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Vanishing or Increasing Trials in the Netherlands?

Carolien Klein Haarhuis* and Bert Niemeijer**

I. INTRODUCTION

Galanter has documented a long-term gradual decline in the portion of cases that are determined by trial in the federal trial courts.¹ Since the mid-eighties, he has also observed a significant decline in the absolute number of trials.² A similar decline was found in federal criminal cases, in bankruptcy cases and in state courts.³ The pattern was found to hold for a wide variety of cases. Galanter has brought up a strong argument, especially when we realize that virtually every other indicator of legal activity (the number of lawyers and cases, expenditures on law, the amount of regulation) is rising. Some doubt whether the decrease of trials is real or a statistical artifact.⁴ Others argue that the trial was never the norm so that there was never much to vanish.⁵ These arguments do not alter the fact that the evidence offered by Galanter is very strong. In any case it is strong enough to take the phenomenon seriously and to conclude that there is something to explain.

In this article, we will address the question of whether something like vanishing trials exists in the Netherlands. This could be the case, as some of the causes of the decline in the number of trials advanced by Galanter are also observed in the Netherlands. ADR is gaining popularity, the costs of court procedures are on the rise, and there clearly exists a development toward “managerial justice.”

What complicates the matter is that a “trial” is a typical American phenomenon. It can be characterized as a lawyer-dominated adversarial process. Galanter describes a trial as a “full blown,” usually lengthy process, in which at least two parties are involved in a dispute, and evidence is introduced, and which results in a complete and final decision in the case, often by a lay jury. “Trials” as such do not exist in the Netherlands. Dutch law, court system and court procedures differ in many respects from those of the U.S. In general, Dutch procedures are less adversarial, judges are more active and no juries exist. The procedures, at least

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1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) [hereinafter Galanter, *The Vanishing Trial*]; Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7 [hereinafter Galanter, *A World Without Trials*].

2. *Id.*

3. *Id.*

4. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004).

5. Lawrence Friedman, *The Day Before Trials Vanished*, 1. J. EMPIRICAL LEGAL STUD. 689, 689 (2004).

many of those handled by “district courts,” are characterized by an exchange of written documents of evidence, arguments and testimony, and are carried out under the guidance of the judge. Only after the case is deemed ripe, do parties actually appear before the judge.⁶

This makes the question of whether trials are also vanishing in the Netherlands a difficult one to answer. Therefore, in this article, we will understand the trial as a gradual concept. Judicial procedures in the Netherlands can be characterized as more or less trial-like, depending on the degree to which they exhibit typical characteristics of an American trial. In this way we can compare the development of the number of more trial-like dispositions with less trial-like dispositions. For example, trials ending without a decision by the judge can be considered as less trial-like than a full-blown civil procedure ending with a written verdict. In doing so, we aim to give a differentiated image of the various types of trials and filings, and of their relative sizes and proportions. This way, we should be able to give a balanced image of whether the Netherlands are also facing “vanishing trials.”

In the development of the number of various types of civil cases and judgments over time, we distinguish between long-term trends and sudden shifts. When explaining these numbers and trends, we make the same distinction between long-term macro factors and short-term factors. For example, population or economic growth will rather have a gradual long term influence. By contrast, changes in laws and regulations, like a substantial increase in the cost of a legal procedure, may have an immediate drastic effect on the inflow of specific types of cases.

In this article we will first provide a short description of the Dutch (civil) justice system. The focus will be on civil law. Dutch administrative law and criminal law will only be featured to the extent that they are relevant for putting findings relating to civil law into perspective. We will point out which procedures can be considered as more trial like, and which as less trial like. Then we will look at the available data for numbers and trends of various types of cases. Subsequently, we will present a number of potential explanations for the trends in filings and more or less ‘trial like’ procedures. In the explanation effort, we will distinguish between societal (long-term) and policy developments (short-term). This distinction is made because the impact of judicial policy changes can set in relatively sudden, whereas the impact of societal developments is manifested more gradually. This is not to deny, however, that short-term policy changes can have a long-term impact and vice versa.

We will make use of two major Dutch longitudinal studies, in which a number of sociological and other explanations have been assessed empirically for a time-series data set. We will conclude with some reflections on the findings, and will build on the explanations and trends offered by Galanter relating to the supply of civil cases, costs, and “managerial justice”.⁷

6. This Dutch type of court practice is in line with Galanter identified as mainland European practice. Galanter observed a convergence of U.S. court practice towards the “continental dossier system of trial.” Galanter, *A World Without Trials*, *supra* note 1.

7. Galanter, *A World Without Trials*, *supra* note 1, Galanter, *The Vanishing Trial*, *supra* note 1.

II. THE DUTCH COURT SYSTEM

A. *The Courts*

In the Netherlands, there are 61 subdistrict courts which differ in size between one and nine judges. Subdistrict court cases are decided by a single judge. It is relatively simple for ordinary citizens to have their case heard in the subdistrict court. What is more, they do not need a lawyer to represent them. The subdistrict judge usually delivers an oral judgement immediately after the session. The subdistrict judge deals with all civil cases involving an amount under 5,000 Euros, cases involving rents and employment, and cases involving minor offenses of criminal law.⁸

In the Netherlands there are 19 district courts. These differ in scale between 200 (Amsterdam) and 45 judges. Each district court is made up of sectors. These always include an administrative sector, a civil sector, a criminal sector and a subdistrict sector.⁹ A number of district courts have a separate sector for family and juvenile cases, especially when the inflow of such cases is considerable. Procedures before the district court always require a lawyer. Most of the cases are decided by a single judge, but there are full-bench divisions with three judges to deal with more complex cases. In criminal cases the full-bench division deals with more complex cases and all cases in which the prosecution demands a sentence of more than one year of imprisonment.

The civil sector handles all civil cases not specifically allocated to the subdistrict judge. This comes down to all cases involving an amount greater than 5,000 Euros (among others, this includes money loans, debt collection, commercial transactions, services), summary procedures, divorce cases, and insolvency cases. Usually administrative disputes are heard by the district court; in many cases the hearing by the administrative law sector is preceded by an objection procedure under the auspices of the administrative authorities. The judges of the criminal law sector deal with all criminal cases that are not dealt with by the subdistrict judge.

There are five Courts of Appeal in the Netherlands. With regard to criminal and civil law, the judges of the Court of Appeal only deal with cases where an appeal has been lodged against the judgement by the district court. The Court of Appeal re-examines both the facts of the case and the legal questions.

In most cases it is possible to contest the Court of Appeal's decision by appealing in cassation to the Supreme Court of the Netherlands.¹⁰ It examines whether the lower court observed proper application of the law in reaching its decision. The facts of the case as established by the lower court are no longer

8. In 2002, the subdistrict courts were administratively incorporated into the district courts, and were named the "subdistrict sector" of the district courts. For matters of clarity, however, we maintain the distinction between subdistrict and district courts.

9. *Id.*

10. In addition to criminal and civil cases, the Court of Appeal also deals with all appeals against tax assessments, in its capacity as administrative court. There are also a number of special tribunals in the Netherlands. The Central Appeals Tribunal is the highest judicial authority which is mainly active in legal areas pertaining to social security and the civil service. The Trade and Industry Appeals Tribunal is a special administrative court that rules on disputes in the area of social-economic administrative law, the Competition Act and the Telecommunications Act.

subject to discussion. Civil actions are adjudicated by three or five justices, depending on the degree of difficulty and the importance of the case.

B. Civil Procedure

The Netherlands have a continental law system. Dutch civil law is largely written down in codes, of which the Civil Code and the Code of Civil Procedure or the Commercial Code are the most important examples.

1. Summons and Petitions

In civil procedure, there exists a difference between the summons procedure and the petitions procedure. The summons procedure is the most common procedure in Dutch civil law. It generally starts by a writ of summons by the bailiff: an official call to appear before the court containing the grounds for the claim. The defendant can respond by a statement of defense. The judge then assesses whether a court session with both parties attending is required. After the court session, the judge can give a verdict by making a definite decision; he can decide to give the parties the opportunity to explain their position further; or he can demand parties to submit evidence. The summons procedure is therefore rather formal and lasts on average about 18 months.

Cases in the summons procedure by the subdistrict courts regard real estate rental problems, labor-related cases and all other civil cases with an interest below Euro 5,000. The last category is the largest, including damage claims and debt collection. The summons procedure by the district courts concerns all other civil cases with an interest greater than 5,000 Euro, as well as summary procedures.

The petitions procedure is less formal and much faster than the summons procedure. The petition procedure is directed towards the court rather than towards the other party. It usually concerns cases in which there is no conflict between the parties, but in which a disposition by a judge is legally necessary. The procedure is often restricted to a petition, a written defense and a court session. Parties are invited to the session, but are not obliged to appear before the court. They are also not obliged to submit a written response and can compensate for this orally in court. The petition procedure is not concluded by a verdict but by a disposition.

Typical petition procedures in subdistrict courts involve some types of real estate rent cases, labor-related cases (dismissals) and family cases (heritage, custody). The most frequent type of case in petition procedures in district courts is divorce. Other types of cases are social welfare, insolvencies and enforced intake and treatment of psychiatric patients.

2. Summary Procedure

Sometimes it is necessary to obtain an interlocutory judgment from the civil courts at very short notice, for example in the case of working disputes (strikes, dismissals) or vacations of houses. These proceedings are referred to as summary proceedings. Summary proceedings are usually held before a single judge: the president of the court or his deputy. Summary cases are handled orally by the

president of the court. In many cases, parties do not continue their case after the oral judgment.

3. *Referrals to Mediation, Withdrawals and Settlements*

Not all cases filed at courts are concluded by a final judgment: first, because parties may choose to withdraw their case for a variety of reasons; second, because parties may reach a settlement during the procedure, which is sometimes induced by a judge at the court hearing. Part of the settlements are also concluded by a written verdict, however. Third, since 2000, a growing number of courts have a referral facility to mediation. Here, judges can ask parties to have their case handled by a mediator.¹¹ In all these instances, the case ends without a final judgment.

4. *Trial-Like and Less Trial-Like Procedures*

Galanter describes a trial as a full blown process in which at least two parties are involved, and evidence is introduced and which ends in a complete and final decision in the case, often by a lay jury. From the foregoing it is clear that there are great differences in Dutch procedures in terms of the extent to which they more or less resemble a trial. We can safely conclude that the petitions procedure (relatively informal, fast, often no conflict, parties not necessarily involved) generally can be considered as less trial-like than the summons procedure. We can also conclude that procedures before the subdistrict courts (small cases, a single judge, no lawyer representation obliged, quick and simple procedure, and oral judgment) are clearly less trial like than procedures before the district courts. Finally, it is clear that summary procedures and cases concluded by a referral to mediation, a withdrawal or a settlement, are far less trial like than cases concluded by a written verdict.

C. *The Dutch Civil Justice System in Numbers, in Comparison to Some other European Countries*¹²

The number of lawyers per 10,000 inhabitants in the Netherlands is 7.7.¹³ This is relatively low in comparison to other European countries.¹⁴ The Netherlands has a total of some 2,100 judges (in 2004).¹⁵ The total expenditure on the administration of justice for 2003 is estimated at 690 million Euro.¹⁶ With this amount the Netherlands are in the middle-to-lower range amongst other European

11. Bert Niemeijer & Machteld Pel, *Court-Based Mediation in the Netherlands: Research Evaluation and Future Expectations*, 110 PENN ST. L. REV. 345 (2005).

12. For facts and figures of European judicial systems, see European Commission for the Efficiency of Justice, *European Judicial Systems 2002 Report*, available at <http://www.coe.int/T/E/Legal-Affairs/Legal-cooperation/Operation-of-Justice/Efficiency-of-Justice/systeme%20judiciare%20A.pdf> (last visited May 1, 2006).

13. *Id.* at 72.

14. *Id.*

15. *Id.*

16. *Id.*

countries.¹⁷ In 2003, the courts dealt with 1,773,050 cases.¹⁸ Of these, 67,000 were dealt with by the courts of appeal, 785,000 by the district courts and 908,000 by the subdistrict sectors.¹⁹ With regard to these numbers, the Netherlands are in the middle-to-lower range in Europe.²⁰ The average length of a court procedure in the Netherlands is rather short in comparison with other European countries.²¹ Finally, a relatively large percentage of the cases (about 70 percent on average) are decided on by judgment.²²

III. TRENDS IN CIVIL CASES

To verify to what extent we can speak of “vanishing trials” in the Netherlands, we will describe trends in the outflow of civil cases in the Dutch court system. We will start by presenting the totals of civil judgments, subdividing between trial like and less trial like procedures (summons versus petitions; districts versus sub-districts, respectively). Changes in the number of judgments may of course be preceded or paralleled by changes in the number of filings, as Galanter indicated for the U.S.²³ For this reason, we also control for case inflow, that is, the number of filings. Subsequently, we assess whether the observed trends occur across all cases, or only amongst specific subtypes, such as family or business cases. We furthermore examine the composition of the numbers of cases disposed of: what is the relative proportion of judgments, withdrawals, settlements and other ways of case disposition? Finally, while assessing trends in judgments, we control for demographic and macro-economic trends (population growth and GDP, respectively), indicators of legal activity (budget of the justice department, court personnel, number of attorneys) and density of laws and regulations.

A. Civil Judgments, Divided in Type of Court and Type of Procedure

Van Velthoven constructed and analyzed time series of data, encompassing both filings and final judgments in the Netherlands, covering the period between 1951 and 1999.²⁴ Figure 1 shows the trends in the total number of final civil judgments in the Netherlands. Van Velthoven observed a steady rise in civil final judgments after 1967 (from 130,000 in that year to almost 478,000 in 1999). An even steeper rise occurred between 1980 and 1985. Between 1985 and 1989, the number of civil judgments remained stable, followed by a new period of fast growth between 1989 and 1995.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Galanter, *The Vanishing Trial*, *supra* note 1; Galanter, *A World Without Trials*, *supra* note 1.

24. B.C.J. Van Velthoven to the Universiteit Leiden, Department of Economics Research, “Civiele en administratieve rechtspleging in Nederland,” (Jan. 2002). We complemented these data with data from 2000 to 2004 by Statistics Netherlands. CBS (Statistics Netherlands), “Rechtspraak in Nederland 2003,” available at <http://www.cbs.nl/nr/rdonlyres/c64f05ba-b479-49a0-8252-9c5ae4be40db/0/2003w37pub.pdf> (last visited May 1, 2006); CBS (Statline), available at <http://www.cbs.nl/> (last visited May 1, 2006).

*Total Number of Civil Judgments, Divided into Summons and Petitions,
1951-2004²⁵*

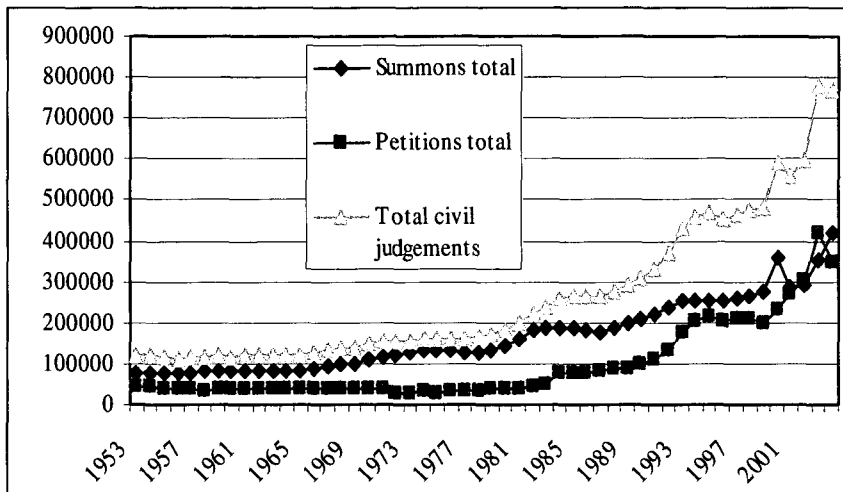


Figure 1

A number of “bumps” can be observed after 1999, particularly with respect to petitions. The small drop in summons cases around 2000 might be ascribed to a raise in the court fee by on average 7.5 percent in 1999. However, the overall long-term trend in the total of civil judgments reflects a strong increase. The sudden increase after 1999 is partly a registration effect,²⁶ but there are also indications that particularly, the number of labor cases has increased strongly.²⁷

As we have seen, Dutch civil judgments vary with respect to the underlying procedure. We have assessed that a summons procedure can be considered to be more trial-like than a petition procedure. In addition, there is variation with respect to the type of court. Procedures before a district court can be considered as more trial-like than the procedure before a subdistrict court. To what extent do we observe differences in the trends in civil judgments when accounting for these distinctions?

Figure 1 reveals that the judgments following a summons reveal a slightly different pattern than the judgments following petitions. The rise in petitions largely took place between 1983 and 1995, and again after 1999. Over the past 5 years, the rise in petitions has been very steep. The rise in summons cases has been more gradual over the years. To a considerable extent, the steep rise in petitions cases from 1992 can be ascribed to a shift within the category of family cases. In 1992 the filing of divorce cases changed from the summons procedure to the petition procedure.

25. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24.

26. During 1998-99, Statistics Netherlands reported only the number of judgments on summons and not on petitions. Van Velthoven, *supra* note 24, at 6. From 2000, Statistics Netherlands (CBS) reports about *both* types of decisions. CBS Statline, *supra* note 24.

27. See discussion *infra* Part C.1.

To a large extent, the increase in the total number of civil judgments can be ascribed to the increase in cases handled by the subdistrict courts, as shown in Figure 2.

*Civil Judgments: District and Subdistrict Courts, 1951-2004*²⁸

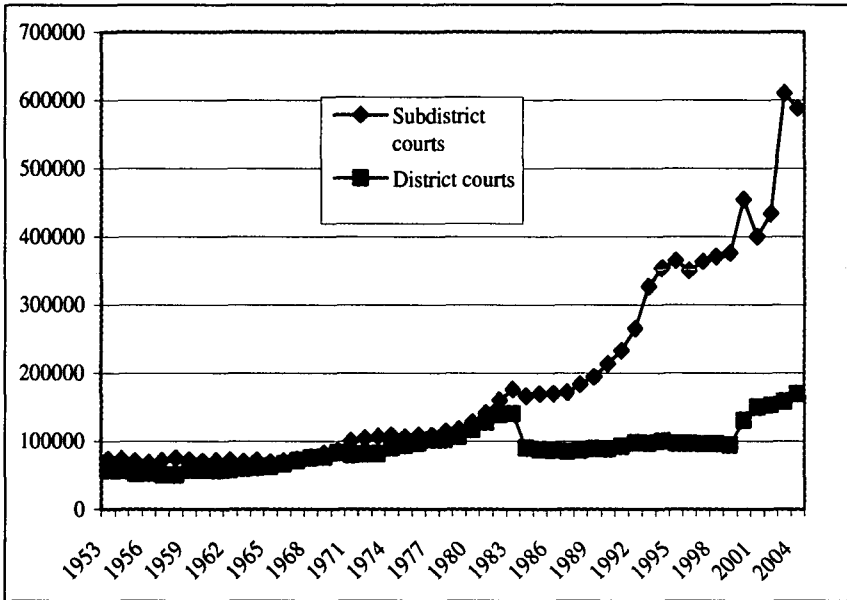


Figure 2

After 1983, the relative proportion of cases before the subdistrict courts has risen significantly. The sudden, sharp increase in cases handled by the subdistrict courts after 1999 and after 2002 can at least in part be ascribed to a change in the Dutch legal system in 1998, enlarging the competence of these courts. Commercial civil disputes with a value between 2,689 Euros and 4,538 Euros,²⁹ which used to be handled by the district courts, then became within the competence of the subdistrict courts. This led to a shift of a considerable number of cases from the district courts to the subdistrict courts (Eshuis and Paulides, 2002).³⁰ In 2002, with the transition to the euro, again an enlargement took place, though (much) smaller.³¹

In conclusion, we can observe a gradual, sometimes sharp increase in both summons and petitions. The increase is clearly stronger for the subdistrict courts than for the district courts. In part, this difference depends on the amendment of the law regulating the competence of the courts. The numbers do not confirm an eventual decline of "trial-like" procedures in the Netherlands.

28. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24.

29. The shift in maximum case value took place before the transition to the Euro, and was originally expressed in Dutch guilders: from Fl. 5,000 to Fl. 10,000.

30. R.J.J. Eshuis and G. Paulides, *From District to Subdistrict Court*, WODC (2002).

31. The maximum case value then shifted from Fl. 10,000 (4,538 Euros) to 5,000 Euros; an increase of about 10 percent.

1. Appeals

Van Velthoven found that the share of appeals (before the Courts of Appeal and before the Supreme Court) in the total number of civil judgments has been relatively constant over the years up to 1998, about 2 percent of the total number of civil judgments.³² In most recent years, we observe a slightly smaller share of appeals, varying between 1.1 percent and 1.4 percent. This is related to a rise in the *total* number of civil judgments, as shown in Figure 1. Figure 3 displays trends in the number of civil judgments by the Courts of Appeal.

*Courts of Appeal, Civil Judgments, 1951-2004*³³

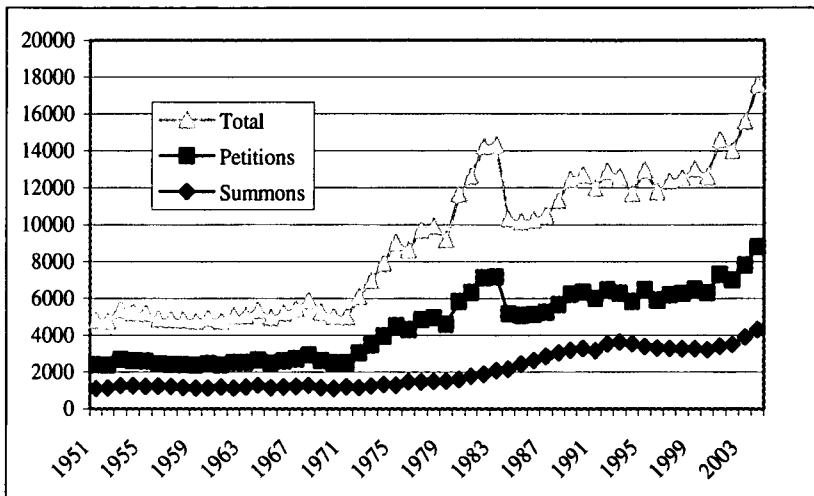


Figure 3

The total number of judgments by the Courts of Appeal reveals a steady increase between 1951 and 2004. This is consistent with the gradual increase in the overall number of civil judgments. Compared to the steady rise in the judgments on summons cases, the rising trend in petitions is highly unstable, with a large upward shift in 1972 and again in 1980, followed by a drop around 1985.³⁴

B. Controlling for Filings

Does the observed rise in civil judgments hold, when controlling for the total number of initial filings? Whether this is the case is revealed by Figure 4A-D. Figure 4A and B show the inflow (filings) and the outflow of summons and petitions cases in the district courts. The reason why we use the term 'outflow' rather than civil judgments is that it also includes other ways of disposition: settlements,

32. Van Velthoven, *supra* note 24 at 6.

33. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24.

34. There is also a clear upward trend in the number of decrees by the Supreme Court of the Netherlands (not shown). CBS Statline, *supra* note 24. The proportion of summons decrees to petitions by the Supreme Court is on the rise. *Id.*

intermediate judgments, and withdrawals.³⁵ Nonetheless, between 85 and 90 per cent of the outflow still consists of civil judgments. The outflow of summons cases in the district courts reveals a decline after 1992 (fig.4A).

*Summons Cases, District Courts 1986-2003*³⁶

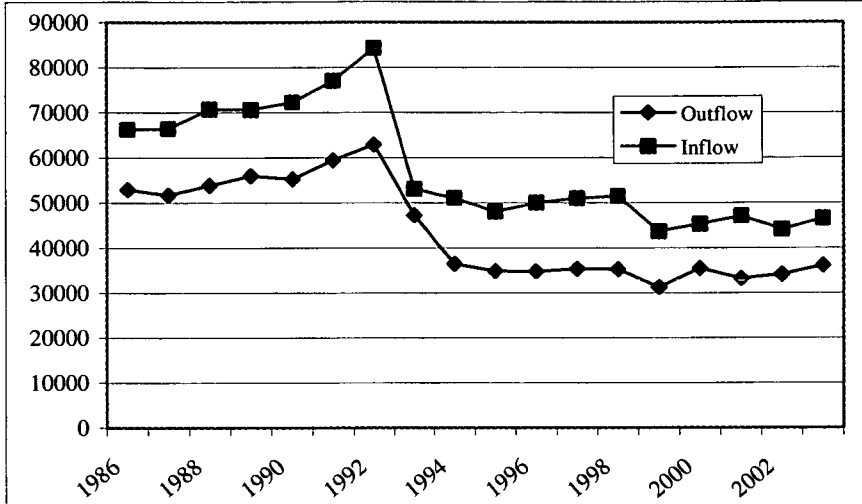


Figure 4A

There has neither been a significant rise nor a decline in case dispositions *relative* to filings. The inflow for the summons cases reveals a similar pattern than the outflow, although it is found to be at a higher level and slightly sharper. A slightly different picture emerges with respect to the petitions (fig.4B). The disposition of cases has been on the increase but fluctuating, while the filings reveal a slower and more gradual rise. The level of inflow, however, is structurally below the outflow level, particularly between 1993 and 2000. A possible explanation for this difference is that cases were handled more quickly in this period, causing a rise in outflow and a decline in the stock of filings at the same time. Finally, both the outflow and inflow of petitions have revealed a remarkably steep rise between 1992 and 1994, perfectly mirroring the aforementioned decline in summons cases in this period in Figure 4A. There is a simple explanation for this: in 1992, a change of regulations took place with regard to divorce cases in the district courts. Divorce cases were moved from the summons procedure to the petitions procedure.

35. Time-series data reporting about "outflow" rather than civil judgments were the only data available to allow for a reliable comparison with case filings, or inflow. These data were gathered and processed by the Council for the Judiciary in cooperation with WODC, the Research and Documentation Center of the Justice Department in the Netherlands. E.C. Leertouwer, et al., *Forecasting Models Judicial Chain: Civil and Administrative Cases*, WODC (Research and Documentation Center of the Dutch Ministry of Justice) and Council for the Judiciary, 64 (2005).

36. *Id.*

Petitions, District Courts, 1986-2003³⁷

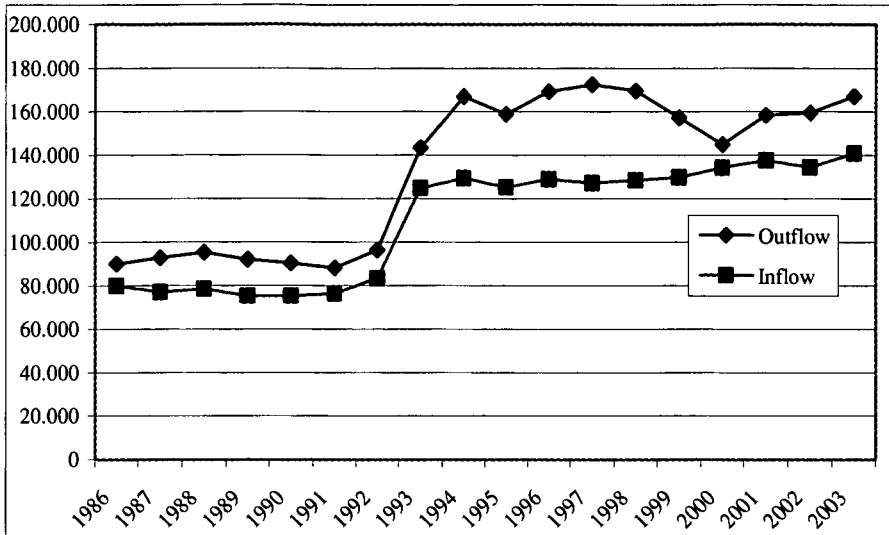


Figure 4B

Figure 4C and 4D depict the development in the number of cases before the subdistrict courts.

Summons, Subdistrict Courts, 1986-2003³⁸

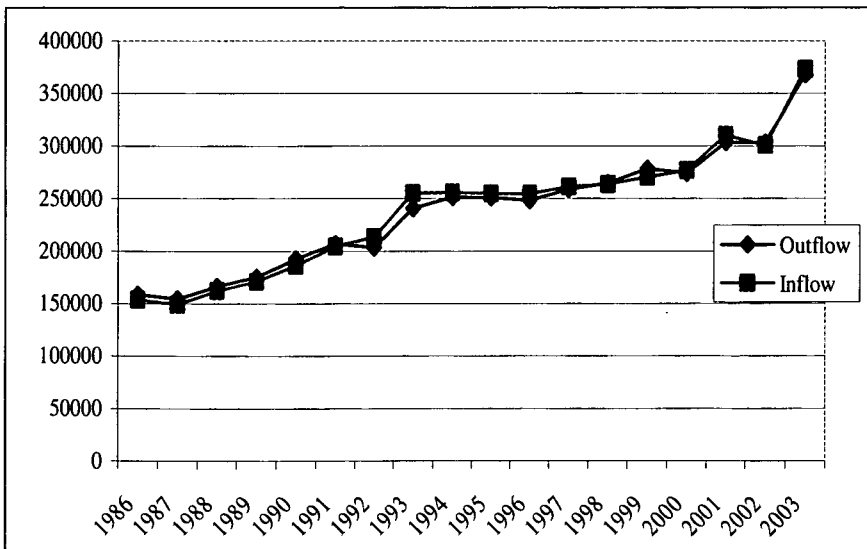


Figure 4C

37. *Id.*
38. *Id.*

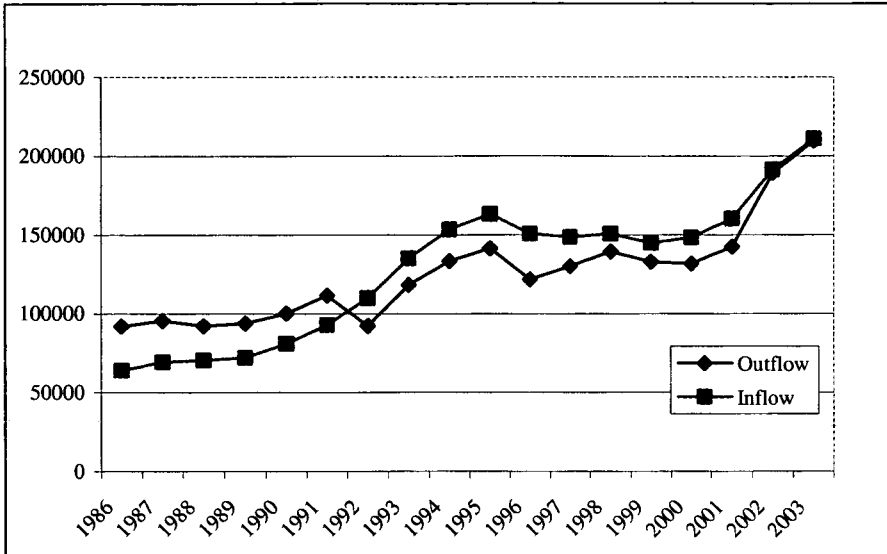
*Petitions, Subdistrict Courts, 1986-2003*³⁹

Figure 4D

The inflow and outflow of summons cases in the subdistrict courts are highly intertwined; both reveal a gradual rise over the past 17 years, and a steep rise after 2002. The recent increase may be ascribed to an expansion of the competence of the subdistrict courts, implying that civil cases with an interest up to 5,000 Euro were transferred from the district to the subdistrict courts⁴⁰ The summons cases before the district courts are largely debt cases, followed by damage claims and neighbor conflicts.⁴¹ To a lesser degree, the same is true for the petitions.⁴² Here, the rise in outflow is characterized by a number of fluctuations: a sharp rise in filings between 1986-1995, followed by a stable period up to 2000. In 2000 and 2003 we again observe a sharp increase of both the inflow and outflow of cases.

In conclusion, data from 1986 onwards show that the upward trend in civil case dispositions is equalled by the upward trend in filings. Over the years, the numbers of outflowing petitions differ more from the filings than summons cases. This is true for both the district and the sub-district courts. The outflow of summons cases in the district courts underwent a sharp decline after 1992.⁴³ The inflow pattern for the summons cases reveals a similar trend. In the district courts, the sharp decline of the outflow and the inflow of summons from 1992 is mirrored by the corresponding rise in petitions.⁴⁴ This can be ascribed to a change in regulations with respect to divorce cases. The overall picture shows that there has been neither substantial rise nor decline in the disposition of cases relative to filings.

39. *Id.*40. *Id.*41. *Id.* at 63.42. See *infra* fig.4D.43. See *infra* fig.4C.44. See *infra* fig.4D.

C. Breaking Down the Cases to Type

Thus far, we have observed a rise in the outflow of civil cases across the various case types and courts, except for the summons cases in the district courts before 2000 (nevertheless followed by a recent rise). To what extent can we differentiate between case type with respect to the observed rise in outflow? To investigate this question, we break down the total number of case dispositions into specific categories, like family, trade and labor related cases. The data on the various sub-types of outflow only cover the period between 1986 and 2003⁴⁵

1. Subdistrict Courts: Labor and Non-Labor Case

Figure 5 displays the index of the trend in civil cases handled by the subdistrict courts, broken down to case type (1988=100). The steady rise in civil summons cases (from about 150,000 in 1986 to 350,000 in 2003) can be ascribed to the rise in cases “by default” for about 80 percent.⁴⁶ These cases nearly always regard debt procedures. In cases by default the judge arrives at a decision despite the absence of (a reaction of) at least one of the parties in court.

The smallest category of labor-related cases reveals a slight, fluctuating increase from about 10,000 cases in 1986 to about 15,000 cases in 2003.

*Summons Cases Handled by the Subdistrict Courts, 1986-2003*⁴⁷

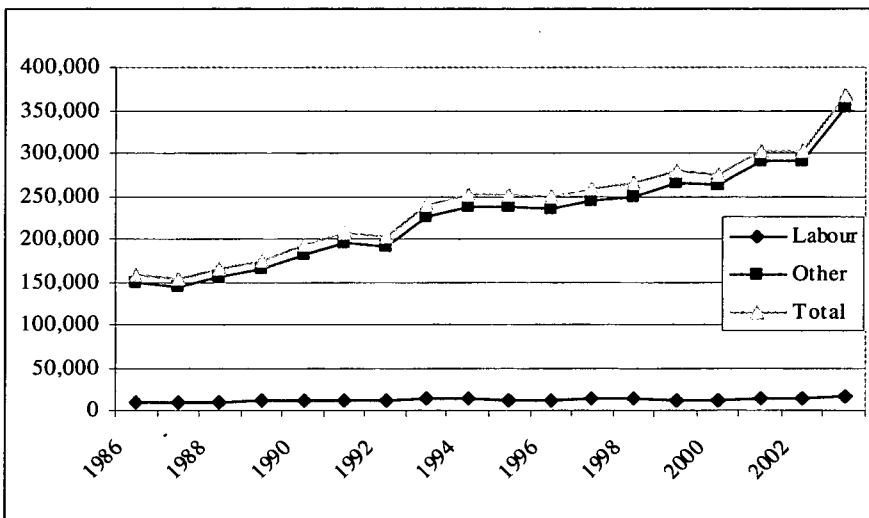


Figure 5

Again, the effect of the subsequent enlargements of the competence of subdistrict courts in 2000 and 2003 can be clearly observed.

45. Leertouwer, *supra* note 35.

46. CBS Statline, *supra* note 24.

47. Leertouwer, *supra* note 35.

The total number of petitions handled by the subdistrict courts (in absolute numbers), broken down to labor-related and other cases, is shown in Figure 6.

*Petitions Handled by the Subdistrict Courts, 1986-2003*⁴⁸

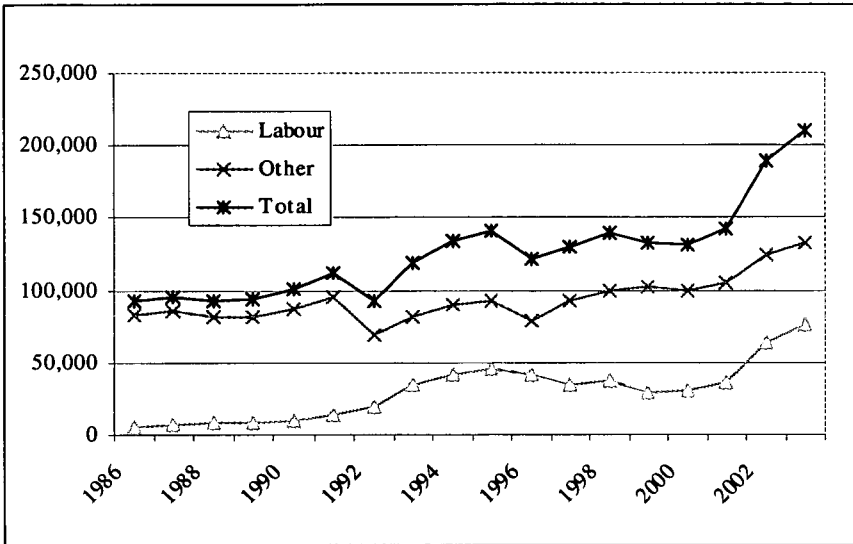


Figure 6

As indicated, the petitions cases before the subdistrict courts constitute the least trial like civil procedure. Labor cases reveal a rise between 1992 and 1995 and again from 2000 onwards, which is reflected in the total. This corresponds with the state of affairs of the Dutch economy. A weakening economy results in a rise of dismissals and, consequently, in a rise of labor cases before the court. Particularly after 1998, labor cases have been on the rise. While in 1997, the total number of labor cases was 34,915, it more than doubled to 75,323 in 2003. Apart from an autonomous rising trend, this can in part be ascribed to a new standard procedure used to handle dismissal cases more efficiently.⁴⁹

The (largest) category non-labor cases (other) reveals a gradual rise over the past seventeen years, despite small drops in 1991 and 1995. This category consists of family cases relating to allowance support, mentorship over financial and non-financial interests, guardianship and inheritance law.⁵⁰

Since many of these family cases are a consequence of divorce, their rising trend is likely to be correlated with the long-term increase in divorce rates.⁵¹

48. Leertouwer, *supra* note 35.

49. *Id.* at 74.

50. CBS Statline, *supra* note 24. Cases related to land lease (less than 100 yearly) and real estate rent (both not shown here) that are dealt with by the subdistrict courts occupy a very small share of the cases. *Id.* Cases regarding real estate rent have steadily decreased from about 3,500 in 1986 to 1,337 in 2003. *Id.*

51. See *tbl.1.*

*Divorce rates in the Netherlands, 1960-2004 (CBS Statline, 2005).*⁵²

Year	Divorce rate (per 1000 inhabitants)
1960	5,672 (0.49)
1970	10,317 (0.79)
1980	25,735 (1.82)
1991	28,277 (1.88)
1992	30,463 (2.01)
1993	30,496 (1.99)
1994	36,182 (2.35)
1995	34,170 (2.21)
1996	34,871 (2.25)
1997	33,740 (2.16)
1998	32,459 (2.07)
1999	33,571 (2.12)
2000	34,650 (2.18)
2001	37,104 (2.31)
2002	33,179 (2.05)
2003	31,479 (1.94)
2004	31,098 (1.91)

Table 1

2. District Courts: Family and Non-Family Cases

The sharp drop in the total of case dispositions between 1992 and 1994 can be fully ascribed to the sharp decline in family (divorce) cases as a consequence of the previously mentioned shift from family cases using the summons to the procedurally less extensive petitions procedure. The category named “other cases” has revealed a gradual increase in the 1986-1998 period, followed by stabilization up to 2003. This category consists of nearly 25 percent of summary procedures: cases in which a judicial decision is required on the very short term. Examples are cases related to the clearance of inhabitants from their houses, the denial of street access, and rectifications.⁵³

52. CBS Statline, *supra* note 24.

53. *Id.*

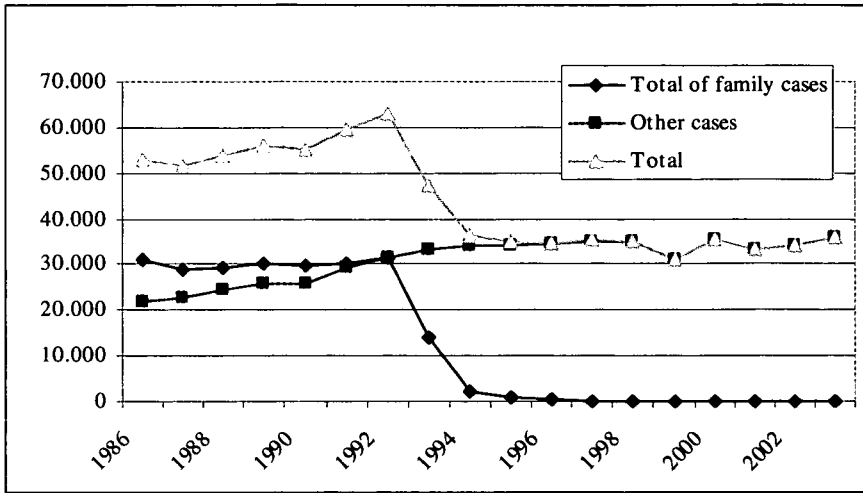
Summons Handled by the District Courts, 1986-2003⁵⁴

Figure 7

Figure 8 displays the various sub-types of petitions, disposed of by the district courts. The sharp increase in the number of family cases, particularly divorce cases, after 1992 is precisely in line with the aforementioned transfer of these cases from the summons to the petitions procedure. Between 1998 and 2000, the total number of petitions underwent a significant decline. Most likely, this decline can be ascribed to the drop in monetary family cases, as a consequence of the enlarged competency of the subdistrict courts.

With regard to insolvencies, no remarkable pattern can be distinguished; however, a slight increase can be observed after 1999. For one part, this may be related to the weakened economy. For another part, this is to be ascribed to the introduction of the Dutch Debt Adjustment Act (1998), through which overindebted natural persons can apply for a legal debt adjustment procedure if they are unable to reach a voluntary settlement with their creditors. The category named "other" consists of psychiatry cases and social welfare cases, and a category of cases. Psychiatry cases are related to a specific Act, regulating the enforced intake and treatment of people suffering from psychiatric disorders. These cases have been steadily on the rise.

In sum, except for shifts in family cases from one court to another, none of the sub-types of cases reveal a clear downward trend. Sub-types of cases that have clearly been on the rise are labor cases, various types of family cases, and cases related to the treatment of people with psychiatric disorders. Types of cases that have kept relatively constant over the past decade are divorce cases, cases related to lease and real estate rent, and insolvencies.

54. Leertouwer, *supra* note 35 (including family and other summons cases).

Petitions Handled by the District Courts, 1986-2003⁵⁵

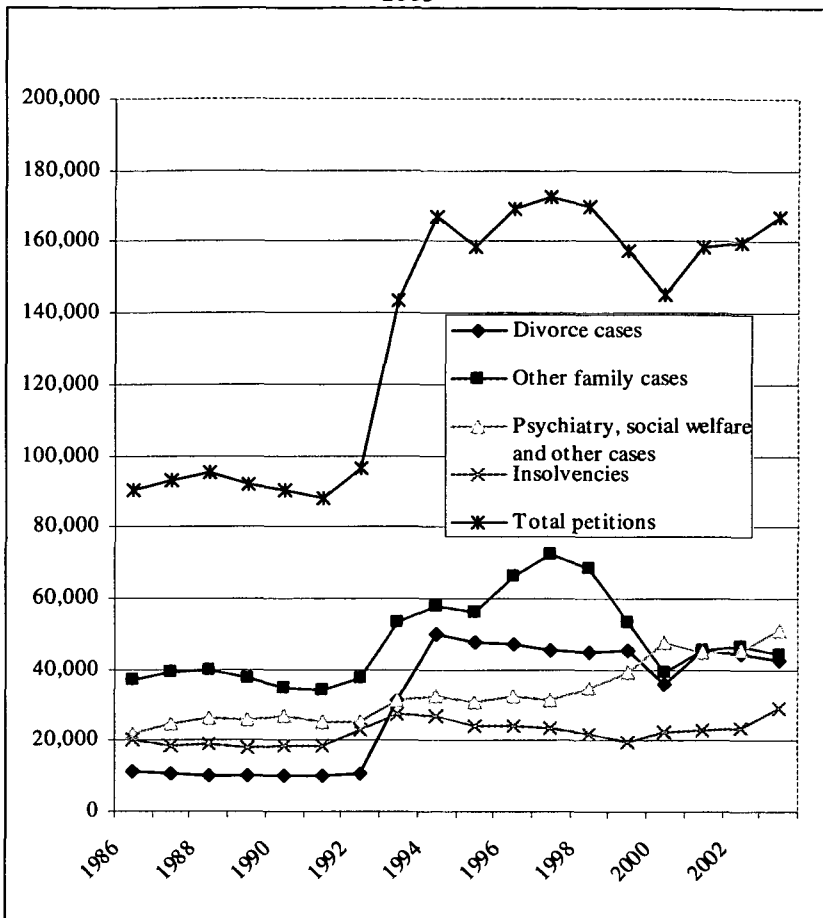


Figure 8

In conclusion, the overall rise in civil judgments seems to hold when differentiating among case types. However, we have obtained a more refined picture of where the largest increase in civil case dispositions has occurred: in the labor and family cases more than in the business-like cases.

D. Composition of Civil Case Dispositions

Not all cases disposed of are civil judgments. There are other ways in which cases are concluded, for example by withdrawal or settlement. The available data allow us to roughly break down the composition of civil case dispositions for the years 2001-2004, dividing these into: final judgments, withdrawals and other ways of case disposition.

55. *Id.*

*Composition of Total of Civil Cases Disposed of by District and Subdistrict Courts, 2001-2004*⁵⁶

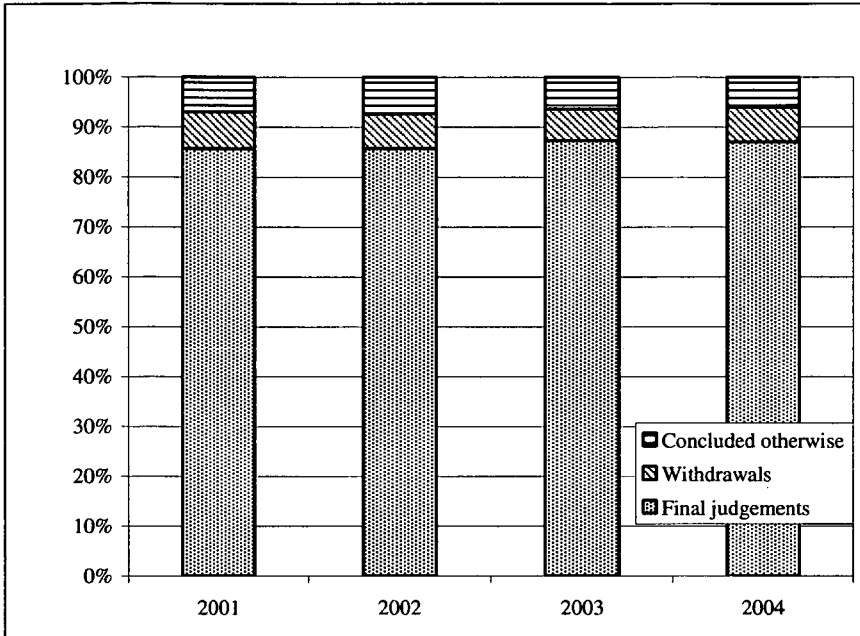


Figure 9

The composition of civil case dispositions by the district and subdistrict courts has been relatively constant over the past four years. The figure learns that around 85 percent of the total number of civil case dispositions are final judgments, either following a summons or a petition procedure. The formal endorsement of settlements between parties by a civil judgment constitutes an unknown part of this percentage. Less than 15 percent of the cases resulted in a withdrawal or other conclusion. For the summons cases, the share of withdrawals seems to be slightly higher than for the petitions (not shown). The proportion of “other ways of disposition” is more or less the same for summons and petitions.

In conclusion, the proportion of final judgments in the total number of dispositions can be considered high. What is more, the composition of case dispositions has been constant over the past four years. We are unable to observe a trend of ways of case disposition other than final judgments in the Netherlands.

E. Controlling for Trends in Macro-Economic Factors and Legal Activity

In the previous sections, we observed an overall rise in the number of civil cases that are filed before and disposed of by the Dutch courts. How does this overall rise relate to demographic and macro-economic developments in the Netherlands, such as population growth, GDP and indicators of legal activity? By pos-

56. CBS Statline, *supra* note 24.

ing these questions, we follow Galanter's approach towards understanding the vanishing of trials in the U.S.⁵⁷

In each of the below figures, we use the grand total of civil judgments, that is, all final judgments by the subdistrict and district courts, the Courts of Appeal and the Supreme Court.⁵⁸ Figure 10 displays the number of civil judgments per 1000 inhabitants.

*Civil Judgments per 1000 Inhabitants*⁵⁹

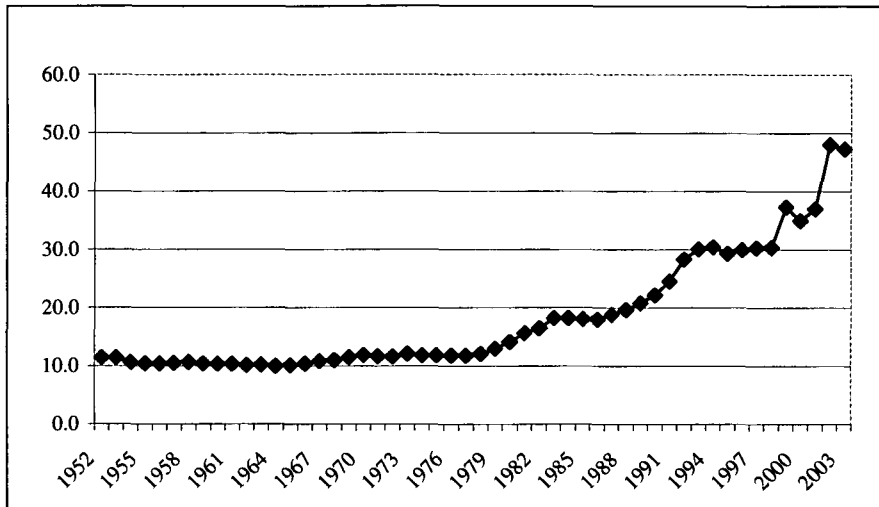


Figure 10

The total Dutch population increased from 10 million in 1950 to 16 million in 2004. However, population growth has not kept pace with the large increase in the number of civil judgments. The number of civil judgments per thousand inhabitants increased sharply: from 11.4 in 1952 to 47.2 in 2004.

Figure 11 shows the number of civil judgments per million of Euros gross domestic product (GDP) controlled for inflation, representing the relative weight of trials in the Dutch economy.⁶⁰ The economic weight of civil judgments appears to be on the rise over the years. Up to 1980 there was a downward trend in the number of civil judgments per 1000 Euros GDP, to be ascribed in large part to high inflation (the annual average between 1962 and 1980 is 6.5 percent). Between 1980 and 1996, the financial weight of civil judgments is again on the rise, in part caused by a relative decline in GDP and inflation. Apart from a few fluctuations, the recent trend is also upward.

57. Galanter, *The Vanishing Trial*, *supra* note 1; Galanter, *A World Without Trials*, *supra* note 1.

58. The share of appeals in the total of civil judgments is small (about 15 percent for the Courts of Appeal and about 1.5 percent for the Supreme Court). Excluding the appeals yielded similar pictures.

59. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24.

60. See fig.11.

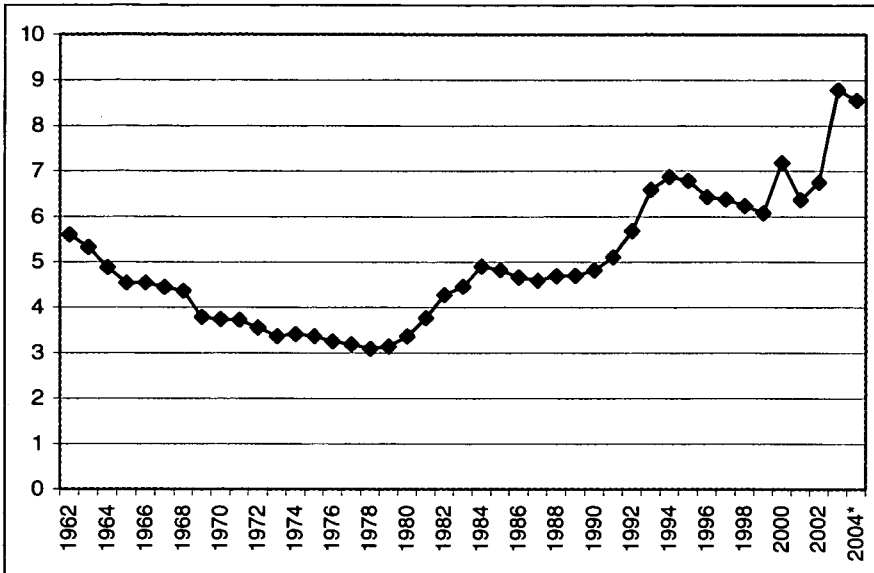
Civil Judgments per GDP Million Euros, 1953-2004⁶¹

Figure 11

Figure 12 reveals the number of civil judgments per member of court personnel (judges as well as administrative personnel) in the Netherlands.

Between 1951 and 2004, the total of judges and court personnel members (in full time equivalents) increased almost sixfold, from 2,420 in 1951 to 13,221 in 2003.⁶² The strongest increase in court personnel took place between 1995 and 2004: the personnel size in the district and the subdistrict courts increased by 50 percent; the personnel of the Courts of Appeal increased by 45 percent.

Despite the large absolute increase in court personnel, no clear long-term trend can be distinguished in the proportion of civil judgments relative to court personnel. After 2002, however, the proportion has revealed a rise. This might be indicative of an increase in court productivity.⁶³

61. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24. Figures have been corrected for inflation.

62. For the years after 1995, the time series by Statistics Netherlands (2005) on the number of court personnel members (including the office of the Public Prosecutor) reveal a number of holes. CBS Statline, *supra* note 24. To substitute for the missing years (1996-1998 and 2004), we took the less comprehensive figures by the Council for the Judiciary (2005) and added estimates of the number of personnel members in the Public Prosecutor's office (between 3500 and 4000 full time equivalents) to get an approximation of the *total* number of court personnel members.

63. Council for the Judiciary of the Netherlands, Annual Report 2004.

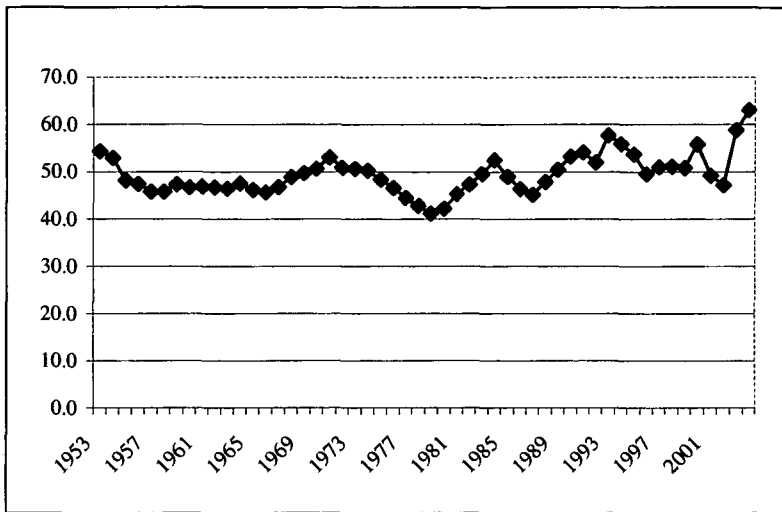
*Civil Judgments per Court Personnel Member, 1953-2004*⁶⁴

Figure 12

Figure 13 shows the number of civil judgments per registered attorney in the Netherlands over the years.

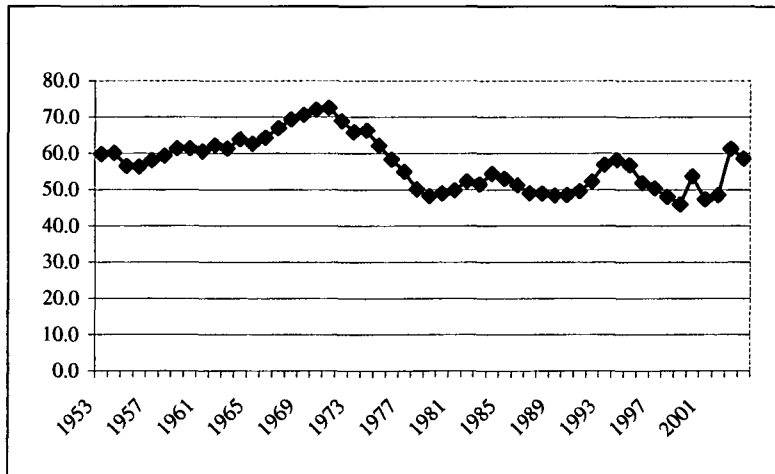
*Civil Judgments per Attorney, 1953-2004*⁶⁵

Figure 13

Over the years, the total number of registered attorneys in the Netherlands has revealed a steady increase, from around 2,000 in 1951 to 13,111 in 2004. The

64. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24.

65. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24; Netherlands Bar Association (2005).

figure reveals that, between 1973 and 1980, the number of civil judgments per registered attorney in the Netherlands has dropped. Since 1980, the proportion has been fluctuating, showing no clear trend. Nonetheless, peaks are observed between 1991-1995 and after 2003.

The trend in Figure 13 strongly resembles the trend in the previous Figure 12, on the proportion of civil judgments relative to the amount of court personnel. Apparently, the amount of court personnel and lawyers, both indicators of the "supply side capacity" of justice, have undergone similar developments.

Figure 14 reveals the trend in the number of civil judgments per 1000 Euro budget of the Justice Department, corrected for inflation.

Number of Civil Judgments per 1000 Euro Budget of the Justice Department, 1952-2004⁶⁶

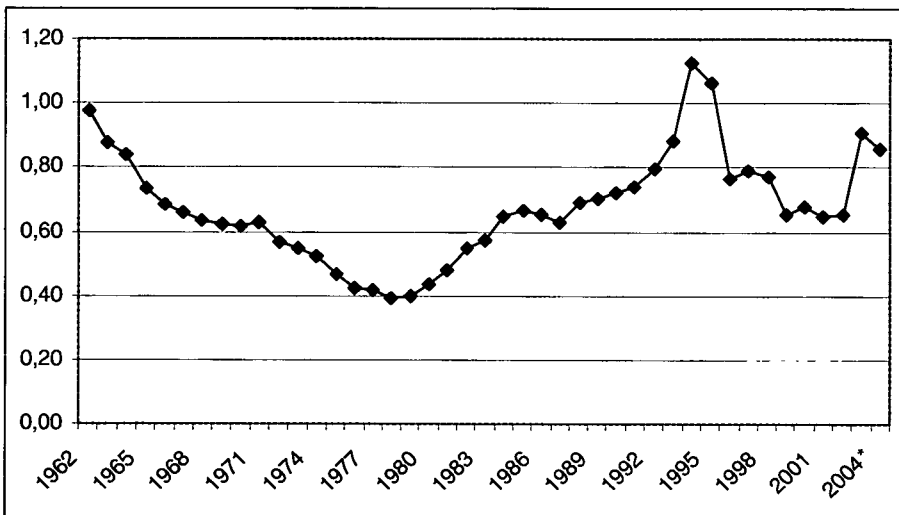


Figure 14

The monetary importance of civil judgments in the total of activities deployed by the Justice Department has fluctuated significantly over the past decades. Between 1962 and 1979, the monetary weight of civil judgments in the budget of the Justice department decreased (in part due to high inflation rates). Between 1979 and 1994, this trend was transformed into a steady increase. Apparently, more activities of the Justice department then regarded civil court cases. The rise is in line with the absolute rise in civil judgements as shown in Figure 1 of this article. In 1994, the trend ceased to rise, and a decline set in, followed by recent fluctuations.

The budget for legislation and civil and administrative litigation has made up between 25 percent and 33 percent of the total budget over the years and has in-

66. Van Velthoven, *supra* note 24; CBS Statline, *supra* note 24. Figures have been corrected for inflation.

creased accordingly. This is in contrast with the declining financial support in the U.S. (cf. Galanter and Lande, this volume).⁶⁷

Figure 15 reveals the relative proportion of civil judgments relative to the stock of laws and regulations in the Netherlands over the past decades.

*Proportion of Civil Judgments to Stock of Laws and Regulations, 1953-2000*⁶⁸

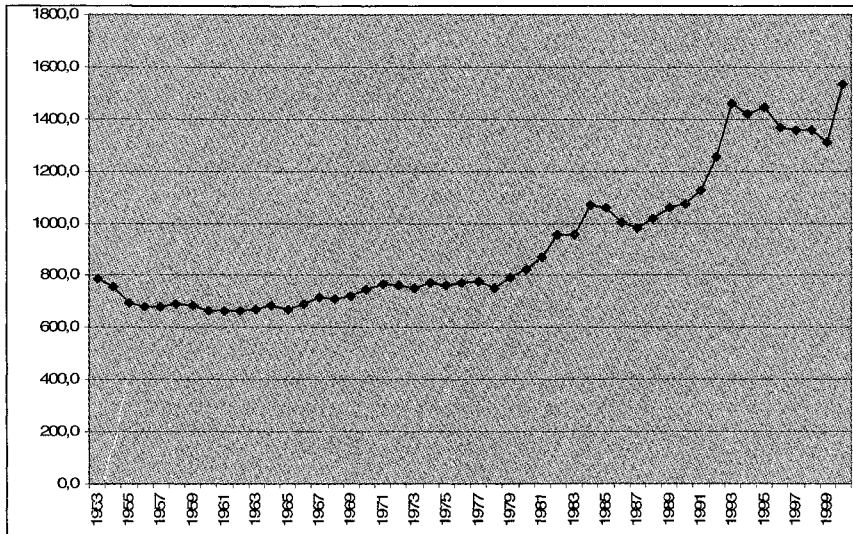


Figure 15

Figure 15 is based on estimates by Van Velthoven of the stock of laws and regulations in the Netherlands.⁶⁹ The numbers on the y-axis represent the proportion of civil judgments relative to Van Velthoven's proxy, and lack substantive meaning. The most important part of the figure is the trend over the past decades. We used Van Velthoven data because it is the most complete with respect to coverage in time.⁷⁰

In conclusion, the observed steep rise in the total number of civil judgments in the Netherlands still stands after controlling for population growth and GDP, as well as for the stock of laws and regulations. The rise in judgments is more or less paralleled by the increase in other "legal indicators" such as the number of court personnel members, and the number of registered attorneys. For the share of civil judgements in the total justice budget, the picture is less clear.

67. Galanter, *The Vanishing Trial*, *supra* note 1; Galanter, *A World Without Trials*, *supra* note 1.

68. Van Velthoven, *supra* note 24, at 29-30. This estimate has been based on a proxy, i.e. the yearly number of editions within a special series of publications regarding the stock of laws and regulations. This number of editions fluctuates between 151 in 1953 and 386 in 2000.

69. *Id.* at 30.

70. Between 1995 and December 2003, a total of 8,688 pieces of legislation and regulation have been adopted or amended. See EDWIN DE JONG, ALLE REGELS TELLEN?: DE ONTWIKKELING VAN HET AANTAL WETTEN, AMVB'S EN MINISTERIELE REGELINGEN IN NEDERLAND 19-25 (2004), available at http://www.wodc.nl/onderzoeken/onderzoek_348.asp?loc=/ (last visited May 1, 2006).

IV. TOWARDS EXPLANATIONS FOR THE TRENDS IN CIVIL CASES IN THE NETHERLANDS

The previous section learned that civil trials in the Netherlands are by far not on the decline, but rather, on the rise. A number of specific areas were identified where the rise in trials is steeper than elsewhere. In the first place, family cases related to allowance support, mentorship over financial and non-financial interests, guardianship and inheritance law as well as labor-related cases, have been on the increase, whereas divorce cases have been relatively constant over the past decade. In the second place, the rise in civil final judgements has been largest for the subdistrict courts (and to a lesser extent, for petitions). As described in section 2, the procedure before the subdistrict courts and the petitions procedure are less comprehensive than the procedure before the district courts. This might imply a shift to less trial-like forums.

In this section, we address the question why trials are not vanishing in the Netherlands (as of yet). When explaining trends in the number of cases, we distinguish between short-term policy factors—like changes in laws and regulations—on the one hand, and long-term social (-economic) macro factors on the other hand. Long-term explanations can hold despite short-term institutional changes; that is, a long-term trend can reveal short-term “bumps.”

We will come up with a number of explanations for the found trends. To a large extent we will build upon empirical insights from two Dutch quantitative, longitudinal studies in which socio-economic, socio-legal and a number of other explanations were simultaneously tested on a time-series data set.⁷¹ Subsequently, we will assess whether and to what extent these empirical explanations are in line with the four clusters of explanations for the decline in trials across the United States by Galanter.⁷²

A. Short-Term Explanations

In the previous section, we highlighted a number of changes in laws and regulations that help explain (sudden) shifts in the number of civil judgements.

First, we showed the effect of a shift in 1998 of commercial civil disputes with a value between 2,270 and 4,538 Euros away from the district courts to the subdistrict courts. This resulted in a significant decline of civil cases before the district courts around 1999, and a corresponding increase in cases before the subdistrict courts. A renewed though smaller shift took place in 2002, with the transition to the Euro.

Second, the court fee for civil (and administrative) trials was raised by an overall average of 7.5 percent in 1999.⁷³ This might have caused small incidental drops in the total number of civil cases. However, the overall long-term trend in the total of civil judgements displays a strong increase.

71. See generally Van Velthoven, *supra* note 24; Leertouwer, *supra* note 35.

72. See generally Galanter, *The Vanishing Trial*, *supra* note 1; Galanter, *A World Without Trials*, *supra* note 1.

73. Another raise by 15 percent took place in 2004.

Third, the amendment of the divorce law in 1993 accounts for a significant decline in family cases before the summons procedure, as cases were moved from there to the less trial-like petitions procedure.

Fourth, the sudden rise in labor cases around 1998 can be partly ascribed to a new standard procedure to handle dismissals more efficiently (as shown in section III-C.1).

B. Long-Term Explanations for Trends in Civil Case: Two Empirical Studies

Van Velthoven was the first to perform quantitative explanatory analyses on the (upward) trends in civil cases over the past decades.⁷⁴ He developed an econometric model for the explanation of civil filings over time, thereby integrating socio-legal, socio-cultural and socio-economic factors. The model is estimated using yearly time series of the appeal to and the judgements by the judiciary in the civil and administrative sectors between 1951 and 2000.

In 2005, Van Velthoven's findings were more or less replicated by the first version of a forecasting model for civil and administrative filings, using data for the period of 1986-2003.⁷⁵ The model strongly resembles Van Velthoven's model, although the composition of indicators in some clusters of explanatory factors is slightly different. Moreover, the WODC/Council model not only involves variance over time, but includes variance between the 19 district courts, 5 Courts of Appeal and the Supreme Court.

For the purpose of this article, we only focus on civil cases in the description of the findings by the models. What is more, we restrict ourselves to the explanations tested by empirical analyses. In theory, many other relevant factors may explain for civil judgments.⁷⁶ Yet the explanatory factors in the two models were partly chosen on the basis of the availability of data covering the intermediate to long-term.

The first cluster of explanatory factors has been derived from the 'problem frequency' theory, in which people's legal problems are expected to depend on their socio-economic situation and their participation in society.⁷⁷ Substantive indicators of problem frequency are considered the percentage of people in social security, population density, divorce frequency, unemployment and the proportion of immigrants in society.⁷⁸ Apart from these indicators, the WODC/Council

74. The author notes that (along with our observation in the previous section) the trends in civil judgements are largely in line with the trends in civil filings. Differences can be explained away by shifts in laws and regulations.

75. See generally Leertouwer, *supra* note 35. This model was set up to provide a more solid basis for the yearly budget of the Ministry of Justice, and to render the process of preparing the budget more transparent. The model has been developed by the Research and Documentation Center (WODC) of the Dutch Ministry of Justice in co-operation with the Dutch Council for the Judiciary [*hereinafter* WODC/Council model].

76. For suggestions and examples, see *infra* Part IV and V.

77. See generally Gresham M. Sykes, *Legal Needs of the Poor in the City of Denver*, 4 LAW & SOC'Y REV. 255 (1969).

78. Van Velthoven, *supra* note 24, at 7-9.

model also includes the composition of the population in terms of age (proportion of juveniles, labor force and elderly).⁷⁹

Unemployment was found to have a negative effect on the number of filings in both studies. Possibly, more “tension” at the demand side of the economy leads to more civil filings. No straightforward, significant effects of any of the other problem frequency indicators on the number of civil filings were found.⁸⁰

The second cluster of explanations reflects the socio-cultural situation in society. Once problems have come up, they are sometimes translated into a legal case.⁸¹ Salient socio-cultural macro-indicators assumed to affect this transformation are the density of laws and regulations and indicators of (decreased) social cohesion. The density of laws and regulations was considered relevant because these determine the extent to which problems can actually be transformed into legal problems. Decreasing social cohesion was considered relevant because (a) due to lack of convergence between attitudes and behaviour, the probability of problems is higher; (b) it becomes less likely that parties undertake joint action to resolve a problem outside the court room. Van Velthoven has brought up a number of indicators for decreasing social cohesion: secularization, divorce frequency and the proportion of foreign inhabitants.⁸² The WODC/Council model added to these indicators the “share of single-person households,” “mobility” (moves) and the number of acts of violence and other public order disturbances.⁸³

The density of laws and regulations was found to have no significant effect on civil filings. What is more, no independent effect was found of the social cohesion-indicator “divorce frequency” on the number of civil filings. Van Velthoven found a positive effect of the proportion of immigrants on filings. However, no effect was found in the WODC/Council model.⁸⁴

Third, apart from the social-cultural factors, socio-economic resources such as education, income, and professional status are deemed relevant, because these determine the extent to which parties know how to resolve a problem. However, no effect with respect to these variables was found on civil filings.

The fourth cluster of explanatory factors reflects insights from the economic theory of litigation, which is based on a rational choice perspective: only if the parties’ benefits of going to court outweigh the costs, will they proceed to adjudication. Relevant indicators for the costs of going to court are the costs of a lawyer, court fees, and the duration of a court procedure.

In line with the expectations in both studies, each of the three cost indicators were found to negatively affect the number of case filings. Van Velthoven found that a simultaneous raise of the costs of a lawyer and court fees by 1 percent causes a decrease in filings of 0.18 percent.⁸⁵ Decreasing the average duration of

79. See Leertouwer, *supra* note 35.

80. When performing the same analysis on the number of *final judgments*, Van Velthoven found none of the indicators of problem frequency to have a significant effect. See *id.*

81. See generally William L.F. Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming Claiming*, 15 LAW & SOC’Y REV. 631 (1981).

82. Van Velthoven, *supra* note 24.

83. See Leertouwer, *supra* note 35; see Van Velthoven, *supra* note 24.

84. See Leertouwer, *supra* note 35.

85. See Van Velthoven, *supra* note 24.

a case by 1 month would cause a yearly increase in civil summons of 132 cases per 100,000 inhabitants.⁸⁶

The final cluster of empirically assessed explanations regards the supply capacity. Court filings in times of over-demand depend on the available supply of court and related resources, of which substantive indicators are personnel size, the number of lawyers and the number of criminal cases per 100,000 inhabitants.⁸⁷ Filings were found to increase with an increase in available lawyers, but not in the other capacity indicators.

In conclusion, indicators of problem frequency make the largest difference for case inflow. Particularly, the economic variables such as unemployment have a (negative) effect on civil filings: the more unemployment, the less filings. Van Velthoven concludes from this that filings increase with enhanced demand-side “tension” in the economy.⁸⁸ Indicators of *costs* of going to court come in second, particularly lawyer costs and court fees. These were found to sort the expected negative effect on the number of civil case filings. The supply of justice, i.e. legal infrastructure (especially the number of lawyers) has substantial predictive power. One wonders why. Are lawyers discovering previously hidden demand, or is it a consequence of rent-seeking professionals?

These recent empirical findings suggest that the call for justice ought to be addressed by a combination of various (partial) prevailing theories. Civil filings are not exogenous, but are determined by developments in society, such as (economic) problem frequency indicators and supply capacity (of lawyers). The costs of going to court indeed seem to dampen the demand for justice; but overall, the effects of costs do not outweigh the (positive) effects of societal developments.⁸⁹

1. How do the Explanatory Factors Cause Civil Filings?

The explanations by Van Velthoven are purely ‘macro’, in the sense that the micro or meso-level mechanisms causing the long term trends in the total of civil cases remain unknown. For instance, Van Velthoven concluded from the negative effect of unemployment that supply side tension in the economy ‘apparently’ causes more filings.⁹⁰ A possible underlying mechanism behind this finding might be that, in a situation of less unemployment, more people are in the labor process and hence run a higher risk of conflict with employers or other parties. This would be in line with participation theory.⁹¹ However, other mechanisms

86. *See id.* Apart from indicators of the costs of going to court, Van Velthoven derived indicators for the *benefits* of going to court by comparing these with *alternatives* to a court procedure, such as legal insurances and ADR. *Id.* at 14. He also argued that average available income determines the capacity of parties to bear the costs of going to court. *Id.* None of these variables made a significant contribution to civil case filings, however. *Id.*

87. *Id.* at 15-16.

88. *Id.* at 22.

89. In their concluding remarks, the authors pleaded for more research to enhance the explanatory power of their models. Van Velthoven aimed to include more information on a number of potentially crucial explanatory factors, including the financial size of disputes, the costs and benefits of ADR, as well as supply side capacity. *See id.* The authors of the WODC/Council model have devised an analysis of the impact of legislation, policy and jurisprudence on both the inflow and the outflow of cases to and from the courts. *See Leertouwer, supra* note 35.

90. Van Velthoven, *supra* note 24, at 22.

91. *See Sykes, supra* note 77, at 259-68.

causing a similar effect are also thinkable. For example, more employment generates more disposable income, rendering a court procedure less expensive in relative terms. On the basis of these arguments, we would plea for a research design by which the existence of such mechanisms can be assessed (see section 5).

C. Explanations for Vanishing Trials Revisited

Galanter argued that fewer cases that come to court become full-blown trials.⁹² Galanter introduced four clusters of explanations for the vanishing of civil (and criminal) trials in the U.S.⁹³ We will assess for each of these clusters to what extent it is applicable to the Dutch case.

1. Diminished Supply

Galanter argued that in the U.S., fewer cases are resulting in a trial because they did not get to court in the first place, or, having come to court, departed for another forum.⁹⁴ This “diminished supply” may have to do with a change in the mix of cases being filed, as fewer cases were found in trial-prone categories. This in turn may be related to a change in litigants’ strategies. For example, defendant corporations are more averse to the risk of trial than ever. With regard to the U.S., Galanter found that empirical support for this explanation was lacking.⁹⁵ Despite the finding that filings decreased, however, trials decreased much more. This finding underlines that we ought to identify different sets of factors, explaining filings on the one hand and trials on the other hand.

In the previous section, we showed that neither civil judgments nor case filings have vanished in the Netherlands. By contrast, over the past few years, filings increased by 8 percent in the district courts and by no less than 20 percent in the subdistrict courts. Yet not all types of case filings are on the increase. While labor-related cases, commercial cases and family cases related to allowance support, mentorship and inheritance law have been on the increase over the past decade; divorce cases have been relatively constant.⁹⁶ What is more, the large growth in filings before the subdistrict courts, together with the (smaller) rise in petition procedures, might indicate a shift to less “trial-like” forums.

2. Diversion

In the U.S., for many types of cases, politicians and business elites have embraced alternative dispute resolution (ADR) as an alternative preferable to courts

92. Galanter, *A World Without Trials*, *supra* note 1.

93. See Galanter, *The Vanishing Trial*, *supra* note 1, at 515-22; Galanter, *A World Without Trials*, *supra* note 1.

94. Galanter, *The Vanishing Trial*, *supra* note 1, at 516.

95. *Id.*

96. These findings relate to the filings of these types of civil cases. Civil cases regarding allowance support, guardianship and inheritance law are often consequences of divorce; a single divorce case may trigger the filing of various other family cases.

and trials.⁹⁷ However, this “diversion” argument finds no straightforward empirical support in the U.S., because the decline in trials is not confined to sectors where ADR has flourished.⁹⁸

Since the 1960’s, Dutch legal culture could be characterized by “informal pragmatism,” as apparent in a pragmatic public administration, a mild penal climate and a relatively informal civil justice.⁹⁹ This informal pragmatism encompassed, among other things, a variety of pre-trial and out-of-court alternatives. This accounted for relatively low litigation rates. Over the last decade, however, a slow process of legalization and formalization has taken place. The density of laws and regulations has increased.¹⁰⁰ A clear example is the adoption of a general law governing administrative procedures (AWB). This decline in “informal pragmatism” may well have led to the growing number of case filings in the Netherlands.

Decreasing informal pragmatism may also reflect a decreasing amount of interpersonal trust within Dutch society.¹⁰¹ The Social Cultural Planning Office (SCP) found that 55 percent of the Dutch population has trust in other people.¹⁰² In socio-legal theory, theoretical concepts such as social relationships and trust have won ground in the explanation of dispute resolution behaviour.¹⁰³ Particularly, social capital theory has yielded useful insights.¹⁰⁴ Social capital refers to the total of tangible and intangible resources such as information, money and skills that people can obtain through the social networks in which they find themselves. Social capital generates social trust; either on the societal level, or between individuals.¹⁰⁵ Given mutual trust, people are less inclined to cause legal disputes at all. What is more, if trust abounds, people may choose informal ways of resolving disputes, which also leads to a decrease in the number of filings.

3. Costs

Vanishing trials are likely to be related with an increase in the costs of trial.¹⁰⁶ Cases have become more technical and complex, and therefore, more expensive from a financial viewpoint as well as in terms of duration. In addition, lawyers

97. See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843 (2004). Stipanowich even perceived an increase in institutionalized forms of ADR.

98. Galanter, *The Vanishing Trial*, *supra* note 1, at 517.

99. See Erhard Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, 28 LAW & SOC’Y REV. 789 (1994); ERHARD BLANKENBURG & FRIEK BRUINSMA, *DUTCH LEGAL CULTURE* (1994).

100. See Van Velthoven, *supra* note 24; DE JONG, *supra* note 70.

101. See SOCIAAL EN CULTUREEL PLANBUREAU, *DE SOCIALE STAAT VAN NEDERLAND* (2005), available at http://www.scp.nl/publicaties/boeken/9037702023/Sociale_staatsaat_van_Nederland_2005_kopieerbaar.pdf (last visited May 1, 2006).

102. See *id.*

103. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

104. See generally Ronald S. Burt, *The Network Structure of Social Capital*, in 22 RESEARCH IN ORGANIZATIONAL BEHAVIOR 345 (Barry M. Staw & Robert I. Sutton, eds., 2000); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* (1990); Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

105. See PUTNAM, *supra* note 104, at 65-66; ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 15-30 (2000); Burt, *supra* note 104, at 346-57.

106. Galanter, *The Vanishing Trial*, *supra* note 1; Galanter, *A World Without Trials*, *supra* note 1.

and experts are becoming increasingly expensive, pricing some parties out of the market.

The cost argument was unambiguously sustained by the findings from the two Dutch empirical studies described in this section. Both lawyer costs and court fees were found to have a dampening effect on the total number of civil filings; as well as on civil judgments. However, the cost effects were not large enough to outweigh the positive effects of specific “problem frequency” indicators (like unemployment) on the total number of filings.

In terms of duration, civil procedures in the Netherlands appear to have become less costly over the past few years. Cases have taken less time; and the proportion of summary proceedings has increased.

4. *Managerial Justice*

A fourth and final explanation offered by Galanter is the rise of a new style of judging: managerial justice.¹⁰⁷ Galanter describes managerial justice as a change in institutional practice and ideology. Judges have come to see themselves more as problem-solvers than as judges presiding at trials. They have developed as case managers in the early stages of litigation, promoting settlements and clearing dockets. This would have led to a decrease in adversarial, expensive and long-lasting trials.

D. The Recent Rise of Managerial Justice in the Netherlands

Managerial justice as Galanter describes it, shows similarity to what only recently has started to happen in the Netherlands. While in the U.S., managerial justice is largely induced by declining funds¹⁰⁸ budget and personnel in the Netherlands have increased. In contrast with the U.S., the major impetus for managerial justice has come from the justice department within the Dutch central government. Confronted with rising numbers of civil, administrative and criminal cases and limited financial means, the Dutch government felt the need to increase the managerial capacity, the efficiency and the productivity of the (civil) justice system. There are a number of concrete indications for this government-induced tendency towards managerial justice.

1. Management of the Court System

In 2002, the national Council for the Judiciary was established to improve the management of the court system. This Council has directive and supervisory powers where the (financial and administrative) management of the courts is concerned. The tasks of the Council for the Judiciary include the allocation of budg-

107. Galanter, *The Vanishing Trial*, *supra* note 1, at 519.

108. See John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Things Needed to Administer Justice*, 2006 J. DISP. RESOL. 213.

ets, personnel policy, use of ICT and accommodation.¹⁰⁹ The Council was also given the task of promoting the quality and efficiency of the judiciary system and advising on new legislation. Also in 2002, each court obtained its own managerial council, chaired by the court president. This council is charged with the general management and day-to-day operation of the court. It is responsible for both management (in terms of finance, personnel, organization and information) and judicial policy.

2. *More Efficient Court Procedures*

To shorten the duration of court procedures, a number of instruments have been deployed over the past few years.¹¹⁰ The first one regards the implementation of efficient work processes by the court administration. Several measures have been taken to reduce duration. These measures include maximum terms for every procedural step, the removal of a number of procedural sidesteps, and specific requisites for summons and petitions, for instance relating to the sort of information these have to contain. A second instrument regards a more active role of the (civil) judge. Early in the process, if the judge deems it useful, he has the authority to hold a meeting in which he can try to reach a settlement. Moreover, he can use this opportunity to gather more information and to plan further proceedings.

3. *Better Utilization of Court Capacity*

A number of instruments were deployed to enhance the efficient utilization of existing judicial capacity. First, co-operation between courts has been on the increase, on management issues as well as with respect to content in various areas of specialization. This was done to more evenly spread the workload and at the same time to enhance the exchange of specific knowledge between the courts. Enhanced co-operation may lead to increased efficiency.

A second instrument is the so called “flying brigade,” a temporary organization of judges and lawyers (staff) who are called up to assist courts with high caseloads.

A third instrument of more efficient capacity utilization is the possibility to deploy non-judicial actors to relieve the courts of part of the workload.

The enlargement of the competency of the subdistrict courts can be seen as a fourth instrument to improve the utilisation of court capacity. Few cases are brought before the district courts, and more cases are brought before the subdistrict courts, where single judges rather than a full-bench division can efficiently pass judgment. An earlier example is the transfer from divorce cases from the summons procedure to the less intricate petitions procedure.

109. De Rechtspraak, The Judiciary System in the Netherlands, available at <http://www.rechtspraak.nl/Information+in+English/default.htm> (last visited Apr. 8, 2006).

110. See Roland J.J. Eshuis, *Sneller Procederen: Empirisch Onderzoek Naar de Afdoening van Civiele Bodemprocedures*, in *VERSNELLINGSBELLEID IN DE RECHTSPRAAK: RESULTATEN EN REFLECTIES* 7, 7-49 (A. Klijn, et al., eds., 2005), available at http://www.rechtspraak.nl/NR/rdonlyres/B8826675-1Df7-4146-8FFc-6B3191864E49/0/RVR_RECHTSTREEKS_205_DEF.pdf (last visited Apr. 8, 2006).

4. Stimulation of ADR

For a few years now, the Dutch courts have stimulated mediation as an alternative means to resolve disputes; under certain conditions, judges can refer cases to a mediation procedure.¹¹¹ Today, a large variety of mediation, arbitration and binding advice procedures is in place.¹¹² These procedures all provide a cost-effective and speedy alternative to court, by offering dispute resolution processes that are tailored to the particular needs of parties. Knowledge on the demand for and the outcomes of ADR procedures in the Netherlands is currently growing, as many ADR institutions have started to issue yearly reports.¹¹³ For example, the commission for real estate rent (“Huurcommissie”) reported a yearly inflow of about 65,000 cases. Other large ADR procedures in civil law are binding advice in consumer disputes (about 12,000 complaints were filed in 2004); and arbitration and mediation in the building sector.

The above mentioned activities, presented under the common denominator of “managerial justice” only started a few years ago. At this moment it is probably too early to expect a significant effect on the number of cases and their disposition. However, it is quite imaginable that in the coming years all these measures will sort effect, resulting in a decreasing number of trial-like procedures.

E. Five Overlapping Trends

Galanter described five “scenarios” in which he reflects on the situation with respect to trials in the U.S.¹¹⁴ We apply these scenarios to the Dutch situation and will sketch five trends.

First, we recognise what Galanter characterized as convergence to mainland European practice. As we described at the beginning of this contribution, Dutch court procedures have been less adversarial and based more on written documents than (jury) trials in the U.S. by tradition. Nevertheless, Dutch legal practice has been subject to significant changes. Less trial-like procedures, such as the use of the petitions procedure and subdistrict courts have been explicitly promoted over the past decade. What is more, court management has received much attention recently. Examples are the institution of the Council for the Judiciary and the promotion of efficient and shorter procedures. In line with Dingwall’s remark with respect to England, these processes have still resulted in civil judgements rather than replaced them.¹¹⁵ Nevertheless, judges are increasingly encouraging

111. See L. COMBRINK-KUITERS, E. NIEMEIJER & M. TER VOERT, *RUIMTE VOOR MEDIATION* (2003), available at http://www.wodc.nl/onderzoeken/onderzoek_181.asp (last visited May 1, 2006); Niemeijer & Pel, *supra* note 11, at 345-347.

112. See ALEX F.M. BRENNINKMEIJER, MICHAEL VAN EWJK & CORNELIS VAN DER WERF, *DE AARD EN OMVANG VAN ARBITRAGE EN BINDEND ADVIES IN NEDERLAND* (2002), available at http://www.ibr.nl/documenten/Geschillenbeslecting-Arbitrage/aard_omvang_arbitrage.pdf (last visited May 1, 2006).

113. See C.M. Klein Haarthuis & J.G. van Erp, *Filtering Effects of ADR Procedures: The Dutch Case* (June 5, 2005) (unpublished paper presented at Law & Society Annual Meeting).

114. Galanter, *A World Without Trials*, *supra* note 1.

115. See Robert Dingwall & Emilie Cloatre, *Vanishing Trials?: An English Perspective*, 2006 J. DISP. RESOL. 51.

on-site settlement during the early stages of a case, which has become a very well known and often successful method of resolving civil disputes.¹¹⁶

Second, like Galanter we observed a trend of diversion to ADR, or 'displacement' in the Netherlands. We showed that ADR procedures like mediation and arbitration seem to be on the rise.¹¹⁷ At the same time, however, we also observed an increase in civil filings and judgements. Therefore, we would like to point out that ADR procedures do not automatically "divert" cases away from the courts, but instead may attract cases that otherwise would not have reached court at all (e.g. cases characterized by smaller financial interests). In other words, ADR and formal court procedures are not "communicating vessels." It is therefore too early to conclude that the increasing recourse to ADR procedures will have a negative effect on court litigation rates.

Third, the perceived assimilation of legal standards and litigation procedures by large companies or organisations also seems to apply to the Dutch case. More and more companies are instituting formal complaints procedures to deal with dissatisfied customers. Companies in some lines of business commit to quality standards and formalized ways of dispute resolution already in the initial contract with (private) clients. An example is a Dutch institute that delivers warrants for newly built houses (GIW). Another form of assimilation are the many disciplinary codes that function to keep up specific norms within lines of business or professions (e.g. medicine, legal profession) and thereby also serve to resolve disputes. What is more, organizations of branches in the private sector have instituted dispute resolution procedures. The assimilation trend is definitely not confined to the private sector. Complaint procedures, mediation and binding advice have also become daily practice in the public sphere. Examples are the Ombudsman for citizens' complaints regarding local or central government, and boards for collective labor disputes between employee councils and sub-parts of the public administration (e.g. police, social welfare).

Fourth, according to Galanter, the character of the U.S. legal system and hence the role of the judge transformed from the assessment of complete cases with respect to content, to the formal endorsement of negotiated outcomes. Examples of a similar nature can be observed in the Netherlands. If, for instance, outcomes from arbitration or mediation procedures or settlements are filed with the court, an enforceable writ of execution is obtained. Judges in practice only marginally assess these outcomes; that is, with respect to form and not with respect to content. Another illustrative example regards the debt collection procedure, in which the outcome of a preceding informal procedure is endorsed in court without any further substantive reconsideration.

Fifth and finally, in line with Galanter's evolution scenario, we observe an increasing responsibility of the parties themselves to find the appropriate means to resolve their disputes. A number of recent changes in the Dutch legal aid and court system serve to stimulate this. For example, court fees have been raised like in England while subsidies for legal aid have been lowered.¹¹⁸ What is more, the

116. Niemeijer & Pel, *supra* note 11, at 347.

117. For more information see the website of the Netherlands Mediation Institute (NMI), available at www.nmi-mediation.nl (last visited May 1, 2006); or the website of the Netherlands Arbitration Institute (NAI), available at www.nai-nl.org/english (last visited May 1, 2006).

118. See Dingwall, *supra* note 115.

role of the former Dutch 'bureaus' for legal aid changed from assistance (e.g. with writing letters or documents) to referral ("legal counters"). Finally, the notion of "no cure no pay" with respect to legal aid has been called into question.

The above "trends" as we named them are not based on solid empirical material but rather on evidence that is tentative or even anecdotal. What is more, as Dingwall rightly observed, the five trends or scenarios are not mutually exclusive but overlapping and sometimes even mutually dependent or reinforcing.¹¹⁹ For example, as the role of judges is shifting (either induced by policy or not), more room is created for practicing ADR, which in turn marginalizes the judges' role further.

V. SOME CONCLUSIONS

In this contribution, we have demonstrated that trials are by no means vanishing in the Netherlands. Neither the number of civil judgments nor filings have revealed a downward trend. Instead, we observed a steady rise in civil cases over the years, including recent years.

However, not all types of case filings are on the increase. While labor-related cases, commercial cases and family cases related to allowance support, mentorship and inheritance law have been on the increase, divorce cases have been relatively constant over the past decade. What is more, the large growth in filings before the subdistrict courts, together with a smaller rise in petition procedures, might indicate a shift to less trial-like forums. A number of specific institutional changes in the Netherlands account for short-term shifts in the number of civil judgments: first, two enlargements of the competency of the subdistrict courts; second, a new standard procedure to handle dismissal cases led to a rise in labor cases; third, the shift of divorce cases from the summons to the petitions procedure in 1992 has caused a vast increase in petitions cases, which was mirrored by a drop in summons cases. Fourth, the raising of court fees, for example in 1999, was followed by a small drop in the number of cases.

These short-term institutional changes are not as ad hoc as they seem, however. Over the past decade, the Dutch government has been effectuating these and other measures to maintain and enhance the efficiency of the civil justice system, and to speed up the handling of cases. Therefore, institutional changes in the Netherlands ought to be perceived as tangible indications of a long-term central policy strategy.

Apart from the institutional changes, a number of long-term, socio-economic factors were found to account for the observed trends in the number of civil cases in the Netherlands. These factors were derived from two major Dutch empirical time series studies, incorporating a variety of economic and sociological explanations. The main focus of these studies is on filings rather than on judgments. First, indicators of "problem frequency" were found to have a significant effect. Civil filings were found to increase with higher employment rates and with more added value. Second, court fees and lawyer fees, that is, the costs of going to court, were found to have an unambiguous dampening effect on civil filings as well as trials.

119. *See id.*

As indicated before, these explanations are purely “macro” in the sense that the micro or meso-level mechanisms causing the long term trends in the total of civil cases remain unknown. Therefore, we would like to suggest a number of theoretical refinements to the existing theories and explanations.

VI. RECOMMENDATIONS FOR FURTHER THEORY DEVELOPMENT

Current explanations for trends in court filings and trials may be refined by incorporating a micro-model for individual choices. In such a micro-model, it is assumed that individual litigants weigh the various costs and benefits of (a) the choice of whether to file a case or not; and of (b) whether or not to go to trial. In other words, individuals are assumed to be rational.¹²⁰ The individual costs and benefits of litigant strategies are not necessarily financial or temporal, but may also be psychological, for example where they regard the perception of fairness of a procedure. They may also be sociological, like the gain or loss of structural (emotional or business) relationships.

What is more, not only must litigants’ behavioral choices be modelled, but also judges’ choices, as these affect trends in the number of, particular trials. This notion is clearly sustained by Galanter’s managerial justice argument: judges can choose to encourage settlement or ADR instead of trial.

Now, how might the adoption of such a micro theory enhance our understanding of trends in the number of filings and trials?

First, it may enhance our understanding of the relation between socio-economic macro variables on the one hand and the total number of filings or judgments on the other hand. One of the examples regards average age. Age may strongly affect a litigant’s cost-benefit considerations. For example, young people may not proceed to trial in a labor conflict, as their future career depends too much on their employer’s “goodwill”; or, because they have more alternatives on the labor market and thus opt for an alternative employer instead of trial.¹²¹ In other words, by adopting a micro model, mechanisms providing the link between factors at the aggregate level are made explicit. Second, a theory that builds on micro level behaviour may bring about a more informed choice of indicators for macro explanations. When reasoning from an individual perspective, substantive arguments can be used for whether to include ‘unemployment’ or ‘average age’ as an indicator for economic growth, and for the expected direction of these indicators. Third, having identified relevant working mechanisms through the micro model, one may wish to develop a research design that allows one to test for the supposed “mediating” effects. For example, if the theorized mechanism behind the positive effect of unemployment on civil filings is an increase in the number of labor conflicts, a variable could be included that estimates the amount of (individual or collective) labor conflicts. This would enhance the credibility of the empirical association between unemployment and civil filings.

Finally, the two Dutch empirical studies focused on explaining civil filings. However, additional analysis yielded the finding that the explanations regarding problem frequency apply to civil filings but do not significantly contribute to

120. See COLEMAN, *supra* note 104.

121. For another example, see discussion *infra* Part IV.

trends in final judgments (trials). This would encourage the development of explanations that differentiate between filings on the one hand and trials on the other hand. On the one hand, the number of filings reflects the link between society and the court system, and will therefore be addressed by a combination of economic, sociological and psychological theories. On the other hand, the number of trials not only depends on the determinants of filings, but also on additional factors. For example, whether or not to proceed to trial (after having filed), new institutional constraints come in that again affect litigants' strategies. These institutional constraints also affect the behaviour of individual judges ("managerial justice"). For example, cutbacks in the expenditure on courts can make judges promote settlements or ADR instead of moving on to a full-blown trial.¹²²

122. See Galanter, *A World Without Trials*, *supra* note 1.