Chapter 13
The Netherlands: A No-Nonsense Approach to Civil Procedure Reform

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13.1 Origins

The Dutch Code of Civil Procedure was introduced in 1838. It replaced the 1806 French *Code de procédure civile* which, due to the French occupation of the Netherlands, had become the law of the land in 1811 and had remained in force after the country's liberation in 1813. French procedural law would reign supreme in the Netherlands throughout the nineteenth century since the 1838 Dutch Code was, to a large extent, a translation of the French Code. In addition, some elements had been adopted from the 1819 procedural Code of Geneva.[1] This Code was also based on the French Code, but the general opinion in several European countries in the nineteenth century was that the Geneva Code contained important improvements when compared with its French counterpart.[2] The most important improvement that was adopted by the Dutch Code from the Geneva Code was its Article 19, which prescribed that the judge could order the parties to appear in person before him in order to attempt a settlement of the case during the proceedings. The Geneva Code (as well as the Dutch Code) had introduced this rule when it had abolished compulsory preliminary conciliation before the *juge de paix* which could be found in the French Code.

Shortly after its introduction in 1838, the new Dutch Code became the object of criticism. This is not surprising, because already during the parliamentary debates

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Section 13.8 on mediation was written by R. Jagtenberg.

[1] Bellot 1877 (first edition 1821).

[2] See Van Rhee 2005, pp. 9–10. See also the contribution of A.W. Jongbloed (Jongbloed 2005) in the same volume, which contains an overview of developments in Dutch civil procedural law from 1838 until 2005.

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on the Code it had been pointed out that the source of many of its provisions, i.e. the French 1806 Code, was prone to defects. The lack of immediacy in civil proceedings, for example, became a matter of complaint, as well as the fact that the ordinary procedure of the Code left the initiative as regards the progress of the case to a large extent to the parties; the judge did not play a very pronounced role in the conduct of the lawsuit. However, even though complaints were voiced, it was not until the end of the nineteenth century that important changes were introduced in the Dutch Code. This occurred as a result of the so-called *Lex Hartogh* of 7 July 1896.[3] When preparing the amendments to the Code in the *Lex Hartogh*, two options were considered. The first option was to increase the judge's powers as regards the conduct of the lawsuit, that is, to phrase it in modern procedural language, to strengthen his case management powers. The second option was to take away those elements of the existing law of procedure which gave the parties the opportunity to delay the action without good reason for doing so. In the end the second option was chosen. One example of the important changes which followed was that after the statement of rejoinder further written statements of case were in principle no longer allowed. The new Act also enabled the court to declare in its decision that an appeal against an interlocutory judgment could only be brought at the same time as an appeal against the final judgment.

The Dutch Code of Civil Procedure was amended many times during the twentieth century.[4] However, fundamental reforms had to wait until 1 January 2002.

13.2 Present Situation: Outline of an Ordinary Civil Action at First Instance and the Division of Powers Between the Judge and the Parties

An ordinary adversarial first instance case in civil matters is initiated by a writ of summons, served by a bailiff, without the intervention of the court (we do not discuss the procedure commenced by petition here nor other ways of bringing an action). The writ of summons is, at the same time, the claimant's written statement of claim. The statement of claim contains information on the parties to the action, the claim and its grounds, and also specifies the defence of the opposing party – at least as far as it has become known to the claimant – and indicates the means of evidence available to the claimant in support of his allegations.[5] After the case has been entered in the court calendar (docket), the defendant has to file his statement of defence at the earliest date available in this calendar, or ask the court for a postponement to prepare his statement of defence. Apart from the actual defence, the statement of defence needs to mention the available means of evidence in support of the

[3] Hartogh and Cosman 1897. See also Jongbloed 2005, pp. 69–95.

[4] Van Nispen 1993.

[5] Art. 111 Dutch Code of Civil Procedure.

defendant's case.[6] After submission of the statement of defence, the judge orders a personal appearance of the parties and/or their respective advocates for an oral hearing unless he decides that this is of no use in the particular case at hand.[7] The judge takes the decision whether or not a personal appearance should be ordered within a period of 2 weeks after the statement of defence has been submitted. When this appearance is ordered, most Dutch courts schedule ninety minutes for the hearing.[8] This means that judges take a fair amount of time to discuss the case with the parties.

At the hearing the judge will obtain further information by putting questions to the parties regarding their factual and legal statements.[9] Subsequently, the judge will in most cases encourage the parties to reach a settlement.[10] Parties may submit evidence and the judge may ask for additional documents prior to the hearing. If the case cannot be settled, the judge will discuss with the parties the further procedural steps that need to be taken. Often, the judge will render a final judgment after the hearing without any further examination of evidence or any other procedural steps. As a result of the fact that judges are inclined to render a final judgment after the hearing, there is an incentive for the parties to be as complete as possible in their written statement of claim and statement of defence.

If the hearing does not lead to a settlement and matters of fact have not been sufficiently clarified, the judge often renders an interim judgment ordering the taking of evidence. The Netherlands has not embraced the notion of a single hearing at which all evidence is presented to the court. In the case of witness examination, for example, it is common that two separate hearings are scheduled. First, one of the parties will present witness evidence (*enquête*). Subsequently, a couple of weeks later, the other party may present (counter) evidence (*contra enquête*).[11] After the examination of evidence, the judge may set a date on which the advocates of both sides hold their oral closing pleas.[12] In the (rare) event that there has been no early personal appearance of the parties, the judge may not refuse a request of either of the parties to give an oral closing plea.

In most first instance cases, a single judge will render a (final) judgment. In complex and important cases, a judgment is often rendered by a panel of three judges. The judgment should be reasoned and address the essential arguments raised by the parties.

There are many variations from the aforementioned outline of a civil lawsuit. Many cases are undefended and disposed of by means of a default judgment.

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[6] Art. 128 Dutch Code of Civil Procedure.

[7] Arts. 87, 88 and 131 Dutch Code of Civil Procedure.

[8] *Handleiding Regie vanaf de Conclusie van Antwoord*, 2008, para. 16, available at: www.rechtspraak.nl (consulted in March 2013).

[9] Art. 88 Dutch Code of Civil Procedure.

[10] Art. 87 Dutch Code of Civil Procedure.

[11] Art. 168 Dutch Code of Civil Procedure.

[12] Art. 134 Dutch Code of Civil Procedure.

In addition, parties may file motions, such as a motion for the discovery of documents[13] or a motion for the joinder of parties. At times, it is possible for the parties to lodge an appeal against an interim judgment.

13.3 Recent Reforms in Dutch Civil Procedure

In order to understand the procedural and institutional context in which the Dutch judge currently exercises his powers in civil actions, the present section discusses various recent reforms in Dutch civil procedure. It not only concentrates on reforms affecting the powers of the judge and the parties, but deals with other reforms as well, especially those which were introduced to increase the efficiency of civil litigation.[14]

During the last 20 years, the Dutch civil justice system has been subject to considerable reforms. The reforms were triggered by the shortcomings of the system that existed in the early 1990s. At that time, most ordinary civil cases – as Eshuis has it – underwent a 'paper trial': an exchange of written documents between the claimant, the defendant, the judge and possibly an expert, without any public hearing. The pace at which the exchange was set was not controlled vigorously, and the parties would play their cards (i.e. their statements of case) one by one, saving their best arguments and factual statements until late in the procedure. The exchange of the statements of claim, defence, reply and rejoinder usually took half a year or more. Defended cases, including those that would settle at an early stage, would on average take 525 days (median) (mean 700 days). About 10 % of cases would last longer than 4 years, whereas half a % would take more than 10 years.[15]

The reforms of the Dutch civil justice system that were introduced to change this situation not only concerned the powers of the judge and the parties, but dealt with other issues as well, especially those which addressed court structure and court organisation and aimed to increase the efficiency of civil litigation.

13.3.1 The Institutional Setting: The Organisation of the Judiciary

On 1 January 2002, a Reform Act that affected both the judicial organisation and the proceedings at first instance entered into force.[16] This led to an overhaul of the court organisation and the creation of a 'Council for the Judiciary', an independent body aimed at safeguarding the quality of the judicial system. Another significant change

[13] It should be noted that 'discovery' is not used here in an Anglo-American legal meaning.

[14] See extensively Eshuis 2007.

[15] Eshuis 2007, p. 13.

[16] Parliamentary Papers 27,181, 27,182, 26,855, 27,748 and 27,824. See Van Mierlo and Bart 2002.

was that the County Courts (*kantongerechten*) and District Courts (*rechtbanken*) were merged such that there would be only a single court of first instance. The main idea was that larger courts would allow for a more efficient allocation of resources and a greater degree of specialisation. At present, the former County Courts are considered to be the small claims division of the District Courts. In order to combat delays, a separate division, a so-called 'flying brigade' of judges, was temporarily established in order to assist individual courts that had significant backlogs.

In order to rationalise the court system, a further reduction of the number of courts was introduced. The number of District Courts, for example, has been reduced from nineteen to eleven. It is believed that these measures will enhance specialisation within the courts and therefore increase efficiency.[17]

In the meantime, significant changes to the rules on jurisdiction were introduced. Before 1999, the County Courts would handle mostly cases below 5,000 guilders (roughly €2,200). At present, the small claims division of the District Courts handles all cases in which the claim is below €25,000. As a result, a much larger number of cases is now handled by means of fairly informal and more cost- and time-efficient procedures.

The courts' budget almost doubled between 1995 and 2004. The number of people employed by the nation's District Courts increased by roughly fifty % in the same period.[18] Meanwhile, the financing of the courts changed from input-based (i.e. the courts are financed based on the number of incoming cases) to output-based (the courts are financed based on the number of cases disposed),[19] which was thought to serve as an important incentive for increasing efficiency within the courts. The system basically makes use of a table that sets standards for the amount of time that is appropriate for each 'product' that the Judiciary 'produces'. For example, one contested labour case equals 385 'standard minutes' of judge time and 275 'standard minutes' of time for the paralegal staff irrespective of the real time needed. A contested commercial case handled by the civil law section of the District Court should on average consume 940 min of judge time and 760 min of time for the paralegal staff.[20] In the end, this system implies that courts that do not meet these averages are likely to face deficits. The system was introduced between 2002 and 2005. Since 2005, this 'output'-based system of financing the courts has been fully in place.

As elsewhere, the government has promoted the use of alternative methods of dispute resolution. For years programmes have been in place to encourage the use of in- and out-of-court mediation. One recent measure in this regard is that since 1 April 2007 all courts in the Netherlands may indicate to the litigants that mediation

[17] See also in this regard Tromp et al. 2006.

[18] Civil litigation costs the taxpayer €10 per capita in 1995 and €19 per capita in 2004. See Van Erp 2006, Chapter 5.

[19] See Andersson Elffers Felix 2006, available in Dutch at: http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Documents/5_Bekostiging_doelmatigheid_kwaliteit_rechtspraak.pdf (consulted in March 2013).

[20] These are 2002 figures. See *Official Journal* (Stb.) 2002, 390.

is an option in their case. For low-income groups, legal aid is available in the event they opt for mediation. The possibility of mediation is mentioned as an option at the legal aid bureaus (the so-called 'juridische loketten') where citizens can obtain legal information.

13.3.2 Reform of the Rules of Civil Procedure

As a part of the larger effort to reform the justice system, the rules that govern the civil litigation process were also thoroughly revised. One important change in the rules of civil procedure was the introduction of uniform court rules. Until the year 2000, each of the eleven ordinary courts of first instance had their own local rules that supplemented the Code of Civil Procedure. These rules *inter alia* addressed the time available for the various steps in the procedure and the conditions under which extra time would be allowed for a particular procedural step. The local court rules (and customs) were replaced by a nationwide set of rules. These uniform rules were created by a committee of judges and laid down in so-called *procesreglementen* (procedural regulations). It was hoped that these uniform rules would reduce the time necessary for handling cases in court.

As stated, on 1 January 2002 a Civil Justice Reform Act entered into force that altered the procedural rules that governed the proceedings before the courts of first instance. Most significant was that the Act aimed to curb the number of written statements of case and emphasised the personal appearance of the parties. Before the Reform Act, parties could as a matter of right file two written statements of case each. As mentioned above, it was common in the 1990s that the parties indeed filed these two written statements. Since the 2002 Reform Act, the parties are entitled to file only a single statement of case. Leave is required if parties wish to file additional statements. The law presently prescribes that the judge should in principle schedule a personal appearance of the parties after the defendant has filed his statement of defence. The Reform Act has contributed to an increase in the number of cases in which the court orders a personal appearance of the parties. In the early 1990s, such a hearing was scheduled in only 15 % of defended cases nationwide.[21] Large differences between the District Courts existed.[22] Since the early 1990s, the number of cases in which hearings are scheduled has increased. Data from cases handled by 10 out of the 19 District Courts, between the 1st of May and the 31st of August 2002, show that a personal appearance of the parties was scheduled in 60 % of all defended cases. Differences between the 10 District Courts were fairly large, ranging from 29 % to 100 %.[23] Data from the District Courts of Utrecht and

[21] Groeneveld and Klijn 2002, para. 1.1.

[22] Also see Eshuis 2007, p. 125, on differences between courts in 1994–1996 and 2003. See also Duin et al. 1990, pp. 401–407.

[23] Groeneveld and Klijn 2002, para. 1.1.

's-Hertogenbosch in 2006 and 2007 indicate that in these courts a personal appearance of the parties was scheduled in 90–95 % of all cases.[24]

Other elements of the 2002 Reform Act include:

- The introduction of an explicit duty for the court to prevent undue delay and to take steps to achieve this, either *ex officio* or on the request of a party.[25] The court is empowered to determine which procedural steps should be taken and at what time. As a result, this is not the exclusive domain of the parties anymore.
- The assumption of the legislature that the infringement of procedural rules will only result in sanctions if the interest protected by the infringed norm has actually been harmed.[26]
- A reduction in the number of interlocutory appeals by establishing that such appeals are in most cases only allowed with the explicit consent of the court by which the interlocutory ruling has been given.[27]
- A broadening of the rules on party-driven discovery of documents.[28] Currently, legislation is being proposed to further enable the parties to obtain a judicial order compelling their adversaries to produce documents.[29]

Another important development concerns the possibilities to examine evidence prior to the commencement of the action. Originally, the taking of evidence prior to the commencement of the action only served to avoid loss of information. Article 876 of the 1838 Code of Civil Procedure restricted the possibility to examine witnesses prior to litigation to exceptional cases, for example when the witness was very old or seriously ill.[30] Gradually, however, the possibilities to hear witnesses prior to litigation have been widened. A 1951 Act[31] allowed parties to request an examination of witnesses prior to litigation if this was needed to make informed decisions about settlement or about initiating a procedure. The 1988 Civil Evidence Act further widened the possibilities for the provisional examination of evidence prior to the commencement of the action or during (the early phases of) litigation. This Act also introduced provisions that enabled investigations by a court-appointed expert and a local visit to a scene of the dispute prior to the commencement of the proceedings. In recent case law, the Dutch Court of Cassation further widened the scope of pre-action examination of evidence. It held that judges must in principle

[24] Van der Linden 2008, para. 1.5.

[25] Art. 20(1) Dutch Code of Civil Procedure.

[26] Parliamentary Papers, Lower House (TK) 1999–2000, 26 855, Nos. 3 and 5.

[27] Art. 337 Dutch Code of Civil Procedure.

[28] Art. 843a Dutch Code of Civil Procedure.

[29] See http://www.internetconsultatie.nl/informatieverschaffing (consulted in March 2013). A legislative proposal is currently being debated in Parliament (Parliamentary Papers, Lower House (TK) 2011/2012, No. 33,079).

[30] See, e.g., Court of Cassation, 16 January 1928, W. 11786, *NJ* 1928, 329.

[31] Act of 18 July 1951, *Official Journal* (Stb.), 302.

grant a request for the pre-action examination of evidence.[32] A request may only be denied based on a limited number of grounds.

In order to enable parties to settle their case at an early stage with minimal involvement of the Judiciary, a special procedure (*deelgeschillenprocedure*) has been introduced by the law of 17 December 2009[33] as regards claims for damages as a result of physical injury or death.[34] One or both of the parties in such cases may ask the judge, either before or during the proceedings in court, to decide on a sub-issue that is either directly relevant or related to part of the matter that keeps the parties divided, but only if such a decision may contribute to the settling of their case out of court by way of a settlement agreement (*vaststellingsovereenkomst*).

On 27 July 2005 a Class Settlement Act entered into force. The Act enables the Court of Appeal in Amsterdam, upon a request by a claimant, to declare a negotiated settlement between some (representatives of) claimants applicable to all individuals who suffered a similar harm, except for those who explicitly opted out.[35] The Act is inspired by class actions and class settlements in the United States. It aims to enable the efficient resolution of large numbers of cases in which similar legal and factual issues are involved. The Act has led to the (efficient) resolution of a number of cases. A proposal to amend and at some points expand the Class Settlement Act was not successful.[36]

The rules on court fees have recently been simplified. In addition, (severe) sanctions have been put into place in the event litigants do not pay the fees in due time. Many cases have been dismissed as a result of a failure to pay court fees timely.[37] Currently, a substantial increase in court fees, which was envisaged before the government recently (April 2012) stepped down, has been shelved.[38] The aim was that the total revenues should double in order to make sure that from 2013 the Dutch civil justice system would be paid for by its users. In the explanatory memorandum,[39] the government justified the increases in fees by advancing that litigation should be regarded as the personal responsibility of the parties involved, that this measure fitted well into the government's programme of improving the civil justice system and that higher fees were mandatory given the need for cuts in the state budget. The proposal met fierce resistance. Many, including the Dutch Bar Association,

[32] See, for an overview of this case law, Thoe Schwartzenberg 2011, para. 44. Also see HR 16 December 2011, *LJN* BU3922 (*Cyrte Investments*).

[33] *Official Journal* (Stb.) 2010, 221; in force since 1 July 2010.

[34] Arts. 1019w-1019cc Dutch Code of Civil Procedure.

[35] Van Hooijdonk and Eijsvoogel 2009, pp. 84–87.

[36] Parliamentary Papers, Lower House (TK) 2011–2012, No. 33,126.

[37] Von Schmidt auf Altenstadt 2010, pp. 73–76.

[38] Available in Dutch at: http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/wetsvoorstel-invoering-van-kostendekkende-griffierechten.html (consulted in March 2012).

[39] See pp. 1–2; Available in Dutch at: http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/memorie-van-toelichting-invoering-van-kostendekkende-griffierechten.html (consulted in March 2013).

the Dutch Council for the Judiciary and the President and Procurator General at the Court of Cassation (*Hoge Raad*),[40] opposed the proposed legislation. Opponents have stressed the positive externalities of civil litigation and expressed fear that higher court fees will prevent litigants from filing their cases in court.

13.4 The Transfer of Case Management Powers from the Parties to the Judge

The 1838 Dutch Code of Civil Procedure provided the judge with only limited case management powers. As was indicated above, one of the few case management powers the judge could exercise had been taken from the Geneva Code of Civil Procedure of 1819, which allowed the judge to order the parties to appear before him to attempt a settlement of the case. For the rest, the parties – especially the so-called 'most diligent party', as the 1806 French Code of Civil Procedure has it – were left the initiative as regards the progress of the case in court. The limited powers of the judge and the far-reaching powers of the parties were completely in line with liberal ideas on the organisation of the state in the nineteenth century; the parties could freely dispose of their private rights and duties outside the court; the same was also true when they brought their case to the attention of the court.[41] Even at the end of the nineteenth century, when a fundamental reform was introduced in Dutch civil procedure in order to speed up litigation (*Lex Hartogh* of 1896, see above), the legislature did not opt for strengthening the powers of the judge to achieve this goal. The reform mainly concerned the elimination of those aspects of the existing procedural system that gave the parties the opportunity to delay the action.

Although afterwards attempts were made to increase the case management powers of the judge – in line with developments abroad, notably in Austria – none of these attempts were successful. A revolutionary draft Code of Civil Procedure of 1920 would have meant a radical change, but it never made it to the statute book.[42]

Radical reforms were only introduced in the early twenty-first century. As described above, a (court-driven) personal appearance of the parties is currently scheduled in most (disputed) cases. Parties are entitled to file fewer written statements than before. At a personal appearance the judge actively obtains information by putting questions to the parties. Judges also promote settlements during that hearing. After the hearing, the judge may render (a summary) judgment. Since the parties do not know whether the judge will close the hearing and issue a judgment after the personal appearance, they both have an interest in providing detailed factual statements and legal arguments in their first written statement of case. After all,

[40] Available in Dutch at: http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/Griffierechten.pdf (consulted in March 2013).

[41] Verkerk 2005, pp. 281–290.

[42] See Van Rhee 2011, pp. 2031–2051.

they may not have the opportunity to file additional written statements at a later point in time. At the end of the early oral hearing, the judge discusses the further procedural steps to be taken with the parties. His case management powers are again very pronounced in this stage, since it is the judge who ultimately decides on the further course of the action.

The present model of litigation may be qualified as moderately adversarial.[43] The parties play a leading role where they determine whether an action will be brought and what the subject matter of it will be. They may agree to terminate the action before judgment. However, the parties may not withhold information relevant for the action, and, although they determine the subject matter of the action, they have a duty to submit truthfully all relevant facts.[44] The powers of the judge are limited in this respect. He may not rule on claims that have not been brought before him, or adjudge more than has been claimed. At the same time, he must make sure that he rules on all aspects of the case as determined by the parties.[45] The judge may not introduce additional facts on his own motion, but must limit himself to the facts that have been adduced by the parties.[46] Facts that have been introduced by one party and that have not been denied by the other party must be accepted by the judge as true; he may not require proof of such facts.[47]

Although the powers of the parties are large as regards the above aspects of the case, the Dutch judge has extended powers as regards procedural matters. It is, for example, the judge's task to guard against unreasonable delay in litigation. He may take the necessary measures to prevent such delay.[48] He has to make sure that the action is conducted in an orderly manner and may deny further postponements of the submission of statements of case.[49] In all stages of the action, the judge may order the parties to provide further explanations of their respective positions or to submit documents related to the case.[50] *Ex officio*, he may order the parties to prove their respective statements as far as the facts advanced in them are contested, or order an appearance of the parties in court, a local inspection or an expert report. The rule *iura novit coria* (or *ius curia novit*) applies throughout civil litigation.[51]

As can be seen from the above, various powers that were in the past within the domain of the parties are currently firmly in the hands of the court. As opposed to the nineteenth and early twentieth centuries, the precise division of powers between the court, the litigants and their attorneys is no longer a matter of fierce ideological debate. The primary focus of government policy is to ensure access to justice, litigant

[43] Verkerk 2005, pp. 281–290; Hugenholtz and Heemskerk 2009, Section 5(5).

[44] Art. 21 Dutch Code of Civil Procedure.

[45] Art. 23 Dutch Code of Civil Procedure.

[46] Art. 24 Dutch Code of Civil Procedure.

[47] Art. 149(1) Dutch Code of Civil Procedure.

[48] Art. 20(1) Dutch Code of Civil Procedure.

[49] Art. 133 Dutch Code of Civil Procedure.

[50] Art. 22 Dutch Code of Civil Procedure.

[51] Art. 25 Dutch Code of Civil Procedure.

satisfaction, swift procedures and low costs. Increasingly, it is believed that parties, judges and lawyers are jointly responsible for achieving those goals. The 2002 Reform Act stressed the parties' right to be heard. In 2006, a government-appointed committee presented a report on the fundamentals of the civil justice system. The authors stress that parties, lawyers and the judge should cooperate and are jointly responsible for the proceeding.[52] The transfer of powers from the parties and their lawyers to the court was justified by the need for more cooperation and efficiency in litigation and the widespread belief that civil litigation is not merely a private enterprise of the litigants.

13.5 Effects of the Reforms: Efficiency, Quality and Costs

It is difficult to appraise the reform measures that have been implemented since 1 January 2002. Nevertheless, it is possible to draw some conclusions as to the success of these measures. Some of the most relevant (empirical) observations regarding time-efficiency, costs and quality are discussed below.

The new procedure that was introduced in 2002 aimed at a friendly settlement of cases during the personal appearance of the parties in court after the submission of the statement of defence. If such a settlement could not be reached, the aim was an efficient handling of cases within a short time frame. It was thought that a friendly settlement or the efficient handling of cases within a short time frame would be promoted by the fact that the parties had to provide all necessary information in their statements of claim and defence, respectively. Research has shown that indeed the new procedure produced some of the expected results.

Data based on cases concluded between 1994 and 1996 already showed that cases in which a personal appearance of the parties was ordered were resolved considerably more quickly.[53] More recent data based on 150 personal appearances before the District Courts of Utrecht and 's-Hertogenbosch in 2006 and 2007 show that in 32 % of all cases a settlement was indeed reached. In an additional 60 % of cases, the judge rendered a judgment after the personal appearance of the parties, whereas only in the remaining 8 % of cases additional steps had to be taken, such as a continuation of the hearing at a later point in time or the exchange of additional statements of case.[54] Recent research has confirmed these findings. It seems, however, that personal appearances do not cause parties to settle more frequently but do cause the parties to settle at an earlier point in time.[55]

The median time to disposition decreased since the 2002 Reform Act. Between 1994 and 1996, the median time in defended cases was 525 days; in 2003 it was

[52] Asser et al. 2006, Chapter 5.

[53] Eshuis 1998, p. 92.

[54] Van der Linden 2008, para. 3.7.

[55] Eshuis 2007, pp. 214–216.

336 days and in 2005 it was 294 days.[56] Courts that used personal appearances more frequently showed stronger declines in the median time to disposition.[57]

In 2010, the number of cases filed at the small claims divisions of the District Courts (i.e. the former County Courts) was approximately 930,000 (25 % of these were family law cases). At the civil law division the number of cases filed was approximately 260,000, whereas on appeal around 17,000 civil cases were introduced.[58] In commercial cases filed at the small claims division, default judgments were rendered on average 1 week after the defendant failed to defend his case. If a defence was introduced, the average duration of the case was 17 weeks. Undefended commercial cases brought before the civil law division lasted on average 6 weeks. Contested cases lasted on average 59 weeks. On appeal, commercial cases lasted on average 65 weeks.[59]

Costs for the courts were €993 million in 2010. Of this, €960 million was directly paid to the Council for the Judiciary. This amounts to €61 per capita. Of every €100 earned in the Netherlands, 17 cents were spent on the Judiciary. Court fees cover 20 % of the courts' budget.[60]

An extensive report published in 2007 showed that the cost efficiency measured in 'standard minutes' increased between 2001 and 2005. Whether this implies that the court system indeed became much more efficient is unclear; the new system of financing the courts is vulnerable to manipulation.[61] Surveys showed that a large proportion of the judges who were interviewed believed that efficiency played a greater role in the Judiciary than before due to the new system of output-based financing of the courts discussed above. A large majority of judges believed they had sufficient time to handle standard cases. Roughly half the judges, however, believed they had insufficient time to handle special/exceptional cases. On average, judges were of the opinion that the quality of their work had remained unchanged. Judges did experience a tension between efficiency, on the one hand, and quality, on the other.[62]

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[56] Van Erp et al. 2007, p. 50.

[57] Eshuis 2007, Table 41, p. 211.

[58] *Rechtbanken: afgehandelde civiele en bestuurszaken, 2000–2010*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtbanken-%20afgehandelde%20civiele%20en%20bestuurszaken.pdf (consulted in March 2013), and *Appelcolleges: afgehandelde zaken, 2000–2010*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Appelcolleges-%20afgehandelde%20zaken.pdf (consulted in March 2013). See also Eshuis et al. 2011, Chapter 5.

[59] *Hoe lang duurde de afhandeling van zaken in de afgelopen jaren?*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtspraak-%20doorlooptijden%202005–2010.pdf (consulted in March 2013).

[60] *Wat kostte de Rechtspraak in de jaren 2000–2010?*, available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtspraak-%20kosten%202000-2010.pdf (consulted in March 2013).

[61] Boone et al. 2007, Chapter 5. On the cost efficiency of the justice system, see also Van der Torre et al. 2007.

[62] Boone et al. 2007, Chapter 5, p. 172.

Since 2002, a nationwide system of quality controls has been introduced by the Council for the Judiciary. A fairly extensive quality programme is currently in place. The programme includes regular litigant satisfaction surveys (see below), measures to improve court management and extensive quality audits of individual courts once every 4 years. This national programme aims to improve and measure various aspects of 'quality'. Rutten-Van Deursen reviewed much of the work done by the Council for the Judiciary in this respect. Her findings were fairly positive. She concludes that the Council for the Judiciary has in many ways made a positive contribution to improving the quality of the judicial system.[63]

13.6 Failure of Reform Measures, Problems Caused and Reform Proposals for the Future

Although the reforms have led to some clear improvements of the justice system, there have been some drawbacks of the measures described above. It seems that the replacement of local court rules governing *inter alia* the length of postponements by a uniform, national set of rules has, by itself, not resulted in a reduction of the number and length of postponements that are being granted. In addition, there is survey evidence available on the effects of the new system of financing the courts. One survey reveals that judges perceived much more work pressure in 2008 than they did in 2003.[64]

More extensive written statements of case, oral court hearings and the pre-action examination of evidence have emphasised the significance of the early stages in the litigation process. Although such was not intended by the legislature, as a result of this there seems to be a decline in the proportion of cases in which witnesses are heard at evidentiary hearings. A study by Ashmann revealed that the District Court of Rotterdam in 2007 and 2008 rendered significantly fewer interim judgments ordering the examination of evidence (*evidence orders*) than a decade earlier.[65] Some have criticised the tendency perceived in legal practice to dispose of cases without examining evidence as it hampers the pursuit of truth.[66]

Although an increase in judicial case management powers may theoretically give rise to problems as regards, for example, the impartiality of the judge since he may become too much involved in particular lawsuits, such problems have not become evident. This is not surprising since under the new Dutch regime the case management powers of the judge have mainly been increased as regards procedural issues (conduct of the lawsuit). The judge has not been given far-reaching additional

[63] Rutten-van Deurzen 2010, available online with an English summary at: http://arno.uvt.nl/show.cgi?fid=113027 (consulted in April 2013).

[64] Weimar 2008.

[65] Ahsmann 2010, pp. 13–27 and 23.

[66] De Bock 2011, p. 240.

powers as regards the content of the case, although it must be admitted that his powers to order the parties to supply additional information have been increased.

Here it should also be mentioned that a Government Committee consisting of the professors Asser, Groen and Vranken, appointed to investigate further necessary reforms in Dutch civil procedure, is of the opinion that some problems remain in the current system.[67] The Committee has made various recommendations regarding the role of the litigants and the court in civil litigation. Parties should, according to the Committee, 'put their cards face up on the table'.[68] The duty of parties to provide information goes beyond the duty to support and provide evidence for their own statements.[69] On the basis of these general principles, the Committee proposes to make the discovery of documents more widely available.[70] They advise introducing discovery rules like those in the English legal system.[71]

Another tenet of the proposals of Asser, Groen and Vranken is that they emphasise the role of the court. They argue that a judge should not remain passive during the process of fact-finding. The authors clearly refute a sporting theory of justice and argue that the autonomy of parties can no longer be the guiding principle of Dutch civil procedural law.[72] Asser, Groen and Vranken wish to introduce further forms of case management, *inter alia* by further strengthening the role of the personal appearance of the parties.[73] Most revolutionary is their suggestion that deviates from the adversary principle. They suggest that the judge should be allowed to allege facts *ex officio*. In their final report they argue that, although the parties should allege facts upon which they base their claim, request or defence, the judge should be entitled to investigate also undisputed statements of fact. The Committee favours the introduction of a new provision that empowers the judge to adduce matters of fact.[74] Of course, the Committee stresses that the *audi et alteram partem* principle should always be safeguarded.

In 2007, the Minister of Justice gave his reaction to their findings and recommendations. Interestingly, the Minister of Justice is of the opinion that the judge should act with restraint in exercising *ex officio* powers in order to guarantee the judge's impartiality. The government also warns that a judge who has *ex officio* powers to make sure that all facts and legal arguments are introduced in the case, may, as a consequence, be held responsible for not making use of these powers. The possibility to act *ex officio* might turn into something similar to a 'Belehrungspflicht'

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[67] Asser et al. 2003, 2006.

[68] Asser et al. 2003, p. 80, 2006, p. 46.

[69] Asser et al. 2006, p. 73: '… dat partijen informatieplichten jegens elkaar hebben die verder gaan dan het onderbouwen en bewijzen van de eigen stellingen'.

[70] *Ibidem*, Section 6.5.3.2.

[71] *Ibidem*, p. 74.

[72] *Ibidem*, p. 49: '… in dit verband hebben wij afstand genomen van het begrip "partij-autonomie" en geconcludeerd dat dit niet meer als richtinggevend beginsel kan dienen'.

[73] *Ibidem*, Section 7.1.2.

[74] *Ibidem*, p. 46 and Asser et al. 2003, p. 81.

(duty for the judge to inform the parties about the various aspects of their case) which, according to the government, should be avoided.

The Minister initiated a programme for legislative action, which could in time lead to a revision of (parts of) the Code of Civil Procedure.[75] As discussed above, a proposal to redraft the rules on the discovery of documents and a proposal to amend the Collective Settlement Act have been launched. Several of the Committee's suggestions have, however, not yet led to the introduction of legislation.

13.7 Litigant Satisfaction

The litigant satisfaction evaluations that are currently being conducted show that on average litigants and legal professionals are satisfied with the manner in which the Dutch civil justice system functions.[76] Of the professionals, 73 % are generally satisfied. As regards the litigants, the relevant figure is 81 %. Less satisfaction exists as regards the length of time proceedings take: of the professionals only 46 % are satisfied in this respect, whereas only 55 % of the litigants are satisfied.[77]

It is furthermore interesting to note that empirical studies have shown that the introduction of the personal appearance of the parties in the court after the statement of defence has had a positive effect on the litigants' perception of the fairness of the legal process (before this reform, many cases in the Netherlands only gave rise to a 'paper trial').[78]

Large scale litigant satisfaction surveys were not common until quite recently. A good historical comparison between litigant satisfaction before and after the reforms is not possible.

13.8 Mediation

In the Netherlands, during the past 20 years mediation – under the guidance of a professional mediator – has become established as one option for settling a legal dispute, next to pursuing a case through the courts. It is important to underscore the *professional* character of mediation here, as this modern mediation is to be distinguished from *traditional* mediation practices. Mediation is a method whereby a neutral helps the disputants to find a mutually acceptable solution to their dispute.

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[75] *Visie op het civiele proces: reactie fundamentele herbezinning burgerlijk procesrecht*, available at: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2007/02/05/reactie-fundamentele-herbezinning-burgerlijk-procesrecht-7026.html (consulted in March 2013), p. 11 *et seq.*

[76] Prisma 2004, 2006. See also Prisma 2002.

[77] *Klantwaarderingsonderzoek (KWO),* available at: http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtspraak-%20klantwaarderingsonderzoek.pdf (consulted in March 2013).

[78] Van der Linden 2010; Eshuis 2009, Section 7.1, Tables 20, 84 and 88, and Verkerk 2010, Chapter 6.2.

Traditional practices encompass a variety of agents mediating as a side-activity, using their intuition, experience of life, or even authority to broker settlements. Judges in the Netherlands traditionally constitute one such category of agents, using their authority, even to sometimes push litigants who have appeared before them into a settlement. This practice of judicial mediation, which followed unpredictable patterns depending on style and preferences of individual judges, still exists today, but has become a bit more standardised since the 2002 revision of the Code of Civil Procedure.[79] Perhaps more importantly, such judicial mediation is not referred to as 'mediation' anymore, but as (*gerechtelijk*) *schikken* – settling under the supervision of a judge – whereas the concept of 'mediation' has come to be reserved for the carefully structured processes that trained and certified mediators will go through together with disputants.

A judge in the Netherlands today has the option to either attempt to reconcile the litigants (hence: *schikken*) himself or to suggest litigants to turn to an external certified mediator (court-referred mediation) or, obviously, to render judgment.

Is there a place for the second judicial option (referring to external mediators) if the judge himself can also direct parties to settle? Modern mediation appears to be a typical American invention, after all. The concept of modern mediation originated in the USA, where researchers at Harvard established in the 1970s that negotiation will be more effective if parties focus on their underlying interests, instead of taking up positions. A new breed of mediators then sought to impart such evidence-based negotiation skills on disputants who had ended up in a stalemate. Mediation would thus 'empower' disputants. The new approach gained popularity in family disputes and commercial disputes particularly, and courts started to advise and gradually enjoin litigants to try mediation first: seemingly a win-win strategy for disputants and the Judiciary, or at least the treasury, alike.

Despite the continental-European tradition of a fairly active judge, this phenomenon of 'court-annexed mediation' caught on in Europe in the 1990s, together with the enthusiasm for being trained as a mediator. Ambivalent motives underlay this development: on the one hand, the autonomy of litigants seems better protected in modern mediation; but on the other hand, financial gains for the treasury are feasible through what is essentially a privatisation of dispute resolution.

Many European jurisdictions started out legislating on (court-referred) mediation, hoping a regulatory framework would somehow stimulate the actual use of mediation. The Netherlands constitute a remarkable contrast, as in this country court-referred mediation was introduced bottom-up. First, large-scale experimentation with judicial referrals to mediation took place, under supervision of the Ministry of Justice, and with day-to-day project management being located within the Judiciary itself. Qualified mediators needed for these experiments were recruited from the newly

[79]The court is allowed to order a personal appearance of the parties to obtain further particulars and/or to attempt reconciling them after the statement of defence has been submitted (*comparitie na antwoord*); research findings suggest that in approximately 70 % of all procedures, courts of first instance will order such a *comparitie*, though not always exclusively to attempt a settlement. Moreover, there are as yet no set judicial approaches towards reconciliation, though patterns have been charted out through recent research: Van der Linden 2008.

created umbrella organisation for mediators, the Netherlands Mediation Institute (NMI). An effective public-private partnership emerged. Judges received condensed training enabling them to recognise the prospects and pitfalls of mediation. In this way, the difference between modern mediation and supervising settlements in court (*schikken*) became increasingly clear. For one thing, unlike a judge, an external mediator may hear disputants separately (caucus) and probe deeper to chart out even conflict factors that have no relevance in law at all.

The outcomes of the nationwide experiments were so promising that the Ministry decided to have mediation liaison officers introduced in virtually all courts by 2007. Detailed monitoring of referrals, and of the views held by judges, parties and their lawyers, has continued until recently, and a report with the major (statistical) findings over the past decade has been published (in English) by the Netherlands Council for the Judiciary online, where it can be downloaded.[80]

In 2009, NMI mediators handled about 40,000 mediations in all, including those referred to them by the courts. As a percentage of all cases submitted to the Dutch courts, however, only two % were settled through external mediation. As demonstrated in the report referred to above, there may be positive secondary effects on the demand for in-court adjudication, coined 'the shadow of referral.'

An intriguing aspect of mediation in the Netherlands is that the government has consistently opposed regulation. Regulation was considered detrimental to the flexibility of mediation. Besides, the actual use of mediation in the Netherlands was (and is) much higher than in most of the neighbouring countries where detailed regulation *has* taken place. Up to the present time, there are just the in-house rules and model contracts of the NMI; disputants who decide to attempt mediation under the guidance of an NMI-registered mediator will sign a mediation agreement at the outset, when they will commit themselves to the choice of mediator, to keep all matters discussed confidential and to use their best endeavours to negotiate a solution. NMI mediators are, moreover, subject to Rules of Professional Conduct that special Disciplinary Review Boards will use in construing the legal relationship towards disputants in the event of complaints.[81]

Quite a number of complaints have been dealt with to date, and in the official database of the Dutch courts, today, over 800 hits will be produced using the key 'mediation'. This does not mean that mediation was at the heart of the dispute in all these cases; yet some judgments have addressed fundamental issues that have arisen in regard to mediation. One example is the issue of whether the court, in ascertaining the truth in the continental-European tradition, can override contractually agreed secrecy in a case where mediation has been attempted but failed. The Dutch Supreme Court held in 2009 that such overriding is indeed allowed, depending on certain parameters.[82]

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[80] Jagtenberg et al. 2009, available at: www.rechtspraak.nl/English/publications (consulted in June 2013).

[81] The most recent versions of the NMI in-house rules and models can be consulted online at: www.nmi-mediation.nl/english (consulted in June 2013).

[82] Hoge Raad, 10 April 2009, *LJN* BG9470.

Despite the abhorrence of regulation, the Netherlands have now introduced some (scanty) provisions on mediation in the Civil Code and in the Code of Civil Procedure, so as to implement domestically the 2008 EU Directive on Mediation in Civil and Commercial Matters.[83] One of the provisions in the EU Directive precisely concerns a professional privilege for mediators, which the Dutch legislator unwillingly has to introduce now. As part of a recent 'innovation' package to enhance efficiency, the Minister has announced he will seek to secure professional quality requirements that (privileged) mediators will have to meet. Other aspects that will now be provided for in law as required by the EU Directive are that mediation halts the expiration of limitation and prescription rules, and an extension of the possibilities for making mediated settlement agreements enforceable. Finally, judges may advise mediation in all cases, but in the end the litigants decide. This is in line with the Dutch research outcomes, and the philosophy of mediation, that the decision for litigants to try mediation may be informed, but must remain voluntary.

13.9 Relevance of the Dutch Reforms for Other Jurisdictions

The Dutch experience shows that reforming a civil justice system is not merely a matter of adjusting the rules of civil procedure. Changes in the rules went hand in hand with other changes, such as an adjustment of the number of court staff, the introduction of 'flying brigades' to reduce the backlog of cases, and changes in the manner in which the courts are financed (e.g. from input-based to output-based) and mediation. In order to assess the effects of (different aspects) of the reform programme it is of great importance that the quality of the administration of justice is measured and monitored; litigant satisfaction evaluations, for example, should be conducted on a regular basis. In the Netherlands much more attention than before is directed to gathering data and to conducting empirical research. We believe empirical data and research are valuable means to assess and improve the quality of the civil justice system.

As regards the rules themselves, there seems to be consensus that the judge should have sufficient powers to control the progress of cases and that parties should be encouraged to adduce the facts and to identify relevant evidence at an early stage. Oral court hearings at an early point in time, in which the parties themselves should participate, have shown to be of great importance in resolving cases in a quick and satisfactory manner. As regards mediation, the Dutch approach is that too much regulation will reduce the significance of this type of dispute resolution. This is, however, not in line with the present European trend in this area.

[83] Act of 15 November 2012 implementing the EU Mediation Directive, Stbl. 2012/570. This 'thin' piece of implementing legislation has been followed, however, by an initiative for a private member Bill (MP Mr. Ard van der Steur) that seeks to regulate mediation, and notably the profession of mediator, in far greater detail. This Bill is currently being discussed in Parliament.

Appendix: Facts and Figures Relevant for the Powers of the Judge and the Parties in Civil Litigation

Netherlands

Year of Reference: 2008

Part I: General Data on the National Civil Justice System

1. Inhabitants, GDP and average gross annual salary

Number of inhabitants	16,405,399[84]
Per capita GDP (gross domestic product)	€36,322
Average gross annual salary	€49,200

2. Total annual budget allocated to all courts €889,208,000

3. Does the budget of the courts include the following items?

	Yes	Amount
Annual public budget allocated to salaries	☒	€620,748,000
Annual public budget allocated to computerisation	☒	€69,185,000
Annual public budget allocated to court buildings	☒	€104,933,000
Annual public budget allocated to training and education	☒	€40,535,000
Annual public budget allocated to legal aid	☒	€419,248,000
Other (please specify)	☒	€37,251,000

4. Is the budget allocated to the public prosecution included in the court budget?

☐ Yes
☒ No

(a) If yes, give the amount of the annual public budget allocated to the prosecution services

Legal Aid (Access to Justice)

5. Annual number of legal aid cases and annual public budget allocated to legal aid

	Number	Amount
Civil cases	Other than Criminal: 249,182	Other than Criminal: €262,204,000
Other than civil cases	Criminal cases: 158,054	Criminal: €157,044,000
Total of legal aid cases	407,236	€419,248,000

[84] All data are based on the CEPEJ report 2010, 2008 data, http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Netherlands.pdf. (consulted in July 2013), unless stated otherwise

Organisation of the court system and the public prosecution

6. Judges, non-judge staff and *Rechtspfleger*

	Total number	Sitting in civil cases
Professional judges (full time equivalent and permanent posts)	2,153	N/A
Professional judges sitting in courts on an occasional basis and paid as such	900	N/A
Non-professional judges (including lay-judges) who are not remunerated but who can possibly receive a defrayal of costs	0	N/A
Non-judge staff working in the courts (full time equivalent and permanent posts)	5,129	N/A
Rechtspfleger	0	0

The performance and workload of the courts

7. Total number of civil cases in the courts (litigious and non-litigious): ca. 1,300,000

8. Litigious civil cases and administrative law cases in the courts

		Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Total number of first-instance cases	Pending cases by 1 January of the year of reference	N/A	N/A	N/A	N/A
	Pending cases by 31 December of the year of reference	N/A	N/A	N/A	N/A
	Incoming cases	N/A	Small claims division: 930,000[85]	Civil/Commercial division: 260,000[86]	N/A
	Decisions on the merits	Litigious cases resolved: 230,000 Non-litigious cases resolved: 943,000	N/A	N/A	N/A

(continued)

[85] *Rechtbanken: afgehandelde civiele en bestuurszaken, 2000–2010*, available at http://www.rechtspraak.nl/Actualiteiten/Persinformatie/Documents/Rechtbanken-%20afgehandelde%20civiele%20en%20bestuurszaken.pdf (consulted in March 2013). See also Eshuis et al. 2011, Chapter 5.

[86] *Ibidem.*

(continued)

	Litigious civil cases in general	Civil cases by category (e.g. small claims, family, etc.)		
Average length of first-instance proceedings	N/A	Small claims division, undefended cases: 6 weeks Defended cases: 17 weeks.[87]	Commercial division, undefended cases: 6 weeks Defended cases: 59 weeks.[88]	N/A

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[87] *Ibidem.*

[88] *Ibidem.*

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