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One or More Judges in the
Courtroom?

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ONE OR MORE JUDGES IN THE COURTROOM? ADJUDICATION BY SINGLE JUDGES OR COLLEGIAL COURTS

Reyer Baas, Leny de Groot-van Leeuwen & Miek Laemers*

Abstract

Until the eighties, judicial cases in the Netherlands have been largely considered by collegial courts consisting of three judges. Those days are gone. In this article is explained how the assignment of cases to either a collegial court or a single judge vary considerably, along with the arguments to choose for adjudication by a multi-judge or a single judge court. Judges are united on the merits of adjudication by three judges, particularly when it comes to quality. But do they acknowledge possible hazards attached to collegial decision making?

Key words

Adjudication, case assignment, judicial discretion, marginal judgment assessment.

1. Introduction

From the year 1811 onwards – when the Dutch judiciary was organized through a decree issued by the Emperor Napoleon – judicial decision making in the Netherlands was centred around collegial courts rather than single judges (*unus iudices*). The judges of the peace were an exception. Summary proceedings, which require adjudication by one judge, did not occur frequently at the time. Because of growing delays in legal proceedings, the possibility of single judge adjudication in civil court proceedings was opened up in 1909. In the 1920s single judges also appeared in juvenile courts and courts for minor criminal offences. The share of single judge decision making grew at a slow but persistent pace, until more than 80 percent of the criminal cases were decided by single judges in the 1980s. However, after decades of mainly efficiency oriented reform of the judiciary, recently the improvement of judicial quality has received much attention in the Netherlands. Measures to improve the quality of the courts include a shift away from single judge adjudication towards deliberative decision making in panels of three judges.

Both inside and outside the judiciary it is wondered whether the quality has been under pressure of the present-day emphasis on efficiency. Common intuition says that a panel of judges produces better results, because of the accumulation of knowledge and visions, leading to more balanced opinions. The

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dominant position of adjudication by single judges, being comparatively efficient, would not always have been beneficial to the quality of adjudication, it is assumed. The major reason to opt for a single judge is saving in expenses. Is this presumption right? Overall, empirical research on this issue is very scarce indeed. It does not appear, for instance, in Kritzer's overview of empirical research and civil justice.¹ According to Cross and Donelson, there is little scholarship on how nations can improve their legal systems and create quality courts.²

Against this background, the present article focuses on the issue of collegial and single judge adjudication, among others based on an empirical study of adjudication by one or more judges, which included interviews with and a questionnaire among judges and observation of court sessions in the Netherlands.³ The authors interviewed 9 judges. The questionnaire was undertaken of 52 managing judges of the various sectors of the courts of first instance and 17 managing judges of the courts of appeal in the Netherlands.

This article discusses current practices and judicial views on the issue. Central questions are: (1) how the assignment of cases within the judiciary is distributed among collegial and single judge courts, (2) how single judge adjudication becomes to some extent collegial through the introduction of 'marginal assessment';⁴ (3) which development has taken place in this regard and which considerations and criteria played a part in the distribution of cases in the Netherlands during the past few years. These empirical questions engage several theoretical themes on decision making, which will be discussed in the final section.

2. Regulations on single or collegial courts

At present, law prescribes that civil and administrative disputes are basically under the jurisdiction of single judge courts in the Netherlands. Criminal cases are, as a rule, tried in collegial courts. However, the law stipulates, a criminal case is subjected to the single-headed police court's authority, when the case appears to be uncomplicated and the public prosecutor does not demand a sentence over one year of imprisonment. Subdistrict cases, among which offences, claims up to 25,000 euro and labour and rental cases fall within the competence of the (single) cantonal judge. The legal starting point as regards appeals in civil, criminal and tax proceedings is adjudication in a collegial court. Several administrative courts of appeal, consisting mostly of three-judge

1 Kritzer 2009a; Kritzer 2009b.

2 Cross & Donelson 2010.

3 This study resulted in a publication by Baas, De Groot-van Leeuwen and Laemers (2010).

4 See section 5 of this article.

panels, are competent in judging on (various) cases of administrative law. The Supreme Court of the Netherlands is the competent authority for jurisdiction in cassation of civil, criminal and tax cases. Administration of justice by the Supreme Court occurs in panels of three or five justices.

3. Case assignment in practice

As seen, Dutch law merely sketches the outlines of case assignment to single judge courts or to collegial courts. As a result, courts have much discretion to enact their own policies. With the exception of cases of which the law defines that they ought to be considered in a collegial or single judge court, it is not determined beforehand whether and how a case is allocated to a three-judge panel or to one judge. The results of our questionnaire and the interviews show that the allocation of cases depends on substantive and functional criteria that have developed in practice. Complicated cases or cases that are likely to be exposed to much publicity are allocated to collegial courts. The education of sector starters⁵ can also play a part in the assignment of cases to a collegial court. Therefore so-called 'education chambers' are occasionally established, in which less experienced judges gain practical experience under the auspices of a practised chair. In exceptional circumstances, underperformance can give rise to deploy a particular judge (merely) in a collegial court. In courts of appeal, legal simplicity can give cause to allocate a case to a single judge court of appeal. These criteria, mentioned by the respondents in the questionnaire and interviews, coincide to a large extent with the standards that the Dutch Council for the Judiciary proposed in 2007. The main criteria for assignment of a case to a particular judge, sitting in a single-judge formation, are expertise and experience. Personal preference of judges themselves is little put forward as a major criterion.

Within a court, the practice of case assignment varies per court sector⁶ and so does the level of case allocators. Sometimes so-called 'cause list judges' initiate the actual case assignment; in other cases, this responsibility is in the hands of a judge acting as a team leader,⁷ an experienced court clerk or an administrative employee. Between the court sectors that concern the same field of law, some outlines about the case assignment can be distinguished. In the trade sectors usually a cause list judge is responsible for the assignment of a case to a single judge court after the statement of defence. Subsequently the judge on

5 A *sector starter* is a judge who has little judicial experience in the field of law concerned.

6 A *court sector* is a sector in a court that is responsible for the adjudication of a case in a particular field of law (usually trade, family, crime and public administration).

7 A *cause list judge* is a judge who manages the cause list and considers cause list sittings. A *sector chair* is a judge heading a court sector. A *team leader* is a judge heading a team or a division.

the case decides whether a session in court is required. In most of the family sectors, session schedules are drawn up in which sessions in court are planned for the various types of family cases. Just very few types of cases (such as disfranchisement of parental authority) are always considered in a collegial court. In the administrative sectors, cases are first prepared by administrative and legal employees, until they are 'fit for a session in court'. After a preliminary investigation the administrative sectors follow various operating procedures. The criminal sectors apply an entirely different method than the other sectors. The public prosecutor goes through the criminal cases and indicates whether they are appropriate for treatment by a collegial or by a single judge court. He takes the allocation decisions on the basis of covenants, which are established between the offices of the public prosecutor and the criminal court sectors. In these covenants, rules of case assignment are agreed upon as well as the number of sessions in collegial and single judge courts. Eventually the criminal chamber that considers the case (a single judge or a collegial court) preserves the right to refer a case to another (collegial or single judge) chamber. In the criminal sectors of the courts in appeal, the assignment is mostly performed by either the sector chair or a 'gate judge'.⁸

4. Judicial discretion in case assignment

Judicial discretion in the Netherlands

The Dutch legislator leaves judges and courts much discretion in determining whether a case is best handled in a single or in a collegial court. However, if the law explicitly prescribes the number of judges in particular categories of cases, then violation of the provision leads to the annulment of the judgment.⁹ The freedom that judges and courts enjoy in the assignment of cases is consistent with the concept of judicial independence. This principle ensures that the independent judiciary – without interference from the legislative and executive power – decides how to organize the handling of cases. The Dutch court boards formally have the authority to create single judge chambers and collegial chambers. They also determine who of the judges in their court will try the cases that have come in. In practice, the allocation of cases is performed by the court sectors. Judicial independence not only guarantees that no other branches of government give instructions on how judges should settle a dispute, but also that judges who have been assigned a case, are independent in relation to

8 A *gate judge* is a judge who considers the nature and size of incoming cases, after which he assigns them to a single or collegial court (whether or not specialized).

9 Article 5 of the Dutch Act on Judicial Organization (in Dutch: Wet op de rechterlijke organisatie).

other judges in the exercise of their function, both with regard to the content of the decision as with regard to the manner of treatment. This means that judges who have been assigned a case, should not receive binding instructions from the board of the court or from fellow judges on the settlement of the case. The discretion courts enjoy in the choice for a single judge or a three-judge panel also takes shape in the judicial competence for referral of a case. A single judge is almost always authorized to refer a case to a collegial court, if he considers this court more appropriate for deciding on a case. Reversely, a collegial court is entitled to refer cases to a single judge court. In practice such referrals occur to only a very limited degree.

Judicial discretion in other countries

In comparison to other countries, the Dutch courts have large discretionary powers in assigning cases to either a single judge court or to a collegial court. Research on the allocation of cases within courts in six Western European countries shows that Dutch law heavily relies on internalized professional values of independence and impartiality. The same goes for the law in England and in Denmark, while in Germany and in Italy, courts have way less opportunity to decide autonomously whether a case should be handled by one judge or by a panel of judges. In France, rules of case assignment are more stringent too. In 1975 the French *Conseil Constitutionnel* ruled that the decision to settle particular categories of cases by either a single judge court or a panel of judges should not be decided per case. In France, the principle of equality before the law prevents that citizens in similar circumstances are tried by courts that are composed under different rules.¹⁰

Judicial agreements

Although not entirely uncontroversial, the freedom of judges to consult one another or even to enter into agreements about the disputes they have to settle, is also seen as falling within the scope of judicial discretion. Consultation and agreement of judges are not uncommon practices. For instance, Dutch cantonal judges have created and later revised the so-called 'cantonal judge formula' without being obliged by the law. This formula is a method of calculating the severance pay in individual labour disputes. In matters that have been agreed upon, it is more obvious to opt for single judge adjudication than in cases in which agreements or instructions are absent. Likewise, adjudication by one judge is reasonable in cases in which the interpretation of law and case law is steady and clear (*clair or éclairé*).

10 *Conseil Constitutionnel*, Décision n° 75-56 DC du 23 juillet 1975, *Journal officiel du 24 juillet 1975*, p. 7533. Recueil, p. 2.

Yet, the discretion to consult or to enter into agreements may raise questions on how this power is related to the principle of judicial independence. Judicial consultation may improve the unity of law and could increase the support for a policy, but it may conflict with the principle of judicial independence as well. This is not only applicable for decisions on substantive law, such as assessing the penalty in criminal law and the determination of damage in civil law, but also in the field of procedural law. That does not mean that judicial consultation outside the hearing in chambers is not permissible. Judges in courts of last instance in particular have an interest in some kind of accordance of the course to be followed.

However, in spite of the judicial freedom in the assignment and handling of cases, three requirements cannot be ignored. First, as mentioned before, although Dutch courts have to a large extent discretionary power in the allocation of cases to a single judge or to a panel of judges, there are certain strict legal regulations on the number of judges that needs to consider the case as well. Court-cases in appeal, for instance, are handled by a forum consisting of three judges. Further, due to reasons of judicial independence and impartiality, it must be apparent which judges have decided on a case. Therefore each judgment mentions their names on pain of being null and void. Finally, individuals should rest assured that only these judges, and no other persons, have rendered their judgment. With a view on these conditions, some respondents in the questionnaire show hesitations against the practice of judicial arguments, since this allows the involvement of other persons than the judge in the decision. There can yet be no doubt that merely the judge who has been assigned the case is the one who takes the final decision and bears full responsibility.

5. The process of adjudicating single judge cases

It shows from the previous that there is a wide variety of forms of adjudication in single judge and collegial courts in the Netherlands. The most frequent forms are pictured concisely in the figures 1 and 2.

A case allocated to a single judge court is generally considered in a court session. A minority of cases (mainly petitions) are settled without a session. Save the situations in which the judge gives a ruling on the case immediately after the court session, which happens regularly in police court and subdistrict cases, the judge or the court clerk assisting the judge, writes a draft judgment. This draft is subsequently discussed by the judge and the clerk and decided by the judge. In some cases another person becomes involved in one of these procedures: his task is to perform a so-called marginal assessment of the draft decision.

Marginal assessment of single judge judgments

Marginal assessment of a draft judgment is performed by a judge or a senior court clerk. None of these officials have in any way been involved in the case before. Marginal assessment can be limited or comprehensive. The first amounts to a brief check on the presence of inaccuracies. The latter involves a close investigation on the consideration of relevant facts and on the proper application of the law. This type, which requires inspection of the case file, occurs less frequent than a limited judicial one. The comprehensive procedure is prescribed by the Council for the Judiciary when the draft has been written by a judge-in-training or a judge with little experience in the field of law he is working in. When the judge on the case has taken note of the comments of the judge or clerk who performs the marginal assessment, he processes them insofar he agrees, after which the final judgment is passed.

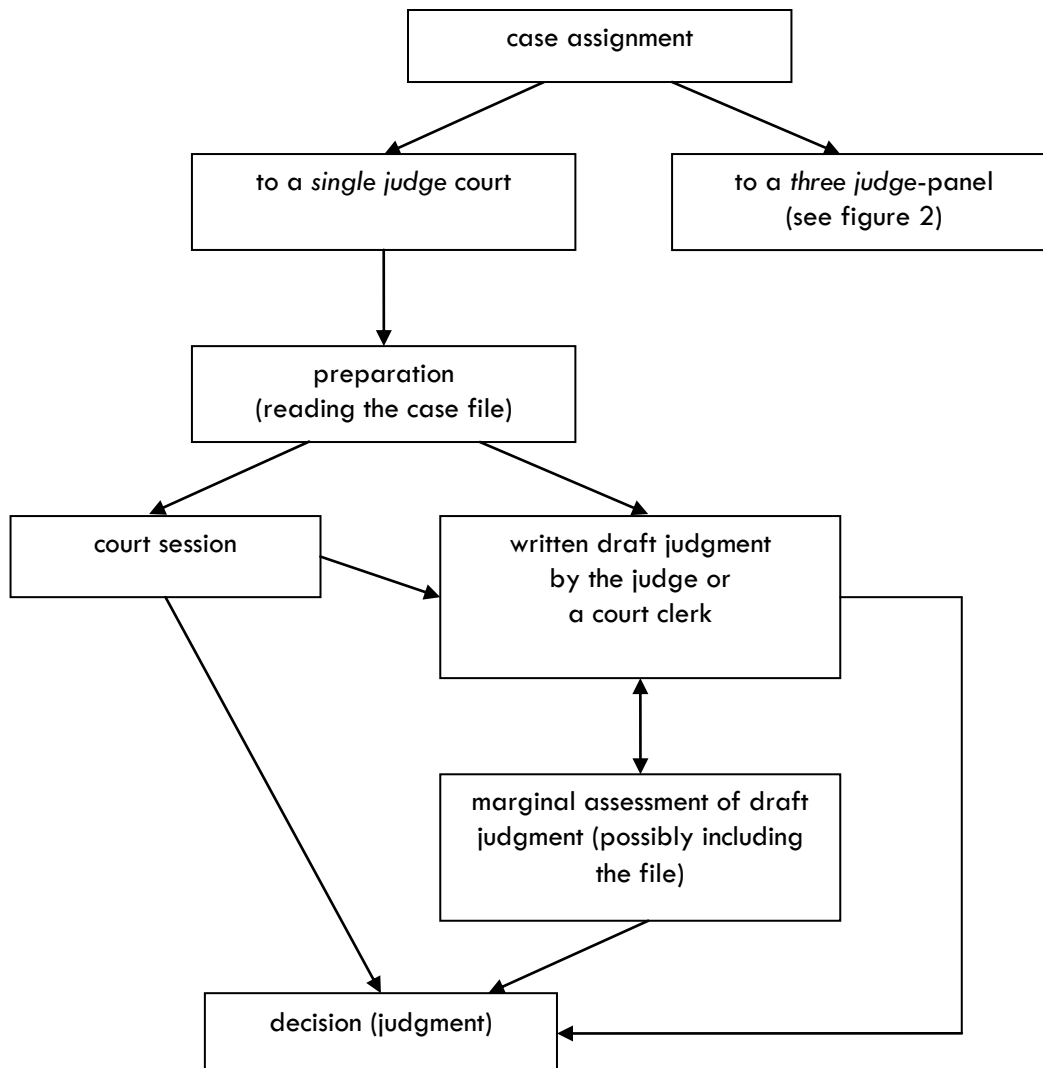
Marginal assessment of draft judgments seems to be an undemanding method to improve a judgment's quality. It can be organized rather easily and the chance for errors and inaccuracy is said to get smaller, when draft judgments are read by a colleague before they become final. Nearly all respondents in our research are favourably impressed by the effects of marginal assessment on the quality of a judgment. Nevertheless, this kind of assessment is not common practice yet. In courts of appeal, marginal assessment has not made headway at all, which is not surprising in view of the small share of cases heard by single judges in these courts. In the trade and administrative sectors, judgment assessment occurs more frequently than elsewhere. In the criminal sectors, a minority of judges read the drafts written by a colleague. Two thirds of the respondents point out that all judgments drafted by sector starters are assessed before they become final. In general, marginal assessment of draft judgments is the exception rather than the rule.

In order to promote the practice of marginal assessment, the Dutch Council for the Judiciary has laid down norms.¹¹ Judges in the courts of first instance are assumed to review one (draft) judgment per month. Sector starters should have a colleague assess all drafts during the first six to twelve months.

The practices of adjudication by single judge courts, as mentioned by the respondents, appear as follows:

11 The norms have been established by the Project Group Quality Norms 2007, pp. 13-14.

Figure 1- Adjudication in single judge courts



6. The process of adjudicating collegial court cases

A case assigned to a collegial court is generally the responsibility of three judges. However, their personal involvement in the procedure may vary considerably, leading to a wide variety of practices. By way of example, it happens that one of the judges writes an opinion prior to the session in court, as a starter for discussion, or afterwards, leading up to a draft judgment. Sometimes a draft is devised after the session in court, but before the discussion among the judges in the collegial chamber. In other cases no draft is written until the deliberations are finished. Figure 2 presents a summary of the main forms of adjudication in collegial courts as reported by our respondents.

Apart from the preparation to the court session, which primarily amounts to reading the case file, adjudication by a collegial court usually consists of three

stages: a *court session* and subsequent *discussion* (in the absence of any others than the judges and the court clerk), leading to the *decision making* by three judges in chambers. Although the judges are appointed to handle and decide on the case, experienced court clerks often fully participate in the decision making process. They lack the right to vote in hearings in chambers indeed, yet the effect of this is modest, since judges constantly aim at consensus and therefore rarely proceed to the vote.

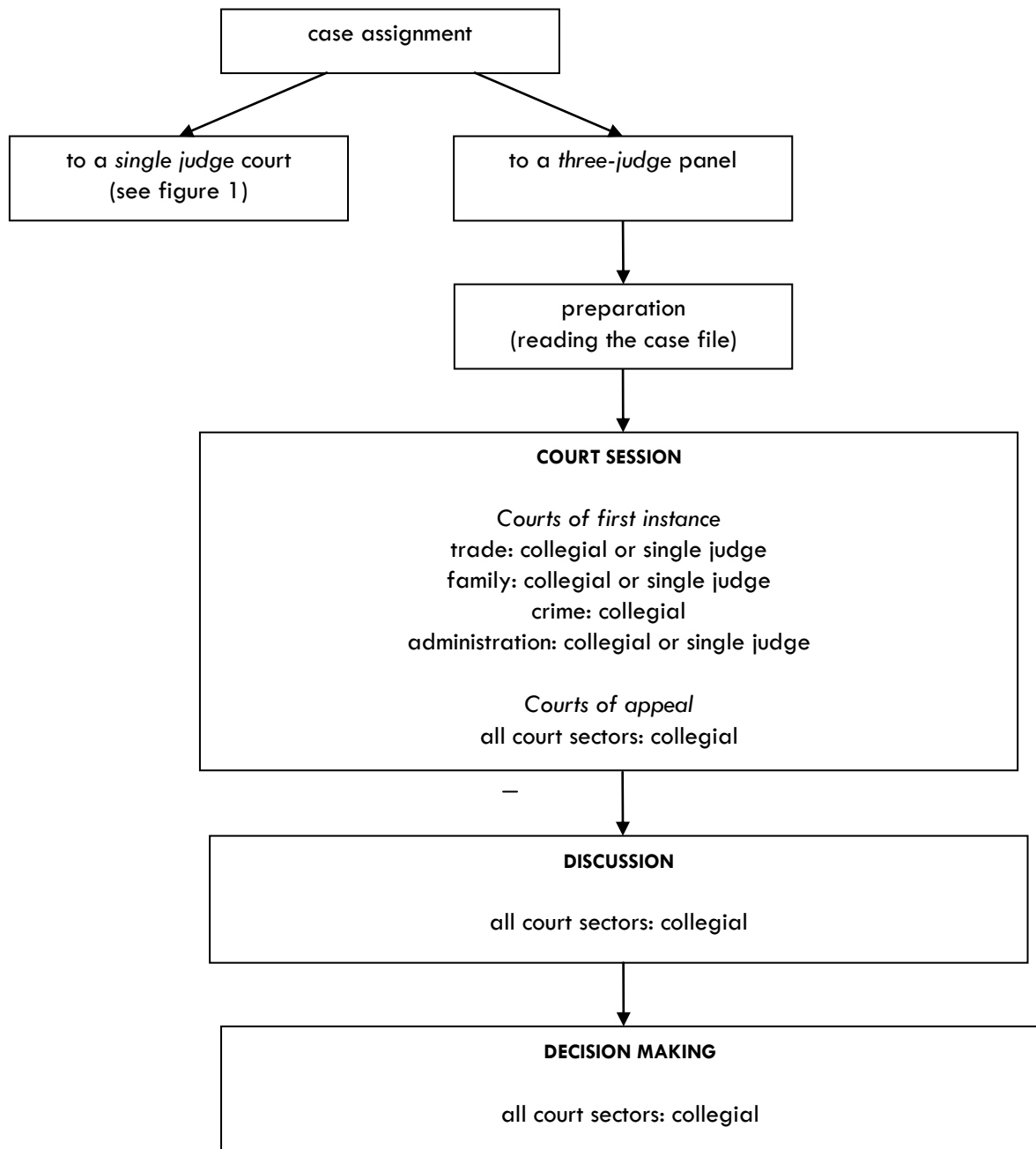
Even when a trade, family or administrative case has been assigned to a three-judge court, the hearing in court is often held in the presence of just one judge (see figure 2). Ensuing discussion and decision making is obviously carried out by three judges. The judges who were absent during the court session are informed about the ins and outs of the case by the (single) judge who has presided the session.

It rather much depends on the kind of case whether it is adjudicated in a collegial court or by a single judge. In the period 2008-2011 approximately 5 percent of the trade law cases (4.9 percent (in 2008) and 5.5 percent (in 2011)) were decided by collegial courts. In family law, these figures vary from 0.2 percent in 2008 to 1.4 in 2011. In criminal law, the years 2008-2011 show an increase in the share of cases that were considered in a three-judge court: from 10.8 percent in 2008 to 13.8 in 2011. Likewise occurred with administrative cases: from 8.9 percent in 2008 to 10.5 percent in 2011. In appeal, nowadays a vast majority of cases are considered in collegial formation.

The observed rise in the share of collegial decision making complies with the intention of the Dutch Council for the Judiciary to have more cases considered in a three-judge court. As a means to improve the quality of the jurisdiction, the Council has laid down norms for the collegial adjudication in courts of first instance.¹² In the trade sector, the norm for cases to be handled in collegial formation is 10 percent. Further, 3 percent of the family cases should be considered by a three-judge panel. The established norm in criminal cases is 15 percent, for administrative cases it is 10 percent.

12 Council for the Judiciary 2012, p. 36.

Figure 2- Adjudication in collegial courts



7. Judges' arguments pro and contra single and collegial adjudication, connected to literature sources

What do judges think about the effects of single and collegial adjudication? Which kind is better? Collegial court adjudication is beneficial to the quality of the judiciary in general (say 80 percent of the 59 judges who participated in the questionnaire) and the judgment in particular (according to 91 percent).

One third of the respondents think the sessions in court and decision making should take place more often by panels of three judges instead of single judges. Although both adjudication in a collegial court and judicial assessment are appreciated, respondents regard the first as even more beneficial to quality. When asked which of these forms produces the best judgment, 23 out of 59 respondents opt for judging in panels; 8 prefer judicial assessment. The others find both forms equally suitable or do not make a choice. The companionship resulting from working together is highly appreciated, although about half of the respondents consider adjudication in a collegial court as (very) pressing, apart from the severity or complexity of cases tried by collegial courts, which are generally more intense in comparison to cases brought before a single judge court. Perhaps these respondents experience more pressure due to being witness of each other's performance. In the questionnaire it is emphatically requested to just assess the relation between form of adjudication and pressure of work, but what may play a part is that cases in a collegial court are often more complex and sizeable than in single judge courts and hence bring about higher pressure.

The bulk of the respondents' arguments and considerations pro collegial courts also arise in literature and policy documents. It is generally assumed that groups make better decisions than individuals do. Social psychology learns that the difference in quality is especially prevalent in decisions on complex problems. Our respondents mirror these arguments very clearly. They explicate that panels of judges better enable the exchange of ideas and points of view, and broaden the basis in legal literature and case law, which results in more deliberate decisions. The literature also mentions that collegial decision making tends to prevent abuse of power, e.g. driven by personal dislikes of judges. This argument is not put forward by any of the respondents.

As the flipside of the single/collegial coin, our respondents point out a number of advantages of adjudication by a single judge court as well. First of all, the efficiency argument is brought up: single judge decision making saves time and money. Second, adjudication by one judge may create a more informal atmosphere in court sessions, compared to sessions in which a full panel of judges is involved. Third, the organization of single judge adjudication is much easier.

Some respondents argue that a ruling by one judge may be as good as one passed by a panel, when the judge on the case is an expert on the matter. Another argument put forward in favor of single judge adjudication is that by

laying responsibility for both process and judgment on the shoulders of one judge, he is likely to decide in a more conscientious way.¹³

Concerning the allocation of cases between single or collegial courts, both the respondents as well as scholars in administration of law argue that single judges are usually experienced and skilled. Accordingly, cases in single judge courts are, as a rule, not assigned to sector starters. Respondents and scholars also point to a hazard, namely that court boards may give in to the temptation to assign cases to a single judge court, not after reflection but under the influence of scarcity (in means and in manpower) or because they are faced with high demands of processing times – even when adjudication in a collegial court would be more appropriate from a quality point of view. Both respondents and scholars bring up the argument that if a single judge underperforms, the court in appeal has to repair the flaws. Some respondents mention that single judges may not always be able to cope with heavy cases (in terms of legal complexity, extensive fact-finding or emotional pressure) and feel lonesome by constantly settling cases all by themselves.¹⁴

8. Discussion: Over-optimism?

Reflection on the preference of single or collegial decision making is scarce in recent literature and in empirical studies. In this section theory and literature will be connected to two issues that emerged from our empirical study. These issues are: (1) if it is indeed agreed that collegial decision making is superior, why then are cases which are primarily allocated to single judges seldom referred to collegial courts, whereas judges are authorized to do so? (2) Is collegial decision making indeed as superior as commonly assumed? These issues are connected through a single theme: over-optimism. This plays out as over-optimism on one's own capacity and over-optimism about collegial court quality.

The single-or-group issue resonates with theories and literature on decision making in general, on *judicial* decision making and on separate opinions. Most theorists presume that judges pass rulings (single-handedly or after deliberation in a panel of judges) without critically engaging the potentially deep dif-

13 Besides, some respondents raise that they, when acting as a single judge, are pleased to be solely responsible for a case and to be free to have their own approach. Further, a single judge's ruling may show some more unity, as it does not need to contain a compromise between different views. The argument that an oral judgment (passed by a police court judge) better fits in with the suspect's environment, is brought up in the questionnaire and interviews and is not confirmed in the literature.

14 Respondents also comment on the financial aspects of the single/collegial issue, since court budgets in the Netherlands partially depend on the share of collegial court cases. Further, several judges mention the educational effects of collegial courts for inexperienced colleagues; many express their pleasure in collective consideration of court cases.

ference between individual and group decision making.¹⁵ Psychological literature and research show, however, that certain mistakes in decision making are made unconsciously and in good faith again and again.¹⁶ In the first place people tend to seek information to support the views and opinions they already have and tend to ignore the information that undermines their views and opinions. This 'belief perseverance' makes that people look for verification instead of falsification of their ideas.¹⁷ The implication for our issue could be that, because a single judge will simply more overlook his own mistakes, a panel of judges should be preferred, because such formation will have more possibilities to avoid belief perseverance. But we should not be too optimistic about this solution, for does idea enrichment and contradiction really occur in panels? How about the fact that in a deliberating group those with a minority position often silence themselves or have otherwise disproportionately little weight because of informational pressure and social influences?¹⁸

The psychological literature on self-deception offers another perspective on the decision making process in general: we should not be too much convinced of human capacities of balanced, open reasoning. According to Messick and Bazerman the human mind 'has an infinite, creative capacity to trick itself'.¹⁹ Individuals are quite capable to confirm bias, even if they are aware of the hazard of confirmation bias. In relation to our subject, judges may prefer to handle a case as an *unus iudex* instead of being part of a three-judge panel, although they are not fully capable to do the case, because they simply overestimate themselves, for example in their capacity to handle statistical information. This may explain that on the one hand judges in our study report that collegial decision making is beneficial to the quality of the judgment, whereas on the other hand cases are only very rarely referred from a single judge court to a panel of judges, although, as explained above, the law provides them ample opportunity to do so. This paradox seems not to be recognized by judges themselves.

People (judges included) are 'creative narrators of stories that tend to allow us to do what we want and that justify what we have done. We believe our stories and thus we believe that we are objective about ourselves.'²⁰ There are many mechanisms that are helpful to keep up our neutral appearances. One of these is the induction that takes place by evaluating our past perform-

15 Hart 1994; Dworkin 1978; Posner 2008.

16 Nisbett & Ross 1980; Kahneman, Slovic & Tversky 1982.

17 Oswald & Grosjean 2004.

18 Sunstein 2006.

19 Messick & Bazerman 1996.

20 Ten Brunsel & Messick 2004, p. 225.

ances. 'If what we were doing in the past was OK and our current practice is almost identical, then it too must be OK.'²¹

Attribution theory adds another twist here, asserting that success will usually be attributed to oneself and failures will mostly be attributed to others. Out of self interest, we may regard factors, such as institutional practices in the courts, as immutable. It can be pleasant to pretend to be less important than you know you really are, for example so as to believe that you do not have any discretion or in order to believe that it is someone else's problem; either because they are to blame or because the responsibility is someone else's, not yours. In that way, the responsibility for the decision is removed to somebody else. Judges may well assume that, if something has gone wrong in the allocation of a case to a single judge or a panel of judges, this is due to some system failure and not their fault. So they would blame the judicial organization or politics and have the opinion that the system should take the responsibility, take measures and change the informal or formal rulings. Literature on decision making suggests that individuals may perceive that the situation at stake is an ethical dilemma, so that ethical principles need to be considered, or that the situation is a business problem, so that organizational goals are of the utmost importance.²² Putting the blame on the organization is one way of escape from responsibility.

According to Cross, the influence of collegiality on judicial decision making has seen less empirical analysis than the impact of ideology. As far as it has been researched, it has been examined indirectly, often with the focus on judicial dissent.²³ In Dutch legal culture, outspoken criticism and opinions are hidden behind closed doors, most of the time. Dissenting opinions between judges are never published; the deliberations are confidential and judges are obliged to maintain secrecy on their deliberations. In the Netherlands, judges are obliged to speak in one voice. In order to reach a common decision, they need to discuss and compromise.²⁴

Some argue that the Dutch system should adopt separate opinions (either dissenting, either concurring opinions), so as to force judges to explain their judgments in public and to reveal the grounds for their (dis)agreement as explicit as possible.²⁵ Scholars have divergent ideas on the value of separate opinions. Most judges do not like to dissent, according to Posner.²⁶ The comparative study of judicial transparency and legitimacy by Lasser shows some-

21 Ten Brunsel & Messick 2004, p. 228.

22 March 1995; Messick 1999.

23 Cross 2009.

24 De Groot-van Leeuwen 2006; De Groot-van Leeuwen 2001.

25 Drion 1973.

26 Posner 2008, pp. 32-33.

thing else. He argues that in France the judicial deliberations remain secret, so that judges in chambers feel free to voice their opinion, enabling a real debate on the cases. It seems that because of the secrecy of the hearing in chambers, all arguments and implications of possible judgments can be reflected upon. When considered like that, the competence of justices in the American Supreme Court to issue separate opinions may well obstruct the exchange of ideas. Judges surely do not always tell what they think. In the European Court of Justice, there is no record of separate opinions. The same argument as the one by Lasser on France has been put forward with regard to the European Court: 'In the course of deliberations there is frequently particular dispute over questions that leave no trace in the reasoning of the judgment. As a general rule such questions are not overlooked, as some critics think, but reaching agreement on them is so difficult that the Court prefers not to mention them.'²⁷ Edward states that 'if there is a vote, this does not mean that, from then on, the majority alone determine the form and content of the judgment. The minority may be quite as active as the majority in testing the soundness of the legal reasoning in the draft. The minority may even suggest that the language of the draft be strengthened in order to make it clear what the Court has decided.'²⁸

In the Netherlands, as is the case in the United States, judges themselves engage in a continual quest to reduce conflict through holding conferences, have collegial consults, circulating draft opinions and memorandums and conducting private meetings between individual judges or groups of judges.²⁹ Some years ago, a picture was sketched of Dutch courts as places where seminars, workshops and courses follow in rapid procession.³⁰ Among judges in general, there exists a huge pressure to socialize and to behave collegial.

According to Sunstein and others, social pressures and informational influences help explain some otherwise puzzling findings about judicial voting of the federal courts of appeals in the United States. It turns out that like-minded judges end up with more extreme opinions after deliberation. On three-judge panels, Republican appointees predominantly show conservative voting patterns when sitting with two other Republican appointees, whereas Democratic appointees mainly demonstrate liberal voting patterns when acting in court with two other Democratic appointees.³¹ The interesting point is that these opinions are more extreme than those of the same judges individually. This tendency is known as group polarization: people may adopt more radical views after dis-

27 Everling 1984, p.1308; De Waele 2009, p. 372.

28 Edward 1995, p. 539.

29 Goldman & Lamb 1986.

30 Van Gunsteren 1998.

31 Sunstein, Schkader & Elmar 2004.

cussion than they had before the discussion began.³² We should therefore not be over-optimistic when it comes to the idea that panels are less susceptible to confirmation bias. Their views may harden in more extreme positions.

9. Conclusion

In the Netherlands, practices of allocating cases to either a collegial court or an *unus iudex* in courts of first instance vary considerably, along with the arguments given for these decisions. Views of judges on the general merits of single and group decisions are much more equivocal, however. Over 90 percent of the judges in our questionnaire hold the opinion that collegial consideration of cases is (very) beneficial to the quality of the decisions, whereas a majority of judges acknowledge the efficiency of single judge courts, the more hands-on approach and informal atmosphere in single judge court sessions.

Marginal assessment of draft judgments may to a certain extent compensate for the lack of discussion in single judge courts, but when it comes to quality, judges prefer collegial decision making. One third of the respondents, especially criminal judges and family judges, feel that cases should be handled by panels of judges more often. In spite of that, referral of a case from a single judge court to a collegial court is the exception rather than the rule. Once a case has been assigned to a single judge court or a collegial court, it remains under its responsibility. Nonetheless, respondents agree that not all cases need consideration by three judges. A large number of cases is regular and requires no discussion. In such cases, fast processing prevails. The essence is in good case assignment: cases that are complex, emotionally charged or that generate much publicity are better handled by a collegial court.

Further, there are good arguments to let courts explain why they have chosen for consideration of a case by one or more judges. That brings understanding in judicial motives and generates empirical material for additional research on the question whether more or less is better. Because of the diverse effects of decision making by single judges and collegial courts, it is also recommended to develop a clear policy on the allocation of cases, so that each case can be assigned more considerately to either one judge, to one judge in addition to a marginal assessment procedure, or to a panel of judges.

As discussed above, the views exposed by judges are based on received wisdom. Our ongoing research at the Radboud University Nijmegen will therefore focus less on views and more on evidence-based analysis. This entails, among others, observation of deliberation of judges in chambers, as well as comparison of cases decided by single judges and panels of judges, on criteria

³² Friedkin & Johnsen 2011.

such as formal logic in argumentation and the proper use of up-to-date case law.

References

- Baas, De Groot-van Leeuwen & Laemers 2010
R. Baas, L. de Groot-van Leeuwen & M. Laemers, *Rechtspreken: samen of alleen. Over meervoudige en enkelvoudige rechtspraak*, 's-Gravenhage: Raad voor de rechtspraak 2010.
- Cohen 2005
J.M. Cohen, *Inside appellate courts. The impact of court organization on judicial decision making in the United States Courts of Appeal*, University of Michigan 2005.
- Council for the Judiciary 2012
Council for the Judiciary, *De Rechtspraak. Kengetallen 2011*, 's-Gravenhage: Raad voor de rechtspraak 2012.
- Cross & Donelson 2010
F.B. Cross & D.C. Donelson, 'Creating quality Courts', *Journal of Empirical Legal Studies* 2010, Vol. 7, Issue 3, pp. 490-510.
- De Groot-van Leeuwen 2001
L.E. de Groot-van Leeuwen, 'Critizing Judges in the Netherlands', in: M. Addo (ed.), *Freedom of Expression and the Criticism of Judges*, Aldershot: Ashgate 2001, pp. 153-160.
- De Groot-van Leeuwen 2006
L.E. de Groot-van Leeuwen, 'Merit Selection and Diversity in the Dutch Judiciary', in: K. Maleson & P.H. Russell (eds.), *Appointing judges in an age of judicial power*, Toronto/Buffalo/London: University of Toronto Press 2006, pp. 145-158.
- Dworkin 1978
R. Dworkin, *Taking Rights Seriously*, London: Duckworth 1978.
- Edward 1995
D. Edward, 'How the Court of Justice Works', *European Law Review* 1995, p. 539.
- Edwards 2003
H.T. Edwards, 'The effects of collegiality on judicial decision making', *University of Pennsylvania Law Review* 2003, Vol. 151 (5), pp. 1639-1690.
- Everling 1984
U. Everling, 'The Court as a Decision-Making Authority', *Michigan Law Review* 1984, pp. 1294-1310.
- Friedkin & Johnsen 2011
N.E. Friedkin & E.C. Johnsen, *Social influence network theory: a sociological examination of small group dynamics*, New York: Cambridge University Press 2011.
- Hart 1994
H.L.A. Hart, *The Concept of Law*, Clarendon Press 1994.
- Hettinger, Lindquist & Martinek 2006
V.A. Hettinger, S.A. Lindquist & W.L. Martinek, *Judging on a collegial court. Influences on the Appellate Decision making*, Charlottesville: University of Virginia Press 2006.
- Kahneman, Slovic & Tversky 1982
D. Kahneman, P. Slovic & A. Tversky, *Judgment under uncertainty. Heuristics and biases*, New York: Cambridge University Press 1982.
- Kornhauser & Sager 1993
L.A. Kornhauser & L.G. Sager, 'The one and the many. Adjudication in collegial courts', *California Law Review* 1993, Vol. 81, pp. 1-59.
- Kritzer 2009a
H.M. Kritzer, 'Early Empirical Research on Civil Justice', University of Minnesota Law School, *Legal Studies Research Paper Series*, No. 09-29, 2009.

Kritzer 2009b

H.M. Kritzer, 'Empirical Legal Studies before 1940. A Bibliographic Essay', *Journal of Empirical Legal Studies* 2009, Vol. 6 (4), pp. 925-968.

Langbroek & Fabri (eds.) 2007

P.M. Langbroek & M. Fabri (eds.), *The right judge for each case. A study of case assignment and impartiality in six European judiciaries*, Antwerp/Oxford: Intersentia 2007.

Lasser 2004

M. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford: Oxford University Press 2004.

List 2008

C. List, 'Collective wisdom', *Colloquium on Collective Wisdom*, Collège de France 2008.

March 1994

J.G. March, *A Primer on Decision Making. How decisions happen*, New York: Free Press 1994.

Messick & Bazerman 1996

D.M. Messick & M.H. Bazerman, 'Ethical leadership and the psychology of decision-making', *Sloan Management Review* 1996, Vol. 37 (2), pp. 9-22.

Ng 2007

G.Y. Ng, *Quality of judicial organization and checks and balances*, Antwerpen: Intersentia 2007.

Nisbett & Ross 1980

R.E. Nisbett & L. Ross, *Human inference. Strategies and shortcomings of social judgment*, Englewood Cliffs: Prentice Hall 1980.

Oswald & Grosjean 2004

M.E. Oswald & S. Grosjean, 'Confirmation Bias', in: R.F. Pohl, *Cognitive Illusions: A handbook on Fallacies and Biases in Thinking, Judgment and Memory*, Hove: Psychology Press 2004, pp. 79-96.

Posner 2008

R. Posner, *How judges think*, Cambridge: Harvard 2008.

Project group quality norms 2007

Project Group Quality norms (Projectgroep Kwaliteitsnormen), *Eindrapport Project Kwaliteitsnormen*, 's-Gravenhage: Raad voor de rechtspraak 2007. Adopted by the Council for the Judiciary in the *Annual Plan of the Judiciary Rechtspraak 2010 (De Rechtspraak. Jaarplan Rechtspraak 2010)*, 's-Gravenhage: Raad voor de rechtspraak 2010.

Sunstein 2006

C.R. Sunstein, *Infotopia. How many minds produce knowledge*, Oxford: Oxford University Press 2006.

Sunstein, Schkader & Elmar 2004

C.R. Sunstein, D. Schkader & L.M. Ellman, 'Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation', *Stanford Law Review* 2004, Vol. 90 (1), pp. 301-354.

Surowiecki 2005

J. Surowiecki, *The wisdom of crowds. Why the many are smarter than the few*, London: Abacus 2005.

Ten Brunsel & Messick 2004

A. Ten Brunsel & D.M. Messick, 'Ethical Fading: The Role of Self-Deception in Unethical Behavior', *Social Justice Research* 2004, Vol. 17 (2), pp. 223-236.

Van Gunsteren 1998

H.R. van Gunsteren, 'De strijd tussen politiek en rechterlijke macht', *Trema* 1998, pp. 280-283.