



de Rechtspraak

Council of the
Judiciary



The Judiciary Quarterly

The Annual Lecture for the Judiciary 2008

A Credible Judiciary:
judges bridging the gap



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Editorial

On the following pages you can read the text of the Annual Lecture for the Judiciary, which was held on 13 November 2008. This was the third annual lecture in as many years and is therefore part of a young tradition within the research programme of the Netherlands Council for the Judiciary. For the first time we invited a 'real' outsider to address us on the subject of our functioning and our position in society. The outsider in question was cultural sociologist Gabriël van den Brink. Where should he be placed in the *tableau de la troupe*?

In view of his writings, in particular his recent study *Schets van een beschavingsoffensief. Over normen, normaliteit en normalisatie in Nederland* (Outline of a civilization offensive. About norms, normality and normalisation in the Netherlands) (2004), we could place him in Scotland in the second half of the eighteenth century among the Scottish moral philosophers. These were thinkers such as Adam Smith and John Millar and the sociologist Adam Ferguson (1723-1816). Ferguson can be regarded as a founding father of sociology for his *Essay on the History of Civil Society* (1767). Although I have never read this work, I understand from its description that it is a first comparative historical study that focuses on the evolution of forms of authority.

The central concept dealt with by Gabriël van den Brink is not authority but modernity: a concept that stands for a way of living in which people are nowadays guided by principles such as approachability, equality, self-sufficiency and involvement. This is a high ideal – too high to be achievable, as is apparent from his own analyses. But this does not prevent him from identifying the obstacles that we must seek to remove. It is this practical and moral way of thinking, born out of a desire to improve society, that makes Van den Brink in my view the Dutch heir to this Scottish forefather.

This is indeed precisely what prompted us to ask him what lessons the judicial system and the judiciary could learn from the knowledge gained, inter alia, from our own research programme. You can read his answer below.

Albert Klijn









Gabriël van den Brink (1950)

Gabriël van den Brink (1950) studied philosophy and history. His main subject is the process of modernization.

After finishing his dissertation in 1995 he focused his attention on problems of Dutch society. He published more than 15 books (in Dutch) about different aspects of Dutch social life. Topics on which he has published are – amongst others – the political *habitus* of Dutch citizens, migrants in Rotterdam and modernity as an answer to relativism and conservatism.

In 2006 he was appointed as a full professor in Social Administration at the University of Tilburg. In addition to this function, he is lecturer in Social Safety Studies at the Dutch Police Academy.

A Credible Judiciary: judges bridging the gap

Gabriël van den Brink

Ladies and gentlemen,

I regard it as a signal honour to have been invited to deliver the third Annual Lecture for the Judiciary here this afternoon. I say this not only because of the fundamental importance of law to our democracy and because of the high regard I have for members of the judiciary. It is above all a signal honour because I myself know little about the law. In the past I have been involved with many different things, varying from historical research to philosophy and from problem neighbourhoods to politics, but never with the law. So I am an outsider, someone who looks at law from the outside, and although I appreciate that the judicial system is of crucial significance to our democracy I have no real understanding of what this involves.

And this is precisely why I have been asked to give this lecture. After all, I am not the only outsider to have a perception of the law. The majority of Dutch people probably know little about the law, but do have ideas about what a judge is or does. The judiciary wish to learn more about these perceptions. What impact could this have on the day-to-day functioning of the judges? Should the judicial system take account of public opinion? Before addressing these questions I should like to put before you a number of ideas about the gap between judges and members of the public. For this purpose I will deal with the following questions.

1. Is there a gap between the public and the law?
2. If so, what is the nature of this gap?
3. For whom does this gap pose problems?
4. Can the gap be bridged?

I shall support my ideas with some statistics and literature, but I would not wish to give the impression that my remarks are based on systematic research. What I wish to convey above all is a particular way of looking at the issue. I shall examine some developments in society from a sociological perspective and then relate them to the concerns of the judiciary. My hope is that this will aid you in considering the issue of the gap.

A gap between the public and the law?

The judiciary are worried about the concerns of many Dutch people about crime. For example, a large proportion of the population considers that sentencing is too lenient. These concerns have been studied in some detail and three conclusions can be drawn from the findings. First of all, there is indeed a substantial gap between the sentencing practice of judges and the wishes of the public. Second, this gap has existed for many decades. And, third, the situation is unlikely to change in the future. Let me cite a few figures to illustrate this.

The 2002 Social and Cultural Report (published by the Dutch Social and Cultural Planning Office) revealed that the great majority of the Dutch population had very strict views on crime and sentencing.

- For example, two thirds of the population considered that the authorities did too little to tackle crime (68 percent).
- A comparable proportion considered that society functions better if the criminal justice system intervenes more often and more firmly (71 per cent).
- Over three-quarters of the respondents agreed with the statement that crimes too often go unpunished as a result of mistakes by judges and prosecutors (77 percent).
- They also considered that the criminal justice system does not dispose of cases quickly and efficiently (78 percent).
- Moreover, 80 percent of Dutch people took the view that the number of prison cells should be increased, and no less than 91 percent felt that crimes are generally punished too lightly in the Netherlands (SCR 2002: 658).

I suspect that the percentages would turn out very differently if judges were asked these questions. In addition, one has to wonder whether these figures would still be representative today. After all, they date from 2002 and things could have changed since then. But that is not the case at all. The proportion of Dutch people in favour of stricter sentencing has remained the same for many years. This is evident, for example, from the following factors.

- The proposition that ‘Crimes are punished too lightly in the Netherlands’ was endorsed by 86 per cent of the population in the mid-1980s and by 82 per cent in 2005. Although there have been minor fluctuations in the intervening years, there have not been any substantial changes.
- There is broad support for the introduction of capital punishment in the Netherlands. The proposition is as follows: ‘It might perhaps be a good thing if the death penalty was introduced again for certain crimes’. Two thirds of Dutch people agreed with this proposition in 1970 (36 percent), and this proportion was roughly the same 20 years later (35 percent) (SCR 1998: 637).

- Finally, it is striking that the idea that crime is on the increase scarcely changes. Take, for example, the following question: ‘Do you believe that crime in the Netherlands has recently increased, remained the same or decreased?’ Some 30 years ago 89 per cent of Dutch people considered that crime was on the increase and around the turn of the century 85 per cent were still of the same opinion (SCP 1998: 638; SCP 2002: 656).

In other words, these pronouncements about punishment and related matters show that views have changed little in the Netherlands over the years. Nor are they likely to change in the near future. Naturally, there is no way of knowing how we will view these questions in 10 years’ time, but we do know that the Dutch population does not expect serious changes. In fact, many members of the public are of a pessimistic frame of mind. This is evident from the 2004 Social and Cultural Report which explicitly included a number of questions about the expectations of Dutch people for the year 2020. There we read the following.

- Over two third of the population expect (much) greater problems with organized crime and terrorist threats (68 percent). The same is true of murder and manslaughter (69 percent). In addition, three quarters of the public expect problems with threatening behaviour and assault to be greater (or much greater) than at present (75 percent).
- If the questions are limited to security and crime in a more general sense, 73 percent of the population foresee a further deterioration in the near future.
- This is in keeping with expectations about surveillance and punishment. The vast majority expect greater use will be made of private security firms (89 percent) and CCTV surveillance (94 percent) in 2020.
- A majority think that more suspects will be arrested and punished than at present (51 percent), and also that heavier sentences will be handed down for crimes of violence (61 percent).

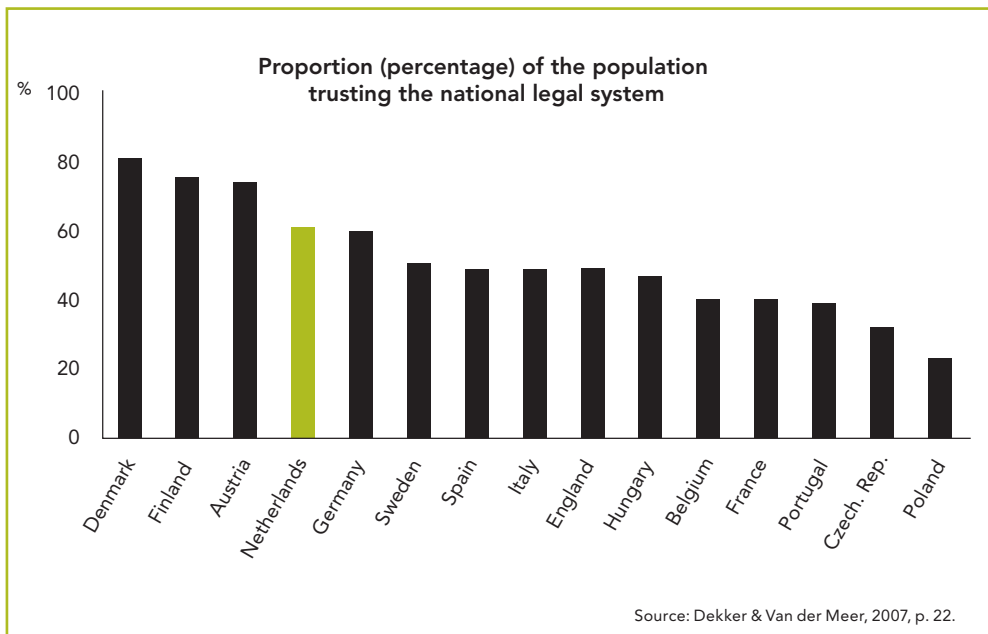
All of this indicates that the Dutch population has its own way of looking at crime and punishment and that this differs greatly from the views of legal professionals. The courts come up short in the eyes of a fairly large proportion of the general public, and this reproach could in turn be a source of concern to you. In this sense, there is indeed a gap between the general public and the law. What makes this more complicated, however, is that the opposite could also be argued on the basis of public opinion surveys, namely the proposition that a reasonably large and stable part of the population has a good deal of confidence in the judicial system. This is a challenging paradox that requires elucidation.

The Council for Judiciary decided to take up this challenge. Since the introduction of the new Judiciary (Organization) Act in 2002 the Council has twice commissioned research into con-

confidence in the judiciary. This started in 2003 when the Council requested the Social and Cultural Planning Office to examine how confidence in the authorities – in particular the judicial system – could be measured by empirical research and what results this would produce. The underlying idea was to create a way of monitoring confidence in the judicial system. The SCP published its report in 2004 and came to the conclusion that there were no indications of a crisis of confidence (Dekker, Maas-de Waal & Van der Meer, 2004). In 1998 almost three-quarters of Dutch people had much or even great confidence in what the judges did, and this was no different five years later (71 percent). Together with Denmark and Sweden we belong to the group of north-west European countries in which the public has traditionally had great confidence in the national legal system, which is a clear contrast with the countries of south-eastern Europe. Although the level of confidence has fallen slightly over the longer term, this is also the case in other countries too and is mainly attributable to the effect of shocking events such as the IRT affair (concerning controversial criminal investigation methods) and the Srebrenica massacre. And, finally, the SCP noted that confidence in the judges or the legal system was not something completely separate but formed part of the confidence that people had generally in the rule of law and the welfare state (Dekker et al. 2004: 44-55). In other words, there was no reason to establish a separate monitor for this purpose. It was felt that it would instead be more sensible to ‘hitch a ride’ periodically with other surveys and – in the view of the researchers, much more importantly – to make more frequent use of qualitative surveys (Dekker et al. 2004: 16).

This advice was heeded. However, the Council did wish to be informed about the explanatory power of a number of factors, such as the relevance of living in deprived neighbourhoods. The SCP reported on this in a follow-up publication (Dekker & van der Meer, 2007). The main finding, in my view, is that the SCP was once again unable to discover any alarming developments. In this respect the Netherlands was still a high-trust society.¹

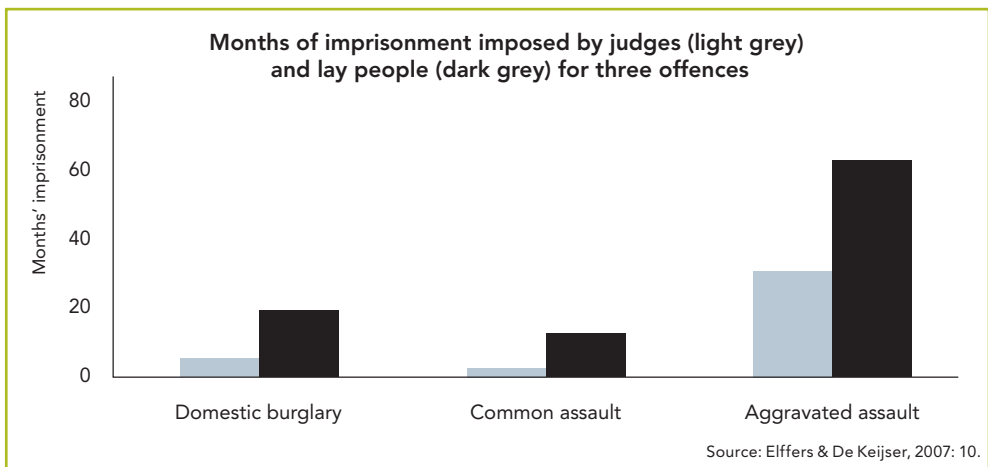
1 This conclusion was recently reinforced by the second report published in the series of public opinion surveys entitled *Continu Onderzoek Burgerperspectieven* (Dekker & van Steenvoorden; 2008: 16-17). From the perspective of comparative research in different countries, there is less reason for gloom than might appear from articles on declining confidence in government and politics.



The Netherlands shares fourth place in this list, with 61 percent expressing confidence in the legal system. The only countries with higher confidence ratings were Austria (74 percent), Finland (76 percent) and Denmark (81 percent). The authors maintained that there had been no substantial reduction of confidence in the Dutch judicial system. However, they did note that there were sharp short-term fluctuations in this confidence, which were mainly due, in their opinion, to media coverage of particular events. Miscarriages of justice such as the Schiedam Park murder case undermine the image of the criminal justice authorities, thereby causing a temporary drop in public confidence. What is interesting, however, is that confidence recovers in due course (Dekker & Van der Meer, 2007: 13-21, 42-47). This last point was in fact striking. It suggests that a certain level of confidence in public institutions exists in every society. Scandals, escapes, disasters and other incidents have a temporary effect, but public confidence evidently returns to its original level in due course. Apparently, it is not even necessary for the justice authorities to take any remedial action. In short, dips in public confidence are no big deal and the judges can better confine themselves to continuing their usual salutary work.

It could be inferred from this that the gap relates not so much to how the courts operate in general but to the results of the manner in which they operate. In that case, the gap is perhaps caused by the public's lack of knowledge about the situations which judges are called on to decide. If that is the case, greater understanding for judicial decisions could be promoted by giving the public more information about the cases. This is the information thesis in a nutshell.

To check the value of this thesis, De Keijser, Van Koppen and Elffers (2006) carried out an experiment in their study in which a group of criminal judges and a group of lay people were asked to assess the same criminal cases. These cases, in which the evidence was not in debate, concerned reasonably serious offences, namely domestic burglary, assault and aggravated assault. The judges were asked to reach their verdict on the basis of a file, as were some of the lay people taking part in the experiment. The other lay people were given a brief newspaper article on the case as their source of information. The results of the study showed that the judges and the lay people did indeed impose very different sentences. Whereas the judges imposed a term of imprisonment averaging 5.3 months for burglary, the sentence imposed by lay people averaged 18.8 months. The sentence imposed by judges for assault was 2.5 months' imprisonment, whereas the lay people imposed custodial sentences of 12.1 months. And in the case of aggravated assault the perpetrators were sentenced to 29.7 months by the judges and 60.9 months by the lay people. This provided direct confirmation of what was termed the 'punitiveness gap'.



The researchers in fact acknowledged that the experiment had a number of limitations. For example, the lay people could base their ruling only on the criminal file and did not take part in a courtroom session. Nor did they have a frame of reference within which the offence could be compared with other offences. They were required to determine the length of the sentence and were not called upon to express an opinion on the evidence. And, finally, they knew that their rulings would not have any consequences for people of flesh and blood. In consequence, it was still not possible to determine the real nature of the gap between judges and the public.

This has been taken one step further (precisely as regards the limitations just mentioned) by a very recently published study on criminal rulings of judges and lay people (Wagenaar, 2008). In this study lay people were involved as much as possible in the actual course of events in the criminal process in order to assess whether they would reach different conclusions than professional judges. The lay people not only had to study the criminal file but also to attend the trial. They were sworn in and together had to form a court sitting in chambers and thus reach a joint decision. In this way the study examined not only given results (the sentences) but also the reasoning processes by which lay people and judges arrive at a given result. The same applied to the evidence. In this way Wagenaar was able to shed light on the reasoning, an aspect which had hitherto received little attention. This is of great importance because the process of establishing the truth and assessing the evidence takes place in a specific manner in criminal law. Wagenaar emphasizes that criminal cases are never about scientific evidence. In fact, the judge is faced with a mission impossible. He has to establish what has happened, but the number of possible scenarios is infinitely great and the information supplied is always insufficient. It is impossible in principle to say with certainty which scenario is the truth. This is why judges set to work in a different way in practice. What they need is a good story that is backed by sufficient evidence. And this is precisely what Wagenaar examined. He studied how the lay people dealt with the story and the underlying evidence and how this differed, if at all, from the approach adopted by the professional judges.

The results of Wagenaar's analysis are remarkable. The differences in reasoning between judges and lay people proved to be relatively small. Both groups applied equally complex reasoning and the differences related mainly to the treatment of the underlying evidence. Certain lay people sometimes wished to proceed on the basis of unfounded assumptions. There was no difference whatever between the judges and the lay people as regards sentencing. And in so far as a gap did exist, it was not so much between judges and lay people as between judges and well-educated lay people on the one hand and the less educated lay people on the other (Croes, Elffers & Klijn, 2008: 13-15).

It may be wondered whether this solves the puzzle of the gap. I would answer both yes and no. The puzzle can be said to be solved if one had assumed that lay people were unable to understand or evaluate the often complicated reasoning applied in the criminal process. Wagenaar's study shows that lay people are well able to do this. Indeed, it even shows that lay people who study all aspects of the criminal process reach roughly the same conclusions as the criminal judges and are inferior to them only in relation to minor points. This is good news for judges and for the general public. Judges evidently pass judgments that are, in principle, acceptable to the public, while the public are evidently able to assess complicated cases justly.

Yet in my view there is something misleading about research of this kind. Both De Keijser et al. and Wagenaar isolate the lay people concerned from their own social environment in order to allow them to play a role, mentally or physically, in the world of the law. This is a world that has its own rules and produces its own truths in order to ultimately reach a sound decision on guilt and punishment. While it may be satisfying to know that the majority of lay people who are transported to this legal world are able to arrive at the same responsible judgment as the professional judges, what does this actually prove? In my view, it proves above all that the rules of a world such as the judicial system are especially strong and persuasive, so strong and persuasive indeed as to largely cancel out the differences between judges and lay people. As long as lay people are willing to act within confines of this world there is no problem at all. However, the main difficulty is that this willingness is lacking on the part of most members of the public in daily life. They have an opinion on what judges do, but base this on arguments very different from those used by judges. Indeed, the arguments they employ are often of a decidedly anti-legal nature. In other words, the problem concerns not so much lay people acting within the confines of the legal world but the distance that exists in day-to-day reality between the legal and non-legal worlds. This brings me to the question of the nature of the gap.

What is the nature of the gap?

I propose to approach the question of the gap from the perspective of cultural sociology. Above all, I wish to distinguish between two dimensions, the first of which relates primarily to information and knowledge and the second of which relates to the normative attitude of members of the public.

In modern society views and truths are reached in a variety of ways. Sciences and churches, organizations and professional groups, government bodies and members of the public each permanently produce their 'own' truth. We have therefore had to relinquish the belief that all these different truths can be united in a single Truth. But it does not follow from this that all these forms of 'knowledge' are equal or that they can be employed in a random manner. On the contrary, both the production and the use of knowledge are confined to a specific domain and there is generally little point in transferring the specific views of domain A to domain B without modification. This certainly also applies to the issue with which we are concerned here. In relation to the law two extreme forms of knowledge can be set off against each other. On the one hand, there are the legal professionals who pursue a strongly *argumentative* truth and, on the other, there are journalists and media for whom truth is in the first place of a *dramatic* nature.

The notion that the judicial system produces its own specific form of knowledge was confirmed yet again when the debate about the Lucia de B. case (The case of Lucia de B. is a highly controversial legal case in the Netherlands, in which a supposedly statistically significant correlation between the presence of a particular nurse and the occurrence of suspicious medical incidents on her ward played a central role in getting her a life conviction for serial murder of a large number of patients). and other controversial cases flared up last year. Some academics stated that the truth had been determined in the wrong manner and that there had been judicial errors. In response Cleiren, professor of criminal law, stated that the way in which the criminal law operates is indeed different from that assumed by many members of the public. As I know her personally, I asked her to explain to me what these differences are. On the basis of her explanation, I arrive at the following four distinctive characteristics.

- First of all, it is important to note that the authorities have a *monopoly* in determining the truth in criminal cases. This is closely connected with other matters such as the State's monopoly on the use of force and its monopoly on prosecution, trial and punishment. But this is indeed something special because the search for truth in other domains such as religion, science and journalism is not subject to any monopoly.

- Second, the determination of the truth in criminal matters concerns not all facts but *specific facts*, namely those connected with a criminal offence. A tremendous number of facts are therefore not taken into account.
- Third, the search for truth has to comply with countless *rules and principles*. Investigating officials have to work in a systematic, lawful, reliable and proper manner. These restrictions apply to a much lesser extent outside the legal domain.
- Fourth, it is important for the judge to be *personally convinced* of the truth established in this way.

All in all, the criminal process produces a specific type of truth which may not be equated with truth as meant in common parlance. It follows that legal truth is to a large extent a professional matter which is barely comprehensible for outsiders.²

If legal truth is put at one extreme of the cognitive axis, it takes little effort to imagine what type of truth should be put at the opposite end. Journalists and the media generally try to establish their own truth, but as they use very different procedures for this purpose the end result too is very different. Although practical statements, hard data and scientific opinions play a role in the media domain, the rules of human imagination tend to be decisive. This means that although much information is processed by the media, the manner in which it is processed is determined by the rules of drama. As the Social Development Council has noted in one of its advisory reports, these rules have their own logic (RMO, 2003: 33-36). This media logic includes the following procedures.

- The *framing* procedure, by which complicated reality is reduced to a clear and comprehensible story.
- The process of *personalization* by which an identifiable person comes to represent hitherto anonymous mechanisms or structures. This is mainly important when mistakes are made because the person concerned can then serve as a scapegoat.
- The procedure of *repetition and variation*. A report can gain strength through constant repetition or if a number of variants are shown.³
- Coverage takes the form of *entertainment* in that the report or broadcast is designed to be extra exciting. This can be done by contrasting different people or their positions, but it can also be achieved by playing on the emotions and using dramatic images.

All of this means that the modern media are more about perceptions than about facts, let alone facts that would be decisive for the courts. The cognitive axis therefore has two

2 In anticipation of my arguments, I would note that the fact that the law is incomprehensible to outsiders is underlined by Wagenaar, who notes that highly educated lay people have great difficulty understanding the legal jargon (Wagenaar, 2008: 57).

3 The modern media are not in fact the first to adopt this procedure; classical rhetoric too formulated rules for strengthening the credibility of a message.

extremes. In the legal domain truth depends not on perceptions but on arguments; its aim is to produce inner conviction, not a good evening's viewing. It is not dependent on market or viewing figures, but results from a monopoly. And, last but not least, it has serious consequences for the suspect, whereas in the media there is often a sense of unaccountability.

What is the place of the public on this cognitive axis? What is the basis of their thinking and what kind of truth is of most importance to them? I think that the attitude of many members of the public is somewhere in the middle. They are unable and unwilling to exercise the high degree of rationality required in the criminal law. They prefer to use their common sense. As a rule, they also realize that there is a difference between the media images and the everyday reality. In terms of rationality they occupy an intermediate position. This also applies to the reference framework within which views and truths are established. As I have said, determining the truth is a professional matter for judges and other lawyers. The difficulty which so many members of the public experience in this connection is not due solely to the technical jargon. It is also attributable to a manner of thinking that is far removed from their everyday experience. Many members of the public seek to relate the truth to what they experience in their daily life; their truth is not of a professional but of an existential nature. This is one reason why they are able to keep a certain distance from the media. The media are, after all, dependent on viewing figures and the related commercial considerations. Finally, members of the public occupy the middle ground when it comes to determination of the truth. They are not enamoured of the strict arguments used in the legal profession and prefer instead to rely on anecdote: experiences which they retain in the form of a story or anecdotes which they have heard from others. Although these do not lack drama, they differ from the media coverage in one fundamental way. The anecdotes of members of the public often concern fairly trivial matters, everyday experiences that receive no media coverage because they lack dramatic potential. But they are experiences which are shared by most people and in a sense provide a healthy counterbalance for perceptions in the media. This is represented in this table by a few key words.

The cognitive axis: truth as perceived by judges, the public and the media.

	Rationality	Frame of reference	Determination of trutha
Judges	High	Medium	Low
Public	Professional	Existential	Commercial
Media	Reasoning	Anecdotes	Perceptions

Although these nuances are important, they relate exclusively to what I have termed the cognitive axis. In addition, what I have said has been only about the public in general, whereas everyone understands that differences between individual members of the public can be considerable. Dutch politicians and civil servants have long referred to what they term ‘the citizen’, who they may then have classified as spoiled, xenophobic or calculating according to context. Only in recent years has there been a growing realization that this mythical creature does not exist and that in reality there are many different kinds of citizen. How many members of the public view the judicial system is largely determined by what they experience in their everyday lives or in their immediate environment. They thus have their own truths, which depend in part on a number of characteristics, for example the social class from which they come, whether they live in an urban or rural environment, whether they have or have had children, whether they have received much or little education and so forth. In other words what any member of the public thinks about the judicial system depends in part on his or her social position. This brings me to the second - attitudinal - axis, which relates to norms.

These norms are closely bound up with the lifestyle of the citizens concerned and with the extent to which they are capable of participating in a modern society. A few years ago I myself made a distinction in this connection between three types of citizen, depending on their attitude to modern life. Modernity’ stands for a way of living in which citizens are guided by principles such as approachability, equality, self-sufficiency and involvement (Van

den Brink, 2007). As this distinction seems to me to be relevant to the case we are considering, I will briefly introduce you to them.

I would describe the first group as *active* citizens. They are often highly qualified and have a substantial income. They tend to own their home and live in an affluent (or, to use the terminology employed by the former minister of Housing Peter Winsemius, an ‘advantaged’) neighbourhood. They are fairly interested or even very interested in politics and, although they generally take a critical view of what government does and does not do, they have a great appreciation of the democratic system. These members of the public also have an aversion to traditional authority. They have their own clear views on good and evil and are generally not bothered by the fact that other members of the public have different views. Nor do they feel particularly anxious by the presence of a large number of immigrants in the Netherlands and are generally inclined to view the multicultural society as a welcome enrichment. In short, they are people whose education, experience and social position means they have a relatively large fund of social and cultural capital. This is partly why they have a positive attitude towards modern society. They play an active role in this, are open to new challenges, are enterprising and, as far as the public sector is concerned, would welcome fewer rules and less bureaucracy.

As the second group is diametrically opposed to the first group in respect of each of these facets, I have described them as *anxious* citizens. As they generally have little education, they tend to have a low income, which is even more the case if they have to get by on disability or unemployment benefits. They almost always live in rented accommodation in a disadvantaged neighbourhood. Most of them have little interest in and know little about politics. But they often have pronounced views on what they describe as ‘profiteers’ in The Hague. They generally have a negative view on how our democracy functions. Most of the people in this group consider a strong leader to be necessary and believe that those who commit serious crimes should be locked up for life. It is noteworthy that people in this group have often lost their moral compass. They have difficulty in distinguishing between good and evil, for example because very disparate views are held or because these views change quickly. They have little enthusiasm for the multicultural society and would prefer to see most immigrants leave the country. In short, they are people whose education, experience and social position mean they have little social and cultural capital and therefore view modern society as highly problematic. They seldom play an active role in society and often adopt a wait-and-see approach, hoping that they will be protected by the authorities against the forces of social change.

The normative axis: attitudes of active, awaiting and anxious citizens.

	Educational level	Democracy	Morality
Active citizens	High	Positive	Self-aware
Awaiting citizens	Medium	Ambivalent	Hesitant
Anxious citizens	Low	Negative	Confused

Finally, there is a third group whom I would describe as *awaiting* citizens and who occupy an intermediate position in respect of the points to which I have referred (Van den Brink, 2002: 76-87).

It cannot be denied that a classification of this kind comes across as rather artificial. It follows that other typologies with other indicators have been proposed in the academic literature. But this does not alter the fact that there is always a certain continuum for the classification of the different categories of citizens. This axis is of importance to the subject of my lecture.

Research shows that some members of the public have a fair degree of confidence in the legal system and others less confidence. What factors account for this difference? One might imagine that living conditions would play a role. While the inhabitants of disadvantaged neighbourhoods have indeed been found to have less confidence in the judicial system than those who come from more affluent neighbourhoods, the difference is not very large (Dekker & Van der Meer, 2007: 10, 36). More important factors would appear to be moral uncertainty (what the researchers call *anomie* – and also education (Dekker & Van der Meer 2007: 31-37).⁴ Confidence in the judicial system does not in fact stand alone. My classification of active citizens is borne out by the finding of the SCP researchers that there is a close correlation between confidence in the judiciary and confidence in other institutions such as the

4 In her inaugural lecture De Groot-van Leeuwen expressed astonishment at the fact that little research has been done into these differences. Every empirical study shows that the level of education is the sole significant factor which correlates systematically with confidence in the legal system. Poorly educated people have less confidence than highly educated people, but, strangely enough, almost no action is taken on this finding (De Groot-van Leeuwen, 2005: 29).

police, the civil service or parliament. This is an attitude which is found above all in the (upper) middle class. Suspicion and cynicism are more prevalent in the lower and lower middle classes. These differences are mainly attributable to the social and cultural backgrounds of the people concerned and determine in part how they view society.

It may be wondered what position the judges take in this dimension. It has been established that the composition of the judiciary has changed in recent decades: a degree of democratization has been introduced. For example, there is a deliberate policy of ensuring that two thirds of the entrants to the profession have already had a career. Efforts are also made to achieve a degree of diversity in terms of gender, parental background and age (De Groot-van Leeuwen, 2005: 6, 21). The judiciary has undergone a process of normalization not only in terms of its staff composition but also in terms of its organization. In recent decades the courts have developed into an ordinary business: targets have to be achieved, work is streamlined and the organization has become more efficient. All of this supports the idea that the judiciary is no longer an ivory tower. Judges now like to emphasize that they are at the heart of society and that they themselves are very ordinary people (Ippel & Heeger, 2006: 136).

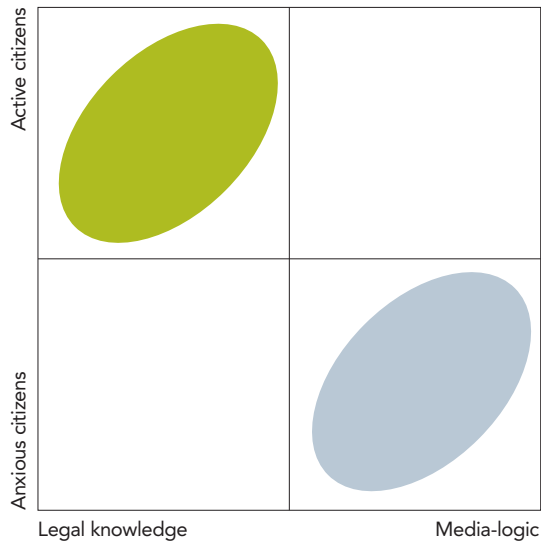
However, from a sociological perspective this view is utterly wrong. Clearly, the great majority of the judiciary belong to the upper echelons of society. They frequently take part in the administrative and political games in which the rules of society are established. I would say that to a large degree our judges fit the profile of the active citizen. They are highly qualified, democratic, morally aware and modern people with an open mind. In short, they are the best of what Dutch society has to offer. But it would be nonsense to think that they are close to the ordinary 'man in the street'.⁵ After all, the majority of ordinary people belong to the categories of awaiting and anxious citizens (categories which account for more than 75 percent of the population).

Using the dimensions I have just described, we can now map out the force field in which the judicial system operates. In figure 1 the horizontal line corresponds with the cognitive axis and the vertical line with the normative axis. In consequence, we can show in a cognitive sense how the determination of the truth by legal professionals (left) relates to the truth as viewed by journalists and the media (right). The vertical, normative axis shows the relative positions of the two extreme categories of citizen: the highly educated, tolerant or enterprising citizens (above) and the poorly educated, authoritarian or anxious citizens (below).

5 This was well illustrated by the portrait of the judiciary recently painted by *Vrij Nederland*. The picture that emerged from the article in question was that of moderate, liberal-thinking and non-religious professionals, who prefer to obtain their information from the public broadcasting channels, regularly read the quality broadsheet NRC and like listening to classical music (Husken & Lensink, *Rechters versus de minister* (Judges v the Minister), 2008: 40-45).

Although the result is naturally an over-simplification of reality, it does help to determine where the gap exists.

Figure 1: The worlds of the law (green) and of poorly educated citizens (grey).



In my view this is basically a gap between two 'worlds'. For example, there is the world of the law, a domain which is largely governed by its own rules not only when it comes to determining the truth but also in terms of prevailing values and standards. In our diagram this world must be positioned in the upper left quadrant. The distance from this world to that of the active citizen is shorter than the distance to the anxious citizen. In terms of thinking the active citizen is closer to the type of reasoning used in the legal world and applies the same set of normative values. This is why it is not so difficult for people of this kind to play a role in the legal domain. They can quite easily understand how real judges think and can therefore, as Wagenaar has shown, arrive at similar findings.

But there is also a world of anxious citizens, which is located in the lower right quadrant. In this world the values and standards are very different and the manner in which truths are dealt with also differs markedly. In theory, a degree of overlap could exist between this world and that of the law, but our empirical data show that any such overlap is small.

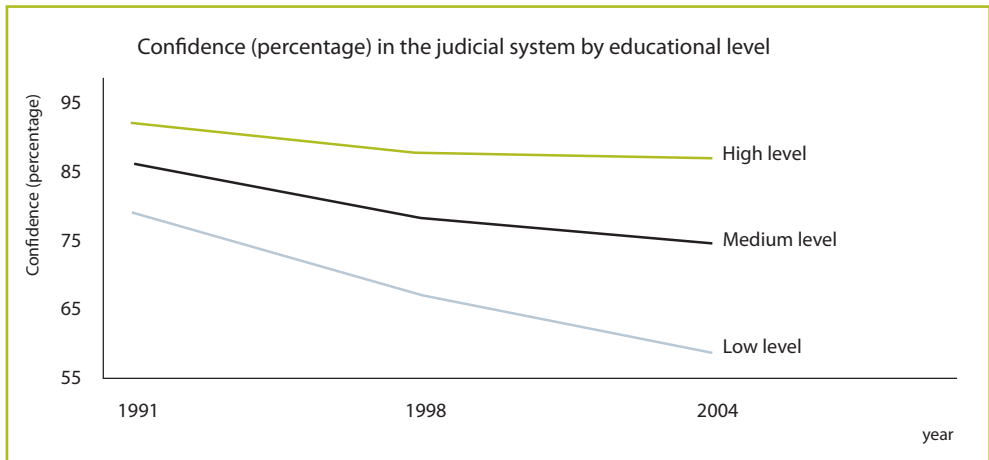
The gap is and remains fairly large, as others have also established. I would mention just a few examples. The survey conducted by *Vrij Nederland* shows that about 63 percent of the judges comply with article 1 of the Constitution: for them every form of discrimination is objectionable (Husken & Lensink, 2008: 36). But ordinary people feel much less compunction about this. For example, in 2004 some 59 percent of poorly educated Dutch people still considered that Dutch families should be given preference in the allocation of homes (SCP, 2007: 298). In addition, three-quarters of the judges and prosecutors disagreed that the sentences were too low (Husken & Lensink, 2008: 30-35). However, the great majority of poorly educated people considered that criminal offences were punished too lightly in the Netherlands. In 2002 they accounted for no less than 93 percent (SCR, 2002: 681). Judges are irritated by journalists and politicians who seize upon particular incidents to fly policy kites, but they do feel pressured by society (Ippel & Heeger, 2006: 137-138). Finally, De Groot-van Leeuwen points to the fact that some 1.5 million Dutch people are to all intents and purposes illiterate, whereas the law is to a large degree all about language. She therefore concludes that the differences between the two worlds are underestimated (De Groot-van Leeuwen, 2005: 31-32).

It would not be so bad if these differences were gradually diminishing, but this is certainly not the case. Indeed, the distance between the two worlds in figure 1 is actually increasing as the two axes develop in different directions. On the cognitive axis, for example, the ongoing specialization and professionalization of the judiciary is an important factor. The majority of the judges and prosecutors emphasize that this specialization is necessary (Husken & Lensink, 2008: 31). But this creates the risk that fewer and fewer people are able to understand what is actually going on. Some authors are already identifying the supply of specialized information as a problem: it is becoming increasingly difficult for criminal lawyers to keep abreast of all changes in primary and secondary legislation and the related case law (Ippel & Heeger, 2006: 154, 164). It is therefore also becoming more difficult to bridge the gap between legal language and the language of everyday life. Indeed, some authors argue that the language of the law is becoming so inaccessible that even court reporters have difficulty in understanding the reasoning given in judgments. This is borne out by surveys done among journalists and court reporters a few years ago (Malsch, 2004: 56). This trend is reinforced by the fact that the services of specialists are called upon more and more often in legal proceedings. Examples include psychologists, experts on other cultures, DNA experts and information technology professionals. They are increasingly involved in the determination of the truth, but the specific rules of legal procedure must be followed in this connection (Cleiren,

2008: 6, 12). All of this means that the business of determining the truth has become highly professionalized. This is all the more problematic because the criminal process no longer takes place in seclusion. Nowadays the aim is to have a high degree of openness or transparency by having the matter reported as well as possible in the press and explaining what has been done. But, as I have already explained, the media apply their own methods in reporting – methods which, lawyers believe, result in an incorrect representation of the case. The possibility cannot therefore be excluded that the distance between truth as perceived by the judiciary and truth as perceived by the media is widening. If so, the tensions we have already identified are, if anything, likely to increase in the future.

An important change is taking place not only on the cognitive axis but also on the normative axis. We can see that over the years Dutch judges have started to impose ever heavier sentences and have a higher conviction rate. There has also been a substantial increase in prison capacity. All of this illustrates that the Dutch penal climate has become quite strict, certainly when compared with that of other countries (Van der Heide, et al., 2007; Van Wingerden & Nieuwebeerta, 2006; Van Tulder & Diephuis, 2007). But what does this development signify?

At first sight it might be thought that this would reduce the gap between the world of the law and that of ordinary people. However, two observations should be made in this connection. First of all, it is noteworthy that many professionals in the legal field regret or even condemn this development. Those most forthright in their opinions on this subject are defence counsel. Many of them express concern about the rapid changes which Dutch criminal law is undergoing and about the direction of this development. They complain that too much attention is focused on the emotional aspects of a case, that retribution plays a role more frequently and that the judges are showing less and less interest in the person of the suspect. Defence counsel consider that the administration of justice has become harder, faster and more basic and hence less good in the last 15 years. Obviously, defence lawyers have their own axe to grind, but it is noteworthy that a good many judges share their view. They perceive a hardening of the judicial climate or loss of quality or consider that great emphasis is wrongly placed on the criminal law (Ippel & Heeger, 2006: 137-138, 153-154, 163; Husken & Lensink, 2008: 28).



A second point to be considered in this connection is whether the greater strictness of the judges has actually helps to bridge the gap. In any event these harsher sentences have not increased the confidence of the population in the judiciary. The SCP researchers noted that confidence in the judiciary declined among all groups between 1991 and 2004. This decline was relatively modest in the case of the more highly educated group, but relatively marked in the case of the more poorly educated. As a result, the difference in confidence between the two groups is slowly but surely widening (Dekker & Van der Meer, 2007: 28). To put it in my own words, I would say that conceptual and experiential worlds of active citizens and anxious citizens resemble each other less and less. In consequence, the identified tensions are, if anything, increasing rather than decreasing.

Who has problems with the gap?

I myself was unclear for a long time how I should view the relationship between these two worlds. I thought of the legal order as a closed system and a counterpart of the social order. In this respect I was helped by the work of Cleiren. In her inaugural lecture (1992) she considered the question of whether the law is open or closed. A legal system is considered 'closed' when every human act is subject to a legal standard. In such a case everything which is not prohibited is also permitted. A layman tends to think of the criminal law as a closed legal field, but this proves to be a misunderstanding. Not only because the courts always have a certain discretion in interpreting the law, but above all for reasons of principle. It would be quite impossible to apply legal standards to all conceivable acts (Cleiren, 1992: 17-19).

This sheds a different light on the principle of legality as set out in article 1 of the Code of Criminal Procedure. It gives the courts responsibility for filling inevitable gaps and developing new norms. In a formal sense article 1 does indeed amount to a safeguard for the rule of law, but in a substantive sense this must be realized anew time and again. Both the judiciary and the executive therefore have a duty to safeguard the principles of the rule of law in practice. In consequence we must conclude that 'The' rule of law does not exist as such: it is a collection of ideals and points of view which do not have a perpetual and unchangeable content but which themselves evolve and must be updated continuously. In this sense law is an open system: it requires interpretation, updating, supplementation and addition by the executive and the judiciary, although this is subject to the limits defined in law (Cleiren, 1992). For this reason a certain gap between judges and ordinary people is inevitable.

But also among the well-informed 'Active' people among the public many fear the rule of law is threatened by a number of developments (Van de Donk, 2008). Hardly any group in the Netherlands challenges the notion of democratic rule of law. What do people mean? Given the emphasis placed on management in recent decades, it might be expected that the public would consider speedy trials or efficient organization to be of the greatest importance. But this is not the case. On the contrary, they consider it very important that judges do their work well. Their views on the quality of judicial action focus above all on two aspects: whether judges are aware of what is going on in society and the extent to which they treat everyone equally. I will return to the first point in a moment, first I want to deal with the first issue: the principles of a fair trial.

Confidence in the Judiciary system depends to a large extent on whether the judge sets to work fairly. The findings of the American psychologist Tyler are relevant in this respect. He

states that an unbiased approach, equal treatment and adherence to correct procedure are more important to an assessment of how the courts operate than personal experiences or individual opinions on crime (Dekker & van der Meer, op. cit.). This is in keeping with what goes on during a court hearing. In general, defendants make no problems about complying with the rules of procedure. In most cases they have respect for the judge. Defendants tend to be more negative about the police and the prosecutors and sometimes reproach the judge for agreeing too easily with the prosecutor. But most of them understand very well that the judges are just doing their job. Research by Vrugink shows, for example, that defendants often have a more negative view of the behaviour of the police and prosecutors than of that of the judge. Needless to say, they reserve most praise for their own lawyer, but the judge generally comes off pretty well as an objective actor (Vrugink, 2002). The research by Ippel & Heeger, to which I have already referred on a number of occasions, even shows that the assessment of the work of the judge by two thirds of all suspects varies from neutral to positive. Many of them therefore regard the trial as a game in which each party has a specific role to play. In this connection they expect the judge to hear their story without prejudice and to reach an independent decision (Ippel & Heeger, 2006: 142, 152). In other words, they know that a gap exists, but it does not bother them. Elffers and De Keijser studied the public's perception of judges and, conversely, the judges' perceptions of the public. One of the questions they put to the judges was about the public's perception of the judiciary. Surprisingly, both the judges and the public took the view that in reaching their decision judges should not be swayed by what the public think. However, judges did believe that judicial imperviousness was something that the public did not wish (Elffers & De Keijser, 2004).

Various developments that tend to undermine the authority of the judges and the Judiciary have occurred in recent decades. Processes of democratization, emancipation, horizontalization always have two effects. On the one hand, classical forms of authority lose their credibility and, on the other, citizens become more and more assertive. Former authorities can no longer claim a special status, position or a competence. They may still enjoy authority, but they have to acquire it through their own professional and personal behaviour. This judges have in common with many other persons in positions of authority such as politicians, teachers, mayors, police officers and specialists. The second trend is that members of the public are increasingly inclined to adopt an independent and assertive approach, partly as a consequence of higher standards of education and the development of a knowledge-based society. This was something which started in the upper echelons of society, but has now extended to large parts of the population. Nowadays even poorly educated or disadvantaged people have little hesitation in expressing their views loudly and clearly. As a result of these develop-

ments the involvement of other parties with the administration of justice is growing. More and more persons permit themselves to express a view on the work of the judges. One example are the media, which have a tradition of monitoring authorities. Another is the independent experts, who increasingly comment on the decisions and omissions of the judges. There are also the opinion pollsters and the crime reporters who duplicate whole sections of criminal investigations. And, finally, there are the relatives or friends of the defendant or victim who have their own views on what happens in court. Formally speaking, administering justice remains a monopoly of the State, but in reality public opinion is playing an ever more important role.

Actually the judges themselves have not been insensitive to this process. As I have already said, they belong to the most civilized, democratic and liberal part of society and have therefore evinced much respect for the feelings of ordinary people. The members of the judiciary are well aware that they ultimately derive their power and influence from the sovereign people. This is why they take the results of all these opinion polls seriously and why they periodically commission studies of public confidence in the judiciary.⁷ The surveys of punitive attitudes to which I referred at the beginning of this contribution are part of this.

Nor does the Judiciary allow its fears to be easily allayed. It is almost as if something is gnawing at their democratic conscience, as though the judges doubt the legitimacy of their own authority or are afraid of what ordinary people might say in return. This is even noticeable in the courtroom. Judges who address defendants know, of course, that the element of coercion is very strong. Habermas's ideal of a 'herrschaftsfreie Kommunikation' is still far away. But they do not address defendants in an authoritarian or condescending manner. They consider it of great importance that defendants understand the sentence imposed on them, even if they do not agree with it (Ippel & Heeger, 2006). Such behaviour corresponds with the feminine style which, according to the typology of Hofstede, characterizes Dutch culture in general (Hofstede, 1995). Understanding one another, being heard, consulting, creating mutual understanding and other characteristics of this style are not unknown in the world of the law. Perhaps this is also due to the fact that there are now almost as many women as men working in the judiciary. To obviate any misunderstandings I hasten to add that I welcome the strong impact of a democratic culture in the world of law and am certainly not advocating a return to the closed authoritarian style of former times. But this new approach does entail fresh problems, one of which is that the inevitable gap between the Judiciary and the public prompts more and more questions, both among the judges themselves and among the public. The question is therefore what we must do about this gap.

7 Many people think that elections and opinion polls involve the same processes. For an excellent consideration of the relevant pitfalls see the dissertation of Wil Tiemeier (2006).

Can the gap be bridged?

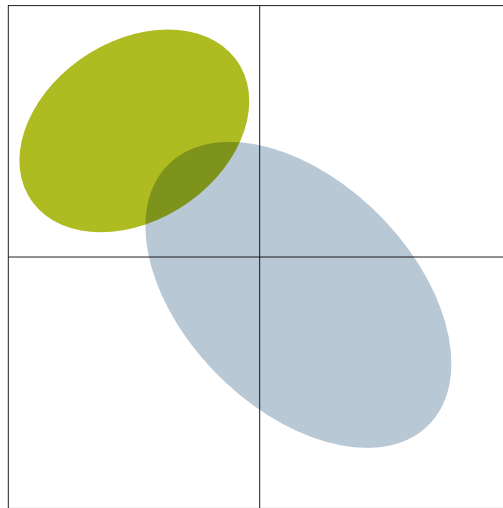
Although judges and the public are separated by an inevitable gap and this is even becoming increasingly visible, this does not mean that we should simply throw in the towel. My solution would be to *bridge* rather than *close* the gap. The starting point should be that although the distance between judges and the public is a given, efforts should be made to improve the interaction between these two worlds. This should be a two-way movement. It would be a good thing if the experiential and conceptual world of the public (or elements from this world) could be better reflected in the domain of the judicial system. And, by the same token, it would also be a good thing if the experiential and conceptual world of the law (or elements of this world) could be reflected in the domain of the general public. An improvement in communication between the two worlds would in any event provide an enormous boost for the public credibility of judges. I will now touch on both these aspects.

The first movement would involve the communication of the experiences, ideas, views and expectations of ordinary citizens to the domain of the judiciary. This could be achieved by strengthening the lay element in the judicial system. However, an objection to this approach might be that the quality of the administration of justice would suffer as a result. Groenhuijsen points out, for example, that consideration of the evidence presupposes a degree of professionalism not possessed by ordinary people (Groenhuijsen, 2007). This reservation is in keeping with the comment made earlier about increasing specialization and appears to be supported by Wagenaar's findings (Croes et al., 2008: 41).

What the public mean when they say there are in favour of greater involvement of lay people is also debatable. The survey conducted by the Research and Documentation Centre (WODC) and the Council into the wishes of the general public concerning involvement in the judicial system shows that 92 per cent of the respondents were in favour of such involvement, but that they mainly envisaged the exchange of information between lay people and the judiciary. They did not envisage lay people having direct influence on verdicts or sentencing. What they wanted was a better exchange of views and ideas. Besides expressing a wish for judgments to be comprehensible, they also stated they wished to have more opportunity to be heard by the judge (Koomen, 2006; Klijn & Croes, 2007). This finding bears out the conclusion drawn by Elffers and De Keijser, who considered that judges themselves had become the victims of the media in the sense that the wishes they imagined the public to have did not correspond with what the public actually wanted (Elffers & De Keijser, 2004).

In other words, the problem is not the division of roles between the public and the judiciary but the defective communication between them. Something could be done about this by the judiciary. For example, the position of victims in the judicial process could be strengthened. The attempts made so far have met with little success. Although the victims now have the right to address the court, the suspect does not need to be present and the judge is not obliged to act upon the victim's story. In other countries such as France and the United States, victims can play a more active role. This would be one way of ensuring that more justice is done to the experiences of the general public in the judicial domain. This would not close the gap, but it would bring about more interaction between the two sides of the gap.

Figure 2 : Public have more contact with the Judiciary



The second movement to which I have referred goes in the opposite direction and requires the judiciary to do more to seek out the domain of the general public. To make clear what I mean I should perhaps first say something about the concept of *public credibility*. Thinking about legitimacy was for a long time indebted to the manner in which the German sociologist Max Weber dealt with the question of authority at the beginning of the 20th century. He distinguished between three forms of authority, each of which has its own source and dynamic: *legal* authority, which is based on a formal hierarchy and impersonal relations; *traditional*

authority, which is based on the standards of the past and is of a personal nature; and *charismatic* authority, which results from the personal actions of a leader and manifests itself in times of crisis (Weber 1956).

Weber's groundbreaking work prompted a broad flow of social sciences studies into authority and leadership. And from the 1970s onwards the literature on managers and management was no less wide-ranging. In this connection I should like to draw attention to the ideas of Kouzes and Posner (1993). They developed a new theory of credible leadership and tried in this way to do justice to the social changes that have occurred since Weber's time. They identified four dimensions that play a role in credibility:

- In modern society authority is no longer a product of social position, but must instead be achieved through *interaction* with employees or subjects.
- In this process the personality and *personal ideals* of a leader are of decisive importance.
- Leaders become credible when they communicate their views to others with the help of *images and stories*.
- A leader must be *aware of reality* and the gap between what he promises and what he delivers should not become too large.

These four aspects can be described as the interactive, normative, performative and cognitive dimensions of credible leadership. They correspond, broadly speaking, to four types of expectation which modern subjects or employees have of those in authority. Members of the public expect their leaders to be honest, to develop a vision of the future, to serve as a source of inspiration and to demonstrate sufficient competences (Lange, 2004). Could judges strengthen their public credibility by these means? Naturally, I understand that you cannot set to work in the same way as politicians or business managers. The basis for the social authority of the judges will be formed by their professional legal skills. But a number of the elements mentioned by Kouzes & Posner could be added in order to boost their credibility in a democratically-minded environment.

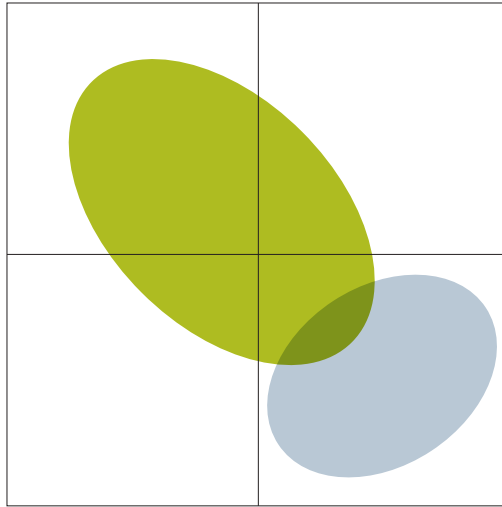
First of all, judges could enter more directly into an *interaction with the public* when providing the grounds for their judgment. For example, they could decide not to have the judgment explained by a press officer or a younger colleague, and instead take it upon themselves to explain it to the public. This would not be without risk, because the judgment might encounter incomprehension, prompt a public debate and lead to social protest. But my advice would be that a judge should not run away from this. On the contrary, the judges concerned would gain credibility by defending the judgment not only in their own trusted environment but also

in the media or even in the neighbourhood where those concerned live. This would indeed require public courage, but without courage the gap cannot be bridged.

Second, the *normative aspect* of judgments should be explained with much greater emphasis. Although the normative character of judicial proceedings and judgments is unmistakable, this is often obscured by the emphasis placed on the technical legal aspects. While the technical aspects should of course be retained, I think it would be a good idea to devote much more attention to the underlying story. Let judges indicate what standards, values or principles have played a role in their judgment. And, above all, let them not hesitate to defend certain values and standards. For too long the law has been thought about mainly in terms of efficiency, but from the perspective of democratic debate greater emphasis should be put on the normative aspects (Van den Brink, 2004). As this is often seen to work at the level of the courts dealing with minor offences, it is unclear why it would not be possible at a different level (Ippel & Heeger, 2006: 135).

Third, the judges could take more account of how *public perceptions* function. I have already pointed to the major differences between truth as established in the judicial domain and truth as seen in the media. Once again, while the judiciary should naturally retain their own ways of determining the truth, they could make much better use of images, stories, metaphors and rhetoric. Do not forget that criminal law attracts great public interest and that films and TV series about criminal cases are generally watched by a wide public. We may even assume that such series and films are one of the main sources of information about the law for a large section of the general public. After all, most people have no first-hand experience of the criminal law and less than 20 percent have ever attended a public trial (Ippel & Heeger, 2006:125). Nonetheless, these people have all kinds of ideas about the judicial system and the judiciary (Dekker & Van der Meer, 2007: 30). Naturally, one could dismiss these ideas as fictitious or unrealistic, but a more intelligent response would be to engage with the public perception more actively. In addition, more research could be done into the interaction between the administration of justice and public perceptions. Finally, we still know little about how ordinary people view the law or about the processes (and fictitious processes) that influence this (De Groot- van Leeuwen, 2005: 26).

Figure 3: The Judiciary seeks more contact with public



The fourth element is that judges and legal professionals could do more to understand the *realities of the people* on whom they often pass judgment. In this sense too the gap could be bridged rather more often. I do not doubt the moral and intellectual commitment of judges who give judgment on the actions of a defendant. However, I fear that certain lawyers may have a point when they say that a deep chasm separates the life of the judge and that of the defendant. They argue that the judiciary are ensconced in an ivory tower: as such they have little real contact with the social underclass or the minority groups from which many suspects come (Ippel & Heeger, 2006: 158).

An attempt can thus be made in four ways to strengthen the interaction between the world of the law and that of the general public. I would repeat that the interaction would not reduce or close the gap. After all, this gap is large and may continue to widen in the years ahead. The risks of such a development should not be underestimated, if not at the constitutional level in any event at the democratic level. These risks can best be countered by strengthening the social credibility of the judiciary. If you take this message to heart, your willingness to allow an outsider to address you this afternoon will not have been for nothing!

Thank you.

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In the Annual Judiciary Lecture judicial leaders and reputed academics are invited to address issues concerning the role of the Judiciary in present society. The lectures contribute to the ongoing debate on the necessity for further development of the judiciary system.

One issue however remains undisputed: the Judiciary cannot afford to be incomprehensible to the anxious citizen.

Two worlds: the Judiciary versus Public life

