

# Shifting judicial tasks

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## *Exploratory investigation of civil and administrative areas*

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# Summary

## Background and problem statement

The role played by the criminal courts in the Netherlands in the imposition of sanctions has diminished in recent years as administrative sanctions have become more widely available under numerous acts. It is not clear whether the civil courts and the administrative courts have also seen some of their tasks transferred to government bodies or other non-judicial institutions. The goal of this exploratory investigation was to gain an insight into such issues. Data were collected between September 2015 and March 2016.

The problem statement is as follows:

*Which legislative proposals in the areas of civil and administrative law, proposed between 2004 and 2014, assign a judicial task to a government body or other non-judicial institution? How does this transfer of tasks take place? And what are the consequences for the public and businesses?*

This exploratory investigation adopts a broad approach to the concept of 'judicial tasks'. Besides resolving disputes between citizens and adjudicating on government actions, the courts also fulfil other tasks, as assigned by law or other types of regulation. The investigation was concerned with all such tasks and activities as come before the civil and administrative courts. The concept of 'transfer' is also understood in broad terms.

The following questions were formulated in response to the problem statement:

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

## Research design

The investigation was conducted in two stages. In order to track down as many items of proposed legislation as possible, all the advisory memoranda from the Judiciary Council were consulted, which had been issued between 2004 and 2014. For those advisory memoranda that mentioned a transfer

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<sup>1</sup> Raad voor de rechtspraak.

of tasks from the civil or the administrative courts to non-judicial bodies, we investigated whether the proposed legislation had been submitted to Parliament and, if so, we then searched the accompanying explanatory memorandum and other parliamentary papers for information on the objective and the expected consequences of the transfer or shift of tasks. Additional details were collected in an expert meeting and several interviews with experts.

The second stage zoomed in on forms of transfer to administrative bodies, dispute resolution commissions, and the legislator. Four cases were examined in greater detail: the Act relating to Structural Measures against Health Insurance Defaulters<sup>2</sup> (shift to an administrative body); the legislative proposal to Strengthen the Administrative Power of Educational Institutions<sup>3</sup> (shift to a dispute resolution commission); the initiative proposal for the Revision of Child Support<sup>4</sup> (transfer to the legislator); and the Work and Security Act<sup>5</sup> (transfer to the legislator). These cases were investigated to see what could be discovered concerning their consequences for citizens and businesses, protection under the law, and the experience of those involved. Data were collected from literature research and consulting annual reports, evaluation reports, and parliamentary papers. Additional information was gathered in interviews with several experts. Given the scope of the present study, it was not possible to conduct empirical research among citizens, businesses or institutions.

## Results

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

### *Which bodies were assigned which judicial tasks?*

Besides administrative bodies, tasks or activities previously undertaken by the civil or administrative courts were assigned to other institutions, including administrative bodies, dispute resolution commissions, mediators, specialist judicial bodies, and the legislature. Many of the tasks were concerned with dispute resolution. For example, the civil courts saw some of their dispute resolution tasks shifted to dispute resolution commissions and mediators, meaning that the courts dealt with fewer cases and/or their role was marginalized to one of evaluator. In cases where the legislature drew the task or activity upon itself, the courts' freedom of judgment was restricted, or else guidelines developed jointly by the judges themselves (such as those for fixing the amount of alimony) were replaced by detailed rules, set down in law.

### *What was the idea underlying the transfer, and how was it motivated?*

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<sup>2</sup> Wet structurele maatregelen wanbetalers zorgverzekering.

<sup>3</sup> Versterking bestuurskracht onderwijsinstellingen.

<sup>4</sup> Initiatiefwetsvoorstel Herziening kinderalimentatie.

<sup>5</sup> Wet werk en zekerheid.

The reasons for transferring judicial tasks and the envisioned effects turned out to be quite diverse, but sometimes highly specific. The ‘transfer’ was most often not the principal component of the proposed legislation, nor was an explicit motivation always given for it. The objectives most frequently cited were to offer a low-threshold alternative to dispute resolution through the courts, more effective resolution of disputes or other problems, relieving the judiciary of its case load, and cost savings for the government and/or the parties involved. Another goal that was frequently named – especially in reference to proposals for transfer to the legislature itself – was to bring home a power or authority where it properly belongs. Proposals for detailed rules set down in law also frequently cited the improvement of certainty under the law and/or equality before the law as an objective.

*Which forms and variants of transfers can be distinguished?*

In the strict sense, transfer means that a task or authority which hitherto had belonged to the civil or administrative court is removed, to be transferred to a non-judicial body. This form of transfer occurs seldom. More often, what happens is the creation of an extra route either alongside or precedent to court proceedings, whereby the courts deal with fewer cases and/or their role is marginalized to that of an evaluator. Often, too, an administrative body receives a task or authority for a new category of cases, which had commonly been reserved to the courts. It may also occur that the legislature puts an end to the courts’ activity in ‘writing the rules’, by itself setting down detailed regulations in legislation; these then replace the standards or formulas developed by the courts.

The second stage of the research adopted a different approach, based on the body to which tasks, cases or activities had been transferred or shifted: administrative bodies, dispute resolution commissions and other non-judicial dispute resolution bodies, and the legislature.

*Transfer or shift from the court to administrative bodies*

A number of varieties can be distinguished when considering the transfer or shift of judicial tasks to administrative bodies. There are instances when an administrative body receives a task or authority that had typically belonged to the judiciary. Around the turn of the century, when the supervision of a number of liberalized markets was being regulated (including the telecommunications and power industries), several of the newly created authorities received, as part of their supervisory task, the authority to resolve certain disputes between private parties in the market. An administrative body may also be granted the specific authority to resolve a clearly defined issue. An example is the Act relating to Structural Measures against Health Insurance Defaulters, which grants the National Health Care Institute<sup>6</sup> the authority to demand an ‘administrative premium’ from those who fail to pay their health insurance premiums, with no judicial intervention. Prior to the Act’s introduction, the health insurers had to institute debt recovery proceedings before the district court; now they merely report defaulters to the Institute.

The arguments in favour of granting dispute resolution powers to market supervisory authorities conform in part with those in favour of the introduction of administrative penalties: dispute resolution by the supervisor was said to be faster and more effective than going through the courts, and the supervisor possesses expertise that the courts lack. Another argument was that dispute resolution can form an instrument in assuring the compliance of market parties with European and

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<sup>6</sup> Zorginstituut Nederland

national regulations. The most important argument for the Health Care Institute's particular authority was the ineffectiveness of the existing debt recovery practice.

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

The comments in the legal literature on the dispute resolution powers granted to market supervisory authorities relate inter alia to the independence of these authorities, which is inadequately safeguarded, especially as relating to government, and the associated protection of the parties under the law. In order to safeguard the independence of the authorities granted the power to resolve disputes, the legislature sometimes opted not to allocate the powers to resolve disputes, regulate, and supervise to one and the same body; or else, if a single institution was so tasked, to prescribe that the relevant staff should be separated from the rest. The supervisory authorities themselves have drafted procedural rules to improve transparency for those involved. How the parties themselves appreciate such rules is not known. In the defaulters' act the legislature opted to rule out appeals to the administrative court, and this was the subject of critical comments at the time. Such research data as are available reveal that the possibilities for protection under the law (the civil law) provisioned in the act are inadequate for a large fraction of the defaulters. A number of safeguards offered by debt recovery proceedings before the district court are also absent.

#### *Transfer from the courts to dispute resolution commissions*

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

The legislative proposal to Strengthen the Administrative Power of Educational Institutions contains a radical variant. The proposed law lays down that in first instance, all school participation disputes shall be placed before the National Commission for Educational Dispute Resolution, as the authority with jurisdiction to pronounce judgment. The Enterprise Division of the Amsterdam Court of Appeal<sup>7</sup> may only play a part in appeals. The goal of the proposed amendment is to remove unnecessary impediments to the resolution of disputes about participation in schools and thereby to strengthen the position of the participation councils. The idea is to have a one-stop shop, with a uniform, simple procedure, provided with safeguards which, incidentally, show an increasing similarity to those offered by judicial pronouncements. This is all the more important because the route via the courts has been closed off in such cases. As far as we can tell from the information available, the consequences for those involved of the shift to the National Commission for Educational Dispute Resolution may be regarded as beneficial, because it brings to an end the very fragmented treatment by the civil and administrative courts, and the individual commissions.

In the amendment to the Copyright and Neighbouring Rights Law,<sup>8</sup> the legislature also opted for a radical variant: the parties are not obliged to go before the copyright dispute commission, but the

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<sup>7</sup> Ondernemingskamer van het Gerechtshof Amsterdam.

<sup>8</sup> Wet toezicht collectieve beheersorganisaties voor auteurs- en naburige rechten.

court must request the commission's advice before handing down a decision. A less radical variant was opted for in the Health Insurance Act<sup>9</sup> and the Act regulating Quality, Complaints, and Disputes in Health Care<sup>10</sup>: health insurers and health care providers are required to become members of the appropriate dispute resolution commissions, which were set up under the relevant acts; no one is obliged to bring a dispute before these commissions, but their decisions are binding; the courts may only provide a marginal evaluation.

Besides the dispute resolution commissions that were regulated by law during the period investigated, there are many other consumer dispute resolution commissions, which have been in existence far longer, including those that operate under the umbrella of the Consumer Complaints Board.<sup>11</sup> The European Directive on alternative dispute resolution for consumer disputes<sup>12</sup> (the ADR directive) prescribes minimal safeguards that must be observed for disputes resolved via a non-judicial procedure. The directive's objective is to strengthen consumer rights while improving the effectiveness of the internal market. In the Netherlands, the quality requirements of the ADR directive have been translated into national legislation to satisfy the directive's implementation requirement.

Research conducted by the Research and Documentation Centre of the ministry of Security and Justice<sup>13</sup> has shown that consumers frequently refer to the cost, speed, and simplicity of this procedure as a reason for approaching the Consumer Complaints Board, rather than going through the courts. Considered as a whole, the costs to the consumer and businesses, plus the simplicity, are greatly valued, but the speed of the proceedings is less appreciated. In regard to neutrality and independence, it has been established that though they are safeguarded under the law, the way the consumer values them depends closely on whether the consumer has won or lost his/her case. Only occasionally is a case brought before the court for evaluation after a resolution procedure before a commission.

Despite the fact that resolution via a commission is often mandatory, both citizens and businesses have the right to bring a dispute before the courts. This arises from article 17 of the Constitution,<sup>14</sup> which provides that no one may be denied access to the courts against his/her will. Extra-judicial dispute resolution may therefore not be compulsorily imposed, against the will of the parties involved. A great deal is done to create safeguards for the fully fledged operation of dispute resolution commissions, which remain attractive to the parties involved. At the same time, though, little is known about the possible consequences of the government's 'ultimum remedium' approach, nor about the consequences of the pressure to steer clear of the courts.

#### *Transfer from the court to the legislature*

When considering a transfer or shift to the legislature, one can distinguish between a variant concerned to restrict the freedom of individual judges to decide on disputes by introducing detailed and/or imperative legal criteria, and one that seeks to put an end to the judges' 'regulatory' activities

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<sup>9</sup> Zorgverzekeringswet.

<sup>10</sup> Wet kwaliteit, klachten en geschillen zorg.

<sup>11</sup> Stichting de Geschillencommissie.

<sup>12</sup> Europese richtlijn betreffende alternatieve beslechting van consumentengeschillen.

<sup>13</sup> Wetenschappelijk Onderzoek- en Documentatiecentrum van het ministerie van Veiligheid en Justitie.

<sup>14</sup> Grondwet.

by introducing detailed legal regulations. Two recent examples of the latter variant are the initiative proposal for the Revision of Child Support, and the Work and Security Act.

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

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

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