
Justice And Credibility: About Bridges Built By Judges

By Gabriël van den Brink

This contribution is meant to understand the (widening?) gap between members of the Dutch judiciary system on the one hand and an important part of the population on the other. To do so I will ask the following questions:

1. What kind of indicators suggests that there is a gap between the public and the law?
2. What can we learn from recent studies in this field?
3. What is the role of social and cognitive dimensions in this respect?
4. Who will be in trouble by such a gap?
5. In how far is it possible to bridge this gap?

Of course I am fully aware of the fact that these questions are also applicable to other countries and perhaps to other times. For empirical reasons, however, I will restrict myself to the Dutch situation, hoping that the international community of scientists is interested in a few findings and ideas that are presented in this article.

A Gap Between The Public And The Law?

Several indicators suggest that Dutch people are much more concerned about crime than most legal professionals are. For example, a large proportion of the population considers sentencing as being 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 already. 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 go unpunished too often 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.
- No less than 91 percent felt that crimes are too lightly punished in the Netherlands (SCR 2002: 658).

I suspect that the percentages would turn out very differently if these questions were asked to legal professionals. However, one has to wonder whether these figures would still be representative today. After all, they date from 2002 and much could have changed since then. But more recent research shows that public opinion in this respect does not change at all. The proportion of Dutch people in favor of stricter sentencing has remained the same for many years. This is evident from the following indicators.

- 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'. One third 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 of crime being 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 hardly change over the years and presumably, they are not 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, with regard to crime the public generally is of a pessimistic frame of mind. This is evident from the 2004 Social and Cultural Report which explicitly included a number of questions about expectations of the Dutch 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 behavior and assault to be (much) greater than at present (75 percent).
- If the questions are limited to safety and crime in a more general sense, 73 percent of the population foresees a further deterioration in the near future.
- This is in keeping with expectations about surveillance and punishment. The vast majority expects greater use will be made of private security firms (89 percent) and CCTV surveillance (94 percent) in 2020.
- More than half 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).

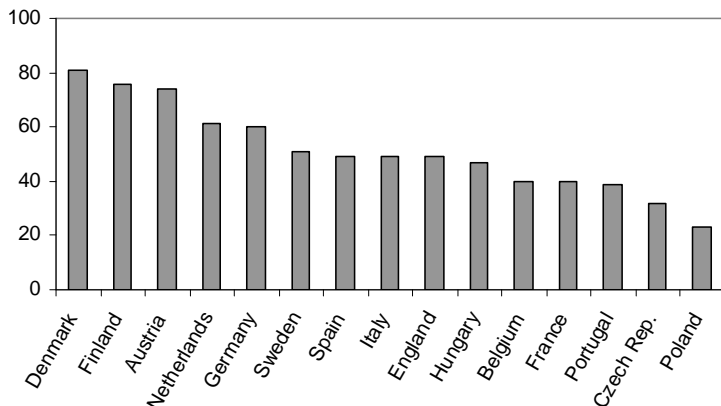
Comparing these views with those of the legal profession indicates a much more punitive attitude of the Dutch population. The performance of the Judiciary falls short of the expectations of a fairly large proportion of the general public. What makes this more complicated, however, is that public opinion surveys also show a stable part of the population holding a considerable degree of general confidence in the judicial system. This is a challenging paradox that requires elucidation.

Lessons From Recent Studies

The Netherlands 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 public confidence in the Judiciary. It started in 2003 when the Council asked the Netherlands Institute for Social Research Social (in Dutch: the Sociaal en Cultureel Planbureau, abbreviated as SCP) 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 tool to monitor the confidence in the judicial system. In its report the SCP came to the conclusion that there were no indications of a crisis of confidence (Dekker et al, 2004). In 1998 almost three-quarters of Dutch people had much confidence in what the judges did, this was not different five years later (71 percent). Together with Denmark and Sweden we belong to the group of north-west European countries with a tradition of basic confidence in the national legal system, in clear contrast to countries of south-eastern Europe.

However recently, like in other countries, the level of confidence has fallen slightly. It may partly be attributed to some shocking events such as the IRT affaire in 1993 (referring to controversial criminal investigation methods) or the Schiedam Park murder in 2000 (referring to the murder of a ten-year old girl in which case the police and the Court made many mistakes). But mainly, as the SCP noted confidence in judges and the legal system did not stay entirely separate of the confidence which people investigate in the rule of law and the welfare state in general. Thus, there was no reason to establish a separate monitor for this purpose. Instead researchers found it more plausible to periodically 'hitch a ride' with other surveys and – much more importantly – to make more frequent use of qualitative surveys.

Figure 1.
Proportion (percentage) of the population trusting the national legal system



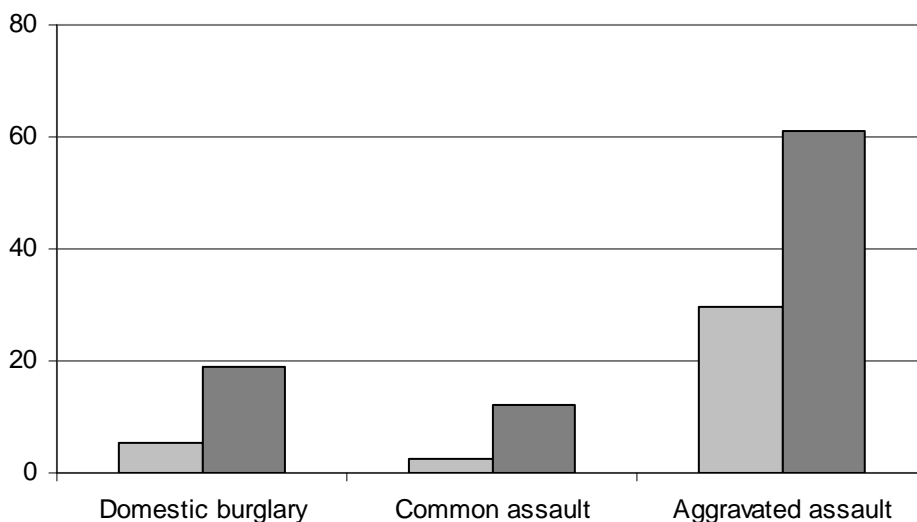
Source: Dekker & Van der Meer, 2007, p. 22.

This advice was heeded. Nevertheless, the Council wished to be informed about the explanatory power of a number of factors, such as the relevance of living in deprived neighborhoods. On which the SCP reported 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. With respect to the judicial system the Netherlands remains a high-trust society.

With 61 percent of the Dutch expressing confidence in the legal system, The Netherlands ranks on the fourth place among European countries. The only countries with higher confidence ratings were Austria (74 percent), Finland (76 percent) and Denmark (81 percent). Maintaining that confidence in the Dutch judicial system had not substantially diminished, the authors did note however, that in the short-term confidence fluctuated sharply. They attributed this mainly to the media coverage of particular events. Scandals such as the Schiedam Park murder undermine the image of the criminal justice authorities, thereby causing a temporary drop in public confidence. What is striking, however, is that in due course confidence recovers again (Dekker & Van der Meer, 2007). Scandals, escapes, disasters and other incidents have a temporary effect, but public confidence apparently returns to its original level without judicial authorities taking any remedial action. In short, dips in public confidence are no big deal and judges can better confine themselves to continuing their usual salutary work.

It may be inferred that the gap relates less to how judges operate in general but more to some incidents on which judges had been called to decide. If that is right, the gap is perhaps caused by the public's lack of knowledge. It might be improved by giving the public more information about the situation and the argumentation in these cases.

Figure 2.
Months of imprisonment imposed by judges (light grey) and lay people (dark grey) for three offences (domestic burglary, common assault and aggravated assault)



Source: Elffers & De Keijser, 2007: 10.

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 which a group of penal law judges and a group of lay people were asked to assess the same criminal cases. The cases concerned reasonably serious offences, (domestic burglary, assault and aggravated assault) and the evidence was not in debate. 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. Other lay people were given a brief newspaper article on the case as their source of information. The study showed lay people to indeed impose harsher sentences than judges. 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. Thus, the 'punitiveness gap' was clearly confirmed.

However, the researchers acknowledged that their 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.

The thesis has been taken one step further (precisely as regards the limitations just mentioned) by a very recently published study directed by Wagenaar (2008). In this study lay people were involved as much as possible in the actual course of events in the criminal trial 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 lay panel sitting in chambers, thus reach a joint decision. Actually, in all cases there were two lay panels were involved - each comprising of three persons. The panels differed only with respect of the level of education. In this way the study examined not only evidence taking and the verdict but also the processes of reasoning which lead lay people and judges to a decision. This allowed Wagenaar to shed light on the reasoning, an aspect which had hitherto received little attention. It illuminates the very specific process of establishing truth and assessing evidence in criminal procedure. In fact, the judge is faced with a mission impossible. The information supplied is mostly insufficient and the number of possible scenarios can vary infinitely. Wagenaar emphasizes that criminal cases are hardly decided on scientific evidence, but rather by looking for convincing story which is backed by sufficient evidence. This is what judges look for in practice, and that is what Wagenaar examined. He studied whether, and if at all how lay people differed from professional judges in dealing with the story and the underlying evidence.

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

One may wonder 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 are unable to understand or evaluate the often complicated reasoning applied in the criminal process. Wagenaar's study shows that lay people are quite capable to do so. 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 deviate from them only in relation to minor points. This is good news for judges and for the general public. The public is evidently able to assess complicated cases, and judges evidently pass judgments which are acceptable to the public in principle.

Yet in my opinion there is something misleading about research of this kind. Both De Keijser et al. and Wagenaar isolate the participating lay people from their own social environment in order to - mentally and physically - play a role 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 transferred to the legal domain are able to arrive at the same responsible judgment as professional judges, what does this actually prove? According to me, it proves above all that the rules of a world such as the judicial system are particularly 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 the confines of this domain 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 it on arguments which are different from legal reasoning used by judges. Indeed, the arguments they employ are often of a decidedly anti-legal¹ nature. In other words, the problem concerns not so much lay people acting within the confines of the legal domain but the distance that exists in day-to-day reality between the legal and non-legal domains. This brings me to the question of the nature of the gap.

The Gap And Its Cognitive Dimensions

I will approach the question of the gap from a sociological and cultural perspective. I wish to distinguish between two dimensions, the first of which relates primarily to information and knowledge while the second relates to the normative attitude of members of the public.

¹ Doing research in deprived neighborhoods in several Dutch cities we have noticed more than once that the residents of these area's have difficulties in accepting all consequences of the Dutch legal system. In fact they are asking for strong leadership and more severe political measures, even if the legal rules have to be suspended (Van den Brink 2007b).

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 (Foucault 1969, Deleuze 1973, Lyotard 1984). 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 (Walzer 1983). 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. They focus primarily on the emotional and dramatic aspects of legal cases, using the rules of mythology or collective imagination to reflect on the dramatic character of human existence (Lévi-Strauss 1979, Biro 1982, Pfister 1988).

The notion that the judicial system produces a specific form of knowledge was illustrated in the debate about the Lucia de B. case² as well as in some other controversial decisions which flared in Dutch public opinion up last year. Some academics stated that that there have been some miscarriages of Justice. In response, Cleiren, professor of criminal law at Leiden University, stated that the way in which the criminal law operates is indeed different from that assumed by many members of the public. I asked her to explain what these differences are and on the basis of her explanation, I arrive at the following four distinctive characteristics.

- First of all, it is important to note that legal 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. This is indeed special, in so far as the search for truth in other domains such as religion, science and journalism does not enjoy an enforceable monopoly.
- Second, the determination of truth in criminal matters does not concern all available facts but rather specific facts, insofar as they are considered relevant for a criminal offence. Worlds of additional facts are hereby not taken into account.
- Third, the search for truth has to comply with a set of formal rules and principles. Investigating officials are restricted to work in a legal, systematic and reliable manner. Outside the legal domain formal restrictions apply much less.
- 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 science or as in common day life. Legal truth is bound to professional criteria which are not easily comprehensible for outsiders (Groenhuisen 2007).

If put on a cognitive axis, the criteria of legal truth are found at one extreme, the truth criteria of mass media may be put at the opposite end. Journalists professionally look at many surrounding facts in establishing their true story, and by using their own searching methods their end result may be different. Although much information is processed by the media, public opinion and imagination tend to be decisive. The way of processing truth follows the logic of drama. The Council for Social Development nicely summarized 'media logic'; these rules have their own logic in one of its advisory reports (RMO, 2003).

- The framing procedure, by which complicated reality is reduced to a clear and comprehensible story (Schön e.a. 1994).
- The process of personalization by which an identifiable person comes to represent hitherto anonymous mechanisms or structures. This is particularly important when mistakes are made and when a person can serve as a scapegoat.
- The procedure of repetition and variation. A statement can gain strength through constant repetition or if a number of variants are shown.³
- Coverage becomes a form of entertainment in that the report or broadcast is designed to be extra exciting. This can be achieved by contrasting different people or their positions and using dramatic images, and it might be done by playing on the emotions.

² Lucia de B. is a Dutch nurse, condemned in June 2004 by the Court of Justice in The Hague being accused of murdering seven patients of hers. In 2005 a group of independent scientists criticized the Court, claiming that the judicial inquiry missed scientific validity. After a renewed inquiry Lucia de B. was released in April 2008.

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

Particularly mass media allude more to perceptions than facts (Beunders e.a. 2005, Entman 1993, Vasterman 2005), let alone facts that would be decisive for a judge. The cognitive axis therefore has two extremes. In the legal domain truth depends on legally acknowledged arguments; its aim is to produce evidence, not applause. It should not depend on market success, but on authority. Last but not least, the justice system will be accountable for some serious consequences for victims as well as suspects, while the plurality of the media easily allows to escape accountability.

Figure 3.
The cognitive axis: truth as perceived by judges, the public and the media.

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

Where 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 the attitude of many members of the public is somewhere in the middle. As a rule, they do realize that there is a difference between the images in the media and everyday reality. They are able to keep a certain distance from the media (Van Hulst e.a. 2009). The media are, after all, dependent on viewing figures and related commercial interests. But they are unwilling to adopt the professional degree of rationality required by lawyers. The difficulty which many members of the public experience is not solely due to the technical jargon. They prefer to use their common sense while the professional manner of thinking is felt to be far removed from their everyday experience. This difference lies in the framework of references wherein views and truths are established. They seek to relate truth to their experience in daily life; their truth is not of a professional but of an existential⁴ nature. Thus, members of the public occupy the middle ground when it comes to determination of the truth. They are not enamored of the strict arguments used in the legal profession but rather prefer to rely on some anecdote which they might have heard from others. Public anecdotes often concern fairly trivial matters, everyday experiences that by lack dramatic potential might not receive media coverage. Such shared experiences provide a healthy counterbalance for perceptions in the media. This is represented in this table by a few key words.

The Gap And Its Social Dimensions

Of course everyone understands that differences between individual members of the public can be considerable. Dutch civil servants and politicians sometimes like to refer to what they term ‘the citizen’, who then is classified as spoiled, xenophobic or calculative. However, this mythical creature does not exist, in reality there are many different kinds of citizens. How people perceive the judicial system is largely determined by their experience in everyday lives and in their immediate environment. Their own truth depends in part on a number of characteristics, whether they live in an urban or rural environment, whether they have or had children, how much education they received, the social class from which they come, and so forth. In other words what people think about the judiciary also depends on their social position. This brings me to the second axis, which relates to norms.

Norms are bound up with the lifestyle of the citizens and the extent to which they participate in society. It is possible to make several distinctions in this respect, leading to different typologies that are used in scientific literature. For instance, the Dutch research agency Motivaction has developed a typology based on eight categories of citizens (Lampert e.a. 2006) whereas other scientists prefer to use three or four categories (Verhoeven 2009). I myself have proposed a distinc-

⁴ We have been able to confirm this thesis in several research projects focussing on the daily life in deprived urban neighbourhoods (Van den Brink 2007b and 2009).

tion between three types of citizens, depending on their attitude to modern life.⁵ However, I would like to stress that similar typologies appear in the works of other social scientists as well (Elchardus 2003).

The first group can be described as active citizens. They are rather highly qualified and have a substantial income. They tend to own their home and live in an affluent neighborhood. They are fairly interested or even very interested in politics and, although they generally take a critical view of governmental policies, they appreciate the democratic system (Bovens 2006). They tend to have an aversion against traditional authority. They cherish their own clear views on right and wrong and are generally not bothered by the fact that other people have different views. Nor do they feel particularly threatened 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 why they have a positive attitude towards modern society. They play an active role, they are open to new challenges, are enterprising and, as far as the public sector is concerned, would welcome fewer rules and less bureaucracy (Van den Brink 2002).

The second group is diametrically opposed to the first group and can be described 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 neighborhood. 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 (Dekker 2002). 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 right and wrong, 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 (Van den Brink 2002). 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, hoping that they will be protected by the authorities against the forces of social change (Elchardus 2003).

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.

It cannot be denied that a classification of this kind comes across as rather stereotypical. Other typologies have been proposed in the academic literature. But they generally present a continuum for the classification of citizens. 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 neighborhoods have indeed been found to have less confidence in the judicial system than those who come from more affluent neighborhoods, the difference is not very large (Dekker & Van der Meer, 2007). More important factors would appear to be moral uncertainty - what the researchers call anomie - and also education.⁶ Confidence in the

Figure 4
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

judicial system does not stand alone. My classification of active citizens is based on the the SCP finding of a close correlation between confidence in the Judiciary and confidence in other institutions such as the police, the civil service or parliament.

⁵ 'Modernity' stands for a way of living in which citizens are guided by principles such as reasonableness, equality, independence and commitment (Van den Brink, 2007a).

⁶ In her inaugural lecture De Groot-van Leeuwen expressed astonishment 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).

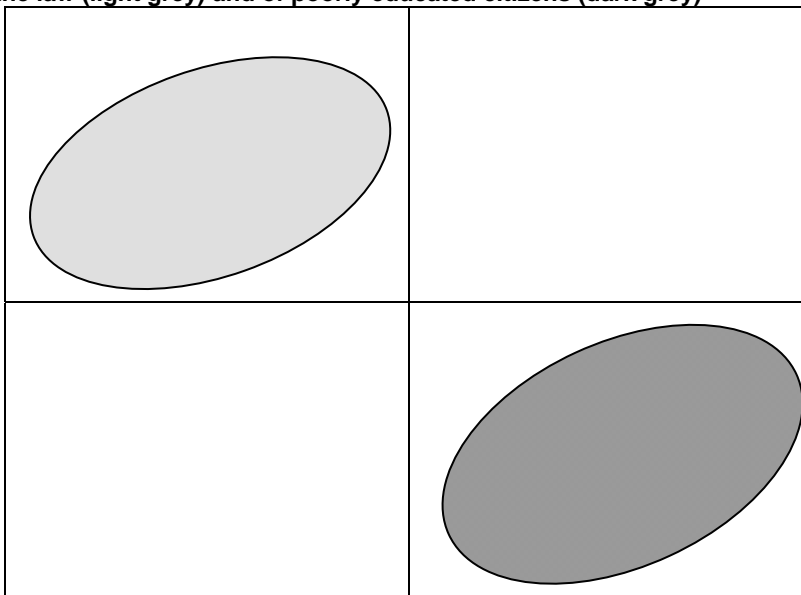
ment. This is an attitude which is found above all in the (upper) middle class. Suspicion and cynicism are more prevalent in the lower and lower middle classes.

One may wonder which position the judges take in this dimension. The recruitment policy has changed the composition of the judiciary in recent decades. Efforts are made to achieve a degree of diversity in terms of gender, parental background and age. There is a deliberate attempt to ensure that two thirds of the entrants have already passed through a professional career. (De Groot-van Leeuwen, 2005). Also in terms of its organization the judiciary has undergone a process of normalization. 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 nowadays like to emphasize that they are at the heart of society and that they themselves are very ordinary people (Ippel & Heeger, 2006).

However, from a sociological distance this image still remains wrong. Clearly, the great majority of the judges belong to the upper echelons of society. They are highly qualified, democratic, morally sensitive and modern people with an open mind. They frequently take part in administrative and political games which establish the rules of society. I would say that our judges fit the profile of the active citizen. 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'. After all, the big majority of ordinary people (75 percent of the population at a rough estimate) belong to the categories of awaiting and anxious citizens (Van den Brink 2002).

Using my two dimensions as described, we can map the arena in which the Judiciary operates. In figure 5 the horizontal line corresponds to the cognitive axis, the vertical line to the

Figure 5
The worlds of the law (light grey) and of poorly educated citizens (dark grey)



The normative (vertical) axis makes a distinction between active (above) and anxious citizens (below) whereas the cognitive (horizontal) axis makes a distinction between legal knowledge (left side) and media logic (right side).

normative axis. It shows 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: highly educated, tolerant or active citizens (above) and poorly educated, authoritarian or anxious citizens (below). Please excuse the over-simplification of reality.

Using these two axes we can locate the world of legal professionals in the upper left quadrant. After all it is governed by standards not only when it comes to determining the truth but also in terms of prevailing values and social behavior. In terms of arguing 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 this kind of people to play a role in the legal domain. They can quite easily understand how judges think and therefore, as Wagenaars' research has shown, they will arrive at similar findings (Wagenaar 2008). 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 (Dekker

2002, Van den Brink 2007b). In theory, a degree of overlap could exist between the two worlds, but in our empirical data such overlap appears as small. It appears as a gap, not a gliding scale.

To A Further Widening Of The Gap

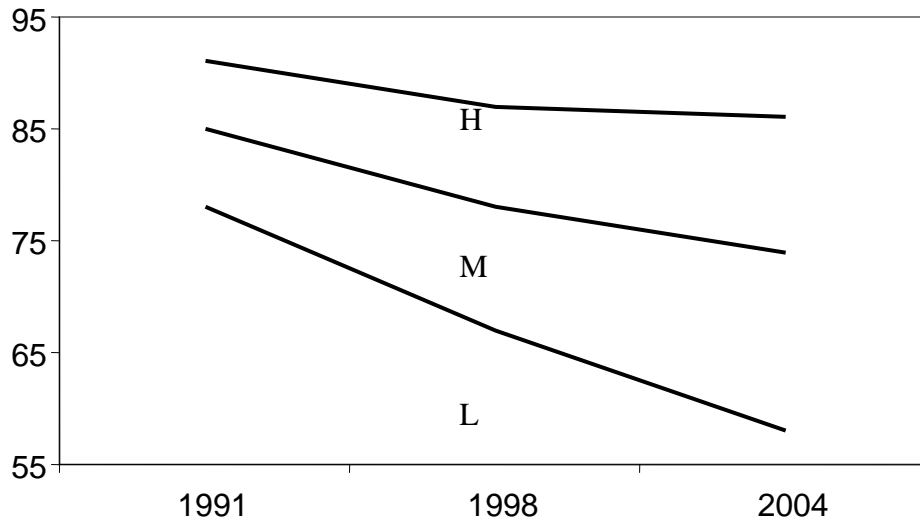
The gap is and remains fairly large, as others have also established. I would mention just a few examples. A survey conducted by the Dutch weekly magazine *Vrij Nederland* shows about 63 percent of the judges complying with article 1 of the Constitution: for them every form of discrimination is objectionable (Husken & Lensink, 2008). But ordinary people bother much less 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). In addition, three-quarters of the judges and prosecutors disagreed that the sentences were too lenient (Husken & Lensink, 2008). 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). Judges are irritated by journalists and politicians who seize upon any incident for flying a policy kite, but they do feel pressured by society (Ippel & Heeger, 2006). Finally, De Groot-van Leeuwen points to the fact that some 1.5 million Dutch people are illiterates in a functional sense, whereas the law is to a large degree all about language. She concludes that the differences between the two worlds are underestimated (De Groot-van Leeuwen, 2005).

Indeed, as developments on the two axes move into different directions the distance between the two worlds is actually increasing. On the cognitive axis, 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). But this entails 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 legislation and the related case law (Ippel & Heeger, 2006). 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). This trend is reinforced by the fact that more and more experts are called upon in legal proceedings. Examples include psychologists, experts on foreign ethnic cultures, DNA experts and information technology professionals. They are involved in the determination of the truth, but must also follow the specific rules of legal procedure (Cleiren, 2008). The determination of the truth has become highly professionalized. This is all the more problematic because the criminal process no longer takes place in seclusion. Nowadays, the expectation of openness and transparency are increased. It leads me to predict that the distance between truth as perceived by the Judiciary and truth as perceived by the media will be widening in the future.

Change is taking place not only on the cognitive axis but also on the normative axis. Over recent years Dutch judges imposed ever heavier sentences and have a higher conviction rate. It was accompanied by a substantial increase in prison capacity. All in all, the Dutch penal climate has become quite strict, certainly when compared to other West-European countries (Van der Heide, et al., 2007; Van Wingerden & Nieuwbeerta, 2006; Van Tulder & Diephuis, 2007). What does this development signify?

At first sight it might be thought that this development on the normative axis would reduce the gap between the world of the law and that of ordinary people. However, two observations should be connected. First of all, it is noteworthy that many professionals in the legal domain regret or even condemn this development. Those most forthright in their opinions on this subject are defense lawyers. 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 more frequently plays a role and that the judges are showing less interest in the person of the suspect. They see the administration of justice getting to be harder, faster and hence less attentive in the last 15 years. Obviously, defense lawyers have their own axe to grind, but it is noteworthy that a good many judges share their view. They experience the hardening of the judicial climate as a loss of quality and think that the emphasis is wrongly placed on the criminal law (Ippel & Heeger, 2006; Husken & Lensink, 2008).

Figure 6
Confidence (percentage) in the judicial system by educational level (H = high, M = medium and L =low)



A second point to be considered in this connection is whether the greater strictness of the judges 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 (see figure 6). 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 widening (Dekker & Van der Meer, 2007). I would say that mental and social 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. Let us therefore ask ourselves whether this is a bad thing.

Who Has Problems With The Gap

In this journal it is unnecessary to point to the fundamental difference between the world of ordinary life and the world of the law. Without this difference the rule of law would not even be possible. The legal order distances itself from, elevates itself above and can intervene in social reality. Trying to understand this I was helped by the work of Cleiren once again. In her inaugural lecture (1992) she considered the question of whether the law is open or closed. A legal field can be said to be 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 amounts to a safeguard for the rule of law, but with respect to content this must be realized anew time and again. '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. Both the judiciary and the executive have to define the rule of law ever again. We must conclude that 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 pub-

lic 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 corresponds with the procedure 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 behavior 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). In other words, they know that a gap exists, but it does not bother them.⁷

The fact that the gap between judges and the public nonetheless raises many questions must, in my view, be attributed not so much to the development of the democratic rule of law as to the democratic rule of law. 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 behavior. This judges do 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 developments 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 for a long time already. 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 has 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.⁸ 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 'communication free of coercion' (in German: '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

⁷ 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. But judges did believe that this judicial imperviousness was something that the public did not wish (Elffers & De Keijser, 2004: 72-76).

⁸ 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).

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.

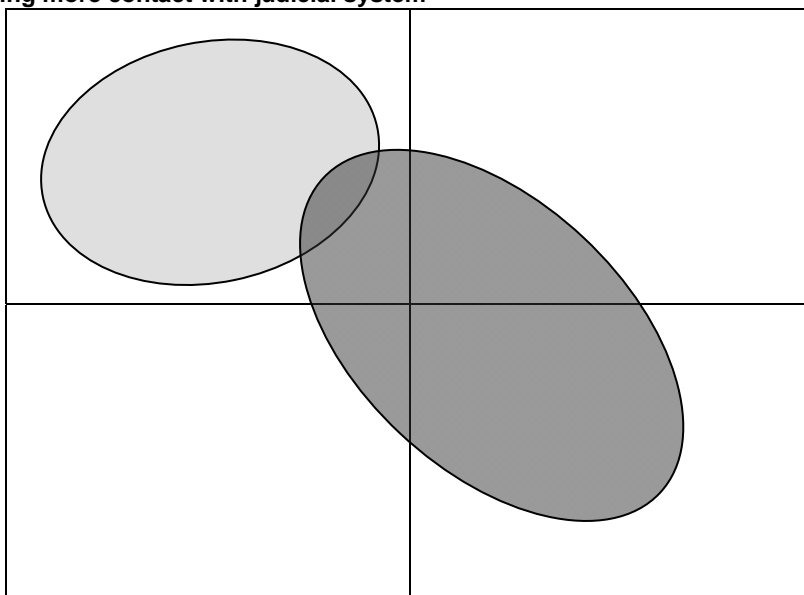
How Could We Bridge The Gap?

Although judges and the public seem to be 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 fact, 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 social and mental world of the public (or elements from this world) could be better reflected in the domain of the Judiciary. And, by the same token, it would also be a good thing if the social and metal world of the Judiciary (or elements of this world) could be reflected in the domain of the general public. Better 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, opinions 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 line with the comment made earlier about increasing specialization and appears to be corroborated by Wagenaar's findings (Croes et al., 2008).

What the public mean when they say they are in favor of greater involvement of lay people is also debatable. The survey conducted by the Research and Documentation Centre (WODC) of the Ministry of Justice and the Netherlands Council for the Judiciary into the wishes of the general public concerning involvement in the judicial system shows that 92 per cent of the respondents were in favor of such involvement, but that they mainly had in mind the exchange of information between lay people and the judiciary. They did not favor 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 earlier 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.

Figure 7
The public having more contact with judicial system



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 trial 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.

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 connected to 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? It is obvious that judges 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.

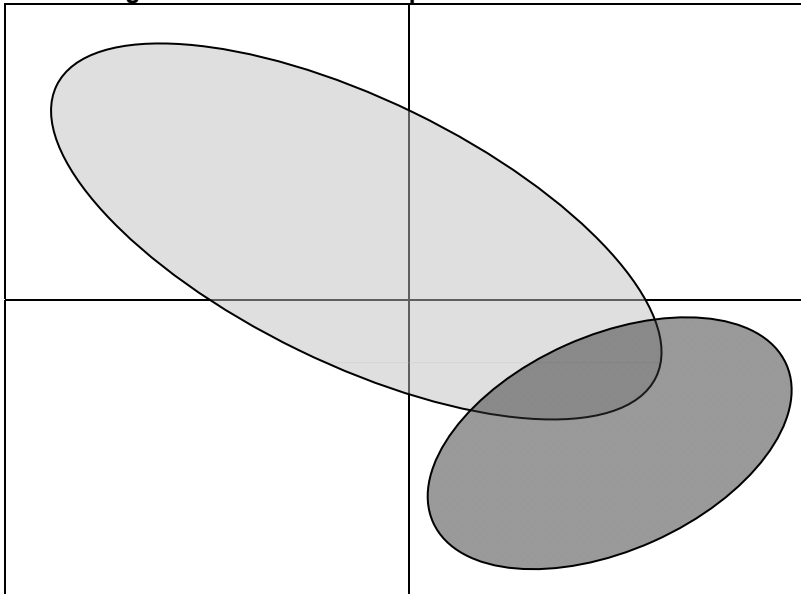
First of all, judges could enter more directly into an interaction with the public when providing the grounds for their judgment. For example, they could decide not to have the judgment explained by a press officer or a younger colleague, and instead take it upon themselves to explain it to the public. 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 safe environment but also in the media or even in the neighborhood 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).

Third, 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). Nonetheless, these people have all kinds of ideas about the judicial system and the judiciary (Dekker & Van der Meer, 2007). 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).

Figure 8
Legal professionals having better contact with the 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 which many suspects belong to (Ippel & Heeger, 2006).

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 interaction would not close the gap. After all, this gap is large and may continue to widen in the years ahead. The risk of such a development should not be underestimated - in any event at the democratic level, if not at the constitutional level. These risks can best be countered by strengthening the social credibility of the Judiciary.

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