types of cases are positive, in our view it is better not to make it compulsory. This is also the conclusion of recent Dutch research. We are on the contrary pleading for the creation of specific, phased mediation policy. Such an approach is also much


32 For the way in which this can be done, please refer to section 12.
33 The Austrian bill, that is expected to come into effect in the near future, can be consulted on the Internet site: <http://www.justiz.gv.at/gesetzes/detail.php?id=17>. Both for the Austrian and for the Norwegian regulation, only those who are registered on a list kept or approved by the government may be called in for ‘die gerichtsnahe Mediation’ or ‘judicial mediation’. In Austria the list is drawn up on behalf of the Minister of Justice, while in Norway the various district courts are obliged to draw up such a list, for which cooperation between the different district courts is possible. Other matters are: the appointment of the competent training institutions, the development of an adequate assessment and guarantee system, the obligation to take out professional liability insurance, (interruption of the) limitation period, the rights and obligations of parties and of the judicial mediator, including information, and confidentiality obligations and rights of non-disclosure. Cf. Welsh 2001, p. 838-861. It is remarkable that the Norwegian bill provides that if the mediation is carried out by a judge ‘the court shall not hold separate meetings with each party, nor receive information which cannot be communicated to all parties involved. The court shall not present proposals for a solution, offer advice or express points of view which may weaken the impartiality of the court’. This does not apply for all judicial mediations, but only for mediations, carried out by judges.
more effective than general incentives to parties to try mediation. The essential point of such a policy is the development of criteria for selecting cases that lend themselves to mediation and which will produce sound and reliable results. Foreign examples as well as the results of the recent Dutch project on court-annexed mediation, show that it is still very difficult to draw up a comprehensive set of reference criteria.

7 Division of tasks between judge and parties

7.1 “Party autonomy”

The next matter that we have discussed in our report is the division of tasks and powers between the judge and the parties. It is usual in the Netherlands in this respect to regard the parties as “autonomous” and the judge as passive. The autonomy of the parties (“party autonomy”) in the law of civil procedure is then derived from the assumed freedom of the citizen with respect to his legal relations. The passivity of the judge is based on the idea that the judge must draw back from this freedom. However the citizen no longer has complete autonomy in this respect. Both in existing legal relations and outside them as a result of social principles of care one must increasingly take into account the justified interests of others and the general interest. Party autonomy now mainly applies with respect to three areas: the content and scope of the dispute in the different instances, the initiative to institute, continue or prematurely end the proceedings\(^{34}\) and the furnishing of evidence. The court does not have the last word on these points and to this extent is “passive”.

Apart from these, one can hardly talk of party autonomy any more.

7.2 Not a battle model but cooperation

If the proceedings are to run more efficiently and quickly and at the same time lead to a result that is also satisfactory from a legal and quality point of view, then the model

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\(^{34}\) In French doctrine a distinction is made between two principles on this point: ‘le principe accusatoire’ or ‘principe d’initiative (d’impulsion)’ which relates to the initiation, progress and bringing to an end of the proceedings and ‘le principe dispositif’ that concerns the content side of the proceedings: what the proceedings are about; see Vincent & Guinchard 2001, no. 533 ff.; Bolard 2002, no. 2392 ff. In Germany this distinction is not made and one talks of the ‘Dispositionsgrundsatz’ that relates to both the initiation, progress and the bringing to an end of the proceedings and to the determination of the content and scope of the litigation; see Rosenberg/Schwab/Gottwald 1993, § 77, not to be confused.
of proceedings as a battleground is in our view counter-productive. To understand the proceedings as a battleground leads to tactical behaviour to defend one’s own interest and ignoring the other party’s interest in the proceedings. This is inefficient and even ineffective, if only because the tendency will be to keep one’s powder dry and not give one’s cards away. Facts are only collected and shared with a view to reinforcing one’s own position. Information that detracts from this is ignored or withheld and in the worst case the other party and the judge are wrong-footed. This is all an inherent part of the battle model.

For this reason we think that this vision must be replaced by a vision that is based on the joint responsibility of all those involved, court and parties, for an energetic, efficient and effective course of the proceedings. The joint responsibility of court and parties in our view leads to a form of cooperation that is characterised by a general obligation to cooperate in reaching the objective of the proceedings. True, the proceedings originate from a conflict of rights and interests and this conflict is also brought into the proceedings, but the way the proceedings themselves are conducted must aim to arrive at the most acceptable treatment for all parties involved. Certainly, the end result will always be translated by those involved into ‘winning’ and ‘losing’, but that does not have to reflect on the way the dispute is handled. It will always happen that one party trips up the other in the proceedings, but if the court then issues a yellow or red card, that gives the signal that the legal dispute may not be carried out by such means. The dispute about the case itself is no excuse, let alone a justification, for discordant behaviour in the proceedings. The English Civil Procedure Rules (1.3) state the following with regard to the parties: ‘The parties are required to help the court to further the overriding objective’. The judge on the other hand has the duty to actively involve himself in the proceedings in order to achieve a result that is also acceptable to the parties.

We have asked the question above (5) whether in a fundamentally revised law of civil procedure in addition to the known principles, partly embodied in Art. 6 ECHR, of the adversarial principle, equality of arms, the principle of publicity, independence and impartiality, space must not also be made for substantive principles and viewpoints, such as the duties of care and information, joint responsibility, proportion and the good order of the proceedings. It may also be clear
from the above why we have answered this question in the affirmative. It is on the basis of joint responsibility and the general obligation to cooperate that open standards such as reasonableness and fairness and good order of the proceedings can fulfil their function in the formation and specific application of procedural rights and obligations. Furthermore space can then also be made for making felt the principles relating to procedural behaviour that already apply between parties on the basis of the parties’ legal relations with one another outside the proceedings.\textsuperscript{35}

The above means that a term like party “autonomy” can no longer serve as a guiding principle. The basic assumption that the parties ultimately determine the boundaries of the legal dispute is not incompatible with the power of the judge to bring the boundaries up for discussion and if necessary to cause the parties to move them. The frequently heard objection that the judge then ‘joins in the proceedings’, has no argumentative force since because it is in the nature of civil proceedings of this kind that the judge joins in the proceedings. He has been doing that for a very long time in the law of civil procedure of many countries, including Dutch law.

7.3 \textbf{Concrete developments}

In our report we develop the above into a number of technical proposals for change. We shall mention a couple here. For example, in a number of cases the existing separation between on the one hand the judge who hears the case himself and on the other hand the central administrative handling of the progress of the case (the ‘cause list’) must disappear in favour of case management by the judge who deals with the case.\textsuperscript{36} The formal approach to procedural complications by means of mini-proceedings within the procedure (“incidents”) must be replaced by a consultation structure between the case managing judge and the parties. The oral hearing of the case – in particular the \textit{comparitie na antwoord} (appearance after statement of defence) and the oral hearing in the procedural model that starts with a petition\textsuperscript{37} - must be thoroughly prepared. Parties may expect information to be given by one party to the other and by parties to the judge in good time before the sitting, that

\textsuperscript{35}Think for example of obligations of doctors to give information to the patient, that make themselves felt in the obligation to furnish the facts in the proceedings, or (vice versa) the infringement of privacy in gathering evidence that may lead to exclusion of evidence with respect to that material.

\textsuperscript{36}Above 1.4.2 \textit{in fine} and 1.4.3 \textit{in fine}.

\textsuperscript{37}Above 1.2.3, 1.4.2 and 1.4.3.
creates as full as possible a picture of the points of view and evidence options. Active
communication is then expected from parties and judge before the sitting about what
is still necessary for this to run efficiently and effectively. The oral hearing must offer
the parties structural scope to explain their points of view. The judge should have the
power in the oral hearing of the case to reject immediately what in his opinion are
claims, grounds and defences that are obviously irrelevant for the decision and to
help supplement missing grounds and defences that are necessary for a well
founded decision. There must be more ample opportunities to submit written
statements from third parties to give the judge and other party an earlier
understanding of what any witnesses might state and hence prevent the unnecessary
hearing of witnesses.

Finally we propose that improper behaviour in the proceedings be punished
with more financial sanctions (astreinte [a daily fine] and award of costs) than is now
possible and usual.

8 The forgotten preliminary phase of the proceedings
8.1 Attention to the ‘pre-action’ phase.
The Dutch law of civil procedure has no regulated preliminary phase that precedes
the actual proceedings. It is no different here from other procedural law systems of
civil law. By the preliminary phase we do not mean something like the English ‘pre-
trial’ phase, but a ‘pre-action’ phase, since the Dutch civil procedure does not have
the trial as the central element in the proceedings. The current procedural law offers
a few separate instruments, in particular in the field of the law of evidence, such as
the preliminary hearing of witnesses by a judge appointed by the court for this
purpose on petition of a party. This is being used increasingly. It helps to avoid
proceedings because due to the witness statements a better assessment can be
made of the evidence position of oneself and of the other party in any proceedings.
There are also the conservatoire beslagen [freezing injunctions] about which we
would like to make a single comment below. In addition it must be considered that
the Dutch kort geding is a quick and easy way to obtain immediate justice (and
enforcement!), which then in fact bypasses a preliminary phase and the following
ordinary proceedings.

Although 95% of disputes are settled out of court and so do not reach civil
action, we think that there is reason for procedural law to concern itself more than is
now the case, particularly in a facilitating way, with the pre-action phase, because *if* things come to an action, what may or may not have happened in this preliminary phase, affects the action. To sum up we say the following about this in our report.
8.2 The dispute between parties creates a relation with standards of behaviour

We have talked above (7.2) of the joint responsibility of parties and court, and the parties' duty of cooperation arising from this. We have chosen this duty as a basis for organizing proceedings and developing rules for proceedings behaviour. It will be clear that this responsibility will already leave its mark on the preliminary phase as the possibility of eventual proceedings must be taken into account here. More particularly we are thinking of those behaviours and measures that serve to prepare for the proceedings (collection of evidence, taking compulsory measures). But where this is not directly at stake, no thinking can take place regarding the part of parties or potential parties in the preliminary phase without a normative framework for their behaviour. We therefore attempt in our report to sketch a more general framework.

From the time when people get into dispute with one another, there is a need for rules of behaviour relating to the dispute. If we limit ourselves to legal disputes then the rules that apply are those relating to the content of the dispute and those relating to its settlement or termination. The question whether and if so, what, rules would have to apply in the preliminary phase must not only be looked at from the point of view of the court involved with the parties but also from the point of view of the parties who have to take eventual proceedings into account. If for example we feel that parties must do their utmost to terminate their dispute out of court and should only gain access to the court if they have done this and can provide evidence of it, then they will immediately take this into account from the start when dealing with their dispute. The same applies for the preparation for the proceedings: if before dealing with the case the judge lays down the requirement that parties have worked out and exchanged points of view and facts prior to the proceedings, then parties will take this into account much sooner than if they had to wait to do so until the proceedings.

In practice the introduction of such rules would mean that the possibility of proceedings will determine the behaviour in the preliminary phase much more than is perhaps the case now. It may be assumed that precisely \textit{that} may mean that many proceedings can be avoided. The previous collection and exchange of facts and evidence for example without any doubt has a clarifying effect and contributes to a more efficient, but also better quality handling of the dispute. The same applies for the information about the point of view of the other party and countering tactics to surprise the other party.
Consideration must also be given to the fact that disputes between parties often arise from an existing legal relationship. Rules that apply to that relationship, not only make themselves felt in the proceedings but also in the preliminary phase. If the legal relationship between parties is of such a nature that they must have their behaviour determined by what reasonableness and fairness demand under certain circumstances, this will also where possible and taking into account the specific circumstances that prevail in a civil procedure, apply in the procedure and a fortiori in the preliminary phase of the procedure. If such a legal relationship does not exist or if the question of whether a legal relationship exists between parties actually forms the starting point for the dispute, then there in any case exists between them a legal relationship of its own type due to the occurrence of the dispute.

What may one then, on this assumption, reasonably expect from the parties in the preliminary phase? In any case that they will take one another’s interests into account with a view to bringing their dispute to an end. They must not let their dispute escalate – let alone, unnecessarily - but on the contrary try to bring it to an amicable conclusion. They should not cause one another more damage in relation to that dispute than is strictly necessary to enforce their own interest that is involved in the dispute. There is then on this point also something like an obligation with respect to the other party as far as possible to prevent and where possible to limit further damage. We are allowing ourselves to be inspired here by the developments in England that we describe in the report, including in particular the pre-action protocols.

Even though we do not subscribe to the view that the civil procedure is a last resort, we do think that proceedings before the judge must be avoided if at all possible and disputes must be solved amicably. Things are no longer allowed to come to proceedings as a matter of course and for this reason, we feel, parties may be expected, if asked, to inform the judge why the proceedings could not be avoided. An aspect that relates to this is that parties are obliged to clarify the foundation of facts of their dispute as quickly as possible. They have in this respect a duty of information to one another to clarify to one another their own point of view and the facts on which this rests. The deal here is that parties are helped more by factual information and clarification about the dispute than by taking up legal positions that

38 Above 5.3.
as it were dictate the selection of facts. The duty here is not to dig in but to communicate. One must prevent people become fixed in legal and factual positions without the facts actually being sufficiently charted. Prematurely taken positions encourage a selection of facts aimed at these positions and so prevent a thorough investigation of the facts. The activities must be aimed at preventing escalation and at obtaining a better understanding of the dispute.

Obtaining a greater understanding of the dispute must in our view be combined with being prepared to reconsider one’s own point of view. In particular institutional parties in the proceedings, such as insurers and mail order companies, who regularly carry on proceedings may simply be expected to regulate their behaviour in the preliminary phase in the way described above and make room for investigation of the facts and review. One can think of the special provisions for this in their general conditions, that is something like general proceedings conditions or pre-action protocols. Even if there is a gateway in the form of proceedings before an industry disputes committee – a very common form of dispute conciliation in the Netherlands - the thing is that on the point of complaints handling and the collection of the necessary facts and data as well as communication with the other party there is a code of behaviour. This code must aim to bring the dispute to an end in a way that also does justice to the justified interests of the other party and, if it does not seem possible to bring it to an end, ensures adequate preparation for the proceedings in the disputes committee or proper preparation for proceedings before the court.

To sum up we would say: the behaviour of parties and the rights and obligations that they have with respect to one another have been determined in the preliminary phase on the one hand by the general social principle that they must take one another’s interests into account in bringing the dispute to an end and that they must aim to settle it out-of-court and on the other hand by the obligation to prepare properly for the proceedings.

8.3 Other countries

A brief tour through England, Germany and France taught us the following. One is first of all struck by the successfully operating guidelines for pre-action behaviour in England and France, though these differ from one another in content. These guidelines aim both at an early exchange of information and documents and early
settlements. In England since the Woolf reform there have been the pre-action protocols. These were introduced due to the efforts of Lord Woolf and his commission ‘to build in and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute’. They ensure (whether or not coupled with ADR) positive results in various types of civil disputes. This applies above all with respect to the simpler and/or standard cases. The Badinter law that came into effect in France on 1 January 1986 has shown positive results over a period of just over 15 years for a particular category of personal injury cases. All the guidelines mentioned lead to a more open and depolarised method of handling disputes, in which the regulations also ensure more structuring and predictability in the proceedings.

England and France also show that even a legally regulated out-of-court settlement offer (that is possible in several variants) can be a great incentive in reaching settlements. In France this instrument is incorporated in the Badinter Law, in England in so-called ‘offers to settle’ of Part 36 CPR, with corresponding Practice Direction. An advantage of the English system (in both the pre-action protocols and the offers to settle) is the fact that the court has various enforcement mechanisms available, though on certain points further investigation is necessary into their most effective use.

In these countries the attention paid to settlement is conspicuous. As regards the proceedings phase it is seen as an express task of the court to encourage settlement or settlement negotiations between parties. In Germany a separate law was also introduced in 1999 as a result of which the separate Länder can oblige parties to try for an out-of-court settlement with a specially set up government body.

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39 See on this in general O'Hare & Hill 2001, no. 6.016 ff. Practical information about the different protocols is given in Tompkins 2001, ch. 9; Sime 2002, ch. 5.
40 Final Report, Chapter 10, para. 1.
41 Official: Loi no. 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à accélération des procédures d'indemnisation' [Law No 85-677 of 5 July 1985 on the improvement of the situation of traffic accident victims and the acceleration of compensation procedures]. The law is however usually named after the person who introduced it, the then Minister of Justice Badinter. See in detail on this Tzankova & Weterings 2002, p. 26 ff.
42 See on this in general O'Hare & Hill 2001 chapter 29; Tomkins 2001, p. 336-338; Sime 2002, chapter 41.
(the ‘Gütestelle’) before they are admitted to the civil proceedings. This is however a little different to compulsory mediation.

A task may also be set aside for the court in this respect after provisional evidence has been furnished, as shown for example by articles 485 jo. 492 Abs. 3 of the German ZPO. At the moment in the preliminary phase the judge could, in cases that lend themselves to this, also refer them to ADR, and in particular to mediation. ADR seems to be growing in all the countries surveyed, though in some countries more than in others.

8.4 Development for the Netherlands
Based on the thoughts developed above (8.2) in our report we make a number of proposals for the Dutch situation. We will briefly summarise them. In the first place we plead that an attempt will be made to find alternative solutions along the lines of substantive private law. Instead of, as now happens in the majority of cases, placing the emphasis on upholding rights and enforcing obligations, obligations to negotiate and widening of opportunities for revision of agreements and adjustment to changes in circumstances could be considered without the intervention of the judge. Consideration can also be given to standardising compensation.

In the field of procedure the further development of methods to mediate and conciliate disputes present themselves. In a European context they are being given more and more attention, where consumer protection is involved, witness among other things the Recommendation of the Commission of 4 April 2001, 2001/310/EC, on the principles applicable to extrajudicial bodies charged with the consensual resolution of consumer disputes. There is in our view every reason to support and encourage this system of informal agreement-based dispute mediation and resolution mechanisms. This could be combined with the introduction of a quality guarantee.

We also think that a check should be made as to whether and how far the activities of legal assistance insurers could offer an alternative for an action in smaller cases. Finally, if the experience in Germany is favourable, introduction of a system like the German out-of-court ‘Schlichtung’ by a body appointed to do this by the government (in Germany: the ‘Gütestelle’) can be considered, with assessment of the

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44 See also the press-release of the European Commission of 16 October 2001 relating to a ‘New European network to help consumers settle cross-border disputes out-of-court’.
advantages and disadvantages compared with mediation. For the same reasons as we have already explained (6.5) we do however consider it is not appropriate to make mediation compulsory in the preliminary phase.

In the Netherlands it is very easy for a creditor to pounce upon his debtor with attachments before the proceedings have begun (the so-called “conservatoire beslagen”, cf. the English freezing injunctions\(^\text{45}\)). Of course permission must be obtained for this from the district court, but that is virtually always given immediately in an ex parte-petition without the other party to that petition being heard. The protection of the latter is found in the very easy and quick way – against provision of security – for obtaining the lifting of such an injunction in the kort geding. Such an injunction must however be followed by bringing proceedings, with the result that a great many proceedings in the Netherlands in fact begin with bringing a freezing injunction. This represents a line through the account of a preliminary phase in which every effort is made to prevent proceedings. In order to avoid escalation due to such compulsory measures in the preliminary phase, we propose that a premature freezing injunction should lead to an obligation to pay compensation for the damage suffered as a result of this by the person against whom the injunction is brought, that is irrespective of the outcome of the subsequent proceedings.\(^\text{46}\)

We also propose a number of evidence measures. The endeavour to introduce a pre-action disclosure like the English one, is not realistic in the Dutch situation (for the present), because such a method of collecting evidence does not fit well into the system of the Dutch law of evidence (nor into that of other systems of civil law procedure). The furnishing of evidence is in fact carried out in the proceedings before the court based on the proof required by the court, in which the court plays a central part. Much more can however be done in the Dutch system with regard to better preparation in the field of collecting facts. Written, unsworn statements from witnesses that are made and recorded in the presence of all the parties must, in our view, be regarded as witness statements. However a petition still to have the witnesses involved heard by the court, can be granted if the court sees reason for this. If a party has not cooperated in collecting evidence in the preliminary phase while this cooperation could reasonably be expected of them, this party must

\(^{45}\) Civil Procedure Rules and Practice Directions, Part 25.
be sentenced to the costs of the proceedings associated with still hearing witnesses in the proceedings. Furthermore it could still be possible to call in the court in the preliminary phase to give parties the opportunity to discuss their dispute with him and where possible to settle it. That is now only possible after the end of a provisional hearing of witnesses.

The introduction of pre-action protocols and offers to settle on the English model can be considered, but it is foreseeable that for the success of the offers to settle the rather restrictive Dutch system of awarding costs will have to be revised. In the Netherlands the winning party does in fact only receive back a relatively small proportion of the costs from the other party, because the lawyers’ costs are calculated in accordance with a fairly modest fixed rate.

Finally we think the option should be introduced, if proceedings seem to be inavertible, that parties hold a pre-action conference with a judge before proceedings are brought.

9 Differentiation
9.1 Differentiation by proceedings

Review of the law of civil procedure does of course involve consideration of the procedural models. What we say about this in our report does of course very much relate to the Dutch situation and so we shall just give a relatively brief summary here.

Compared with a number of neighbouring countries it appears that the judiciary in the Netherlands has a simple structure, as we have indicated above (1.2.1). There are few specialised courts and as regards procedure there is no differentiation according to the specialised court. We do not therefore have separate courts for commercial cases as in France (tribunal de commerce) or for labour cases (French Conseil de prud’hommes, the English Employment Tribunals or the German Arbeitsgerichte). There are however specialised divisions of the existing courts, such as the cantonal judges that in first instance, in addition to the small cases, hear the labour and lease cases and so have built up a specialism in these. We also have among other things chambers for tenancy cases at the district courts and at one of the courts of appeal and a chamber at the Amsterdam court of appeal for certain

46 Loss of the proceedings already results in a liability of the creditor bringing the injunction for the damage suffered by the debtor as a result of the injunction.
cases relating to corporate bodies (Enterprise Chamber). Furthermore in some fields cases have been concentrated in one court, such as in cases concerning patents, for which the district court and the court of appeal in The Hague are exclusively competent. In all these situations there is little differentiation in procedural law: cases are heard in accordance with one of the two main models with a few variations here and there. The separate procedural model that previously existed for the cantonal courts, as we have already stated (1.2.3), was abolished in 2002.

In view of the differences between the European countries in this field, there is no reason to pursue a centrifugal development and to differentiate by setting up specialised courts. For that matter, a centripetal development has been underway in the Netherlands for some time already because the large-scale reorganisation of the administration of justice operates on the principle that it is as far as possible accommodated in the ordinary judiciary. As a result of this, the administrative justice, which was previously spread over various special courts, has been and is being accommodated in the ordinary judiciary (district courts and courts of appeal). In our view, then, differentiation in the Netherlands can and must be sought in a procedure that is tailored to the nature of the cases.

9.2 One basic model

The summons procedure and the petition procedure (see 1.4.2 and 1.4.3) are mentioned in the introductory document. The choice of a particular form of instituting proceedings must however be geared to the purpose served with this institution, for example informality to increase the accessibility of the judge for the applicant or indeed formality to ensure the rights of the defendant. There must therefore be a clearly demonstrable reason why a particular method of instituting proceedings is chosen and this reason does not necessarily lie in the proceedings system in which the case brought is then heard. It is not clear why in the past certain cases were accommodated in the petition procedure and furthermore the summons and petition procedures are becoming more and more similar.

Considering the model of the procedure we find that though indeed a tailor-made procedure for each (type of) case, would be ideal, this is not feasible. We choose a basic model with divisions. For the basic model we choose the procedure that corresponds overall with the choice made for the revisions with effect from 1 January 2002: one written round followed by an oral hearing. Only because of the
numbers is it necessary to divide this basic form into a number of categories in which a different model is appropriate: collection proceedings, small claims and cases that lend themselves for hearing in the *kort geding*.

### 9.3 Divisions

For the procedure in collection cases – money claims against which no defence has been brought – developments are taking place at European level.\(^{47}\) We have been inspired by the fully automated procedure introduced in England.\(^{48}\) Furthermore we choose, from the different models that are feasible, a procedure, in which the claim submitted results in a payment order without any judicial control, to which it is however possible to object, with the result that the claim is handled in a (more) ordinary procedure. Assuming the parties’ own responsibility, we think that this form in combination with automation provides the most efficient allocation of manpower and monetary resources. Undisputed payment order petitions in this way immediately lead via an automated system to an order that can be enforced by law, to which however the defendant can object, resulting in referral to a (more) ordinary procedure. The advantage of this choice is that an estimated 50,000 to 60,000 cases per year no longer have to be decided and settled by a judge. Meanwhile, after the publication of our report, it has been announced that an experiment with “money claim online” is also to be started in the Netherlands.

Apart from the question of whether small claims must remain out of court, for small claims we choose a simpler model than the main model, with limited evidence options.

In neighbouring countries there is, as here, a special procedure for obtaining accelerated decisions. Our *kort geding* has also developed as an alternative to the *bodemprocedure*, as we have already seen (1.4.4). We do not find this development, or at least not to this extent, in neighbouring countries with a comparable institution, such as the French *référé* (art. 484 – 492 NCPC) and the Belgian *kort geding* (art.

\(^{47}\) *Green Paper on Orders for Payment and small claims, no. 3.1 ff.*

\(^{48}\) *Whereby in particular the possibility of electronic submission of claims to a central judge and an immediate electronic decision on this may seem of no concern to us, but at least this exists. In England an experiment began in December 2001 with the Money Claim Online, see <http://www.lcd.gov.uk>, with further links, for an Internet-based collection facility for claims of up to to £100,000.*
584 and 1025 Gerechtelijk Wetboek (Judicial Code)). The question is whether the way in which our *kort geding* has developed does not force us to choose on the one hand shortened proceedings on the merits [*bodemprocedure*] and on the other hand a *kort geding* that is actually reserved for provisional measures. This relates to the question of how far the *kort geding* procedure is sufficiently on a par internationally with attitudes prevailing elsewhere, to be and remain acceptable at European level. In retaining the *kort geding* we feel that the judge in the *kort geding* must have the option on petition of the two parties to give his judgment as a decision as to the merits. That would also have to be possible in case of a unilateral petition, unless one of the parties within a certain time takes action against that judgment – to put it in neutral terms. A shortened *bodemprocedure* thus occurs in urgent cases.

10 Increase of scale

10.1 The phenomenon of increase of scale

The phenomenon of increase of scale is becoming increasingly important in our society and occurs in all areas of substantive law. On the more individual level it is occurring, as in labour law, where the liability of the employer for accidents is being extended by the administration of justice to cases of subcontracting and the use of temporary staff. But the phenomenon is also being observed in the case of mass claims occurring as a result of disasters and the more long term effect of hazardous substances. Examples of this are cases of frauds and accounting scandals in companies listed on the stock exchange where many small investors are victims. It is striking that in the Netherlands in case of mass claims more and more attention is being paid to the role of the State in monitoring compliance with government rules that must prevent damage (for example environmental and safety standards that are enforced when awarding licences to companies).

Complex litigation is a universal phenomenon\(^{50}\) that is typified by the following features: ‘it is big, costly, involves complicated legal issues, factual

\(^{49}\) Much information can be found in unpublished reports of the Provisional Measures congress. An Autonomous Form of Judicial Protection? at the University of Athens on 10-11 December 1998. \(^{50}\) According to P.H. Lindblom and G.D. Watson in their report prepared for the IXth World Conference for Procedural Law in Portugal in 1991 entitled ‘Courts and Lawyers Facing Complex Litigation Problems’. This summarising and concluding final report is based on sub-reports issued by national rapporteurs from 23 countries in response to questionnaires. A summary of the final report was published in the form of an article. See Lindblom & Watson 1993, p. 33-91. See for the Dutch contribution Voskuil 1992.
complexity, huge files or unwieldy masses of paper work, multiple party, interveners, related cases that have been consolidated, or gives rise to important or difficult problems of procedural management.  

The above description already gives some indication of the substance of the phenomenon; a more precise definition is however still necessary.

10.2 Two types

We distinguish between two types of increase of scale in the proceedings. In the first place we have the two-party action in which one or more, but a limited number of third parties join together because of their rights and interests involved the action. We call this the ‘tripartite’ increase of scale because of the limited number of third parties.

We also have the increase of scale characterised by a large number of parties in the action as a result of the occurrence of a large-scale claim. Examples here are in particular consumer, corporate body, environmental and antitrust, or competition law. One talks in these cases of mass claims. This type of increase of scale generates procedural problems both for the legal profession and the judiciary that do not occur or that occur to a lesser extent in dispute conciliation in ‘the ordinary run of cases’. Furthermore: if all the injured parties were to start proceedings at the same time, this would lead to disruption of the judicial apparatus.

10.3 Tripartite increase of scale

In tripartite increase of scale Art. 6 ECHR implies that the idea of regarding the third party in the proceedings as an incident, giving rise to a satellite action to the main action, is outdated. We plead for one simplified regulation, as a result of which there is one action in which all those involved take part.

The ratio of the participation forms lies on the one hand in the coordination of the administration of justice and hence the occurrence of conflicting judgments, on the other hand in bringing the action in an efficient and qualitatively sound way, in accordance with the requirements of Art. 6 ECHR. The public interest that is involved here means that it cannot be left exclusively to the parties involved in the action to

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51 Lindblom & Watson 1993, p. 34-36.
52 One must think here in particular of protection of the shareholders’ interests.
53 That at least is shown by experience abroad. See among others Greiner 1997, p. 32-38.
54 Where we talk in the following for convenience of ‘mass claims’, we mean mass quantities of claims.
monitor this interest. It is also the responsibility of the court. It must have the power to
officially request data and documents from third parties in order to assess whether a
third party must necessarily be involved in the action, and if necessary to call this
third party itself. English procedural law gives inspiration on this point. The English
court bears a statutory general duty ‘to ensure that: as far as possible, all matters in
dispute between the parties are completely and finally determined, and all multiplicity
of legal proceedings with respect to any of those matters is avoided.’ This has
meant that under the CPR the judge has ample power to officially draw in third
parties as party in an action and even to remove and replace them. He can draw in
a third party if it is desirable with a view to settling all the points in dispute under
consideration or to settle a question between one of the parties to the action and the
third party, that relates to the points in dispute. Drawing in a party as plaintiff is
moreover only possible with the permission of the party in question. Of course the
existing parties to the action are always heard if the judge is intending to replace one
of them, to remove them from the action, or to call in third parties. Removal is
possible, if ‘it is not desirable’ for the party in question to be further involved in the
action. The judicial power to officially replace a party, in case of a take-over of a
company and/or a merger for example, also saves many procedurally tinted
(exeuction and appeal) problems. In this respect reference can also be made to the
following. Parties are also encouraged even before starting proceedings to check
whether interests of third parties are directly affected by their conflict. They must in
fact prior to the proceedings indicate on the questionnaire that they have to fill in,
how many parties are involved in, or in all probability will be affected by a decision in
the dispute in hand. This information does in fact form an indication for referral of a
case to multi track.

55 According to the Supreme Court Act 1981, s. 49 (2), that is reflected in Art. 7.3 CPR. See further
Plant 2000, p. 105.
57 That is the track that is reserved for complicated questions, in which flexible action agreements are
made between parties. See Art. 26.8 CPR.
10.4 Mass claims

10.4.1 The crux of the problem

In this type of increase of scale, as stated (10.2), the crux of the problem is formed by the large number of parties faced with an identical or similar problem. It is above all the ‘numbers’ that jeopardise the handling and management of dispute settlement.

It can be said that considerably less attention is paid in Dutch procedural law to this type of increase of scale than to the first type discussed above. As a result of this it is not possible to make an adequate allocation of (judicial) manpower and resources. That holds up the settlement of the pending mass claims and also other cases that are before the judge in question at the time.

10.4.2 Three subtypes and their problems

With regard to mass claims we distinguish three subtypes: (a) fixed claim, that is a claim resulting from the exposure of a large group of people to the consequences of a single event, caused by the same initial damage-causers; (b) insidious claim, that is a claim that is not the result of one event, but of a series of exposures or events, whereby a claim only arises after a long time, so it is not clear by or from what exposure in the series the claim has arisen (e.g. claim due to asbestosis); (c) scattered claim, that is a claim caused to many injured parties that as regards size is so small for each of them that it does not justify the trouble and costs to enforce it individually in law (e.g. claim as a result of train delays).

Various problems arise in this area. In the case of fixed and insidious mass claims the assets of the potential damage-causer(s) will often be insufficient to compensate (fully) the claims of all the victims if the complaints are found to be justified. There is then a high chance that parties who bring their claim early will receive full compensation, while others who for any reason are not so energetic, or for whom the damage only appears later, miss the boat. This exhaustion of the financial resources of the causer hence results in unjustified differences in treatment or outcome. In the case of insidious mass claims the precise number of injured parties is often unknown as a result of the long time that passes between the exposure to the event or events that have caused the damage and the damage becoming apparent. Here too problems may arise with the evidence, causality and limitation period, that lie elsewhere or are specific for each individual case or category of cases. Also it may be difficult to determine who has caused the damage.
That not only makes it especially difficult to distinguish the procedural from the substantive law questions, but also of course to apply more mechanisms that result in a consolidated hearing and trial, since this is often based on an identical answer to the legal questions formulated for all those affected.\(^{58}\) The nature of the injury suffered in insidious mass claims\(^{59}\) is also often so life threatening that one cannot afford years of discussions that in case of injury are not the exception. Also these circumstances may lead to a different procedural approach.\(^{60}\) Finally, in the case of scattered damage this involves ‘rational disinterest’ on the part of the victims to get compensation for their loss and hence to remove the advantage unjustifiably obtained by the damage-causer. This rational disinterest does however mean that (unlawful) damage-causing behaviour is not corrected in these cases.

### 10.4.3 Approach in other countries

The regulation of procedures in this type of case has attracted a lot of international attention. Many countries, where they do not already have extensive (draft) statutory regulations in this field, have placed the subject of mass claims on the (legislation or social) agenda.\(^{61}\) We mention here as an example a few European countries.\(^{62}\) Sweden has as of 1 January 2003 a regulation in the Law for group actions which

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58 Causality and evidence problems have already been mentioned, but one can also think of limitation periods aspects which may also be different for each case, etc.

59 Think of asbestosis or the haemophiliac patients infected with HIV.

60 For example in England a pre-action protocol is in preparation for Illness and Disease, that covers injury as a result of a series of damage-causing events. The rules regarding response times are shorter there than in the Pre-action protocol for Personal Injury.

61 See the instructive (theme) number of the Duke Journal or Comparative and International Law 2001 (no. 2) on large scale (complex) litigation, which contains some ten contributions from authors from different countries who report on the state of affairs and developments in their country.

62 In Canada, Quebec (1978), Ontario (1993) and British Columbia (1995) have statutory class-action regulations, while in provinces that do not yet have such statutory regulations developments are underway in this direction. Reference may be made to a judgment of the Supreme Court of Canada in a case (Western Canadian Shopping Centres v. Dutton, 2001 SCC 46), originating in the province of Alberta, that does not have class action regulations. Nevertheless the Supreme Court considered that class action was permissible in certain circumstances. Meanwhile in Alberta and Manitoba they are working on bills on the subject, while there are similar developments in the provinces of Newfoundland, Labrador and Saskatchewan. See also Watson 2001, p. 269 ff. with many references. In the United States the federal class action regulation is not so energetic, but is regularly subject to critical investigation, which is leading to proposals to revise, refine and amend the regulations. It is worth mentioning in this respect the ‘Manual for complex litigation’, in which guidelines are given on handling among other things mass claims. Not only legal but also practical aspects are covered here, based on practical experience and expertise. Answers are given to and guidelines offered for problems that frequently arise in handling such claims. Via the manual, methods of approach are also being introduced that are still too new or revolutionary to be converted immediately into legislation. Via
also includes an individual class action. In Norway a regulation is being put forward that also provides for a class action. In Germany in response to the implementation of EC Directive 98/27 of 19 May 1998 concerning the protection of Consumer interests the discussion about group actions and the settlement of mass claims is flaring up again. With the introduction of the Civil Procedure Rules, as of 1 April 2000 specific statutory regulations have also been introduced in England for multi-party actions: the so-called Group Litigation Order (GLO) embodied in Part 19.III CPR. This regulation is in essence a codification of the procedural law solutions that the judiciary was forced to create in around 1985 in the form of bundling, structuring and coordination of test and/or lead cases. The Lord Chancellor’s Department has in February 2001 also published a ‘Consultation Paper’ on ‘Representative Claims’. The intention of this was (partly) to sound out whether a basis existed for the introduction of a class action regulation. Based on the reactions received – that were however in the majority against the introduction of a class action regulation in England - the Lord Chancellor’s Department has considered removing the matter from the sphere of the (nationally bound) Civil Procedure Rules, because, as described above, it has a European dimension that can best be implemented at European level.

European regulations in the field of the (out-of-court) procedural regulation of mass claims can be expected in the long term. In response to the 1999 Green Paper on Legal liability for defective products, the EU Commission has announced that it
wishes to take measures to make it easier for consumers to bring collective legal actions.\textsuperscript{70} The Commission is in our view rightly aware that it would be difficult to limit such measures to a particular field\textsuperscript{71} and that they need to be placed in a broader framework. The question about the – unintended – consequences for the rest of the EU of the introduction of a class action regulation, will then come up soon enough.\textsuperscript{72}

10.4.4 Approach in the Netherlands

The Netherlands has no specific regulation for the procedural handling of mass claims. There is however ample opportunity for organisations to make a stand for combined interests of victims\textsuperscript{73} - the “collective action”. There are also limitations on this. The organisation involved can request a judgment on the liability of the defending party, but not demand compensation for the victims whose interests are at issue. For this the individual victims must give the organisation involved express instructions. Furthermore in this type of case also the test case between one or more parties is used to obtain a judgment from the court. A distinction can be made here between the more abstract proceedings in which legal questions are submitted to the court for an answer, and a specific form aimed especially at the mass claim involved and which therefore also focus on the corresponding complex of facts.

The existing mechanisms in Dutch procedural law for handling these claims are not satisfactory for various reasons. They offer insufficient consolation for the problems with mass claims discussed above (10.4.2). The relevant existing objections can only be approached adequately, if there is less freedom than now exists and the injured parties can be forced to harmonise their actions, to carry out consultation and to cooperate. The consultation, coordination and harmonisation of actions must mainly take place in the preliminary phase. For this reason legal support is vital. But even at central level, partly due to the development and publication of manuals, structure and support must be offered.

Finally we feel that the phenomenon of increase of scale, and this type too, cannot be seen apart from the differentiation of proceedings discussed above (9).

\textsuperscript{70} COM (2000)893 def., p. 38.
\textsuperscript{71} For example the consumer law.
\textsuperscript{72} We are referring to cross-border mass claims and related problems. This is known in the United States and Canada as ‘competing class actions’.
\textsuperscript{73} Art. 3:305a ff. of the Civil Code.
There must be scope for differentiation of proceedings depending on the (sub)type of increase of scale that occurs.

11 The three-stage system of first instance, appeal and appeal in cassation

11.1 Appeal and appeal in cassation in Dutch procedural law

In the three procedural models discussed above (1.4) a full-dress appeal [volledig hoger beroep] to the court of appeal [gerechtshof] is possible. The Dutch hoger beroep has no limitations with respect to the assessment criteria. On appeal the case is examined again as to the grounds, and also the facts. New factual and legal statements can be presented, even statements that conflict with the viewpoint taken in the first instance. The main restriction that applies is that the appellant must indicate what objections he has against the decision in first instance and that the appeal judge may not annul the judgment of the first judge except for those objections, for example, on a ground on which he has officially based his decision.

For the judgments of the court of appeal, appeal in cassation to the Supreme Court is possible. Appeal is excluded in small cases (with a value of not more than € 1750) but appeal in cassation is possible on limited grounds against the decision in the first instance. The Dutch administration of justice appeal in cassation is based on the French system. The Supreme Court has to examine the judgment objected to in appeal in cassation for any infringement of the law and for shortcomings in giving grounds for the judgment. With regard to the facts the Supreme Court does not have an independent task with regard to testing the cassation. One must remember here that the term ‘factual’ does not only relate to the facts but also to decisions that the Supreme Court, from a point of view of delimiting its tasks with respect to those of the lower court, leaves to these courts. However the Supreme Court regularly gets through to the facts in individual cases because, via its check on the grounds given for judgments, it allows itself the scope to test decisions that also have a factual component against the fundamental requirements of comprehensibility and understandability.

Just a word about the place of the Supreme Court in the judicial organisation. The Supreme Court regards itself, just from the point of view of exercising the administration of justice, as the top of the pyramid. That means that it never accepts direct responsibility for the organisational aspects of the administration of justice. This responsibility lay until 2002 with the Ministry of Justice, but since then has been
transferred to the Council for the Judiciary [Raad voor de Rechtspraak] then created. At its own insistence – resulting from a particular vision of its independence as supreme judge - the Supreme Court has remained outside the circle of responsibility of the Council for the Judiciary. From an organisational point of view it therefore remains under the jurisdiction of the Minister of Justice. Clearly the Council for the Judiciary will and must have an important say in the reorganisation of procedural law. We do however feel that the Supreme Court must also recognise its own responsibility here and must not limit itself to administration of justice in individual cases and law formation only via its judgments.

11.2 Relationship between the instances and finality of the first instance
First instance, appeal and appeal in cassation are related to one another. Changes in the one instance affect the other. Two points are important in considering this relationship. The first is that in most civil law countries, unlike common law countries, appeal is thought to be normal. In fact it is more or less regarded as a hallmark of the quality and legitimacy of administration of justice. Administration of justice in two instances (first instance and appeal) where both points of law and points of fact are considered, is one of the generally accepted basic principles of the law of civil procedure.\(^7\)\(^4\) The second point is that, at the same time, people think that bringing an appeal should remain the exception. If appeals are brought on a large scale there is clearly something amiss with the administration of justice in first instance. This gives rise to the view – which we share – that the law of civil procedure must be concentrated in the first instance. The action must in principle end with the decisions taken there (finality of the first instance).

11.3 The appeal
11.3.1 Two functions
For the law of civil procedure in the Netherlands we distinguish two functions of the appeal. The probably most essential function is the check on the first court. Although

\(^7\)\(^4\) Compare for the difference in attitude the Dutch handbooks and textbooks of Hugeholtz/Heemskerk 2002, no. 5 (p. 11) and Snijders, Yzonides & Meijer 2002, no. 27-54 (p. 50), with the English books Andrews 1994, chapter 16 (Appeals) and, after the Lord Woolf reform of 1999, of O’Hare & Hill 2001, chapter 44. The Lord Woolf reform has made the requirement for prior permission to bring an appeal fairly general. See also on this Plant 1999, p. 323 ff.; Nobles & Schiff 2002. The change was
Art. 6 ECHR does not require any appeal for civil cases, not even to check them, we feel that this must be possible. The second function is that of re-examination. It has two aspects: the party found against can have his case re-examined and parties can change or supplement their statements in appeal and rectify errors that were made in the first instance. There are ample opportunities for this in the Netherlands.

11.3.2. The “reformist” and “cassationist” model of appeal

The possible remedies for parties are under fire, a development that is also occurring in the fields of the Dutch law of criminal and of administrative procedure. In the law of civil procedure the Supreme Court does not want any restrictions. The discussion has however been opened in academic literature. Further analysis shows that the Dutch system of appeal with its ample opportunities for remedy and change of front – according to a German term – is very “reformist”. This is unlike for example the system that has long existed in Austria, and since 2002 also applies in Germany, that is organised in accordance with a variant of the “cassationist” model, where the focus is on the judgment in the first instance and the appeal court checks the judgment and the previous proceedings for correctness and carefulness, whereby the submission of new statements, defences and grounds is in principle only permitted if it had not been possible to submit them previously. In Germany this is formulated as follows with regard to the revision: ‘Die Berufungsinstanz soll sich in aller Regel auf den vom Eingangsgericht festgestellten Sachverhalt stützen und auf ihre genuine Aufgabe der Fehlerkontrolle und –beseitigung bei Tatbestand und rechtlicher Bewertung konzentrieren. Der Rechtsuchende soll sich grundsätzlich darauf verlassen können, dass die in erster Instanz fehlerfrei festgestellten Tatsachen im höheren Rechtszug bestand haben. Nur wenn das Berufungsgericht aufgrund konkreter Anhaltspunkte ernsthliche Zweifel an der Richtigkeit oder Vollständigkeit der entscheidungserheblichen Tatsachen in der ersten Instanz hat, sollen diese im Berufungsverfahren überprüft werden.’

[The court of appeal should as a rule base itself on the facts of the case established by the first court and concentrate on its

thoroughly prepared for by a commission headed by Sir Jeffery Bowman who in 1997 reported to the Lord Chancellor: see LCD Review of the Court of Appeal 1997.

75 Explanatory memorandum to the bill, General Part sub-section I, to be found in Rimmelspacher 2002, p. 105. In a brief comparative law exercise (p. 126-127), apart from Austria, reference is made to comparable developments in England and Wales, Italy and the canton of Zürich. See for the situation in Italy since 1990 in this respect Barsotti & Varano 1999. p. 215-216.
genuine function of checking for and eliminating mistakes in the facts of the case and judicial evaluation. The litigant should basically be able to rely on the facts established without error in the first instance being valid in the higher legal process. Only if the court of appeal has serious doubts on the basis of concrete evidence as to the correctness or completeness of the ultimate facts in the first instance, should these be checked in the appeal procedure.]

11.3.3 A choice

In answering the question what system of appeal should be accepted, the general interest and the personal interest of parties should be taken into account. A check on the court not only serves the interests of the parties involved, but also the general interest that administration of justice must inspire confidence in the public. This function is essential and must be maintained. More difficult is the question whether the ample opportunities for remedy must be maintained. There are arguments for and against. The view of the dispute may develop during the proceedings, as a result of which there is a need for another route to be taken in appeal. It is also important that the higher court does justice on the basis of facts that are as closely connected as possible with reality. On the other hand, there is the fact that the other party must not become the victim of carelessness and errors committed in the first instance and that, since representation in the proceedings is now compulsory, one can be held responsible for this. The boundaries between what is and what is not acceptable are however difficult to draw.

We choose a mixed form between the systems mentioned. In the absence of empirical data – it is however known that the appeal percentage in the Netherlands is around 5% (compared with around 30% in Germany) – it is not possible, while maintaining the existing system, to limit ourselves to changing this on a number of points, since we do not know which of these points are in practice important. For this reason we have chosen a fundamental approach based on the appeal as a further instance. This leads to a number of consequences. Correction of judicial errors and infringement of fundamental principles must always be possible. Differentiation of procedures in the first instance makes itself felt in appeal, as a result of which for example restrictions that apply in the proceedings in the first instance in the field of
furnishing evidence, are also valid on appeal.\textsuperscript{76} On appeal the parties and the court are bound to what was decided in the first instance and not disputed in the appeal. Once a party comes up with new facts etc. on appeal, they may be asked to explain why these facts were not brought up sooner and the court may officially take a critical view of that.

In our report we also make a number of other recommendations for the appeal proceedings point by point.

11.4 Appeal in cassation

11.4.1 Administration of justice by the highest instances: two functions
The highest judicial bodies, irrespective of whether they are entrusted with appeal in cassation, as a rule have two functions: review or final appeal. The first is to check the lower administration of justice. The highest judicial bodies assess, in some suitable way, whether the judgments of the lower courts were reached in a procedurally correct way and correspond in their content with the applicable law. With this check the courts fulfil a task in achieving the previously discussed objective (5.2) of civil procedure, namely to provide a legal claim and a writ of execution to enforce this claim.

The second function of the highest judicial bodies is to promote law development and legal unity. This is a function that primarily rests with them. Lower courts do not have much involvement in this. In other words: achieving the purpose of the law of civil procedure, that lies in the promotion of law development and legal unity (5.3), is mainly the responsibility of the highest judicial bodies, in the Netherlands the Supreme Court.

This indication of the two functions immediately brings us to the heart of the discussion in the Netherlands and elsewhere about the task and position of the highest judicial bodies: how important is each of these two functions, in themselves and in relation to one another? Can they both be carried out together and at the same time? In answering these questions we assume that in a certain sense both functions can always be carried out at the same time. The functions can be distinguished, not separated. The check for example serves in particular the personal

\textsuperscript{76} That is already the case now with the kort geding. Also in appeal the proceedings retain the character of kort geding, with consequences in particular for the (simplified) furnishing of evidence.
interest of the parties to the action. However it also has aspects of general interest, because banishing wrong decisions as far as possible offers a guarantee against the unavoidable personal shortcomings of the judges. This increases the quality, legitimacy, acceptability of and confidence in the judiciary as a whole. Furthermore the correction of a wrong decision regularly marks a new development in the law or contributes to a better harmonisation of the rules. Conversely, the promotion of law development and the concern for legal unity usually means that in the specific case the best decision is taken, in the opinion of the highest court at that time.\textsuperscript{77}

The two functions are therefore closely related, but this does not prevent a stronger accent being placed on one or other function. That also happens. Without us having figured this out precisely on a historic and comparative law basis, it is our impression that in countries with an appeal in cassation and review system the check function weighs heavy.\textsuperscript{78} The picture is now however shifting somewhat. Recently even in countries with an appeal in cassation or review system measures have been taken, considered or in any case pleaded in the literature, aimed at enabling the highest judicial bodies to also undertake their legal development and legal unity function in a better and more structured way.

This is usually based on two considerations. The first is the considerable growth in and ever increasing importance of administration of justice for law development and legal unity. Civil law largely rests on the administration of justice. Whole doctrines largely consist of case law. The legislator cannot manage without the contribution of the administration of justice, and all those involved (legislator, judiciary, politicians and the public) recognise and emphasise openly the importance of the highest judicial bodies for the development of the law and legal unity. It is expected of them; they are tackled and assessed on this, although sometimes there are considerable differences of opinion on the question of how far their task can or must go, not only within their own circle, but also outside it and beyond the boundaries of our own legal system.

A second consideration is the large and constantly growing number of cases that the highest judicial bodies have to deal with in most civil law countries. The

\textsuperscript{77} Explicitly also in this sense among others Rimmelspacher 2002, p. 119; LCD Review of the Court of Appeal 1997, ch. 2; Jolowicz 1997, p. 39-42.

\textsuperscript{78} For countries with an appeal in cassation system this is in fact paradoxical, as appeal in cassation aimed in particular to serve the public interest.
workload involved in this is such that there is not time quietly to consider how to handle law development and legal unity. “It is manifest that a Supreme Court will be unable adequately to fulfil its public purpose role if its judges do not have the time for full discussion and reflection on the complex problems they have to consider”, according to Jolowicz, who then concludes: “Supreme Courts can, no doubt, be effectively prevented from pursuing public purposes by overloading them with cases of no public interest.”

**11.4.2 Another task to be fulfilled by the Supreme Court**

As urged in the literature, we do of course think that the Dutch Supreme Court must make a better and more structured effort than it is now doing (also) as regards law development and legal unity. Figures show that the Supreme Court hears a relatively large number of cases (30%) that can be regarded as dead weight, but it also seems to be well able to select those cases for summary settlement by a small composition of the chamber (three justices). There are a number of different options for holding back the dead weight. In our view it is not necessary to introduce a system in which leave must be applied for to bring an appeal in cassation. We can think of a combination of factors. In the first place the changes we are urging in the law of civil procedure of the first instance and the appeal will affect the quality of the administration of justice in these instances and hence the number of appeals in cassation. In addition one must go into the way cases are selected and differentiated immediately they are received by the Supreme Court. This must all be combined with the development of guidelines, criteria, and evaluation methods for monitoring the quality of the administration of justice in the first and second instance and the selection in cassation. Personal interest also plays a big part in this: society may demand that judicial mistakes can be rectified quickly, easily and cheaply. On the other hand we realise that where less than 1 pro mille of the cases in the first instance get through to the Supreme Court, this still very probably only covers a small proportion (the tip of the iceberg). For this reason here too prevention is better than cure. Monitoring the quality of the judges and judicial decisions is more fruitful than the best thought-out and most transparent system of control in appeal and appeal in cassation.

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79 Jolowicz 1997, p. 56 and 63.
What must change to allow the Supreme Court to fulfil its function in developing the law and promoting legal unity in a more well-considered, systematic and anticipatory way? The initiative for bringing cases does lie with the parties, but the legislator and court can encourage or facilitate this initiative. One can think here of the payment by the state of the costs of the lawyer and proceedings in cases that are important for law development and legal unity; appeal in cassation brought by the Public Prosecutor to the Supreme Court (“in the interest of the law”) with appointment of lawyers paid by the state to explain the parties’ views; more freedom for the Supreme Court to gather information itself from third parties or to be informed by third parties (amicus curiae); preliminary legal questions by lower courts to the Supreme Court. In the case of any increase in mediation as an alternative to administration of justice the above will be further emphasised.

Finally we urge that the procedural law regulations of which we are thinking (see 13) will be harmonised between the Supreme Court and the other highest instances that bear responsibility for civil justice, the Council for the Judiciary and the government.

12 Communication
12.1 The importance of this
In the literature on the law of civil procedure one can search in vain for a discussion of the item ‘communication’. That in itself is remarkable in that legal proceedings are nothing other than communication: the carrying on of a discussion by two parties before the judge, who listens to the parties and gives his decision. Communication here concerns among other things informing, influencing and convincing. This involves fundamental adversarial principles on the one hand and the court’s duty to give grounds on the other. Considerable attention is of course paid to these principles in the literature. The communication between the parties themselves and the communication of the judge with parties on ‘routine’ affairs during the proceedings, before the judge gives his decision in the dispute, are also not – or at least not in all cases – covered by these principles. The handbooks lack considerations summarizing all this from the point of view of communication. That is remarkable as it is a complicated and important subject.

In the civil action on the one hand communication occurs in a largely formalised way. This formalistic nature is connected with the required certainty and
demonstrability of what is communicated and when. Communication is also often broken up, taking place in fits and starts and with long intervals. Also – apart from further hearing in a higher instance – it does not always take place before the same judge(s). The communication in the proceedings is also sometimes emotionally charged. Furthermore it depends on the way in which parties and judges are accustomed to acting – customs, habits, attitudes and personal outlook. This all affects the course of the proceedings and the judicial decision. How the communication goes hence affects the quality of the judicial procedure, both in the individual case and in general.

Communication also has to do with informing third parties and giving account to these third parties. This is what we mean when we talk about ‘communication with regard to civil procedures’. In that respect this not only involves the public conduct of the proceedings and privacy, but also the way in which decisions are given. Others suit their behaviour to their knowledge of decisions or their analysis of the consequences of the decision for their case.

If the communication in the proceedings is to be regulated in a rational way, then a check will always have to be made of what method of communication is most suitable with a view to the purpose of the communicative action in question. For example a decision will have to be taken as to what form of communication offers the best guarantees for bringing the action, for example, to fulfil the requirement that the other party is notified of the commencement of the action. We refer to this already in chapter 8 where we talk about the method of bringing the action in connection with differentiation. Many other questions arise in this respect. Why is more value also attached at present in Dutch civil procedure – as we also do – to the oral hearing than before? What is the added value of this with respect to written communication? What are the advantages and disadvantages of written witness statements compared with the statements that witnesses have made orally before the judge? How and in what way can electronic means of communication be used in the proceedings and can that not be done better?

With these brief considerations we have not wanted to do more than to indicate how important the subject is. In our report we have only been able to do limited justice to that importance. We wanted just to discuss a number of aspects to encourage discussion. We summarise this briefly within this article.
12.2 ICT

The civil action must not be left behind in the field of electronic information and communications technology (ICT). ICT can and must be used on a wide scale in the civil action. The 2005 Administration of justice information policy plan \cite{Informatiebeleidsplan_rechtspraak_2005} developed in the Netherlands describes the Dutch courts in the year 2005, thanks to the use of ICT: the quality of the administration of justice is improved, knowledge is accessible, search engines are available. Discussion with colleagues via the court Intranet for the judge working at home on his portable PC, logged into the network of the Bench, goes without saying. Files are digitalised and always accessible. The public can approach the judicial organisation via the Internet. In a now published (dream) picture of the judiciary in the year 2008, this vision of the future continued: reasonable predictability of the outcome of legal actions, because the judgments have been made accessible. Cases being brought via the Internet. The public must submit their petition – assisted by computerised systems – on electronically available forms. In the absence of a defence an intelligent system advises the judge. Defence can be submitted by e-mail. Parties can consult the judge by video conferencing. The turnaround time of an action is just a question of a couple of weeks.

The reality in the year 2003 is that the picture outlined above is already pretty well technically feasible. One or more elements of the dream picture have now become a reality elsewhere. In Australia documents for electronic submission can be found on the court website. There are guidelines for the way to submit and the size of the document. There is also a video conferencing network. There is an electronic cause list. Use of computers in the court room makes it possible to make a record of the sitting that, by linking stenographic equipment to computers, is also available in real time elsewhere. In England and Wales judgments are now so standardised, that they can be put on the Internet virtually immediately. The Court room 21 project in Williamsburg, Virginia, started in 1993. A court room full of technology: video links make it possible to hear witnesses elsewhere. Oral statements can be saved electronically. We now have something similar: in January 2000 an ICT test room was opened in the Netherlands\cite{ICT_Proeflokaal}. In Austria every lawyer is obliged to have an

\begin{itemize}
\item \cite{Informatiebeleidsplan_rechtspraak_2005} Reiling e.a. 2002.
\item \cite{ICT_Proeflokaal} The ICT Proeflokaal at the district court in Zutphen.
\end{itemize}
Internet connection to all the courts. Electronic submission of documents relating to the case is the rule. Already since 1990 it has been possible for some creditors to forward a Mahnklage [debt collection claim] electronically. In Germany § 130a ZPO has since 1 January 2002 provided the possibility of submitting an electronic document, if that is appropriate, to be used by the relevant judicial body. Further regulations on this point are left to the Federal and State governments. The Mahnverfahren [debt enforcement proceedings], referred to in § 688 ff. ZPO, has now been computerised, as well as the handling of debt collection claims in England, as we have already said in 8.7.4. But meanwhile there is also a regulation on the electronic submission of documents to the Bundesgerichtshof.\(^8\)

In disputes about domain names it is nowadays quite normal to have that dispute settled in arbitration by three arbitrators, who only have contact by e-mail, after an exchange of documents, only in electronic form, by a judgment that is also only given electronically.\(^9\)

In view of what has already been achieved elsewhere, the dream picture outlined above can become a reality. In the Netherlands, too, procedural law can and must offer scope for this. In this respect the aspect of speed must be pointed out. One of the quality aspects of any civil procedure is the speed at which a decision can be obtained. In a world where holidays can be booked sitting at the PC, the speed of legal service provision, not only by the parties’ advisers, but also by the civil judge and the apparatus available to him or her, deserves more attention.\(^4\)

As technological innovations accelerate, the description of the means of communication in a code of civil procedure must be more global, if the changes to that code are not to be constantly trailing along behind the facts. Better use can be made of the facilities offered by modern technology. This can be done by providing more scope in this way for more intensive and hence more constructive contact with


\(^9\) To this extent at least part of the Courtroom.21 project, which was implemented in 1993 and since then the renovated court room of the future, has already become a reality, see: <http://www.courtroom21.net>.

\(^4\) Compare various projects on the website rechtspraak.nl, that is to develop into the electronic counter of the judiciary, mentioned in Jongbloed 2001, and Van Dijk & Reiling 2002. See also Brooke 2002 (the reproduction of a lecture by Lord Justice Brooke, Judge in charge of modernisation(!)).
the litigants in those cases that require good handling of the dispute in question. If the judge when studying the case – at whatever stage – comes up against a question (whether or not factual), there is little against submitting this question by e-mail to (the legal advisers of) the parties asking for clarification. Of course this information must – with a view to being able to check it in a higher instance – be recorded in some way, but e-mail may be much quicker and more efficient than an appearance of parties at the sitting. The new technology should also play a part in the area where recording of the oral proceedings is sensible in view of the further course of the proceedings. For example the recording of what has been discussed in a sitting and or what a witness or expert has stated. The present method where the judge sets this all down in his own way in the record of the sitting by dictation to the clerk of the court is no longer acceptable.

13 Codification at the present time

13.1 Also a review of the method of codification

Our report will form the basis for a legislation programme in the field of the law of civil procedure. In particular it will have to put forward insights and make recommendations for a new code to be drafted, but without translating these into specific draft provisions. The choice of a new code also means however that a start is made on codification and re-codification and this is a phenomenon that is not undisputed or straightforward at the present time. We count it as part of our task to consider certain aspects of this.

We pay particular attention to the method of codification, not to the question of whether it perhaps best not to re-codify the law of civil procedure, but for example to divide it over a number of separate laws or that a different type of regulation would be preferable. In view of Art. 107 of the Dutch Constitution (Grondwet) (the so-called codification article), the experiences in the Netherlands with the current code, and the reforms of the law of civil procedure in other countries in which the option is still for a code, this does not now seem to be a fruitful definition of the problem.

85 Where we talk below of codification we do of course also understand recodification by this.
86 There is also a buzz of (re)codification activities in the field of substantive private law. The Netherlands is a good example. Even more recent are the codifications in the former Eastern Block countries and in the Baltic states. This is also happening at European level. We mention the different study groups that are working on the harmonisation/unification of European private law (law of contracts, law of tort and other obligations, bankruptcy law, personal and family law, goods law), that
Codification has an inside and an outside. The inside relates to the content, in our case of the new law of civil procedure. This content must be set out in the best possible way in the form of rules and that concerns the method of codification, the outside, which we shall discuss below.

### 13.2 The outside

The usual method of codification is based on the scheme of legislation-administration of justice-literature. The legislator lays down the general rules, partly based on administration of justice and literature, and the judge, using the literature, brings these generalities to life in specific cases and adapts them to the changing circumstances. To some extent there is reason to change this and to some extent there is not.

#### 13.2.1. To some extent there is not

To some extent there is not, because the abstraction and generality of rules also have clearly positive sides. As Zimmermann writes, they contribute “to a considerable built-in flexibility” of the codified law. In other words, they leave room for interpretation and creativity, which makes it possible without having to change or supplement the code for each new case, “to keep (the code) in tune with the changing demands of time by active and imaginative judicial interpretation and doctrinal elaboration”.  

The current “factualisation of rules” also makes a considerable contribution to flexibility. This states that rules in themselves already refer to the specific circumstances, principles, interests and values of the case for which they give a ruling. In our terminology, factualisation means a reinforcement of the scheme of legislation and administration of justice (and literature), because the task of the administration of justice is as it were codified at the same time.

have also chosen an approach that looks exactly like that of the big codification movement of over two centuries ago: a cohesive and comprehensive set of general rules (usually called Principles) in a wide to very wide legal field, accompanied by an explanation and comparative law data. An overview of the study groups referred to here with an explanation of the way they work is given among others by Smits 1999, p. 24-85; Hartkamp 2000, p. 331-336, and Hondius 2002, p. 865-900.


88 Completely at odds with this is the idea of an extremely detailed code with many hundreds of thousands of articles, as has been proposed for European civil law by De Mot and De Geest 2002, p. 889/890. Apart from the fact that the result is unusable, in our view the idea completely bypasses the positive and creative elements of abstraction, generality and factualisation of the regulations. The casus that are necessary to give meaning to rules, is even elevated to a rule by them. It is the
The second argument why in our view the scheme of legislation-administration of justice (and literature) must in part be maintained, is that the judge not only has to clear away inadequacies and adapt the code to changing circumstances, but that he also ultimately has to think. A code is more than a sum total or collection of related rules. It is based on what in the English Civil Procedure Rules of 1999 is called an “overriding objective”. Sometimes, as in England, an attempt is made to specify this “objective”, but even then it is not very comprehensible and leaves a certain discretion and freedom of choice in its implementation in specific cases. To focus it on our proposals for changes in the law of civil procedure: given that the legislator accepts it and in the same way as has been usual to date it is included in a new Code of Civil Procedure, then much explanation, study, administration of justice, clarification and discussion will still be necessary before all the changes are in practice harmonised with one another to some extent, have found their meaning, have been made usable and become part of the ordinary knowledge and baggage of those involved. In other words: it will still be a long time before the spirit that speaks out of the changes has become skilled in what is involved, old habits have been set aside, and a certain consensus has been achieved as to how the new procedural law must function. It is an unavoidable and even constant process, for time also gets its teeth into the spirit of a law.

13.2.2 To some extent there is
To some extent there is reason to change the scheme mentioned, because disadvantages are associated with it. It takes a lot of time and money for clarity to be obtained by a judgment of the Supreme Court. Furthermore the legal question does not always clearly emerge due to the development of the proceedings. And should measures have to be taken to bring the cases to the Supreme Court more quickly, that is still not enough. In the scheme of legislation-administration of justice (and literature) the emphasis lies on the formation of rules, by the legislator and, by way of explanation and further development, by the judge. Without doubt this law formation

hypertrophy of what Sunstein 1995, p. 1022, has called the enthusiasm for rules: the belief that “full ex ante specifications of outcomes” are possible. He does moreover qualify it himself as a “chimara”. Also historically the correctness of such an approach is belied. The Prussian Allgemeine Landrecht of 1794 was also very casuistic and was not found to be successful for this reason. On the other hand, the harmonizing codifications of France, Belgium, the Netherlands, Austria and the German BGB of 1900
can always be improved, on both fronts. People are therefore constantly working on this, but in spite of all the efforts, we do not expect a result in which the disadvantages of the long time and the high costs outlined no longer occur.  

The scheme is no longer satisfactory, not practically and even less so theoretically. We urge instead that more effort be put into the dialogue between the legislator and those most directly involved in applying the rules and into providing support in the use of the rules. The dialogue goes further than involvement in the preparation and information brochures on the content once the regulation is introduced. The dialogue is on-going, or at least it is for those subjects that do not lend themselves to clear and well-defined rules, for example because of the nature of the subject (What is prompt administration of justice? What is in the importance of law formation and law development? What does good procedure involve?), or because it has not yet crystallised out enough or is subject to constant change. The conviction has grown that in these situations the legislator will do better not to try to provide for the casuistry and the future developments in advance and to embody them in general rules. That can easily lead to what Teubner has called the “regulative trilemma”: either the general rule is such that it shoots past its target, or it is only running ahead of practice, or it regulates it sufficiently elastically and flexibly, but there is then the risk that it loses control and the whole thing gets out of hand.

The way out is being sought in forms of cooperation with those directly involved. Furthermore the law no longer has its classic, hierarchical central significance. It fulfils a mediating function because it only provides a very general framework, that must then be further fleshed out by those directly involved in the field, using and profiting from the experience and knowledge they have acquired. In this approach the advantages of abstraction and generality that we have outlined above remain. They are even reinforced because the legislator and regulator has to

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89 The idea that rules must be formulated such that citizens are able to settle their disputes and conflicts themselves is attractive, was in the past and is still also regularly expressed, but is unrealistic, even if one accepts that the current method of formulation can be much improved. The unrealistic factor lies in the language and reading skills implicitly expected of the public and their ability to point to certain situations on a more abstract level (for in any case rules are always to some extent abstractions). For the attention paid for example in Sweden to the language and the accessibility of law, where there is a separate department at the Ministry of Justice, manned by 5 linguists, see Van Klink & Witteveen 2003.

90 Teubner 1989.
limit himself to this in view of the matters we are talking about here. This is no longer a solution of timidity, as is often the case with vague standards, but a well-considered choice for a system in which law formation and law use flow into one another, as it were. It is essential that law use is not, like now, limited to administration of justice, but covers the experiences, insights and arguments of all those involved in that particular field. For the law of civil procedure these are judges, lawyers, process-servers and other legal assistants, and also those who are involved in alternative forms of dispute resolution. It is also essential that the experiences, insights and arguments of those involved are collected and exchanged with one another. In other words a process must be set in motion in which choices can be made about how to act in specific situations and in which these choices can be subjected to constant feedback. If the implementation of such a process is not successful, then there is a danger of the lack of control about which Teubner spoke. If it is successful, then not only can one expect more support and commitment than in the centralistic approach, but also a greater opportunity for the really relevant questions to get a chance and be settled in an expert and high quality way.

We distinguish four instruments to give shape to this support, which, when looked at together, supplement and reinforce one another. In succession these are:

a. a help desk, databank or information centre (Internet-based);

b. guidelines, manuals, practice directions, forms or rules of procedure (Internet-based);

c. a law of civil procedure commission with certain regulatory powers;

d. an institute for permanent evaluation and advice on modernising the law of civil procedure.
14 A new balance

In the above we have – briefly – reported on our initial findings in the review of the Dutch law of civil procedure. We have also paid attention to a number of factors that also have to be taken into account and assessed:

a. public administration of justice as one method of conflict-handling among (many) others;

b. the wish to regard public administration of justice as a last resort on the one hand, and its indispensability because of the exclusive duty also guaranteed by Art. 6 ECHR to provision of justice and enforcement and because of its law development function on the other;

c. the requirements of professionalism, constitutional state and service provision of public administration of justice (sometimes also, but not entirely in parallel, described as: the requirements of speed, costs, efficiency and quality);

d. the division of tasks of judge and parties, both in the government process and prior to this;

e. the three-stage system of first instance, appeal and appeal in cassation;

f. well-defined and yet adaptable, flexible regulations.

A fundamental review of the Dutch civil procedure must in our view be aimed at finding a new balance between these factors.
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