

STAYING OUT OF COURT? RESERVATIONS ABOUT A SUPPOSED PRACTICE AND A POPULAR POLICY

*Marc A. Loth**

Abstract

The phrase ‘staying out of court’ raises two questions. Firstly, is there really a tendency to stay out of court? Secondly, if this tendency exists, is it a welcome development or a regrettable one? The first question is difficult to answer, as there are opposing inclinations. And since the judicial domain is a multilayered phenomenon, there is no way of telling whether the tendency is pervasive.

To gain a clearer overview of the judicial domain, it seems advisable to switch from a quantitative to a qualitative perspective, which conceptualises adjudication as part of the democratic decision-making process. We are then in the position to distinguish different kinds of increase or decline in broad or deep judgments and are also able to identify the drawbacks of a practice or a policy of staying out of court: for example, the loss of common ownership, accessibility, visibility and plurality. These findings set limits to a government policy of staying out of court, both in terms of breadth in large numbers of cases as well as in depth for exemplary and complex cases.

* Marc Loth is Professor of Jurisprudence and Legal Theory and Dean of the School of Law, Erasmus University Rotterdam.

1 Introduction

The phrase ‘staying out of court’ is appealing. It refers to a familiar scenario in which, according to a traditional perspective with regard to rule of law, the road to court and adjudication has always been considered the royal path to conflict resolution and to the maintenance of public order. We have discovered, however, that court intervention is potentially problematic from a social point of view. At times it not only fails to solve the social issue at stake but it even generates counterproductive results. In addition, alternative methods of resolution are available most of the time. Hence, the tide has slowly turned and the law has become unpopular. It simply provides us with the means to resolve conflicts and to maintain public order: nothing more, nothing less. There seems to be a tendency to stay away from the courts, as captured in the phrase ‘staying out of court’. The image that this presupposes is certainly familiar and attractive.

But is the image really true? Is there a social tendency to stay out of court? Do the figures support the hypothesis that there is a decline in cases being brought to and dealt with by the court? And if so, is this a welcome development? Is the intervention of the courts an evil to be avoided or an *ultimum remedium* at its best? This paper will address the following questions: (1) What are the recent developments in the judicial domain: is it in fact decreasing or are there other, contradictory, developments? (2) How should we evaluate these developments: as welcome ones or as having regrettable disadvantages? It is clear that these two questions are distinctly different: the first is empirical, the second is normative. For that reason, we will switch perspective with regard to the judicial domain. Firstly, we will address the question of the development of the judicial domain, and we will deal with increasing and decreasing tendencies (section 2). Secondly, we will switch from a quantitative to a qualitative approach (section 3). Thirdly, we will examine a few uncertainties regarding the practice and policy of staying out of court (section 4), and will provide tentative answers to the main question (section 5).

2 The judicial domain: decreasing and increasing tendencies

All this talk of a judicial domain raises the question of what we mean by the term. In the context of Dutch legal and judicial policy, it is defined as ‘the size (number of court pleadings) of the judicial system and the composition of the legal fields within the legal system’.¹ This seems clear enough.

¹ This definition is proposed in a starting document of the project ‘*Rechtspraak 2015*’, initiated by the Dutch Ministry of Justice and designed to develop scenarios on the near future of adjudication in the Netherlands. In the context of this project,

Preferably from a comparative perspective, we can and should try to imagine the judicial domain by comparing figures on the number of cases brought to court and the number of verdicts of the courts. We will then see that the resulting picture is not a homogenous one, as we can identify both decreasing and increasing tendencies. The first is described in a frequently quoted article by Marc Galanter.² Not without exaggeration, he speaks of ‘the vanishing trial’, based on the observation that the number of proceedings ending with a decision and the number of proceedings in general in the US have decreased in the last forty years.³ In his view, there is no ‘litigation explosion’ at all – as the myth would have it – but in fact a ‘trial implosion’.⁴ While almost every other form of legal activity has increased, the number of proceedings has declined, not only in comparison to the total number of cases pending at the courts but also to the population and the size of the economy.⁵ Let us examine the figures.

The *federal courts* handled almost 10 per cent fewer cases in 2002 than in 1962; the absolute number of *civil proceedings* came to 60 per cent less in 2002 than in the mid-1980s. Not only the number but also the contents of the judicial domain for civil cases changed. In 1962, proceedings in the field of contracts and liability law accounted for most of the civil proceedings (74 per cent); by 2002 this percentage had been reduced to 38 per cent. In contrast, there was an increase in proceedings for the protection of citizens’ rights: from 1 per cent of the total number of civil cases in 1962 to more than 33 per cent in 2002 (and 41 per cent if we look only at jury trials). In addition, the number of ‘prisoner petitions’ (including *habeas corpus*) increased enormously, despite a decrease as a result of regulations to limit the number of cases. Proceedings of this type amounted to 12.7 per cent of the total number of proceedings in 2002. The percentages and absolute numbers of federal criminal cases rose somewhat (from 33,110 in 1962 to 76,827 in 2002); however, the number of *criminal proceedings*

Elaine Mak and I have written a paper on the development of the judicial domain, published under the title ‘The Judicial Domain in View: figures, trends and perspectives’ (2007) 3 *Utrecht Law Review* 75.

² See Loth and Mak, above n. 1.

³ M. Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 3 *Journal of Empirical Legal Studies* at 459.

⁴ Galanter starts from the concept of a trial, which he defines as ‘a contested proceeding before a jury or court in which evidence is introduced’ (a definition that he has taken from the Administrative office, see AO Form, JS-10). Several cases can be dealt with in one trial: for example, collective claims for damages in civil liability law. It is also possible that several proceedings take place in one case, in which various aspects of the case are taken into consideration. See also M. Galanter, ‘Contract in court, or almost everything you may or may not want to know about contract litigation’ (2001) *Wisconsin Law Review* 577.

⁵ Galanter, above n. 3 at 460.

decreased by 30 per cent in the period from 1962 to 2002 (from 5,097 to 3,574). As to *insolvency cases and proceedings*, a similar development took place. The justice system for administrative cases in the US is entrusted to ‘administrative tribunals’ and to other forums that do not belong to the judicial system. The trend with regard to a decreasing number of cases, however, is also seen there.⁶ This development is not confined to federal courts. Both for civil and criminal proceedings, a similar tendency can be identified at the *state courts*, where the majority of proceedings take place. The decline in *civil cases* was substantial, both for cases that were settled by a jury trial (from 1.8 per cent of the total number of cases in 1976 to 0.6 per cent in 2002) as well as for those settled by a judge (‘bench trials’; from 34.3 per cent in 1976 to 15.2 percent in 2002). The absolute number of jury trials decreased by a third during the period of the investigation and the absolute number of bench trials declined by 6.6 per cent. As to *criminal cases*, the number of proceedings at the state courts between 1976 and 2002 declined from 8.3 to 3.3 per cent. In evaluating these figures, one must be aware that the character of the average proceedings during this period had also changed, in the sense that they had become more complex and of longer duration.

What is the reason for this ‘trial implosion’? Galanter observes a shift in ideology and in the practice of lawyers and judges involved in the proceedings.⁷ As a result of portrayals in the media, the parties have changed their strategies; consider for example the dangers involved in jury trials. The decline in the number of proceedings can be explained – in any event, for civil proceedings – by a reduced supply of cases, cases being diverted to other forums such as Alternative Dispute Resolution (ADR) and the abandoning of proceedings because of increased complexity, costs and the length of time involved. A change in ideology can also be observed on the institutional side of the judicial system. ‘Managerial judging’ aimed at arranging cases and getting rid of the caseload (Galanter speaks of a ‘turn to judges as promoters of settlement and case managers’)⁸ has grown considerably since the 1960s. Consequently, both judges and lawyers have less experience, and possibly because of this are less inclined to allow the cases presented to them to develop into proceedings. Galanter emphasises the impact that these developments can have on the role of the judicial system in American society. If the number of judgments from proceedings decreases, the legal framework for other forms of dispute settlement will decline in number and importance. Adapting is then no longer ‘bargaining in the shadow of the law’,⁹ but threatens to become a negotiation process in which legal standards are swallowed up.

⁶ *Id.* above n. 3 at 499-500.

⁷ *Id.* at 515 et seq.

⁸ *Id.* at 520.

⁹ *Id.* at 525. See also R.H. Mnookin and L. Kornhauser, ‘Bargaining in the Shadow

Now let us turn to the increasing tendencies. The question of whether something like vanishing trials exists in the Netherlands has been investigated by Klein Haarhuis and Niemeijer.¹⁰ The question is difficult to answer, since in the Netherlands there are no trials that resemble those in the US. The authors therefore understand the trial as a gradual concept: ‘Judicial proceedings in the Netherlands can be characterised as more or less trial-like, depending on the degree to which they exhibit typical characteristics of an American trial’.¹¹ Their conclusions, however, diverge sharply from those of Galanter. The authors state:

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.¹²

This steady rise is displayed by the total number of final civil judgments (from 130,000 in 1967 to 478,000 in 1999), both in summons and petitions, handled by district courts, courts of appeal or sub district courts, and both in judgments and filings (output and input). The overall rise in civil judgments seems to hold true when we differentiate among case types, such as labor cases, various types of family cases and cases related to the treatment of people with psychiatric disorders. The exceptions are divorce cases and those related to lease and real estate rent, as well as insolvencies, all of which have remained relatively constant over the past decade. The overall rise also holds true when we differentiate among the diverse ways that civil cases are disposed of: for instance, by judgment, withdrawal and settlement. The proportion of final judgments is high (about 85 per cent) and has been constant over the past several years. In the Netherlands, there is no trend towards using types of case disposition other than final judgments.

How can we explain these results? Why are trials in the Netherlands not yet disappearing? Apart from short-term explanations, such as changes in the rules of competence, the court fee and so on, some long-term explanations seem appropriate. Firstly, indicators of ‘problem frequency’ appear to have the largest impact on case inflow, since people’s legal problems are dependent upon their socio-economic situation and their participation in society. In particular, economic variables such as unemployment have a negative effect on civil filings: the more unemployment, the fewer filings. Secondly, we must consider the indicators

of the Law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950.

¹⁰ C.M Klein Haarhuis and B. Niemeijer, ‘Vanishing or Increasing Trials in the Netherlands?’ (2006) *Journal of Dispute Resolution* 71.

¹¹ *Id.* at 72.

¹² *Id.* at 104. Criminal proceedings are not a part of their research.

of costs of going to court, such as lawyer and court fees. These were found to have a negative impact on court filings.¹³ Interesting, of course, is why Galanter's explanation of the observed vanishing trials in the US is not valid for developments in the Netherlands. There is no diminished supply, no more diversion, no substantial decrease because of rising costs and no decrease because of the new, managerial style of judging. Apart from diminished supply, these phenomena are familiar enough in the Dutch legal system, but they somehow do not lead to a decline in proceedings. Klein Haarhuis and Niemeijer observe overlapping trends in the US and the Netherlands, but do not provide a satisfactory explanation for the observed differences. What we do see, however, is a large growth in the number of filings before the sub-district courts in the Netherlands, combined with a smaller rise in full-fledged petition procedures, which suggests a shift to less trial-like forums. Perhaps we can say that this comes closer to the findings of Galanter, so that there is, after all, some likeness between his findings for the US and those of Klein Haarhuis and Niemeijer for the Netherlands. Nevertheless, that does not alter our conclusion that the picture shown – decreasing tendencies in the US and increasing tendencies in the Netherlands – is far from homogenous.

3 The judicial domain: different approaches

I am afraid the situation remains the same when we turn our attention from figures to long-term developments. In the paper that Elaine Mak and I wrote on the judicial domain, we demarcated it from other state powers (the legislature and the administration), other legal systems (European and international), other forms of dispute settlement and counseling (ADR) and other courts (different levels, legal cooperation).¹⁴ What we found was that both increasing and decreasing tendencies can be identified in the different relations. On the one hand, there are forces to expand the judicial domain, such as the increased scope with regard to the other state powers, the extension of legislation at the international or supranational level, the jurisdiction of the judiciary in international and European law, more effective domain management, the legalisation of social relations and the growing demands of citizens. On the other hand, there are countervailing powers, resulting in a domain restriction, such as the government policy to force the judiciary into an *ultimum remedium* role, the increasing domain of international and supranational courts, the rise of alternative forms of dispute

¹³ The authors refer to B.C.J. van Velthoven, *Civiele en administratieve rechtspleging in Nederland 1951-2000* (Leiden: Leiden University Department of Economic Research Memorandum 2002).

¹⁴ *Id.* at 82-90.

settlement and a decline in the public trust in the judiciary. All these developments undeniably exist and have an impact on the judicial domain. Without a standard to measure these effects, however, there is no way of telling whether their combined result is an expansion of the judicial domain or a restriction. Because the judicial domain is a multilayered phenomenon, we simply do not know. And so we are back to square one.

What we do know, however, is that a purely quantitative approach is apparently not sufficient. We need to switch perspective to gain a clearer insight into the judicial domain. As a starting point, I would like to propose that there are two fundamentally different ways of looking at, and speaking about, the judicial domain. The first is the talk of policy makers and social scientists, who speak about the judicial domain in purely quantitative terms, just as we have done thus far. The presupposition of this discourse is that the judicial domain is a purely factual, even quantitative and therefore measurable, phenomenon. This quantitative paradigm rests on a conception of adjudication as a public service to solve social problems. In this view – which David Luban has named the ‘problem-solving conception’ – adjudication distinguishes itself from other means of dispute settlement by the use of state power to enforce the judgment.¹⁵ From there it is only a small step to the neo-liberal view of adjudication as a ‘last resort’ if all other mechanisms – which are the responsibility of individual citizens – have failed. The second discourse on adjudication is conducted by lawyers, philosophers and legal theorists. They view the judicial domain not so much as a demarcated playing field but rather as the social function that adjudication fulfills. From this standpoint, the judicial domain is a qualitative or even normative notion that cannot be adequately described without appeal to an evaluation of the social role it plays. In this view – in Luban’s terms, the ‘public-life conception’ – adjudication is nothing more or less than a complement to the democratic decision-making process in society, and therefore a necessary element in the public debate. In this communitarian perspective, adjudication has another social function beyond that of dispute settlement. In judging conflicts, the judiciary contributes to the development of public values and thus to the establishment of the political community. The freedom of citizens is not limited to their private lives but extends to their participation (i.e. self-realisation) in the community. The most important added value of adjudication is not that it licenses the use of state force but that it contributes to the development of the law in the given legal system. The intervention of the judiciary serves an altogether different social function, since in a tentative and provisional way

¹⁵ D. Luban, ‘Settlements and the Erosion of the Public Realm’ (1995) 83 *The Georgetown Law Journal* 2619.

(in the short term) it restores certainty in society as well as social peace (in the long term).¹⁶

How then do we perceive the judicial domain in the context of this qualitative paradigm? How do we conceptualise it as a social function? In short, we should highlight the influence of the judiciary in connection with the impact of its decisions. Much has been written about this influence, especially in terms of judicial activism or judicial restraint. Cass Sunstein, for example, refers to judicial restraint as judicial minimalism: making as few judgments as possible, leaving as much open as possible. The obvious advantage of minimalism is that the burden of forming a judgment is limited and the risk and impact of mistakes are kept to a minimum. Such a 'constructive use of silence' is noted when highly complex questions of principle are at stake in a lawsuit: namely, matters about which people have strong and divided opinions. In such situations, minimalist judges seek to find their way through 'incompletely theorized agreement', sometimes in an abstract form, sometimes in a judgment closely linked to the facts. They prefer not to work deductively but to seek a connection within the specific facts of the case.¹⁷ Minimalists, one could say, are contextualists.

To gain a firmer understanding of different kinds of judgments, Sunstein distinguishes between two perspectives. The first is the *breadth* of a judgment, which has to do with the consequences of a judgment for other cases. Broad judgments have precedential value, while narrow judgments have very little. The second is that of the *depth* of a judgment, which concerns the extensiveness of the reasoning on basic principles. Deep judgments offer extensive arguments on basic issues; shallow judgments rest on incompletely theorised agreement. In combination, these perspectives result in four types of judgments: (1) narrow and deep, (2) broad and deep, (3) shallow and narrow and (4) shallow and broad. It is possible to provide examples of these four categories but that is not my intention here.¹⁸ Instead, I would like to apply this classification to differentiate the diverse possible developments of the judicial domain. Thus, one can distinguish:

Domain expansion in breadth. Activist judges, who often deliver broad judgments, contribute to a domain enlargement in terms of breadth. The judge usually applies professional ethics of social engineering: namely, solving social problems by legal means. For this type of judge, responsiveness and social relevance are the driving forces. With respect to work organisation, he or she is usually a 'caseload manager', dealing effectively and efficiently with the volume of cases. This type of judge is not afraid to expand the judicial domain, if necessary at the expense of that of

¹⁶ P. Ricoeur, *The Just* (Chicago: University of Chicago Press 2000) at 127-133.

¹⁷ C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Chicago, London: Harvard University Press 1999) Chapter 1.

¹⁸ See Loth and Mak, above n. 1 at 91.

the legislature or of other judges. The result is, indeed, more social relevance of the law for society: in other words, more social problems are covered by the law.

Domain restriction in breadth. Minimalism as described by Sunstein leads to a domain restriction in terms of breadth. Minimalist judges avoid the formation of precedents, both on grounds of principle (the domain of the legislature) and on pragmatic grounds (the consequences are not foreseeable). ‘One case at a time’, as Sunstein puts it. This represents the professional ethics of the traditional judge, based on self-restriction. The policy of the judiciary as *ultimum remedium* also fits into this pattern and results in a retreat of the judiciary and, eventually, of the law itself.

Domain expansion in depth. Activist judging by delivering deep judgments results in another kind of domain expansion. One could say this type of judge does not strive for social but for legal relevance. He or she wants to deliver precedents that could serve to judge future cases. At the same time, the judge does not hold back on the issues of principle; on the contrary, he or she explicitly addresses conflicts of values or principles in an attempt to contribute to the public debate on controversial matters. Thus, the judge contributes to the way a democratic society deals with contentious issues. These are not addressed by the legislature, at least not in the first instance, but case by case by the judiciary (compare the abortion issue).

Domain restriction in depth. A minimalist judge delivering shallow judgments will lead to a domain restriction in terms of depth. In the Netherlands, under the pressure of an overwhelming caseload, the judiciary has striven for this type of domain restriction in criminal cases. Unreasoned acquittals and what are termed ‘head/tail judgments’ – in general, all kinds of standardisation – were the result of this tendency that leads, in its turn, to a domain restriction in depth. This tendency has a drawback, however, since these judgments are legally unsatisfactory and socially unconvincing. Still, it is as nonsensical to strive for tailor-made motivations in standard cases as it is to use standard formulations in highly controversial and principled cases. Every case requires its own depth.

For the individual judge, the choice between broad or narrow and deep or shallow can constitute a real dilemma. Judging a case on its own merits is safe and involves few risks in terms of both decision costs and mistake costs. Striving for breadth, on the one hand, offers opportunities for relevance and diminishes costs for future cases.¹⁹ It is the same with depth, because although it is safe to judge in a shallow manner, it contributes little to the democratic debate. Striving for deep judgments, on the other hand, can result in a genuine contribution but can also cause considerable damage,

¹⁹ See J.M. Barendrecht, *De Hoge Raad op de hei: kwaliteitsbewaking en leiding over de rechtspraak door de civiele cassatie: een analyse en denkrichtingen voor de toekomst* (Zwolle: W.E.J. Tjeenk Willink 1998) at 92-98.

both in terms of direct consequences and of trust in the judiciary. On a macro scale, the question with regard to the development of the judicial domain is both the result of the way the judiciary deals with these dilemmas as well as of the policies chosen and implemented by the judiciary itself and by the legislature and the government. It is possible to identify different scenarios but that is beyond the scope of this paper. For our purpose, it suffices to note that a practice or policy of ‘staying out of court’ has two distinct consequences for the development of the judicial domain: It leads to (1) a domain restriction in breadth, and/or to (2) a domain restriction in depth. The first concerns the social relevance of the judiciary; the second involves its contribution to the democratic debate. We will return to this later.

4 Adjudication as public good

In the previous section, we moved from a quantitative to a qualitative approach to the judicial domain. As a consequence, different kinds of considerations have come into play. Our language has changed from one of figures to one of arguments. Since the language of figures has not led to any new insights – not even into whether the judicial domain has increased or decreased – I hope this has resulted in a progressive problem shift. I think it has. The reason is that the public-life conception of adjudication provides a framework for the evaluation of a decreasing tendency in the judicial domain. In this section, I will elaborate on the public-life conception of adjudication, starting by analysing the meaning of the adjective ‘public’ in this context. I consider that ‘public’ has four meanings in this respect:²⁰

- (1) ‘Public’ in the sense of common: The judiciary and its adjudication are common, in the sense of common property. It is a public good (in the economic sense) as well as part of the body politic (in a political sense). As such, it has an ambiguous position. On the one hand, the judiciary is owned by everyone; on the other hand, it keeps its distance from everyone. The judiciary cannot serve its social purpose as an independent state organ if it identifies itself with one or more specific interests. In my opinion, this is one of the reasons that it is not appropriate to speak of citizens as customers and of the judiciary as a service provider. They are that, to be sure, but not only that.
- (2) ‘Public’ in the sense of accessible: The judiciary and its adjudication are accessible for every citizen. As the ECHR judged in the Golder case, the accessibility of the court as a constitutional right is a precondition for the

²⁰ See Loth, ‘Met openbaar gezag bekleed’ in M.A. Loth and N.J.H. Huls (eds.), *Het domein van de rechter* (Deventer: Kluwer 2004) at 46-50.

maintenance of the other constitutional rights.²¹ It is this principle that opposes the systematic exclusion of certain categories of citizens – notably the poor ones – from access to justice, as a result of the functioning of the market of legal aid.

- (3) 'Public' in the sense of visible, transparent: 'Justice must not only be done, it must also be seen to be done'. The visibility of the functioning of the judiciary and adjudication is not only in the service of the demands of democratic control but also of its contribution to the public domain. The social call for accountability leads to more transparency. Alternatively, a retreat of the judiciary from the public domain may lead to less transparency and control.
- (4) 'Public' in the sense of a plurality of perspectives: The judiciary and its adjudication serve a plural democratic society, not only as an independent and impartial forum for the struggle between conflicting interests and values but also because the judgments in their turn contribute to the maintenance of the legal order and to the public domain in general. Adjudication is therefore to be regarded as the complement of the political decision-making process, which constitutes the difference between the public realm in both a democratic and a mass society. 'The end of the common world', Hannah Arendt writes, 'has come when it is seen under only one aspect and is permitted to present itself in only one perspective'.²²

Thus, the judiciary and its adjudication are public goods, in the sense of common, accessible, visible and plural. In each of these aspects they contribute to the functioning of a democratic society. As a consequence, a retreat of the judiciary from the public domain may lead to a loss of common ownership, accessibility, visibility and plurality. An example can illustrate this risk. Chief Justice Klein of the California state Supreme Court gave a lecture in The Hague a few years ago, in which he warned about a two-tier system of justice: namely, private and public. As it happens, in California a complete industry of conflict resolution has emerged, consisting of large companies that hire former judges and sell their services to anyone who is able to pay for them. Though Klein was not an opponent of private justice or ADR, he referred to certain drawbacks relating to this development. Firstly, since only the privileged could afford private justice, access to justice was in jeopardy. There had grown, in fact, a system in which private justice was for the rich and public justice for the poor, as had existed previously in education and health care. It goes without saying that ownership is at stake here. Secondly, private justice does not take place in public court rooms but

²¹ *Golder v. United Kingdom*, ECHR (1975) Series A, no. 1; published in *Nederlandse Jurisprudentie* 1975 at 462.

²² H. Arendt, *The Human Condition* (Chicago, London: The University of Chicago Press 1958) at 58.

in private hotel rooms. As a result, visibility and transparency is seriously in danger, not only with respect to the proceedings but also to the rulings. Since the rulings are secret – only available to the parties involved – lawyers, commentators or society at large are not able to benefit from them. In certain areas of law (e.g. real estate), developments have reached a point where even the administration of private justice is hindered, since arbitrators no longer have enough precedents to use as guidelines for their decisions. As a consequence, law dries up and the public domain is seriously impoverished.²³

ADR has also become an alternative for adjudication in the Netherlands, but it has not grown to the extent that it is becoming a threat, as is apparently the situation in California. Still, one must be aware of similar effects here as well. We have pointed to certain public interests on a macro scale, which are in danger in the event of a retreat of the judiciary from the public domain. But certain individual public interests can also be in jeopardy, such as the interests of the parties involved or those of third parties. As for the parties themselves, the protection of the weaker party against the stronger one (compensation of equality) is certainly in better hands with the judiciary than with a mediator or arbitrator. Privacy can also be on the line. Although it is regularly considered to be an advantage of mediation that it takes relational and emotional aspects into account, this is not a benefit in all circumstances. The judiciary places parties at a distance from each other, thus creating space for debate and argument, leaving emotions to be dealt with privately.²⁴ The interests of third parties can be at stake as well. A settlement can shift the burden to a third party, with the effect that parties are reconciled, although at the expense of others involved. Again, public interests are better dealt with by the judiciary. This does not mean, of course, that mediation, arbitration or other forms of ADR are not profitable or a more suitable means of conflict resolution. It does indicate, however, that they do have disadvantages, both at an individual and a macro level. We should acknowledge that this is not so much a difference of degree as a difference of principle. Hence, it took a change of perspective – from a quantitative to a qualitative paradigm, and from a problem-solving to a public-life conception of adjudication – to highlight these differences. Now that we know what is at stake, we can finally evaluate the practice and policy of staying out of court.

²³ ‘Rechtsverlies’ is the phrase Jan Vranken has used for this phenomenon. See J. Vranken, ‘ADR en de gevolgen voor rechterlijke rechtsvorming; een verwaarloosde samenhang’ in E.J. Broers and B. van Klink (eds.), *De rechter als rechtsvormer* (Den Haag: Bju 2001) 241.

²⁴ Ricoeur, above n. 16 at 130.

5 Staying out of court?

The question in the title of this section can be understood in two ways: namely, as an empirical question of whether there really is a movement away from the courts and - if this tendency is the case - as a normative question of whether it is a positive development. We addressed the empirical question, and found that in the US there really is a tendency to stay out of court ('the vanishing trial', as Galanter called it) but that this inclination cannot be identified in the Netherlands. In fact, the Dutch judicial domain has increased and continues to do so. Since the judicial domain is a multilayered phenomenon, there is no way of telling whether a pervasive tendency exists. It appeared that our notion of the judicial domain was not adequate to answer the initial question. Therefore, we switched from a quantitative to a qualitative perspective, defining the judicial domain not so much as a demarcated playing field but as the social role it plays. In the background, it is more a public-life conception than a problem-solving one. We are still not able to determine whether the judicial domain has in fact decreased or increased, but we are able to differentiate between various kinds of increase or decline (i.e. in breadth or in depth), and we are also able to formulate certain disadvantages of the practice and policy of staying out of court. An ill-considered practice or policy of this nature will easily threaten individual interests (particular party interests or third party interests), and at a macro level will jeopardise the public character of adjudication, in the sense of common ownership, access to justice, visibility, transparency and plurality.

These findings set limits to a government policy of staying out of court. Let me explain this with respect to two kinds of cases that courts deal with: the large numbers of standard cases on the one hand, and the exemplary and complex cases on the other. For capacity reasons, former Dutch governments have attempted to narrow the judicial domain in favour of the administration (small traffic cases) or of the parties themselves (simple divorces). This amounts to a domain restriction in breadth, which necessarily reduces the social relevance of the judiciary and its adjudication. One can live with a certain amount of standardisation in the way these large numbers of cases are dealt with, but a price must be paid. Firstly, specific public interests are at stake, such as those of legal protection in traffic cases and in divorces. Secondly, and more generally, there is a trade-off between the desired scale of standardisation on the one hand, and the need for judicial fine-tuning in specific cases on the other. If the judiciary is forced to become a last resort, the result will be that an important source of legal norms is dried up and a correctional device vis-à-vis the legislature is lost. For exemplary and complex cases, a retreat of the judiciary would amount to a domain restriction in depth, with a host of unwanted consequences. If the judiciary no longer judges issues like abortion, euthanasia, wrongful birth or

wrongful life – arguing in depth which of the conflicting principles will prevail in the case, and why – this will not only marginalise the judiciary socially but, more important, morally as well. What is more, it will rob society of a crucial element in the political decision-making process, without which it would simply not be able to deal with such morally complicated and potentially dividing issues. The conclusion seems to be that ‘staying out of court’ as a policy has only finite viability. There seem to be only limited possibilities for restrictions of the judicial domain, both in breadth in large numbers of cases as well as in depth for exemplary and complex cases.

We began with a picture of the turning tide. Courts are no longer the royal path to conflict resolution and the maintenance of order, we were told, but at most are merely means to achieve these goals. It was posited that there seems to be a tendency to stay away from the courts – and happily so, apparently – for their intervention has all kinds of undesired consequences. However, we must conclude that this scenario is far from accurate. Firstly, we have found no conclusive evidence for an overall tendency to remain away from the courts. Though there is evidence for a decline of the juridical domain in the US (Galanter’s ‘the vanishing trial’), there is also overwhelming evidence for an expansion of the judicial domain in the Netherlands. Secondly, we have found no strong arguments that we should welcome such a development away from the courts if it were to take place. On the contrary, possibilities for a restriction of the judicial domain are limited, both in the breadth (large numbers of cases) as well as in the depth (for exemplary and complex cases). Perhaps the advice to stay out of court is not so sensible after all.

Finally, one restriction needs to be added. Our conclusions are valid at the macro level of society at large but they do not apply directly at the micro level of the individual seeking justice. She or he may have good reasons for wanting to stay out of court, just as she or he may have compelling reasons to file a claim to remedy a perceived injustice. These reasons may have to do with the duration of the expected trial, the costs involved, the alternatives available and so forth. It is simply not possible to determine whether our reservations about the policy of staying out of court have in fact resulted in people doing so. Though our doubts about both the policy and the practice are perfectly in line, it is not justified to perceive a causal link between the two. To establish such a connection would demand additional, empirical research into the decisions of the individuals seeking justice. Such research is beyond the scope of this paper. Nevertheless, on the basis of our conclusions it would seem appropriate to begin such research with the hypothesis that there can be extremely convincing reasons for individuals to decide to go to court. If this holds true, our reservations also apply at the micro level of the individual seeking justice.