Balancing Territoriality and Functionality; Specialization as a Tool for Reforming Jurisdiction in the Netherlands, France and Germany

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1. Introduction

The question of jurisdiction is at the heart of recent discussions regarding the modernization of European judicial organizations.[1] In some cases, special courts have been created for dealing with specific categories of cases, or particular categories of cases have been concentrated within a single court for the entire legal system. In some instances, reforms focus on reducing the number of courts or on creating a limited number of courts of general competence.

These ways of solving jurisdictional problems involve a departure from the classic organizational standard which was based on territoriality. In former times, the territoriality standard focused first and foremost on the geographical location of the court.[2] The standard of territoriality further encompassed issues of timeliness, hearing and understanding, comprehensibility, accessibility and visibility of the judiciary towards society.[3] The recent reforms, however, shift the focus to an organizational standard that is based on functionality. In order to make the judicial organization compatible with requirements of expertise, the allocation of jurisdiction based on subject matter is held to the light. More and more often, specialization is the tool that is used to ensure that judges have the knowledge and skills required to do their job in a timely and correct manner.[4]

It is against this background that the question arises how far functionality should be pushed in the modernization process. An analysis of recent developments in the Netherlands, France and Germany sheds light on this question. In fact, even though these legal systems share a background in the liberal democratic legal tradition[5], they have chosen different ways for dealing with questions regarding judicial specialization. The French judicial system is composed of courts holding competence to hear both civil law cases and criminal law cases (the *'ordre judiciaire'*). Administrative law cases are judged by the courts of the *'ordre administratif'*, with the Council of State at the top of the hierarchy.[6] The Dutch judicial system is based on the French judicial system. However, from the 1980s onwards, important reforms have taken place. The administrative courts were merged with the district courts of general jurisdiction[7], and now only a single 'judicial organization' exists, which deals with decision-making in civil law cases, criminal law cases and administrative law cases. Also, the number of municipal courts was reduced and – at a later stage – these courts were merged with the district courts.[8] Jurisdiction for judging specific categories of administrative law cases and appeal cases in this field still lies with a number of special courts, which do not form part of the judicial organization.[9] In Germany, finally, the federal system allows each region (*Land*) to draw its own judicial map. Therefore, reforms may be carried out in different ways and at different speeds. However, the German judicial organization originates in a tradition of specialization: it is composed of

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[1] P. Albers *et al*, 'De territoriale verdeling van rechtsmacht in Nederland', (2004) 1 Trema 16; J.W.M. Tromp *et al* (eds), *Concentratie en specialisatie van rechtspraak: noodzaak of overbodig?* (Kluwer, 2006). The term 'judicial organisation' is used in this paper in different meanings: 1) the organising of judges and courts; 2) the way in which judges and courts are organised; 3) a group of persons, *i.e.* judges, with a certain goal or function, *i.e.* dispute settlement.

[2] Albers *et al*, *op cit* n 1, p. 16.

[3] *cp* C. Cointat, *Quels métiers pour quelle justice? Rapport d'information du Sénat no 345*, Sénat, 2002, p. 175.

[4] *cp* Central European and Eurasian Law Initiative, *Specialized Courts: A Concept Paper*, 1996, <http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/spc.html>.

[5] *cp* T. Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge University Press, 2003), pp. 7-8.

[6] See <http://www.justice.gouv.fr/index.php?rubrique=10031>.

[7] *cp* Article 43 of the Judiciary Organisation Act (*Wet op de rechterlijke organisatie*).

[8] See Werkgroep BOK (Bestuurlijke Onderbrenging Kantongerechten), *Kantonrechtspraak in de 21e eeuw. Naar afdoening 'op maat'. Een bijdrage aan de evaluatie van de bestuurlijke onderbrenging van de kantongerechten*, 1 March 2006, http://www.justitie.nl/images/Kantonrechtspraak%20in%20de%2021e%20eeuw_tcm34-98977.pdf .

[9] A comprehensive overview regarding the judiciary system in the Netherlands is available at <http://www.rechtspraak.nl/information+in+english>.

five different branches or *Gerichtsbarkeiten*, which deal respectively with civil law cases and criminal cases, administrative law cases, labor law cases, social security cases, and financial law cases[10], and which reside under different ministries.

A comparison of the three legal systems enables us to shed more light on the question of specialization. In France, important reforms have been implemented to improve the judicial organization[11] and the judicial map[12], in particular with regard to specialization. Recent discussions in the Netherlands and in Germany focus on similar issues.[13]

In this article, we examine the tradeoffs and balances obtained between territoriality and functionality in the Netherlands, France and Germany. Second, by focusing on the interaction between the relevant principles regarding judicial organization, a framework and possible scenarios for answering the balancing question will be developed. Third, the lines of the analysis will be drawn together in some concluding remarks.

2. Specializing Judiciaries: Framing the Balancing Question

The analysis will start by identifying the characteristics of specialization, and then will analyze and scrutinize the dilemmas associated with specialization.

A The characteristics of specialization

After investigating the concept of 'specialization', we will turn our attention to its role in the Dutch, French and German judicial systems.

1) The concept of 'specialization'

With regard to the judicial organization in the Netherlands, the concept of 'specialization' has been analyzed by Hol and Loth. They define 'specialization' as:

> '(…) a multiform principle and a dynamic practice of professional functioning which are based on a claim regarding a certain command of knowledge and skills, mastered and exercised on a relatively high level, which claim is relative compared to the command of knowledge in the surroundings and which implies a certain organization of work on the basis of a division of labor.'[14]

Hol and Loth identify three aspects of 'specialization' as applied to the judiciary. The aspect of *knowledge*, first, regards the judiciary's claim with regard to the object and level of learning and experience available to judge cases. Secondly, the aspect of *surroundings* highlights the relativity of specialization in the judiciary as regards the level of specialization of one court in comparison with other courts, of courts and judges vis-à-vis other legal professionals, and of specific fields of judicial decision-making vis-à-vis each other. Finally, from an *organizational* standpoint, 'specialization' is a principle for the division of labor. It translates into a distinction of 'specialisms' (functions) and 'specialists' (persons).[15]

On the basis of this definition, several forms of specialization can be distinguished.

2) Forms of specialization: concentration, allocation and cooperation

An analysis of the legal systems of the Netherlands, France and Germany shows that a variety of different devices have been used to realize specialization of judicial decision-making, including:

i) concentration of cases, *i.e.* the mechanism through which one or more courts in specific territories on the basis of legal provisions or through agreements between courts are allocated exclusive competence to deal with certain categories of cases[16];
ii) allocation of specialized judges to different courts in the state's territory;
iii) cooperation between courts, *e.g.* by the transfer of groups of pending cases from one court to another.

[10] See <http://ec.europa.eu/civiljustice/org_justice/org_justice_ger_en.pdf>.
[11] Cointat, *op cit* n 3.
[12] *cp* the reform set in motion by the French Minister of Justice Rachida Dati. See http://www.carte-judiciaire.justice.gouv.fr/index.php?rubrique=10353&ssrubrique=10543&article=13392, and *infra*, par. 2.
[13] See *infra*.
[14] A.M. Hol and M.A. Loth, 'Beter weten; specialisatie in de rechterlijke macht', (2002) 10 Trema 486, p. 490 (my translation – EM).
[15] Hol and Loth, *op cit* n 14, pp. 490 and 493.
[16] R.C. Hartendorp, *Notitie rechterlijke concentratie* (Raad voor de rechtspraak, 2003).

These instruments have taken particular relevance in the Dutch legal system. Examples concern the concentrated treatment of cases in the area of business law by the Companies and Business Court[17]; the use of 'traveling judges' for the adjudication of certain types of cases[18]; and the joint settlement of fraud cases coming from several districts by the *Noordelijke Fraudekamer*.[19]

In France, an example of specialization through concentration is formed by the exclusive jurisdiction of the *tribunal de grande instance* in Paris with regard to the handling of terrorism cases.[20] Also, France has had much discussion regarding modernization of the existing system of territorial jurisdiction.[21] In June 2007, the Minister of Justice, Rachida Dati, installed the *Comité consultatif de la carte judiciaire*.[22] As a guiding principle for the reform of the territorial jurisdiction in France, she mentioned the adaptation to the evolution of the law, among other things by using specialization as a means to deal with the growing complexity of the law.[23]

The German judicial organization shows a high level of specialization with regard to subject matter jurisdiction. Within each of the judiciary's branches, territorial jurisdiction is the starting-point. However, within the boundaries set by the federal Constitution[24], many German courts show an increasing tendency to distribute cases according to the subject matter rather than on the basis of territoriality.[25] Furthermore, on the federal level, specialization is visible in the creation of the *Bundespatentgericht*, which has exclusive competence for the judgment of intellectual property cases.[26]

The three legal systems confront us with partly overlapping but also relatively diverse solutions regarding the distribution of judicial competences. Several dilemmas of specialization thus surface.

B The dilemmas of specialization

The preceding investigation forms the prelude to an inventory of the reasons for specializing judiciaries. Through a further analysis of this normative framework, insight will be gained into the underlying dilemmas provoked by the tendency towards specialization.

1) Reasons for specializing judiciaries: territoriality versus functionality

The main impetus for specialization is the belief that the concentrated treatment of similar cases will enhance the quality and timeliness of judgments. Expert judges can be appointed to deal with specific categories of (complex) cases, and these judges enhance the level of their expertise by dealing with a constant stream of similar cases.[27] Specialization thus is put forward, among other 'quality enhancing measures', as a solution for improving the timeliness of judicial decision-making, and the level of expertise required for the adjudication of complex cases.

The benefits of specialization are evident in the recent French reforms. Minister Dati argued, among other things, that the courts need to have a 'sufficient [level of] activity' in order to function well. Specialization is carried through in order to guarantee the proper treatment of complex cases and the unity of the law.[28] Also, the number of judges per capita and the implantation of courts are adapted in order to remedy the present inequality regarding the accessibility of justice for the citizens.[29]

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[17] Regarding the functioning of this court, see M.J. Kroeze, 'The Companies and Business Court as a specialized court', (2007) 3 Ondernemingsrecht 86.

[18] R.J.N. Schlössels, 'Concentratie van bestuursrechtspraak. Iets over bundeling van specialistische kennis, territoriale spreiding van rechtspraak en reizende rechters', in: Tromp *et al*, *op cit* n 1, p. 75.

[19] Hol and Loth, *op cit* n 14, p. 497.

[20] Article L706-17 of the *Code de procédure pénale*.

[21] J. Commaille, *Territoires de justice. Une sociologie politique de la carte judiciaire*, PUF, 2000; F. Chauvaud, *Histoire de la carte judiciaire. L'organisation judiciaire entre les pouvoirs, les savoirs et les discours (1790-1930)*, Centre d'Histoire de la France contemporaine, Université de Paris X-Nanterre, 1994.

[22] The progress of this reform can be followed at http://www.carte-judiciaire.justice.gouv.fr.

[23] See http://www.carte-judiciaire.justice.gouv.fr/index.php?rubrique=10353&ssrubrique=10543&article=13392, where three other guiding principles are given regarding related issues.

[24] Articles 92 ff of the *Grundgesetz*.

[25] 'Report by Professor Dr. Burkhard Hess (Germany)', in: European Commission for the Efficiency of Justice (CEPEJ), *Territorial Jurisdiction. Draft report prepared at the request of the Delegation for the Netherlands in the CEPEJ*, Strasbourg, 5 December 2003, CEPEJ(2003)18(D3), available at http://www.coe.int/t/dg1/legalcooperation/cepej/textes/adoptedTexts_en.asp.

[26] Article 96 *Grundgesetz* and Article 65 par. 1 *Patentgesetz*.

[27] Hartendorp, *op cit* n 16, p. 8.

[28] Dati, *op cit* n 12. See also Cointat, *op cit* n 3, p. 209.

[29] Dati, *op cit* n 12.

On the other hand, some reforms in the three countries have been away from specialization. In France, categories of special courts still exist for example for the judgment of labor law cases (the *conseils des prud'hommes*) and commercial law cases (the *tribunaux de commerce*).[30] During the early stages of the reforms of the Dutch judicial system, however, specialization was hampered by the merger of administrative law courts and municipal courts into the district courts.[31] In recent discussions in Germany, it was argued that the smaller branches of the judiciary, *i.e.* the *Gerichtsbarkeiten* for labor law cases and for social security cases, should be merged into the bigger branches of the *ordentliche Gerichtsbarkeit* (civil and criminal law cases) and the *Verwaltungsgerichtsbarkeit* (administrative law cases).[32]

The main concern when specializing judiciaries, or when reducing the level of specialization, thus seems to be the optimal scale of judicial decision-making. Solutions tend to focus on the 'functional' distribution of jurisdiction, while the aspect of territorial jurisdiction is of less concern. On a more fundamental level, this means a re-arrangement of the balance between two types of principles.[33]

2) A framework for interaction: two types of principles

The developments in the Netherlands, France and Germany reveal a shift in the paradigm for discussion. In other words, the reform movements reflect a change in the coherent set of norms, principles, values, convictions and legal practices which is at the basis of discussions concerning the judicial organization.[34]

Traditionally, discussions regarding judicial organization in western liberal democracies were linked to the framework given by the 'rule of law' as understood in the classic sense. This paradigm suggests that the basis of a legal and legitimate government must include certain fundamental elements: legality of government, separation of powers, protection of rights and freedoms, and a guarantee of judicial review.[35] With regard to the judiciary, the basic elements require judicial independence and impartiality. The distribution of judicial competences has historically been based on the standard of territoriality, which ensures equal access to justice for all. However, this classic paradigm does not suffice to meet the needs of present-day society.

A new way of looking at questions of judicial organization has emerged, which combines the classic 'rule of law' principles with a new set of 'management' principles. The elements of this new set of principles are found in 'new public management' theories, which present a conceptual framework for describing the quality standards involved in the management of public institutions. From the 1990s onwards, these theories have been applied in policymaking and in academic discussions regarding judiciaries.[36] The 'new' principles featured in these theories include standards of transparency, effectiveness and efficiency. Transparency implies openness, communication and accountability: it should be clear when a case can be brought to trial and which judge has jurisdiction to decide it. Effectiveness relates to the question of whether certain measures or constructions enable the realization of a specific goal, *e.g.* are the court's procedures adequate to enable it to resolve the particular type of conflict? Efficiency, finally, pertains to the appropriateness of specific measures or constructions for the realization of the intended goal: in other words, does the organizational structure of the judiciary allow for a focus on the main task of settling disputes and can this task be completed within a reasonable time?

The current paradigm for discussion incorporates both the classic 'rule of law' principles and 'new public management' principles in the legal framework which underlies the judicial organization. The new management principles have to be weighed against the classic principles when considering solutions for the judicial organization.[37] In some cases, the two types of principles complete and reinforce each other. In other cases, however, they enter into conflict. Increasing the level of specialization in the judiciary might in fact have negative consequences for the protection of the classic values of judicial independence and impartiality. Newly created possibilities to ensure a flexible distribution of cases and judges give rise to the question to which extent should be held on to the classic value of 'territoriality' when it comes to the adaptation of the distribution of jurisdiction to present-day conditions.

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[30] Article L511-1 of the *Code du travail* and Article L411-4 of the *Code de l'organisation judiciaire*.

[31] *cp supra*.

[32] U. Berlit, 'Zusammenlegung von Gerichtsbarkeiten, ein Diskussionsbeitrag', *ASJ*, 23 December 2003, available at <http://asj.spd.de/servlet/PB/menu/1479094/>.

[33] As regards terminology, 'principles' here refer to values which give a fundamental basis to society; *cf* R. Dworkin, *Taking Rights Seriously*, Duckworth, 1977, p. 22.

[34] *cf* T.S. Kuhn, *The Structure of Scientific Revolutions*, The University of Chicago Press, 3rd edition, 1996.

[35] *cf* Koopmans, *op cit* n 5, p. 7.

[36] *cp* M. Barzelay, 'Origins of the New Public Management. An international view from public administration/political science', in: K. McLaughlin, S.P. Osborne and E. Ferlie (eds), *New Public Management. Current trends and future perspectives*, Routledge, 2002, pp. 15-33.

[37] See in more detail Mak, *op cit* n *, particularly Chapter 1.

A complex balancing question in this way is brought to light. By comparing the Dutch, French and German experiences regarding specialization, an overview can be given of elements to be taken into account when answering this question.

3. Territoriality and Functionality: Striking a Balance

One of the difficulties is how to enhance specialization in the judiciary while at the same time respecting the principles of judicial independence and impartiality. In other words: how is it possible to strike an appropriate balance between territoriality and functionality? In this section, we discuss the benefits and risks of specialization in light of the new paradigm for discussion in the Netherlands, France and Germany. This will set the stage for the sketching of a number of scenarios for further discussion.

A Benefits and risks of specialization

Specialization engenders important benefits for creating an optimally accessible judiciary and an optimally efficient distribution of jurisdiction within a legal system. At the same time, possible risks jeopardize the guarantee of judicial independence and impartiality.

1) Benefits: complementing and reinforcing principles

In the Netherlands, France and Germany, the organization standards of territoriality and functionality are combined in solutions for the distribution of jurisdiction. In a general sense, the mixture of solutions thus expresses the complementing and reinforcing effect of classic 'rule of law' principles and 'new public management' principles.

A complementing effect of principles is easily stated. The principle of access to justice requires timely decision-making in a geographically nearby court. From the point of view of transparency, effectiveness and efficiency, the level of expertise has been added to the framework for reflection. In the three legal systems under scrutiny, the balancing of territoriality and functionality depends on two factors:

i) *the nature of cases:* territorial jurisdiction is indicated for decision-making in relatively simple cases, functional jurisdiction allows for specialization and thus better serves decision-making in complex cases;
ii) *the occurrence of cases*: often occurring types of cases can be dealt with most efficiently through territorial jurisdiction, while cases regarding infrequently occurring legal questions are most optimally dealt with through functional jurisdiction;

When combining these factors, the following forms and levels of territorial distribution and functional specialization of courts emerge:

i) simple and often occurring cases, *e.g.* general contract disputes and simple criminal cases, are dealt with by general and territorially distributed courts (the courts of first instance);
ii) complex and often occurring cases, *e.g.* labour law cases and commercial law cases, are dealt with by 'justices of the peace' (the Dutch municipal court sections of the district courts), or other specialized but territorially distributed courts (*conseils des prud'hommes*, *Arbeitsgerichte*);
iii) simple and sporadically occurring cases, *e.g.* 'mass collective actions' and big criminal law cases (*'megazaken'*), are dealt with by a specific court with general jurisdiction;
iv) complex and sporadically occurring cases, *e.g.* business law cases and intellectual property law cases, are dealt with by a small number of specialized courts (the Companies and Business Court).

A reinforcing effect of these principles is present in measures regarding the promotion of uniform application of the law and regarding the solution of conflicts of competence. These issues concern complications engendered by the choice for specialization. To remedy diverging lines of case law between courts with overlapping functional competences, measures have been implemented which help to promote harmonization. To optimize the assignment of cases to the court best equipped to deal with them, a mechanism for solving conflicts of competences must be invented (*e.g.* the *Tribunal des conflits* in the French legal system). In this way, the classic values of the unity of the law, equality before the law and legal security remain in focus. At the same time, specialization can be used to optimize the transparency, effectiveness and efficiency of the judicial organization. As is shown by the Dutch, French and German examples, the choice for a specific solution is highly dependent on the existing institutional arrangements of the judiciary and on the legal culture in which discussion is taking place.[38]

[38] *cp* Mak, *op cit* n *, in particular Chapter 3.

Regarding the classic principles of judicial independence and impartiality, the interaction with the new management principles is of a more conflicting nature.

2) Risks: conflicting principles
Limits to the compatibility of classic 'rule of law' principles and 'new public management' principles appear in two forms.

Special courts
The creation of a large number of special courts may cause problems in relation to the ability of courts to guarantee the unity of the law and regarding the development of the law. First, general courts find it more difficult to develop case law concerning specific questions of law which are shifted to the jurisdiction of the special courts.[39] Second, by narrowing jurisdiction to a limited number of courts, the possibilities of 'dialogue' between courts are restricted and thus the development of the law is slowed down. Furthermore, insufficient means may exist to counterbalance controversial decisions of special courts.

Concerning the concentration of cases, loss of the appearance of partiality becomes more real in the case of small settings for specialized litigation.[40] In the Netherlands, this concern materialized in the *Clickfonds* cases, which had to do with a fraud affair regarding the stock exchange. The creation of a special criminal chamber with competence to deal with all cases concerned in this affair was perceived as a threat to (the appearance of) judicial impartiality and led to several requests of recusation.[41]

Specialized allocation of cases and judges to courts
A new 'functional' distribution of jurisdiction might be realized by reforming the allocation of cases and judges to courts. In the Netherlands, the law was changed in order to enable the transfer of part of the case-load from one court to another court within the legal system.[42] Such transfers benefit the judiciary's effectiveness and efficiency by helping to ensure the timeliness and quality of judicial decisions. However, the focus on 'new public management' principles has repercussions regarding the geographical proximity of justice: times of travel to the courts may increase. More problematically, the transfer of cases between courts implicates a departure from the principle of judgment by the 'lawful judge', which requires that the law states the general rules of jurisdiction. Still a fundamental constitutional value in the German[43] and in the French[44] legal systems, the guarantee of this principle is no longer a top priority in all legal systems, as is shown by the reform of the Dutch judiciary.

With regard to the assignment of judges to courts, the shift to a functional approach requires special judicial training with the aim of creating 'specialists' judges. Arguably, in this way the judiciary is better able to interact with specialists in its 'surroundings' (*e.g.* the Public Prosecutor's Service or the bar). However, with the increased use of specialist language, the comprehensibility of judicial decisions might suffer.[45] Also, in a small setting of specialized actors, the risk of conflicts of interest and judicial partiality increases.[46] Specialization can be realized by appointing lay judges in specific types of cases. In the Netherlands, for example, lay judges take part in judicial decision-making in the tenancy tribunals (*pachtkamers*) and in military cases. In France, the composition of the labor law courts (*conseils de prud'hommes*) and the commercial law courts (*tribunaux de commerce*) follows the same standard. However, to the extent that the lay judges do not enjoy the same institutional guarantees as professional judges, a risk exists that they may not have the independence and impartiality of ordinary judges. Last but not least, specialization of judges raises a conflict with regard to the guarantee of the classic standard of 'immovability' of judges. In order to ensure that judges will not be subjected to external pressure in their decision-making – in the form of the threat of transfer to a different post – the standard of

[39] *cp* CEELI, *op cit* n 4.
[40] Concerning the pertinence of this risk on the national level (with regard to the Netherlands), see Y. Buruma, 'Concentratie en specialisatie: een inleidende beschouwing', in: Tromp *et al*, *op cit* n 1, pp. 11-20, here p. 16; *cp* W.N. Everts, Het vak van rechter: leiden van terechtzittingen en beslissen in een concrete zaak', in: J.M. Barendrecht *et al* (eds), *Rechtspleging, Samenleving en Bestuur: Een gerichte onderzoeksagenda*, Lemma, 2000, pp. 145-148, here pp. 147-148.
[41] Buruma, *op cit* n 40, p. 17; M. ter Voert and J. Kuppens, *Schijn van partijdigheid rechters*, WODC, 2002, p. 29.
[42] This possibility has been created in the Decree on better use of session capacity (*Besluit nevenvestigings- en nevenzittingsplaatsen*), (2001) Staatsblad 616.
[43] Article 101 par. 1 of the *Grundgesetz*..
[44] T.S. Renoux, 'Le droit au juge naturel, droit fondamental', (1993) RTD civ. 1, pp. 33-58.
[45] On this topic, see M.A. Loth, 'Courts in Quest for Legitimacy: A Comparative Approach', in: M. Malsch and N. van Manen (eds), *De begrijpelijkheid van de rechtspraak*, Boom Juridische uitgevers, 2007, pp. 15-38.
[46] *cp supra*, this paragraph.

immovability forbids the changing of a judge's place of work without the judge's consent.[47] Recent Dutch reforms regarding the possibility of stationing specific judges in another court than their original place of work[48], implies a partial sacrifice of this standard.

The main benefits and risks of specialization have now been mapped. On this basis, let us consider the scenarios for further discussion.

B Scenarios for further discussion
Several ways for continuing the modernization processes in the Netherlands, France and Germany are now conceivable. The options fluctuate between three possible scenarios:

1) Pushing the limits: 100% transparency, efficacy and efficiency
A further optimization of the distribution of jurisdiction can be realized by relating specialized knowledge in the judiciary to specialized knowledge in the judiciary's 'surroundings', including the Public Prosecutor's Service and the bar. The creation of specialized courts at the locations where the Public Prosecutor's Service has established 'functional' units[49] does not have immediate consequences for the guarantee of judicial independence and impartiality. Nonetheless, these measures would be highly beneficial to the effectiveness and efficiency of the judiciary's functioning.

In order to enhance the guarantee of judicial expertise, a solution can be found in the geographical division of the preparation and the hearing of cases. The preparation and decision-making of specific cases might be assigned to a single court, and thus enable the growth of judicial expertise. At the same time, the geographical proximity of the court to the citizens is preserved by allowing the hearing of cases at different locations.[50] Attention should be paid, however, to the requirement of the 'lawful judge' as formulated in the classic 'rule of law' paradigm. From a 'new public management' perspective, moreover, internal incoherencies might surface, as the transparency of the distribution of competences is hampered by the geographical separation of the court's location and the locations assigned for the hearing of cases.

Taking specialization further would certainly entail benefits for the transparency, effectiveness and efficiency of the judicial organization. However, this improvement comes at a price. Indeed, the quality of judicial decision-making might decline if the 'deep' knowledge of specialized judges comes to replace more often the 'broad' knowledge of generalist judges.[51] Also, the physical accessibility of the courts and the development of the law through judicial decision-making might suffer in this scenario.[52]

2) A return to the basics: re-invigorating the separation of powers, judicial independence and impartiality
The second way of dealing with the problems posed by specialization consists in a denunciation of recent and current reforms.[53]

A scenario which takes these warnings seriously will emphasize constitutional requirements, like the legislator's exclusive competence regarding the creation of courts.[54] Guarantees to prevent the risks related to concentration of cases can be found in the limited mandate of judges, in the requirement of collegial judgment, and in the possibility of bringing an appeal against judicial decisions of special courts. Also, concentration of several special competences in one court can prevent this court from developing a practice which is too one-sided. Furthermore, in order to preserve classic 'rule of law' principles a limit has to be set to the possibilities of forum-shopping and judge-shopping.[55]

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[47] Regarding the French legal system, see in more detail T. Renoux, *Le Conseil constitutionnel et l'autorité judiciaire. L'élaboration d'un droit constitutionnel juridictionnel*, doctoral thesis Aix-Marseille III, Économica/PUAM, 1984, p. 99; M.L. Rassat, *La justice en France*, PUF, 2004, p. 18.

[48] Articles 40 par. 2 and 58 par. 2 of the Judiciary Organisation Act.

[49] This reform was proposed in the Netherlands by the former Attorney General Dato Steenhuis, in an interview published in *NRC Handelsblad*, 27 May 2006, p. 33.

[50] *cp* P.M. Langbroek and M. Fabri, *Toedeling van zaken aan en binnen gerechten*, WODC, 2004, p. 19.

[51] L.E. de Groot-Van Leeuwen and S. van Steenbergen, 'Specialistische rechtspraak in de ogen van rechters en wetenschappers', in: Tromp *et al*, *op cit* n 1, p. 49.

[52] Buruma, *op cit* n 40, p. 16.

[53] In the Netherlands, several authors have warned for the risks of taking reforms too far. See for instance P.P.T. Bovend'Eert, 'Raad voor de rechtspraak. Het paard van Troje voor de poort van de rechterlijke macht', (2001) RM Themis 39; H.L.C. Hermans, *Rechter, wetenschap en vrijheid*, inaugural lecture Rotterdam, Friese Pers Boekerij, 2004, p. 17.

[54] Articles 116 par. 1 of the Dutch Constitution, 34 par. 3 of the French *Constitution* and 92, 95 and 96 of the German *Grundgesetz*.

[55] On this topic, see N.J. Baas, *Keuze van een gerechtelijk forum: overwegingen van partijen, voor- en nadelen*, WODC, 2004.

However, if is held on too much to the classic principles for judicial organization, too little importance remains for the reality of the ongoing modernization processes which are supported by the society. Choosing this scenario therefore entails a risk as regards the guarantee of the judiciary's legitimacy in the present-day context, *i.e.* the total of factors justifying public trust in the courts.[56] This brings us to a last possible scenario for the development of the judicial organization.

3) Taking a different perspective: rethinking the legitimacy of the judicial organization

A final way of moving forward in the modernization discussions consists of looking critically at the paradigm for discussion. The current debate requires a choice between optimizing the implementation of 'new public management' principles or the re-invigoration of classic 'rule of law' principles. As this article has shown, differential benefits and risks are involved in the choice of either of these approaches. Underlying this discussion are specific assumptions regarding the judiciary's legitimacy.

In fact, in order to retain (or regain) the public trust in the courts, the functional, institutional and argumentative dimensions of legitimacy need to be ensured.[57] This comes down to a re-investigation of the courts' role; their organisational structure and the quality of judicial decisions needed to live up to the standards imposed by the present-day society. Different ways then open up for continuing the modernization discussions. Views to be taken into account are those expressed by the different interested actors in the legal system. From an external perspective, the interests of actors in the society are represented in the relation between the judiciary and its neighboring domains.[58] From an internal perspective, the relations between actors within the judicial organization itself are at stake.[59]

In a scenario which puts legitimacy first, the differential interests of citizens, judges, and political powers form the basis on which new judicial solutions can be constructed. The discussion then gains both in breadth (maximum participation of different actors) and depth (maximum display of different views). Thus, a third way is available in the search for an optimal distribution of jurisdiction.

4. Conclusion

The reform of jurisdiction on the basis of 'specialization' has laid bare a complex balancing question. Choosing for a functional approach means letting go (partly) of the classic organization standard of territoriality. For the discussions in the Netherlands, France and Germany, further studies will have to consider the underlying conflict between classic 'rule of law' principles and 'new public management' principles. In this light, several scenarios for the discussion present themselves. It seems especially worthwhile to further investigate the guarantee of the judiciary's legitimacy under the effects of specialization.

[56] *cp* Loth, *op cit* n 45.
[57] Loth, *op cit* n 45, pp. 15-16.
[58] M.A. Loth and E. Mak, 'The Judicial Domain in View; figures, trends and perspectives', 2007 Utrecht Law Review 75, p. 82.
[59] Loth and Mak, *op cit* n 58, p. 82.