The following full text is a publisher's version.

For additional information about this publication click this link.
http://hdl.handle.net/2066/210201

Please be advised that this information was generated on 2019-12-20 and may be subject to change.
Pushing Cases away from Judges: Causes and Consequences

Leny de Groot-van Leeuwen
The Institute for Sociology of Law is part of the Law Faculty of the Radboud University Nijmegen. It has a long tradition of empirical research in the area of law and society. Special focuses are the legal professions, food safety regulation, migration law and anti-discrimination law. The researchers at the Institute have different disciplinary backgrounds (including law, sociology, anthropology, development studies, Middle Eastern studies) and much of their research is interdisciplinary. The Nijmegen Sociology of Law Working Paper Series provides a vehicle for staff members, PhD students and fellows to rapidly disseminate their research results.

ISSN 2212-7844

Nijmegen Sociology of Law Working Papers Series 2019/03

Faculty of Law
Radboud University Nijmegen
P.O. Box 9049
6500 KK Nijmegen
The Netherlands

Editors  Tetty Havinga, t.havinga@jur.ru.nl
         Anita Böcker, a.bocker@jur.ru.nl
         Iris Sportel, i.sportel@jur.ru.nl

Lay-out  Babette Janssen

Cover photo  Erik van ‘t Hullenaar

©  2019, Leny de Groot-van Leeuwen

url  http://repository.ubn.ru.nl/
PUSHING CASES AWAY FROM JUDGES: CAUSES AND CONSEQUENCES

Leny de Groot-van Leeuwen *

Abstract
In the Netherlands as probably elsewhere, litigation is declining in a relative sense: the percentage of cases that actually come before a judge is decreasing. This is partly due to legislative proposals that transfer cases away from the judge towards alternative institutions, such as governmental administrative bodies and dispute resolution committees. This paper quantifies that process in the Netherlands. Subsequently the paper evaluates the transfer phenomenon in the light of costs, quality and access to law.

Key words
Access to justice, alternative dispute resolution

Introduction
In general very few people end up in court with their everyday problems (Genn 1999, Genn and Patterson 2001, Van Velthoven and Ter Voert 2004, Van Velthoven and Klein Haarhuis 2010, Ter Voert and Klein Haarhuis 2015). Litigation rates – defined as the number of civil and administrative law cases per inhabitant – have been lower in the Netherlands compared to the USA, but also compared to nearby European countries such as Belgium and Germany for a long time (Blankenburg 1994, Blankenburg and Bruinsma 1994, Blankenburg 1998, Bruinsma 2003). This was partly due to a traditional infrastructure of alternative dispute resolution institutions.¹ A lot of institutions provided dispute handling before invoking a court procedure; parties tried to solve their landlord-tenant problems with rental commissions, consumer problems were handled by complaint boards, divorce procedures by mediators, and disputes with public administration by internal procedures. Moreover, many companies and entire economic sectors had established their institutions for internal arbitration. Thus, compared with the neighboring countries, the Dutch courts were already less crowded. At the same time, however, many were lamenting about the rising “flood of litigation” at the courts. Basically this lament continues to the present day, in spite of the fact that no research has taken place on what this alleged flood in fact consists of. Current figures contradict the whole ‘flood’ image. The number of civil litigation cases, which had indeed been rising between 1985 and 1995, has in fact been declining since around 2011. In 2018, for instance, 250,000 less cases were lodged than were in 2014, on a total of around 1.5 million (Council for the judiciary 2018, Kuiper and Lievisse Adriaanse 2019).

The decline of the litigation rate during the last decade can be attributed to a number of factors. The first one is the rise of court fees in the Netherlands. Research shows that the court fees increased on average with about 50 per cent between 2009 and 2012. Concerning

* Professor at the Institute for the Sociology of Law, Law Faculty, Radboud University, P.O. Box 9049, 6500 KK Nijmegen, the Netherlands. Email: L.de Groot@jur.ru.nl.
¹ In the Netherlands, however, the use of online dispute procedures like E-court, Paypal and eBay is still rarely reported in the studies to the path of justice (Ter Voert and Klein Haarhuis 2015).
commercial law suits in first instance this percentage was 43 per cent. The increase of fees was especially salient in cases with financial stakes between € 500 and € 5,000. According to Croes et al. (2017) this increase of court fees has led to a 20 per cent decrease in the number of court cases in commercial matters between 2009 and 2012.

The second factor is the recent geographic concentration of courts, with longer travel distances to the courts, as a result. Eshuis (2017, 2019) finds that travel distances within the Dutch courts system are higher than in surrounding countries, but are still not extremely high. Two recent studies find no support for the idea that defendants will be less determined to defend themselves when the travel distance is longer. They do show, too however, that the actual number of cases brought to court by local plaintiffs drops when their local court closes down (Eshuis 2017, 2018). Logically less cases will be brought to court if a constant level of determination is confronted by a rising cost to act.

A third factor could be the transfer of traditional judicial tasks to other bodies. In criminal law such transfer has been a trend for a long time. The trend started with the private sector becoming more and more important in criminal law in the Netherlands since the sixties of the 20th century (Metze 1996, p. 154). The trend reached the judiciary in recent years, when the role played by the criminal courts in the imposition of sanctions was diminished as administrative sanctions have become more widely available under numerous acts (Sackers 2010, Barels 2011, Kas 2014, Baas et al. 2015), for example to deal with traffic offenses (Van Tulder and Sicking 2018).

The situation was much less clear with respect to civil and administrative law. We know from research that the share of extrajudicial procedures increased over time, from 6 per cent in 2003 to 11 per cent in 2014, which could be due to an increase of alternative dispute resolution institutions such as complaints and dispute resolution committees (Ter Voert and Klein Haarhuis 2015). As said, litigation rates were already low compared to neighboring countries and were declining as well but the policy mantra of judicial overload continued at the same time. Did a transfer of tasks from the judiciary to non-court bodies also take place in civil and administrative law? In order to address this general question, a research project was conducted at the Institute for Sociology of Law, Radboud University, Nijmegen the Netherlands, on behalf of the Ministry of Justice and Security (Böcker et al. 2016). The next two sections (research questions and design and findings of the research project) and the data of the present paper come from that study. Although the research has been done in the Netherlands, the described mechanisms are relevant on a general level, because ADR has been encouraged forcefully in Europe and elsewhere during recent years (Genn 2010, Kramer 2013, Wagner 2014). At the end of the paper, I contextualize the findings back into the general debate on access to justice.

Research Questions and Design

The investigation adopted a broad approach to the concept of judicial tasks. Besides resolving disputes between citizens and adjudicating on government actions, the courts fulfill other tasks, as assigned by law or other types of regulation. The investigation was concerned with all these tasks and activities as come before the civil and administrative courts. Thus, judicial

---

2 Cf. Eshuis; the scale of the Dutch Court organizations however, is extreme. On average, a Court location that handles small claims – the most common court cases – has jurisdiction over a territory with over half a million inhabitants. This large number of inhabitants translates to large numbers of cases and large bureaucracies, employing 500 to 1,000 people (judges, court staff, support) each (Eshuis 2019, p. 10-25).

3 This is different in some other countries, see Shnoor and Katvan 2017.
tasks were defined as all the work governmental judges do or used to do at the courts before the tasks were transferred to other bodies. The concept of ‘transfer’ is also understood in broad terms. It refers to tasks that were intentionally but also non-intentionally removed from the judiciary. Finally, in this research alternative dispute resolution encompasses all techniques and institutions for resolving disputes other than by means of public adjudication and governmental courts.

Central research questions were: Which legislative proposals in the areas of civil and administrative law, proposed between 2004 and 2014, assign a judicial task to a government body or other non-judicial institution? How does this transfer takes place? And what are the consequences for society?

These central questions were operationalized as follows:

1. Can instances of transfer of judicial tasks be found in legislative proposals on which the Council for the Judiciary (Raad voor de rechtspraak) offered its advice between 2004 and 2014?\(^4\)
2. In these proposals, which bodies were assigned judicial tasks that had previously been performed by administrative or civil courts?
3. What was the idea underlying the transfer, and how was it motivated?
4. Which forms and variants of transfer can be distinguished?
5. What are the consequences of the transfer for citizens, businesses, and society at large?
6. What, if any, measures have been taken to safeguard the citizens’ protection under the law, and how do such measures work in practice?
7. How do those involved experience the exercise of judicial tasks by non-judicial bodies?

The research was conducted in two stages. In order to track as many items of proposed legislation as possible, all the advisory memoranda from the Council for the Judiciary issued between 2004 and 2014 were consulted. For the advisory memoranda that mentioned a transfer of tasks from the civil or the administrative courts to non-judicial bodies, we investigated whether the proposed legislation had been submitted to Parliament and if so, we then studied the accompanying explanatory memorandum and other parliamentary papers for information on the objective(s) and the expected consequences of the transfer of tasks. Additional information was collected in an expert meeting and several interviews with key persons.

The second stage zoomed in on forms of transfer to administrative bodies, dispute resolution commissions and the legislator. Four cases were examined in greater detail: The Act relating to structural Measures against Health Insurance Defaulter\(^5\) (representing a transfer to an administrative body); the legislative proposal to Strengthen the Administrative Power of Educational Institutions\(^6\) (transfer to a dispute resolution commission); the initiative proposal for the Revision of Child Support\(^7\) (transfer to the legislator) and the Work and Security

---

\(^4\) This formal limitation to proposals on which the Council for the Judiciary had advised draws on one of the statutory duties of the Council namely to advise on new legislation which has implications for the administration of justice. This may involve proposals that have a direct impact on the organization of the judiciary as well as on the introduction or amendment of new legal proceedings. Thus, our assumption is that no proposals that do affect the work of judges slip through this net. Overall in our experience, this assumption seems justified.

\(^5\) Wet structurele maatregelen wanbetalers zorgverzekering.

\(^6\) Wet medezeggenschap op scholen.

\(^7\) Initiatiefwetsvoorstel herziening kinderalfentalentatie.
Act\(^8\) (transfer to the legislator). These cases were investigated to discover their consequences for citizens and business, protection under the law and the experiences of those involved. Data were collected from literature research and consulting annual reports, evaluation reports and parliamentary papers. Additional information was gathered in interviews with experts from academia, the Council for the Judiciary, the courts and a dispute resolution commission.

Data were collected between September 2015 and March 2016.

Findings of the Research Project

The first stage of the research looked at 356 advisory memoranda issued by the Council for the Judiciary between 2004 and 2014 on (draft) legislative proposals. Of these, 49 turned out to contain proposals for the transfer of judicial tasks. In 28 cases this involved tasks of the civil or administrative courts. The legislation and proposed items of legislation involved, inter alia, family law, dismissal law, health care and welfare and education law.

Bodies Assigned with Judicial Tasks

Besides administrative bodies, tasks or activities previously undertaken by the civil or administrative courts were assigned to other institutions, including administrative bodies, dispute resolution commissions, mediators and the legislature. Many of these tasks were concerned with dispute resolution. For example, the civil courts saw some of their dispute resolution tasks shifted to mediators and dispute resolution commissions. In the context of this paper, it should be mentioned that during the research period besides the new dispute resolution commissions in the law proposals, competences of existing commissions were extended and also other commissions were established without the necessity of new law during the period of research. In cases where the legislature drew the task or activity upon itself, the courts’ freedom of judgement was restricted, or else guidelines developed jointly by the judges themselves (such as those for fixing the amount of alimony) were replaced by detailed governmental regulations, laid down in law.

The Idea Underlying the Transfer and its Motivation

The objectives of the legislator and its reasons for transferring judicial tasks as well as the envisioned effects, turned out to be quite diverse and sometimes highly specific. The transfer was most often not the principal component of the proposed legislation, nor was an explicit motivation always given for it. Whether the legislator does not want to attract attention to this aspect of the proposal or did not recognize this aspect or did not realize the importance of the transfer for society we don’t know.

If explicit, the objectives most frequently cited were to offer a low-threshold alternative to dispute resolution through the courts, more effective resolution of disputes or other problems, speeding up justice, relieving the judiciary of its workload (case load), speeding up justice, and cost savings for the government and/or the parties involved. Another goal that was frequently mentioned – especially with reference to proposals for transfer to the legislature itself – was to put authority where it properly belongs, i.e. under democratic-political control. Proposals for detailed rules set down in law also frequently cited the improvement of certainty under the law and/or equality before the law as an objective.

\(^8\) Wet werk en zekerheid.
Forms and Variants of Transfer

In the strict sense, transfer means that a task or authority which hitherto had belonged to the civil or administrative court is removed to a non-judicial body. This form of transfer occurs seldom. What happens more often is the creation of an extra route either alongside or precedent to court proceedings, whereby the courts deal with fewer cases and/or their role is marginalized to that of a process evaluator: the judge goes no further than determining whether a particular body has arrived at a decision in all reasonableness. Often, too, an administrative body or complaints tribunal receives a task or authority for a new category of cases, which had commonly been reserved to the courts. For instance the Netherlands Financial Services Complaints Tribunal (Klachteninstituut financiële dienstverlening) was established in 2007, in order to settle complaints in the financial services market. For good or bad reasons, knowingly or unknowingly, consumers can opt for this tribunal’s decision to be binding, effectively closing the route to the judiciary.

Finally, it may also occur that the legislator puts an end to the judicial activity of ‘writing the rules’, by setting down detailed regulations in legislation; these then replace the standards developed by the courts. An example of judicial rule making and the reaction of the legislator can be found in divorce cases. In former days legislation gave the family law judge great discretionary freedom in determining the alimony award in divorce cases (Dijksterhuis 2008). The judges were bound by only two criteria, namely the capacity of the party obliged to make maintenance payments and the need of the one who has the right to receive alimony. As a result the amounts of alimony awarded by judges varied strongly. In 1975 a Commission of judges, the Judicial Alimony Commission, drafted guidelines on the alimony spouses were obliged to pay in case of divorce (Van der Werff and Docter-Scharmhard 1987). These guidelines were used in all courts. Since then the guidelines changed time and time again till 2013. Three times, the legislator proposed to change the law, the Commission of judges came with new ways and the legislator withdraw its proposals. In the end, the legislator decided to take its responsibility because “The rules concerning the alimony should not be determined by the judiciary” (Parliamentary debates: Kamerstukken II 2014/2015 34153, 3, p. 3).

The second stage of the research adopted a different approach, based on the body to which tasks, cases or activities had been transferred or shifted: administrative bodies, dispute resolution commission and other non-judicial dispute resolution bodies, and the legislature. In this way it was made possible to look into more detail what the consequences of transfer of tasks to a specific body are.

Consequences in Case of Transfer from the Court to Administrative Bodies

A number of variants can be distinguished in the transfer of judicial tasks to administrative bodies. There are instances when an administrative body receives a task or authority that had typically belonged to the judiciary. Around the turn of the century, when the supervision of a number of liberalized markets was being regulated (including the telecommunications and power industries), several of the newly created authorities received, as part of their supervisory tasks, the authority to resolve certain disputes between private parties in the market. An administrative body may also be granted the specific authority to resolve a clearly defined issue. An example is the Act relating to Structural Measures against Health Insurance Defaulters (Wet structurele maatregelen wonbetalers zorgverzekering, 1 September 2009), which grants the National Health Care Institute (Zorginstituut Nederland), the authority to
De Groot-van Leeuwen: Pushing Cases away from Judges

demand an ‘administrative premium’ from those who fail to pay their health insurance premiums, with no judicial intervention. Prior to the Act’s introduction, the health insurers had to initiate debt recovery proceedings before the district court; now they merely report defaulters to the Institute.

The arguments in favor of granting dispute resolution powers to market supervisory authorities conform in part to those in favor of the introduction of administrative penalties: dispute resolution by the Market authority was said to be faster and more effective than going through the courts, and the market supervisor possesses expertise that the courts lack. Another argument was that dispute resolution can form an instrument in assuring the compliance of market parties with European and national regulations. The most important argument for the Health Care Institute’s particular authority was the ineffectiveness of the existing debt recovery practice. One of the disadvantages is the preferential treatment of the health insurance companies at the expense of other creditors.

The legal literature contains many observations on the dispute resolution powers granted to market supervisors, but little is known about how it works in practice, nor about the advantages and disadvantages to the parties involved. The expectation was that the dispute resolution by supervisory bodies would offer a rapid, effective alternative to judicial pronouncements, but it was not found to be the case, at least in the initial years (Daalder 2004). Evaluations of the defaulters’ act also point to a lack of effectiveness (Berenschot 2011). This, however, appears to have little to do with the ‘transfer’ aspect of the act. A similar conclusion can be drawn in reference to the advantages and disadvantages to the citizens and businesses involved.

Consequences in Case of Transfer from the Courts to Dispute Resolution Commissions

A number of more or less radical variants can be discerned when considering a shift or transfer to a dispute resolution commission.

The legislative proposal to strengthen the administrative power of educational Institutions contains a radical variant. The proposed law lays down that in first instance, all disputes arising between boards, parents, students and teachers shall be placed before the National Commission for Educational Dispute Resolution (Landelijke Geschillencommissie medezeggenschap onderwijs), as the authority with jurisdiction to pronounce judgement. The Enterprise Division of the Amsterdam Court of Appeal (Ondernemingskamer van het Gerechtshof Amsterdam) may only play a part in appeals. The goal of the proposed amendment is to remove unnecessary impediments to the resolution of disputes about employee participation and parent participation in schools. The idea is to have a one-stop shop, with a uniform, simple procedure, provided with safeguards which, incidentally, show an increasing similarity to those offered by judicial pronouncements. This is all the more important because the route via the courts has been closed off in such cases.

In the amendment to the Copyright and Neighboring Rights Law (Wet toezicht collectieve beheersorganisaties voor auteurs- en naburige rechten), the legislature also opted for a radical variant: the parties are obliged first to go before the copyright dispute commission and any subsequent court must request the commission’s advice before handing down a decision.

A less radical variant was opted for in the Health Insurance Act (Zorgverzekeringswet) and the Act regulating Quality, Complaints and Disputes in Health Care (Wet kwaliteit, klachten en geschillen zorg): health insurers and health care providers are required to become members of the appropriate dispute resolution commissions, which were set up under
the relevant acts; no one is obliged to bring a dispute before these commissions, but their

decisions are binding; the courts may only provide a marginal evaluation.

As said, besides the dispute resolution commissions that were regulated by law during

the period investigated, there are many other consumer dispute resolution commissions,

which have been in existence far longer, including those that operate under the umbrella of

the Consumer Complaints Board (Stichting Geschillencommissies voor Consumentenzaken,

De Geschillencommissie). The European Directive on alternative dispute resolution for con-

sumer disputes (the ADR directive) prescribes minimal safeguards that must be observed for

disputes resolved via a non-judicial procedure. The directive’s objective is to strengthen con-

sumer rights while improving the effectiveness of the internal market. In the Netherlands,

the quality requirements of the ADR directive have been translated into national legislation
to satisfy the directive’s implementation requirement.

Evaluation research has shown that consumers frequently refer to cost, speed and sim-
plicity of this procedure as a reason for approaching the Consumers Complaint Board, rather

than going to the courts (Klapwijk and Ter Voert 2009). The costs, plus the simplicity of the
procedure are considered as sufficient, but the speed of the proceedings is less appreciated.
In regard to neutrality and independence, it has been established that though they are safe-
guarded under the law, the way the consumer values them depends closely on whether the
consumer has won or lost his case. Only occasionally a case is brought before the court for
evaluation after a resolution procedure before a commission.

Despite the fact that resolution via a commission is often mandatory, both citizens and
businesses have the right to bring a dispute before the courts. This arises from Article 17 of
the Constitution, which provides that no one may be denied access to the courts against his
will. Extra-judicial dispute resolution may therefore not be compulsorily imposed, against the
will of the parties involved. A great deal is done to create safeguards for the fully fledged
operation of dispute resolution commissions, which remain attractive to the parties involved.
At the same time, though, little is known about the possible consequences of the govern-
ment’s ultimatum remedium approach, nor about the consequences of the pressure to evade
the governmental court.

Consequences in Case of Transfer from the Court to the Legislature

When considering a transfer to the legislature, one can distinguish between a variant con-
cerned to restrict the freedom of individual judges to decide on disputes by introducing de-
tailed and/or imperative legal criteria, and one that seeks to put an end to the judges’ regu-
laratory activities by introducing detailed regulations. Two recent examples of the latter variant
are the initiative proposal for the Revision of the Child Support, and the Work and Security
Act.

These forms of transfer touch on the classical constitutional view on the relationship
between the judiciary and the legislature, whereby the legislature sets down general regula-
tions that hold for all those subject to the law in a state, while the courts decide individual
cases. Put differently, the legislature sets out the general framework within which the judici-
ary has the freedom to decide. But there is scarcely any debate on how far the legislature
should go in setting standards, and when the restriction of the court’s freedom to decide is
excessively radical.

Restricting the courts freedom to decide by legislative action is not problematic under
the constitution, in principle, but the disadvantage to those seeking redress through the
courts is that the individual approach open to the courts is no longer possible, or at least not
to the same degree. When calculating child support under the proposal for the Revision of Child Support, and when calculating transitional severance pay as set down in the Work and Security Act, the courts have considerably less room to maneuver in individual cases. The possibility of handing down a decision in individual cases has been exchanged for the advantage of greater security under the law and improved equality before the law.

These examples confirm the picture that emerges from the legal and sociological literature concerning regulation of courts. Restricting the domain of the courts by closer regulation by the legislature means greater involvement of the general public’s interests, with improved certainty under the law, better equality before the law, and greater transparency, but fewer individually tailored decisions, and reduced flexibility. Readymade instead of custom made decisions.

Discussion and Conclusion

In the foregoing we saw that if the goals of the alternatives to court proceedings are realized, the positive effects are cheap, quick, effective, technically competent and easily accessible procedures. The other side of the coin, however, the negative consequences are less access to the traditional, governmental courts, lack of guarantees of independency and impartiality, less transparency and less competence in the legal sense. Not only in the Netherlands, but also in the UK (Glenn 2009) and the US (Resnik 2015, 2018), the rise of alternative dispute resolution raises questions as to the rule of law and the lack of transparency. I will expand a little bit on four themes: access, quality, costs and the role of the legislator.

Access to the Judge

As said, conform Article 6 of the European Convention of the Human Rights (ECHR) and Article 17 of the Dutch Constitution, access to an impartial and independent judge should be guaranteed. Access to a judge is therefore a key criterion to answer the question whether there is too little or too much litigation. The shift from the courts to alternative dispute resolution institutes could lead to exclusion, especially for the lower and middle income groups.

Thresholds are threefold and become higher and higher these days. One is the hindrance of access because of time consumption. Judicial delays and backlogs of cases are common not only in European countries but also in the USA (Green 2017). Non-governmental forms of alternative dispute resolution are supposed to be faster, but as we saw this is not always true. Moreover, it is often obligatory for litigants to submit their dispute first at an alternative institution before they can get access to the regular court. The time one needs to get a solution in that way will not be less, but more.

Related to time consumption are financial thresholds. The rise of court fees is already problematic in an access-to-justice perspective, but they will often be moderated to some degree, balanced as they are by the political will to include the poorer layers of society. More importantly even, the public court fees rises will always refer to only part of the whole judicial bill, while in the private alternatives, the litigants pay for the full Monty. The alternative dispute resolution procedures are most of the time market-driven; instead of public funds, the

---

9 Article 6.1 of the European Convention of Human Rights says: ‘In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law…’ Article 17 of the Dutch Constitution determines that no one can be prevented against his will from being heard by the courts to which he is entitled to apply under the law (ius de non evocando).

10 See for example Ernste (2015) about non-binding advise.
individual litigants pay. Financial exclusion appears to be inherent to the non-public alternatives. Theoretically, this could be repaired by establishing a full-blown system of insurances, which are practically inconceivable and even if successful, would involve much higher transaction costs than does a simple system of public justice provision.

Third, ADR tends to create what may be called an intellectual threshold: which common person will be really able to find his way in the rapidly expanding jungle of governmental and ADR institutions and procedures such as mediation, arbitration, binding and non-binding advise, court annexed mediation, on line procedures such as E-court etcetera? Here too, repair actions might partially redress this problem, e.g. in the form of small-scale and low-threshold help desks. But here too, of course, regardless of whether these would be publicly or privately funded, costs to society would rise.

Quality

The quality in technical sense is a great selling point of some of the alternative dispute resolution institutions. Building experts act as arbiters in building cases, artificial intelligence experts act as mediators in artificial intelligence cases, and so on. This point is repeated often by the ADR institutions in spite of the fact that traditional courts have all freedom to appoint the same experts to inform them.

The flipside of the technical quality coin is that the judicial quality of the ADR institutions is questionable. Who decides what the applicable law can be? Who knows the jurisprudence? And moreover, who upholds the core values of independent and impartial judgment? The less judges are involved in decisions, the less guarantees exist. According to a lot of scholars the core values are in danger, in the Netherlands as well as elsewhere. As Resnik (2015) writes: “the diffusion of a range of private, unknowable alternative adjudicators (...) violates the constitutional protections”.

An eruption of this issue has recently taken place in the Netherlands (NRC 25 & 26 May 2019). An ‘E-court’ had been set up to adjudicate conflicts between consumers and health insurance companies. Through the ‘small letters’ attached to the contract between the consumers and companies, the consumers were bound to the E-court decisions (binding advice). Moreover – and with little wisdom in retrospect – the judiciary initially consented to play a marginal role with respect to the E-court decisions. Lately, however, the judiciary has developed doubts about the E-court decision quality, generated as it is by a self-learning computer algorithm. The final consent has therefore been postponed, pending questions directed at the Supreme Court of the Netherlands. The judiciary is now accused of conspiracy by the E-court company, and the company has established a case to be adjudicated by the traditional court – against the state requesting full compensation of foregone profits.

Costs to Society

‘Costs to society’ is here understood as the simple sum of public costs (being the costs of the public justice system paid for through taxes), plus private costs (being the costs of the non-governmental justice system paid out of private pockets). Both can furthermore be seen as

---

11 An example of the complicated nature of the concepts: In the Netherlands exists ‘The court of Arbitration for Art’ (CAFA). This (non-governmental) court “is founded to resolve disputes in the wider art community through mediation and arbitration” (https://www-nai-nlorg/en/cafa).

12 On the website of the Dutch Authority for the Financial Markets (AFM) (https://www.afm.nl/en/consumen-tenklachten/klachtprocedure), for instance, information about access to traditional courts is virtually non-existent and misleading in so far it appears, e.g. stating that the citizen may “consider applying to the courts if Kifid (the Financial Services Complaints Tribunal) cannot handle the complaint”. What would that mean?
simple multiplications, because in any judicial system material costs (buildings, etc.) are low compared to wages. Therefore, costs to society can be put as equal to hours spent multiplied by the hourly rate of the participants (judges, lawyers, litigants, mediators, experts) in the system.

Let us, by way of thought experiment, imagine that all problematic aspects of the alternative system have been resolved by successful repair actions. We have an alternative system with full insurance of everybody against excessive costs, we have so many help desks in the neighborhoods that everybody can find his way in the legal landscape, we have detached so many public judges to the alternative dispute resolution institutions that impartiality and independency are assured, we have created perfect transparent alternative dispute bodies, and procedures and so on. In short, we imagine a system of alternative dispute resolution with the same quality for litigants and society at large, as delivered already by the public system.

Would this quality-rich alternative system, with all its safeguards, require less time than the public system? Or would the mean wages paid in the alternative system to arbitrators, lawyers, etc. be lower than those paid to the public judges? In other words, would the cost to society be lower? My guess is no. In this light, the shift from public to alternative dispute resolution is merely a drive to transfer costs from public funding (all taxpayers) to private funding (litigants). To the extent that alternative dispute resolution would lead to a reduction of the total costs for society, this would necessarily entail a same reduction of *de facto* access to an impartial and independent judge for all.

The Role of the Legislator

Traditionally, the Netherlands had a rich infrastructure of alternative dispute resolution institutions. The balance between traditional dispute resolution and alternative dispute resolution rarely generated political debate (e.g. Malsch 2018). Partly due to this, the legislator does not take into account that the cumulative impact of political proposals for alternative proceedings is to undermine the position of the judiciary. The *ultimum remedium* approach and the anti-adjudication rhetoric in which the alternative dispute resolution procedures and institutions are interpreted as socially positive13 bear in it the danger of a policy that uses this promotion rhetoric to limit the governmental courts’ budget and in this way weaken the court system.

References


---

13 See for example the policy letter Alternative Dispute Resolution 2002-2003 of the Minister of Justice and Safety and the proposals to stimulate the of mediation of the Minister of Justice in 2013.