DUTCH CIVIL PROCEDURAL LAW IN AN INTERNATIONAL CONTEXT

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Introduction

This paper first addresses the manner in which Dutch civil procedure has influenced the civil procedural laws of other countries. As will become evident, its influence abroad was limited. Subsequently, it deals with the role of foreign models in the modernisation of Dutch civil procedural law. It will be shown that since the introduction of the Dutch Code of Civil Procedure in 1838, Dutch law reformers have paid a considerable amount of attention to other European procedural models.

1. The influence of Dutch civil procedure in other countries

Due to the fact that Dutch is only spoken by a relatively small group of people, it is to be expected that the Dutch Code of Civil Procedure and Dutch procedural ideas in general have not been very influential. This is especially so because Dutch procedural legislation has been translated very sparingly into other languages; only the Dutch law of civil evidence is available in English. Some influence is, however, noticeable in those countries where Dutch experts have assisted in drafting new rules of civil procedure (examples are Eritrea and Macedonia). In Europe, Belgium is one of the few countries where there is evidence of Dutch influence and this is due – at least in part - to the fact that Dutch is the mother tongue of ca. half of the Belgian population. Dutch influence may be found, for example, in the area of référé proceedings (kort geding), the astreinte, and to a certain extent also in the area of ideas on judicial case management.

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2 Another reason may have been the fact that Dutch civil procedural law could for a long time not be classified as one of the most modern or advanced systems of civil procedure in the world and therefore, may not have been an interesting model for foreign law reformers.


4 It should be noted that even though it seems to be en vogue, especially in the international debate, to refer to the language spoken by Dutch speakers in Belgium as ‘Flemish’, such a language does not exist. Just as the population of The Netherlands, the members of the Belgian Flemish Community speak Dutch.

As well as the aforementioned examples, Dutch influence is also present in the countries that in 1838 and later were still Dutch colonies. In this paper I will discuss Indonesia (the former Netherlands Indies), Surinam, and the Dutch Antillies including Curaçao.

1.1 Indonesia
In Indonesia, the civil procedure rules are still to a large extent based on two colonial statutes: the *Herzien Inlandsch (Indonesisch) Reglement* or HIR (S. 1848-16, as amended afterwards) applicable for Java and Madura, and the *Rechtsreglement Buitengewesten* or RBg (S. 1927-227) for the other Indonesian territories. In the colonial period, these statutes were only applicable to the indigenous Indonesian population, whereas a separate set of rules (the *Reglement op de Burgerlijke Rechtsvordering* or RBRv (S. 1847-52, S. 1849, 63, as amended afterwards) applied to the European population of the colony (the latter rules being heavily inspired by the 1838 Dutch Code of Civil Procedure). However, additional rules were (and are) introduced by case law because the two ‘indigenous’ statutes only contain a summary set of civil procedure rules. Such case law was (and is) often inspired by the rules that are contained in the ‘European’ statute, whereas references to this statute may also be found in current legislation, for example to the rules governing evidence. The HIR/RBg provides for a fairly flexible procedure in which the judge plays an active role. The active role of the judge is necessary due to the fact that apart from Supreme Court cases, there is no obligatory representation by a lawyer in court in Indonesia.

The European, and in particular Dutch outlook of Indonesian civil procedure is very evident when one takes into consideration the available means of recourse against judgments. A defaulter may, for example, file opposition against a default judgment (*perlawanan* or *verzet* in Dutch), whereas third party opposition according to the Dutch model is also available (*perlawanan pihak ketiga* or *derdenverzet* in Dutch). What was formerly called *request civiel* in Dutch civil procedure (currently *herroeping*) is known in Indonesia as *rekes sipil*. It was copied from the European statute by Indonesian case law. In addition, the law on arbitration was copied from that statute. Furthermore, Indonesia’s Supreme Court or *Mahkamah Agung* is, just as its Dutch counterpart (*Hoge Raad*) a cassation court (even though it seems that the Indonesian Supreme Court is hesitant to redirect cases to lower courts if it appears that points of fact remain to be clarified; as a result, the Supreme Court is developing more and more into the highest court of appeal on points of both fact and law).

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7 The author would like to thank Professor P. Taelman (Ghent) for this information and for some of the references in footnotes 5-6.
9 See e.g. Statute Number 30 (1999) of 12 August 1999 on arbitration. Article 37 (3) of this Statute provides that the examination of witnesses shall be carried out in accordance with the provisions of the ‘European’ Statute.
1.2 Surinam
In Surinam, civil procedure was codified by a Royal Decree of 1868 (nr. 17), which subsequently came into force in 1869. Afterwards, the civil procedure rules were modernised according to the model of the procedural legislation for the so-called residentiegerechten of Java and Madura of The Netherlands Indies. These were first-instance courts for Europeans and their civil procedure rules could be found in the ‘European’ Statute or Reglement op de Burgerlijke Rechtsvordering (RBRv), mentioned above. As stated, the rules of the RBRv were heavily influenced by the Dutch 1838 Code of Civil Procedure.

In 1935 a new Code of Civil Procedure came into being (Royal Decree 17 May 1935, 42). The new Code was again based on the then modernised rules for the residentiegerechten in The Netherlands Indies. As its Dutch counterpart, this Code consisted of three parts or ‘books’. The first book was devoted to ordinary rules of civil procedure, the second book to enforcement, and the third book contained miscellaneous procedural provisions. The 1935 Code is still in force in Surinam.

Important differences between current Dutch civil procedure and civil procedure in Surinam are:

1. Civil litigation is started by way of a petition instead of a writ of summons, which results in a relatively informal procedure;
2. There is no obligation to be represented by legal counsel in first-instance litigation;
3. The judge is very active;
4. There is no court of cassation; only a court of appeal is available.

1.3 Netherlands Antillies and Aruba
In the overseas parts of the present-day Kingdom of The Netherlands, i.e. in The Netherlands Antillies and Aruba (which enjoys a status aparte since 1986), we can also see a considerable Dutch influence.

The 1868 Code of Civil Procedure of the then ‘colony Curaçao’ (the present Netherlands Antillies and Curaçao) came into force on 1 May 1869. The new procedural code replaced the old Dutch rules on civil procedure which had been in force until that time. This procedural code followed to a large extent the 1838 Dutch procedural code if this was possible taking into consideration the judicial organisation of the colony and the local circumstances. In 1919 (Royal Decree 6 July 1918, 72)

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Civil procedure rules were introduced modelled on the rules for litigation at the European *residentiegerechten* at Java and Madura in The Netherlands Indies (S. 1901, 15). However, the 1868 Code remained in force for issues that were not regulated in the new rules.

In 1931 a new Code of Civil Procedure came into being (Royal Decree 16 April 1931, 50). This Code was to a large extent modelled on the existing civil procedural legislation. It came into force in 1932. Again the relationship with the Dutch 1838 Code is clear.\(^\text{15}\)

Important differences between Dutch civil procedure and civil procedure in The Netherlands Antillies and Curaçao are:

1. Civil litigation is commenced by way of a petition instead of a writ of summons, which results in a relatively informal procedure;
2. There is no obligation to be represented by legal counsel in first-instance litigation;
3. The judge is very active.

Even though the Code aims at an oral procedure, in practice written pleadings (statements of case) have become very popular.

Recently an amended Code of Civil Procedure was introduced (1 August 2005). The amendments were necessary due to the introduction of a new Civil Code in The Netherlands Antillies and Curaçao. The amended procedural code contains various improvements. Some of these are the result of the adoption of rules that were introduced in The Netherlands on 1 January 2002 (see below). The amended Code consists once again of three books. Book 1 differs to some extent from Book 1 of the Dutch Code, although there are also many similarities, for example as regards rules on proof. It aims at an efficient, quick and oral procedure. Book 2 on enforcement and Book 3 containing miscellaneous civil procedure rules are identical - also as regards Article numbers - to the Dutch Code of Civil Procedure. It was decided that the 4\(^{th}\) Book of the present Dutch Code of Civil Procedure on arbitration would not be adopted. Instead, the UNCITRAL Model Law on International Commercial Arbitration was followed.\(^\text{16}\)

### 2. The influence of foreign civil procedural law in The Netherlands

Although the influence of the Dutch procedural model abroad is limited, the opposite is true for the influence of foreign civil procedural law in The Netherlands. This may not come as a surprise given the weak points of the Dutch civil procedural model when compared to various other European models, especially before the introduction of the 2002 amendments to the Dutch Code of Civil Procedure (see below). Problematic issues were, for example, the limited case management powers of the judge, the lack of immediacy in the hearing of witnesses and the parties, as well as the preponderant role played by documents and the consequent limited role of the oral

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hearing. If one compares current Dutch civil procedure, even after the 2002 reforms, with for example the advanced system that has been in force in Austria since 1898, much work remains to be done in order to create a civil procedural law that is fit for the 21st century.

Reforms of the law of procedure are currently high on the agenda. As stated, some important reforms were introduced in January 2002.\(^{17}\) In October 2005 further changes were introduced.\(^{18}\) The latter reforms appeared to be necessary as a result of the 2002 reforms, but at the same time they sometimes went further than being mere technical changes prompted by these reforms. In addition, a working group was established in 2001, consisting of three university professors (W.D.H. Asser, H.A. Groen and J.B.M. Vranken, assisted by I.N. Tzankova), whose task it was to formulate proposals for a fundamental new approach to Dutch civil procedural law. The Commission published an interim report in 2003\(^ {19}\) and their final report was published in early 2006.\(^ {20}\)

In this Chapter I will discuss the recent reforms in Dutch civil procedural law as well as the 2003 interim report. In addition, I will make some remarks regarding earlier reform attempts. In doing so I will address the question to what extent foreign models have played a role in these reforms as well as in the interim report. It appeared to be impossible to include references to the final report in the present Chapter due to the fact that the present paper had to be submitted at the same time as the final report was published. It should be noted here that currently it is not known what consequences the final report will have for the outlook of future Dutch civil procedure.

### 2.1 The Dutch Code of Civil Procedure and reforms in the period 1838-2005

The Dutch Code of Civil Procedure was introduced in 1838, when it replaced the 1806 French *Code de procédure civile* which, due to the French occupation of The Netherlands, had become the law of the land in 1811. However, even after 1838 French procedural law continued to reign supreme in The Netherlands since the 1838 Dutch Code was, to a large extent, a translation of the French Code. In addition, some elements had been adopted from the 1819 procedural Code of Geneva.\(^ {21}\) The latter Code was also based on the French Code, but the general opinion in several European countries in the 19th century was that the Geneva Code contained important improvements when compared with its French counterpart.\(^ {22}\) The most important element that was adopted by the Dutch Code from the Geneva Code was Article 19 of the former Code, which prescribed that the judge could order the parties to appear before him in person in order to attempt a settlement of the case. The Geneva Code

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\(^{17}\) Dutch Official Journal 2001, 580.
\(^{18}\) Dutch Official Journal 2005, 455.
had introduced this rule since it, just as the Dutch Code, had abolished the compulsory preliminary conciliation attempts before the juge de paix.

Shortly after its introduction in 1838, the new Dutch Code became the object of criticism. This is not a surprise, because already during the parliamentary debates on the Code it had been pointed out that the source of many of its provisions, i.e. the French 1806 Code, was prone to defects. The lack of immediacy in civil proceedings, for example, became a source of complaints, as well as the fact that the ordinary procedure of the Code left the initiative as regards the progress of the case to a large extent to the parties; also the judge did not play a very pronounced role in the conduct of the lawsuit. However, even though complaints were voiced, it was not until the end of the nineteenth century before important changes were introduced in the Dutch Code. This occurred as a result of the so-called Lex Hartogh of 7 July 1896. When preparing the amendments to the Code in the Lex Hartogh, two options were considered. The first option was to increase the judge’s powers as regards the conduct of the lawsuit, i.e., to phrase it in modern procedural language, to strengthen his case management powers. The second option was taking away those elements of the existing law of procedure which gave the parties the opportunity to delay the action without good reason for doing so. In the end the latter option was chosen.

The changes brought about by the Lex Hartogh are rendered by Ton Jongbloed in his Chapter on The Netherlands in a recently published volume on European Traditions in Civil Procedure. Jongbloed states that as a result of the Lex Hartogh after the service of the rejoinder the service of further statements of case was in principle no longer allowed. Moreover, the law aimed at stopping the abuse of the 1838 Code in legal practice. Jongbloed remarks that many of the remarks made at the time of the introduction of the Lex Hartogh are still recognizable. The learned author provides the following quotations from a book explaining the Lex Hartogh published by Hartogh and Cosman:

‘For no-one who is familiar with the operation of our Code of Civil Procedure is it a secret that it is flawed in many ways with respect to the reasonable requirements such a code must meet. We’d like to leave aside whether this problem can be qualified as a vitium primae conceptionis, or that it is caused by increasing changes in society and a greater need for speed in the settlement of disputes by which the second half of the nineteenth century is characterised.’ (p. VII)

‘On seeking a remedy for a recognised fault within the framework of the existing law, we have taken two systems into consideration. The first one suggests that the solution is found by increasing the court’s influence on the conduct of the proceedings. This solution gives rise to objections; on the one hand the court does not have the information it needs during the conduct of the proceedings in order to enable it to judge whether it should use its powers and urge or even order the parties to make haste; while on the other hand, increasing the court’s influence will abridge the parties’ and their counsel’s freedom […] to conduct the proceedings in the way they see fit.’ (p. XV/XVI)

‘In addition to this, it is also of importance that the Act of 1896 succeeded, as far as interlocutory orders are concerned, in finding a system that makes it impossible for a

24 A.F.K. Hartogh, C.A. Cosman, De wet van 7 juli 1896 (Staatsblad Nº 103) tot wijziging van het Wetboek van Burgerlijke Rechtvordering, toegelicht door ..., The Hague: Gebroeders Belinfante, 1897.
party to wear his opponent down by appealing to a higher or the supreme court before the final decision has been given. The new Act enables the court to declare in its decision that the appeal against the interlocutory judgment only lies at the same moment as the final judgment; it creates hereby a strict order and safeguards in this way a regular, uninterrupted completion and settlement of the case by the court before which the case is brought, if that court feels that, *ex aequo et bono*, the case has any merits.’ (p. XXII/XXIII)

‘The question whether the Act is radical enough and whether the conduct of the party’s examination, had this been England, should have been simplified and extended, or whether the next reform should focus on this, is not covered by our terms of reference.’ (p. XXIX)

Further research is needed in order to determine if and to what extent Hartogh was influenced by foreign examples (from the above quotations it appears that England may have played a certain role). What is already clear, however, is that the approach of the Lex Hartogh meant that for a long period of time the Dutch judge would not possess the powers to actively manage civil litigation; his position remained more or less that of a passive umpire. This would have been different if a draft for a new Code presented in 1920 by the so-called Gratama Commission25 (named after its chairman) had been introduced, but this draft appeared to be far ahead of its time, at least, from a Dutch perspective. It was inspired by the 1898 Code of Civil Procedure of Austria drafted by Franz Klein, which becomes clear, for example, where the draft aimed at a thorough preparation of the case in an initial written phase of the action, and a subsequent oral main phase for the decision of the case.26

Obviously, the introduction of the Gratama-draft would have made The Netherlands a very modern country, at least in the procedural sense, since, as I have stated elsewhere,27 its main source of inspiration, the Austrian Code, inaugurated a new era as regards civil procedural law. After all, the Austrian Code was the first Code to successfully break with the liberal French procedural tradition with its passive judge and its extended party autonomy. It considered civil procedure from the perspective of the function it fulfils for society at large (i.e. the so-called *Sozialfunktion* of civil litigation) and not only from the perspective of the individual parties.28

The Dutch Code of Civil Procedure was amended many times during the 20th century.29 However, fundamental reforms had to wait until recently, i.e. until 1 January 2002.

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The 2002 reforms were preceded by lively discussions in Parliament. It was stated that a fundamental reconsideration of civil litigation in The Netherlands was needed. MPs emphasized that the information on which this reconsideration could be based should also be found abroad.\textsuperscript{30} In the end, considerable attention was paid to the 1999 reforms of English civil procedure.\textsuperscript{31} However, this caused some MPs in the Upper House of Parliament to remark that in their opinion too much attention was paid to England and Wales, especially because interesting data could also be found in other jurisdictions, for example in the overseas parts of the Dutch Kingdom, i.e. The Netherlands Antillies and Aruba. In their opinion, especially the question to what extent an efficient and quick procedure at first instance would increase the number of appeal cases, could be answered by looking at these jurisdictions. In The Netherlands Antillies and Aruba strict time limits are used in civil litigation at first instance and the mentioned MPs held that consequently the number of appeal cases had increased.\textsuperscript{32} However, according to the Dutch Minister of Justice this was not the case.\textsuperscript{33}

Other topics of civil procedure which gave rise to comparative remarks are, for example, the introduction of counter-claims and the possibility of making amendments to the original statement of claim. Some members of the Dutch Lower House asked whether the government shared their view that counter-claims and amendments to the original statement of claim were used in Germany to considerably delay civil litigation. In response, the Minister of Justice stated that in his opinion German experiences in this field were not relevant for The Netherlands. The possibility of introducing counter-claims and making amendments to the statement of claim were, according to the Minister, necessary ingredients of Dutch civil procedural law since the facts of the case are not fixed at the start of the action.\textsuperscript{34}

Finally, to give a few other examples of comparative remarks, England was being referred to in a discussion about the question as to whether a small claims procedure should be introduced in The Netherlands, whereas in the discussion regarding the manner in which witness evidence should be recorded references were being made to the United States of America (stenography) and Germany (tape recordings).\textsuperscript{35} One also finds references to Article 65 of the EU-Treaty and the conclusions of the Tampere European Council. In the preparatory documents to the new legislation it is stated that civil procedure rules governing purely national cases may be affected by Article 65 and the Tampere conclusions, for example rules concerning the gathering of evidence and orders for payment.

The above discussion finally gave rise to the introduction of several reforms of Dutch civil procedural law on 1 January 2002. First of all, the differences in rules of procedure for the lowest first-instance courts (the \textit{kantongerechten}) and the ordinary first-instance courts (the \textit{rechtbanken}) were abolished. A general set of rules for both types of courts saw the light of day, a development that can, at least to some extent, be

\textsuperscript{30} E.g. Parliamentary Papers, Lower House (TK) 1999-2000, 26 855, nr. 4.
\textsuperscript{31} E.g. Parliamentary Papers, Lower House (TK) 1999-2000, 26 855, nr. 5, 2-3.
\textsuperscript{32} Parliamentary Papers, Upper House (EK) 2000-2001, 26 855, nr. 250a, 5.
\textsuperscript{33} Parliamentary Papers, Upper House (EK) 2001-2002, 26 855, nr. 16, 8.
\textsuperscript{34} Parliamentary Papers, Lower House (TK) 1999-2000, 26 855, nr. 5, 56-57.
\textsuperscript{35} Parliamentary Papers, Upper House (EK) 2001-2002, 26 855, nr. 16a, 3-4, 7.
compared to what happened in England & Wales regarding the county courts and the High Court. At the same time, from an organizational point of view, the lowest first-instance courts became part of the ordinary first-instance courts and consequently the former courts were no longer seen as separate courts. Although this was not explicitly stated, one may presume that France was a source of inspiration. After all, in this country the separate existence of the Tribunaux d’instance and the Tribunaux de grande instance is subject to debate.36

Other important reforms introduced in 2002 were:

- The creation of the possibility to introduce rules of procedure by way of orders in council (‘algemene maatregel van bestuur’).37 This development creates more flexibility since it circumvents the ordinary and often cumbersome parliamentary process for the introduction of new procedural laws. This approach is in line with developments that have occurred abroad, for example in France as a result of the 1958 Constitution of the 5th Republic. This Constitution paved the way for the promulgation of rules of civil procedure by way of government decrees. A transfer of powers to make civil procedure rules from Parliament to other bodies has also occurred in England & Wales. There the powers to create many of the civil procedure rules had already been transferred from Parliament to a special Rules Committee in the 19th century. At present, this Rules Committee consists inter alia of the Head and Deputy Head of Civil Justice, the Master of the Rolls, judges, barristers and solicitors.

- The introduction of an explicit duty for the court to prevent undue delay and to take steps to achieve this, either ex officio or on the request of a party.38 As a result, the question as to which procedural steps may and should be taken and at what moment is not the exclusive domain of the parties anymore. In this respect, Dutch civil procedural law has moved in the direction of German procedural law and is following a trend that may also be observed in other jurisdictions, for example England and France.39

- The assumption of the Legislature that the infringement of procedural rules will only result in sanctions if the interest protected by the infringed norm has actually been harmed.40 A similar development can, for example, be observed in Belgium.41

- The introduction of a duty for courts that have no territorial or subject-matter jurisdiction to refer the action to the competent court42 (in the past it was held that a court having no jurisdiction should not refer cases to the competent court precisely because the former court had no jurisdiction to entertain the matter). This development is also in line with developments in other European countries.

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37 Art. 35 Dutch Code of Civil Procedure.
40 TK 26 855, 3, 5.
42 Arts. 73 and 110(2) Dutch Code of Civil Procedure.
• The introduction of a duty for both the claimant and the defendant to supply sufficient information in their statements of claim and defence respectively and to indicate the available evidence.\textsuperscript{43} In the statement of claim - which is part of the writ of summons - the claimant also needs to indicate the most likely defence of his opponent and on what grounds this defence will be based. By way of this duty the Legislature aims at a break with the past since the traditional approach of litigants in Dutch civil procedure was to disclose as little information as possible in the early stages of the action. The emphasis on a ‘cards on the table approach’ is in line with, for example, the Woolf-reforms in England and Wales.

• The reduction of the number of statements of case that may be exchanged as of right. Except for cases where no personal appearance of the parties in court is ordered (see the next point), this number was reduced to two, i.e. a statement of claim that is part of the summons, and a statement of defence.\textsuperscript{44} This change was also envisaged as a break with the past because until 2002 the parties normally exchanged a reply and a rejoinder in addition to the statements of claim and defence. The reduction of the number of statements of case is in line with developments in other European countries.

• The establishment of the rule that after the introduction of the statement of defence the judge has a duty to order a personal appearance of the parties in court unless this would in his opinion be superfluous.\textsuperscript{45} This rule aims at increasing the oral element in civil litigation and immediacy, since it creates a situation where the personal appearance of the parties after the introduction of the defence is the rule and not just a possible course of action, as was the case before 2002. After the personal appearance of the parties the judge may decide to immediately pronounce judgment or to give the orders he deems necessary. If he chooses the latter approach, he may order the litigants to introduce further statements of case or to plead their case orally. However, whether this will occur is not known in advance to the litigants who, consequently, must state their case as well as possible in their statements of claim and defence respectively. The wish to increase the oral element in civil litigation and immediacy can be observed in many jurisdictions in today’s world. The Netherlands were rather late in adopting these measures.

• A reduction in the number of interlocutory appeals by establishing that such appeals are in most cases only allowed with the explicit consent of the court from whom the interlocutory ruling has been given.\textsuperscript{46} This development is again in line with developments in other European countries.

On 15 October 2005 further reforms were introduced which appeared to be necessary as a result of the 2002 reforms. As stated above, some of these reforms went further than being mere technical changes resulting from the 2002 reforms. For example, as a result of the 2005 reforms Articles 6 and 8 of the Dutch Code of Civil Procedure were amended in order to bring them into line with the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

\textsuperscript{43} Arts. 111(3) and 128(5) Dutch Code of Civil Procedure.
\textsuperscript{44} Art. 132 Dutch Code of Civil Procedure.
\textsuperscript{45} Art. 131 Dutch Code of Civil Procedure.
\textsuperscript{46} Art. 337 Dutch Code of Civil Procedure.
2.2 The Asser/Groen/Vranken Commission; A new approach to Dutch civil procedure

As previously stated, a working group was established in 2001, consisting of three university professors (W.D.H. Asser, H.A. Groen and J.B.M. Vranken, assisted by I.N. Tzankova). Its task was to re-evaluate and rethink Dutch civil procedural law in order to make recommendations for a fundamental reform. The commission adopted a three stage approach. The first stage was completed with the publication of an interim report in which the commission explained its main lines of thought.\(^{47}\) I will discuss some features of this report below. The second stage was also completed and consisted of a discussion with representatives of legal practice and legal science on the contents of the interim report. Finally, in early 2006, the commission terminated the third stage of its work with the publication of its final report.\(^{48}\) As indicated above, I did not have the time to include a discussion of this final report in the present paper, since the final report only became available at the same time as the present paper had to be submitted to the International Association of Procedural Law.

In its interim report, the commission concentrated on various points. These points are: (1) the position of the administration of justice by the state courts in relation to other means of dealing with (legal) conflicts such as, for example, mediation; (2) the balance between, on the one hand, the wish to regard the administration of justice by the state as *ultimum remedium*, and, on the other hand, the fact that the administration of justice by the state is indispensable both from the perspective of the individual litigants (cf. Article 6 ECHR) and from the perspective of the interpretation and development of the law; (3) a quick, reasonably priced, efficient and high quality administration of justice by the state courts; (4) the respective roles of the judge and the parties, both during the civil action and in the pre-action stage; (5) the relationship between first-instance litigation, appeal and cassation and the goals of appeal and cassation; and finally (6) the need for clear-cut and flexible civil procedure rules.\(^{49}\) I cannot discuss all these points in detail in the present paper. I shall however, attempt to give an overview of some of the more important points. I will not discuss Chapter 9 of the interim report on complex litigation (‘schaalvergroting’), written by the assistant of the Commission, Mrs. I.N. Tzankova. This Chapter deserves a separate analysis.

2.2.1 The position of the administration of justice by the state courts in relation to other means of dealing with (legal) conflicts

The administration of justice by the state courts is not the only way to deal with (legal) conflicts. In the interim report, a considerable amount of attention is paid to other means of dispute resolution. The determination of small money claims by e.g. legal insurance companies and the German *Schlichtung* are being discussed. Special attention is given to mediation and the experiences with mediation abroad (especially in Norway, England and the USA).\(^{50}\) This is facilitated by the fact that the Greenbook on ADR 2002 of the European Commission contains a wealth of comparative information on this issue.

\(^{47}\) *Supra* note 19.

\(^{48}\) *Supra* note 20.

\(^{49}\) Cf. *Interim report*, o.c., 263.

\(^{50}\) *Interim report*, o.c., Chapter 5.
The Asser/Groen/Vranken Commission observes that different approaches may be taken as regards mediation. In the case of court-annexed mediation the judge should in their opinion only have a facilitating role. Where the judge adopts mediation techniques himself, the Commission is of the opinion that his role as a judge poses certain restrictions. After all, he must be able to resume his role of a judge if in the end it appears that the case cannot be brought to an end by mediation. This means that the judge should not adopt mediation techniques such as hearing the parties separately (caucus). This would infringe upon fundamental principles of civil procedure such as the principle of adiutur et altera pars. In addition, the judge should, according to the Commission, not adopt an evaluative role but should strictly adhere to facilitating the parties in settling their case. An evaluative approach would, for example, mean that the judge would make proposals for a solution of the conflict, offer advice to the parties and express his opinion on specific points; this would directly affect the impartiality of the judge, at least from a formal point of view, and is – in the opinion of the commission - consequently not acceptable.

From the interim report, it appears that the Commission has carefully studied the Norwegian experience with mediation. It refers to the strict guidelines that exist in Norway as regards mediation by the judge. During the mediation stage the Norwegian court should not hold meetings with the parties separately, nor should it receive information which cannot be communicated to the other parties involved in the matter. In addition, the Norwegian court is not allowed to present proposals for a solution of the conflict, nor offer advice or express points of view which might give the impression that it is not impartial.

One of the conclusions of the Asser/Groen/Vranken Commission is that many of the specific features of mediation disappear when a judge acts as a mediator. In their opinion, court-annexed mediation should not become too formalized. Otherwise its advantages will disappear.

The Commission is hesitant as regards the introduction of compulsory court-annexed mediation. The Commission states that empirical research in the United States does not unequivocally show that mediation should be preferred over the ordinary administration of justice by the state courts. In addition, English research shows that there is less of a need for mediation if civil litigation is seen to be sufficiently quick (after the introduction of the CPR in England, the volume of cases referred to mediation decreased considerably). At the same time the Commission is of the opinion that mediation may have certain benefits in reducing the volume of litigation before the state courts. Therefore it opts for optional mediation and the development of criteria in practice for determining which cases are fit for this type of conflict resolution. The Commission states that on the basis of experiences in practice, further steps may be taken in the future.

2.2.2 Civil litigation: ultimum remedium?
In international literature on civil litigation,\textsuperscript{51} this part of the law is said to have various aims. The principal aim is of course the determination and realisation of rights recognised by substantive private law with the help of the state. From this perspective,

procedural law is considered as the ‘handmaid’ of substantive law, to use the traditional expression. This aim, which according to the Asser/Groen/Vranken Commission appears explicitly from the overriding objective of the English Civil Procedure Rules (‘enabling the court to deal with cases justly’), does not pay credit to the fact that civil litigation serves (or should serve) other important goals.

According to some authors, one of these aims is terminating the conflict that keeps the parties divided. However, according to the Asser/Groen/Vranken Commission, this should not be recognized as an aim in Dutch civil procedure, since this aim is better served by other means, for example mediation. In their opinion, the administration of justice by the state courts should aim to obtain binding decisions, not to solve conflicts.

The Commission holds that an important aim that should be recognized in addition to the determination and realisation of rights recognised by substantive private law, is the development of the law and the safeguarding of its uniformity. This is an aim that is recognized in many other jurisdictions, notably in England where we find it discussed in depth by, e.g., J.A. Jolowicz. The Commission is of the opinion that the latter aim of civil procedure should be taken into consideration in the discussion of a new law of civil procedure for The Netherlands. It contradicts the view held by many that civil litigation is the development of the law and safeguarding of its uniformity, cases that are interesting from a legal point of view should reach the state courts even though other means of settling the dispute are available.

The commission states that it will be the task of the Legislature to guarantee that the right balance between the various aims of civil litigation will be found.

2.2.3 Civil litigation that is quick, reasonably priced, efficient and of a high quality
Various approaches may be used to increase the speed of civil litigation, to reduce its costs, to make it more efficient and to increase its overall quality. In fact, all the proposals of the Asser/Groen/Vranken Commission could be brought under the heading of the present paragraph. This would, however, not increase the clarity of the present paper, and therefore I will only discuss two topics here which cannot be brought under the other headings of this paper. The first topic is the development of a fully-fledged pre-action stage (not to be confused with the pre-trial stage of English civil procedure; the pre-action stage is the stage before the actual introduction of the case at the court; the latter stage is also recognized in English civil procedure, see below) and the second the introduction of ‘procedural differentiation’.

2.2.3.1 Pre-action
The Asser/Groen/Vranken Commission discusses the development of a fully-fledged pre-action stage in The Netherlands. This is not a surprise, since in various articles published by the members of the Commission they have expressed a profound interest in English civil procedure with its pre-action protocols. At the same time, attention is paid to other foreign models (e.g. Germany and France).

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53 J.A. Jolowicz, o.c., 39ff.
54 Interim report, o.c., Chapter 7.
The Commission is of the opinion that at present the pre-action stage is underdeveloped in Dutch civil procedure. The first time an exchange of information is prescribed by the civil procedure rules is at the moment of the introduction of the statement of claim (which is part of the writ of summons) and defence respectively, i.e. when the pre-action stage has come to a close. Although the 2002 reforms attempted to change the existing situation in that they have extended the amount of information the parties need to include in their respective statements (see above), it would, according to the Commission, be preferable if an exchange of information took place earlier in the proceedings.

The exchange of information during the pre-action stage could, according to the Commission, serve different goals. First, it would lead to the parties obtaining a clear picture of the facts underlying the dispute. Obtaining this picture may result in the parties re-evaluating their respective positions and, under certain circumstances, in the avoidance of litigation altogether; this would be the case when the pre-action stage is framed in such a manner that the escalation of the conflict is avoided as much as possible. In addition, if the avoidance of litigation does not appear to be possible, the exchange of information would nevertheless serve an important goal since it might result in the case being prepared well before it is brought to the attention of the court and, consequently, result in an abbreviation of the procedure.

An additional method of preparing the case well in the pre-action stage might, according to the interim report, be questioning witnesses in the presence of the parties and their lawyers but without the judge being present. The Commission’s proposal is that the depositions of the witnesses should be put in writing by the witnesses and that later, when the case is brought to the attention of the court, these written documents should be submitted to the judge. During the hearing in court the judge may then decide whether the personal appearance of a witness is necessary or if the written document alone will suffice. In this manner, the efficient use of court time may also be enhanced. As regards this proposal, the English influence is very clear.

The Commission does not exclude the involvement of a judge in the pre-action stage. They hold that the judge might, for example, play a role in reaching the pre-action settlement mentioned above (something which under current Dutch law is only possible where a preliminary hearing of witnesses is ordered). In addition, the judge might, in their opinion, hold a so-called pre-action conference with the parties in order to reach an agreement on the further conduct of the case.

The judge could, according to the interim report, be given further responsibilities as regards the pre-action stage. He could, for example, evaluate the parties’ behaviour and make sure that they have taken into consideration each other’s interests and acted responsibly towards each other. He might apply sanctions if this is not the case. In general, the need for effective sanctions in order to realize possible changes in Dutch civil litigation is emphasized throughout the interim report.

The Commission is also of the opinion that the introduction of pre-action protocols and offers to settle, as they are known in English civil procedure, may be

contemplated in The Netherlands. At the same time, they feel that an alternative to pre-action protocols could be found in changes to Dutch substantive private law. In their opinion, Dutch substantive private law contains at present too many elements resulting in an escalation of the conflict. These elements should be removed. Examples of such ‘escalating’ elements are the rules on notices of demand and recision of contracts (‘ingebrekestelling’) and the rules on the unilateral termination of contracts of indefinite duration (‘duurovereenkomsten’). As regards offers to settle, the Commission notes that these cannot be implemented without changing the Dutch system of cost orders.

2.2.3.2 ‘Procedural differentiation’

The introduction of tailor-made procedural models or specialized tribunals for specific types of cases might result in a more efficient litigation process. The interim report discusses the situation in this respect in The Netherlands, England, Belgium, Germany and France.

In the report it is observed that the current Dutch system is uncomplicated: compared to the other countries discussed in the report very few specialized tribunals do exist. The Commission is of the opinion that there is no reason to change this situation. They therefore concentrate on differentiation as regards procedural models for specific types of cases.

The Commission opts for a procedural standard model with certain differentiations as regards specific types of cases. Adopting a standard model that serves as a starting point for differentiation is an approach that is also chosen in other countries, for example by the drafters of the (new) French Code of Civil Procedure. In addition, the Asser/Groen/Vranken Commission suggests introducing specific procedural models concerning, inter alia, orders for payment, small claims and urgent matters. The standard procedural model could, in their opinion, be organized along the lines of the existing ordinary procedure commenced by writ of summons. A slight modification would be that in general the summons should not be served by a bailiff anymore (as is currently standard practice), but be submitted to the registry of the court; the registry would than be responsible for sending the summons to the defendant. This system is, for example, practised in Germany.

2.2.4 The division of tasks between judge and parties

The Asser/Groen/Vranken Commission is of the opinion that civil litigation should not be viewed as a private enterprise of the parties. As stated above, civil litigation serves goals that go beyond the private interests of the litigants. In this respect the Commission seems to embrace the Sozialfunktion of civil litigation which already formed part of the ideas of Franz Klein, who drafted the 1898 Austrian Code of Civil Procedure. Consequently, parties involved in a civil action before state courts not only have certain responsibilities and obligations towards each other, but also towards society at large. As a result, the concept of ‘party autonomy’, which is commonly used in literature concerning Dutch civil litigation to describe the respective roles of the judge and the parties, is in the opinion of the Commission not a useful concept. It would, in their opinion, be preferable to consider the various aspects of civil litigation

separately and determine, as regards each of them, the balance that should be found between the tasks and responsibilities of the parties on the one hand and those of the court on the other.

In this respect the Commission seems to embrace the view advocated by Loïc Cadiet in France that civil litigation should be seen from the perspective of co-operation.\textsuperscript{57} The parties and the judge have, in their opinion, a joint responsibility to realize the purposes of the lawsuit and there should be effective sanctions put in place if parties do not co-operate sufficiently. In their opinion this would lead to the abolition of interlocutory proceedings as they currently stand. Intermediate issues should not be solved in separate interlocutory proceedings, but the judge and parties should co-operate to solve these issues informally. That, consequently, the judge would become too involved in the lawsuit is not an argument that in the opinion of the Commission should be given too much weight: after all, the judge is already involved in many aspects of the lawsuit at present.

One of the principal problems in current Dutch civil procedure is, in the opinion of the Commission, that the judge has not enough powers as regards the facts of the case. In this respect, the Commission shares the views that are currently advocated in many European countries.\textsuperscript{58} The judge is, in the opinion of the Commission, still too dependent on the parties, a situation that is different in the area of the applicable legal rules, where the maxim \textit{ius curia novit} applies. The Commission therefore advocates an approach similar to - and probably even more far-reaching than - the one that appears in the reports preparing the 1999 changes in English civil procedure, drafted by Lord Woolf.\textsuperscript{59} They are of the opinion that a ‘cards on the table approach’ needs to be advocated in Dutch civil procedure. In their opinion, the current Article 21 of the Dutch Code of Civil Procedure should be interpreted in such a way that the Code prescribes a so-called ‘Wahrheitspflicht’, known from Austrian and German civil procedure. In addition, they would like to see that the judge is given powers to (1) ignore agreements concluded between the parties concerning the conduct of the action, (2) disregard objections of a party that are apparently irrelevant without having the duty to give reasons for his decision or with giving these orally, (3) investigate facts that are not in dispute, (4) supply missing facts ex officio and (5) order the production of (further) evidence ex officio (under current Dutch law, the judge has only very limited powers in this respect). Of course, the \textit{audiatur et altera pars} principle should always be safeguarded.

It would in the opinion of the Commission be advisable to introduce a two-stage procedure. The first stage could be used for preparing the case in writing either in order to have it decided by way of a final judgment in the second (oral) stage or in order to have the court rule that further procedural steps are necessary in this stage. The preparation of the case in the first stage could be done under the guidance of a judge similar to the French \textit{juge de la mise en état}.

\textsuperscript{57} L. Cadiet, ‘The New French Code’, o.c., 58.
2.2.5 The relationship between first-instance litigation, appeal and cassation and the goals of appeal and cassation

Various attempts have been made to make Dutch civil litigation at first instance quicker and more efficient. The 2002 reforms were, for example, aimed at this where first-instance litigation was concerned. However, it seems that on appeal the results that have been achieved at first instance as a result of the 2002 reforms may be reversed.

Under current Dutch law, appellate proceedings serve two purposes. Not only are they meant to correct mistakes that might have been made by the first-instance judge, but they also offer the litigants a new chance to win their case. Consequently litigants may correct the mistakes they may have made at first instance and introduce additions to their original position or even change this position. Until now this has not caused major problems, since traditionally few appeals are lodged in The Netherlands. However, this situation might change. The Commission therefore suggests that the rules governing civil litigation on appeal need to be reformed. In principal, they hold that first-instance judgments should be regarded as final. This idea of course reminds us of the English approach to first-instance judgments. Furthermore, it seems that the Commission was inspired by the recent German reforms as regards appellate proceedings. In the interim report it is stated that appeal should be available where the judge at first instance has made a mistake or has infringed upon fundamental principles of civil procedure. The judge on appeal should, however, not rule on issues that have been decided at first instance and that have not been made subject to the appeal. Clear limits have to be imposed as regards the extent to which new facts can be brought forward on appeal. In principal, only facts that could not have been brought forward earlier should be allowed. In the opinion of the Commission, the party introducing the new facts should explain why these facts could not have been brought forward at an earlier stage and only if his explanation is found to be acceptable to the judge should these facts be allowed.

As regards cassation proceedings at the Dutch Supreme Court, the Commission is of the opinion that more emphasis needs to be laid on the court’s task as regards developing the law and safeguarding its uniformity. They are of the opinion that unlike, for example, the English approach, it is not yet necessary to introduce a system of leave to commence proceedings at the highest court in the land in order to achieve this goal. Instead, they advocate a more rigorous system of selection and differentiation of cases once they have arrived at the Supreme Court. The Commission is of the opinion that in order to execute its primary task, the Supreme Court should opt (1) for a less technical manner of phrasing the grounds for its decisions, (2) for taking into consideration the consequences of its possible rulings, (3) for concentrating more on the Europeanisation of private law and (4) for adopting a more active role in the determination and decision of questions of law.

2.2.6 The need for clear-cut and flexible civil procedure rules

The Commission asks whether ‘re-codification’ in the traditional sense (a code which is applied and interpreted in case law and which takes into consideration legal scholarship) is the proper approach to modern civil procedure reform. They state that, for example, many of the changes introduced in Dutch civil procedure by the 2002 amendment could also have been introduced in practice without a reform of the Code itself. In the end, they point out that re-codification is needed due to the advantages of
a code (abstract rules which can be applied in a flexible manner by the courts), but that real changes are only possible if the new rules are accompanied by mechanisms supporting the application of the new rules. In their opinion, the consultation of preparatory works and parliamentary history, as well as case law and legal literature is not enough to support the proper execution of the rules. In this respect, the Commission is influenced by the successful reform of English civil procedure, which was facilitated by an extensive number of supporting measures. Four additional instruments are proposed in the interim report:
  
- a help desk or information centre on the Internet;
- manuals, practice directions and forms on the Internet;
- a ‘civil procedure commission’ with certain regulatory powers; and
- an institute for the permanent evaluation of and advice on the modernization of civil procedure.

Conclusion
The present paper addresses two questions: (1) to what extent has Dutch civil procedural law influenced the laws of other nations, and (2) to what extent has Dutch civil procedural law itself been influenced by the laws of other nations. As regards the first question, we have seen that Dutch influence is limited to Belgium, the former Dutch colonies and some countries where Dutch experts have assisted in reforming the law of civil procedure. This is mainly due to the fact that the Dutch language is not a language that is widely spoken or read. The situation is aggravated by the fact that information on Dutch civil procedural law is not widely available in other languages. As regards foreign influences on Dutch civil procedural law, the situation is very different. The 1838 Dutch Code of Civil Procedure was heavily influenced by the French 1806 example and also contained some elements from the 1819 Geneva Code of Civil Procedure. Since the 19th century, Dutch lawyers and the Dutch Legislature have consistently taken note of developments abroad. Since the end of the 20th century this has resulted in amendments to the Dutch Code of Civil Procedure which are often in line with what may be observed in other European countries.