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Ashley Terlouw

Appearance and Essence in the Court  
Room

Pursuit of Diversity in the Composition  
of the Joint Chamber

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# APPEARANCE AND ESSENCE IN THE COURT ROOM PURSUIT OF DIVERSITY IN THE COMPOSITION OF THE JOINT CHAMBER

*Ashley Terlouw\**

## **Abstract**

This paper concerns a pilot study among 26 Dutch judges from different courts regarding their views of assigning cases, which means linking a file to one or more judges. I will not describe the way in which files are linked to judges, but deal with the question whether Dutch judges consider it important that courts are diverse in composition and, especially, whether they think that the race or sex of the judge may or must be taken into account.

Assignment in the Netherlands sometimes takes place at random (or on case number, alphabetical order, or initial of the defendant), but more often on conscious considerations related to the file, in which the judge's suitability are taken into account. Judges are no representatives, but the idea that the judiciary should be as much as possible a reflection of the Dutch population gains ground. The plea for more judges from minority ethnicities and more female judges in higher functions within the judiciary results from the idea that descriptive representation in the judiciary is desirable. Earlier research shows that the confidence in the judiciary increases, when women are more or less proportionally represented. This call for descriptive representation must however according to the respondents of my research be explicitly distinguished from the desirability to take external features into account in the assignment of cases. It is not a contradiction to strive for descriptive representation on the one hand and to be extremely critical about considering race and sex in the assignment of cases on the other hand. The consequence in the long run could be that the judge's independence is questioned beforehand if he does not have the same essential identity as the processing party. That is incompatible with the starting point that the symbol of Justice is blindfolded and judges without respect of persons.

But is necessary to guarantee and emphasize that the opportunities to become a judge are the same for everyone, irrespective of race, sex, sexual preference, religion, etc., and that cases are in principle assigned to judges at random. Assignment has to take place in accordance with transparent criteria in a diversely composed judiciary.

## **Key words**

Courts, the judiciary, discrimination, ethnicity, gender

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*'It is just awful when a woman goes into a courtroom and everybody she sees, from the judge down to the clerk, is male. The same is true for blacks who go into courts and see all whites. It's disheartening. Diversity promotes fairness and the feeling that everybody will be treated fairly.'*<sup>1</sup>

## 1. INTRODUCTION

When a man makes a complaint to the Equal Treatment Commission (CGB) about positive discrimination in relation to a preference policy for women in the police force, a question may arise when composing the joint chamber of a court whether it is desirable that at least one of the three commission members is a man.<sup>2</sup> An argument against this is that commission members, just like judges, should be regarded as impartial and therefore their gender should not matter. Nevertheless, asking the question whether a mixed court is preferable is certainly legitimate. Will the man, when he is proven wrong by three white women, not have the feeling that the composition of the court has been to his disadvantage? Would the judgment perhaps be more acceptable to him when it would have been given by a court in which he considers himself to have been representative?

I conducted a small pilot study among Dutch judges regarding their views in the allocation of cases. By allocating cases I mean linking a dossier to one or more judges. By blind allocation, I mean that cases are randomly allocated to judges.<sup>3</sup>

Research into questions of dossier allocation is not new. Recently Langbroek and Fabri conducted a comparative research of this problem.<sup>4</sup> However, departing from the approach of Langbroek and Fabri, I will not describe the way in which files are linked to judges in the Netherlands. This paper chiefly deals with the question whether Dutch judges find it important that joint chambers are diverse in composition and, especially, whether they think that the ethnicity or gender of the judge may, or must be taken into account.

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1 Damon J. Keith 'The front line', in: Linn Washington, *Black Judges on Justice*, New York: The new press 1994, p. 123-124.

2 I use the term joint chamber for a court chamber of three judges and the term mixed chamber for the situation in which this joint chamber has a diverse composition either with regard to gender or with regard to ethnicity.

3 In my definition blind allocation is not contrary to the fact that certain cases are concentrated in specific courts and within courts in specific specialized chambers or sectors. When subsequently, within these courts or units, the assignment takes place at random, there is blind allocation.

4 M. Fabri & Ph.M. Langbroek, *The right judge for Each Case. A study of case assignment and impartiality in six European judiciaries*, Antwerp/Oxford: Intersentia 2007, and M. Fabri & Ph.M. Langbroek, 'Toedeling van zaken binnen het gerecht: regels en praktijk in vijf Europese landen en in Nederland', *Rechtstreeks* 2006, nr. 2.

Langbroek and Fabri's study shows that case allocation is sometimes based on chance (e.g. case number, alphabetical order, or initial of the defendant), but is more often based on conscious considerations related to a particular file, in which the judge's suitability is an important criterion.<sup>5</sup> In the conscious considerations mentioned by Langbroek and Fabri, the objective of diversity in the joint chamber of the court does not occur.<sup>6</sup>

There is, however, an increasing call for diversity within the judiciary in the sense of descriptive representation.<sup>7</sup> There is descriptive representation within the judiciary when the composition of the judiciary reflects the composition of the population. While judges are not necessarily regarded as representatives of all sections of Dutch society, the idea that the judiciary should be as much as possible a reflection of the Dutch population is starting to gain support.<sup>8</sup>

The plea for more non-white judges and for better circulation of female judges to higher functions within the judiciary results from the idea that descriptive representation in the judiciary is desirable.<sup>9</sup> Böcker and De Groot-van Leeuwen, for instance, indicate research showing that the public's confidence in the judiciary increases, among men as well as women, when women are more or less proportionally represented.<sup>10</sup> According to their findings, this favorable impression is not so much derived from the contents of the administration of jus-

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5 M. Fabri & Ph.M. Langbroek, 'Toedeling van zaken binnen het gerecht: regels en praktijk in vijf Europese landen en in Nederland', *Rechtstreeks* 2006, nr. 2, p. 46.

6 Cf. MA. Loth, who finds it reasonable that more diversity results in better administration of justice. 'Het vergroot de collectieve ervaring, kennis en kunde, en draagt bij tot een grotere pluriformiteit in de rechterlijke macht waarin een veelheid aan perspectieven tot gelding komt. Vooral dat laatste is belangrijk, omdat het de discussie aanwakkert en al te gemakkelijke gelijkgezindheid voorkomt.' ['It increases collective experience, knowledge and skill, and contributes to greater multiformity in the judiciary in which a multitude of perspectives applies. Especially the latter is important, because it stimulates the discussion and prevents too easy like-mindedness.'] M.A. Loth, 'Waarom meer diversiteit tot betere rechtspraak leidt. Over recht, cultuur, en twee intrigerende denkers', in: *Mijnheer de voorzitter, Liber Amicurum A.H. van Delden*, Den Haag: Boom uitgevers 2007, p. 112.

7 Cf. B.P. Sloot, 'Moeten rechters lijken op de Nederlandse bevolking?', *Trema* 2004, nr. 2, p. 49-62. The notion 'descriptive representation' is derived from H.F. Pitkin, *The Concept of Representation*, Berkely, California: University of California Press 1967, p. 60 ff.

8 A.G.M. Böcker & L.E. de Groot-van Leeuwen, 'Meer van minder in de rechtspraak: over toetredingskansen van etnische minderheden', *Rechtstreeks* 2005, 4/2005, p. 7 and M. de Rooij, 'A woman is the judge, 60 jaar vrouwelijke rechters in Nederland', *NJB* 2007, nr. 39, p. 2474-2481. Cf. also CGB 22 juni 2001, judgment 2001-53, Consideration 4.11: '(...) It is also a fact of general knowledge that the government, with regard to composition, strives for the judiciary to be as much as possible a reflection of society (...)'

9 In 2006, 48% of the judges were female, but in the category of president this is only 15%. Among the highest judges the percentage is even considerably lower. Cf. *Jaarverslag Raad voor de rechtspraak 2006* and M. de Rooij, o.c., note 8, p. 2476 and 2478.

10 A.G.M. Böcker & L.E. de Groot-van Leeuwen, o.c., note 8, p. 55, note 56: referring to L.A. Schwindt-Bayer & W. Mishler, 2005.

tice, but the confidence in it by the creation of an image and the symbolic function of descriptive representation.

Does this then mean that when allocating cases, it is necessary, or desirable, to take into account, where possible, the physical appearances of judges and to compose joint chambers as diverse as possible? And how do judges themselves think about this?

## 2. A PILOT STUDY

To answer these questions, I conducted a pilot study among 26 judges. Judges and other citizens will perhaps answer this question differently and it can undoubtedly be better deduced from their answers what the influence of diversity of the mixed court is on their confidence in the administration of justice. Yet, I consulted judges in order to see how they react to diversely or unilaterally composed courts, and because they influence the decision on allocation of cases.

The research concentrated on the characteristics of ethnicity and gender, because these features (to be precise, race and sex) are protected by equal treatment laws, are often visible and as such force people to belong to a recognizable group and cannot in principle be discarded. Furthermore, there is special attention for ethnicity and gender in the pursuit of appropriate representation by the judiciary. This does not mean that the same questions could not be asked with regard to sexual preference, religion, age, etc., but other complicating factors play a role, such as the question if an Islamic judge wears a headscarf, which I had to disregard, given the limited scope of this paper.

The 26 judges who participated in the research administer justice within 20 different legal sections.<sup>11</sup> The respondents were selected as follows. I approached respondents through the Council for the Administration of Justice (Raad voor de Rechtspraak) and judges I knew, in which the only selection criterion was diversity. In other words, the respondents had to come as much as possible from different courts and sectors. Four of them were working at the courts of highest instance, namely the Administrative Department of the Council of State (ABRvS), Council for Business Appeals (CBb), Central Court of Appeal (CRvB) and the Supreme Court (HR). The other 22 respondents were judges of first instance, including four deputy judges. Among the respondents were thirteen administrative law judges, of which five were responsible for immigration affairs), ten criminal law judges and three civil law judges. Of the deputy judges, three were also working as a sort of semi-judge for the Equal Treatment Commission (CGB). By sheer coincidence, thirteen of my respondents were

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<sup>11</sup> I use the word judge also for State Councillors and councillors. Just like M. de Rooij, o.c., note 8, p. 2480, I hold the opinion that the word councillor should be replaced by the gender-neutral word judge.

female and thirteen male. Three respondents had a dark skin complexion. I only intended to investigate the opinions and views of judges, and did not intend to conduct a representative study, but rather an impression. With thirteen respondents, I held an open interview on the basis of a questionnaire, while the thirteen others answered the questions in writing.

Most respondents did not have the responsibility to allocate files themselves, but interviews showed that a number of them actually did play a role in some cases, for example in composing joint chambers.

The questions posed to the respondents dealt with the way in which allocation took place within their court, and their views on that. In addition, I presented a number of situations questioning whether they saw reason to take the gender or ethnicity of the judge into account when allocating cases.

### 3. COMPLETELY BLIND ALLOCATION IS UN-DUTCH

My research confirmed the findings of Langbroek and Fabri that, in the allocation of cases, most courts, on the one hand, take account of experience, status, expertise and training of the judge and, on the other hand, of organizational and efficiency reasons.

Five of the 26 respondents did not think it was necessary, and was even undesirable that allocation took place blindly, and two of them made no clear statements. One respondent replied:

*'It is un-Dutch not to think when allocating cases and just take all its consequences for granted, for instance allocation of a case to a judge who absolutely has no clue about the issue concerned'. [RM6 President District Court]*

According to him, there is no blind allocation. In his opinion, the idea that this would be desirable stemmed from a fundamental distrust in the judiciary and from the idea that failing to allocate blindly may lead to manipulation, while every judge had been selected, trained and sworn in on the basis of independence and integrity. Another respondent had an opposite reaction and felt that the Netherlands was different from Germany and Italy where much importance was attached to the right to a 'natural judge'; according to this respondent, it is done 'very practical' in the Netherlands. 'We do not think too much about it and just let the tombola turn', he remarked [RM13 Highest judicial instance; Criminal Sector].

Most respondents who advocated blind allocation held the opinion that there are, and should be, exceptions to this principle. Of the 26 respondents, 22 advocated taking expertise and experience into account. The main argument they put forward was the importance of the quality of the administration of justice.

Among the five respondents who thought blind allocation unnecessary or undesirable were the two presidents I interviewed, one of the three sector presidents and one vice-president who within his sector was responsible for 'quality management'. In a follow-up research, it might be interesting to examine whether a place in the hierarchy of the courts and the organizational tasks the judge has, influences his opinion on allocation issues.<sup>12</sup>

Some courts have laid down agreements on allocation in a code. A number of respondents either handed me a copy of the code or referred me to the website of the Dutch Supreme Court or the Council for the Administration of Justice. The outline of the code corresponded with the findings of Langbroek and Fabri that allocation sometimes takes place at random, but that in most cases it is the most suitable judge with regard to experience, status and expertise that is sought.<sup>13</sup> Other factors connected with the case may count as well, such as mega-character (many connected cases), media attention, financial interest, principle nature (impact for other cases) and complexity.

#### 4. GENDER AS A FACTOR IN ALLOCATION

I submitted two cases to the respondents about the role of the gender of the judge in allocation. The first case concerned a rape case in which a lawyer requested either a female judge or a mixed chamber. The second case concerned whether a university may pursue affirmative action in preferring male medical students. In both cases, the question to the respondents was whether they were advocates of a mixed chamber.

All respondents stated that they would reject any request of a lawyer about allocation. The respondents held the unanimous opinion that such a form of forum shopping at the request of the lawyer or the public prosecutor (or any other party) must never be honored. Only one respondent kept his options open:

*'Unless the lawyer would substantiate that and why trial by male judges – in this court – would necessarily be remiss (...). But that substantiation should in such cases also take place in a public session – so that the public prosecutor can give his opinion on the request. If that does not happen, it would, through a kind of backroom politics, be implicitly admitted that male judges in this court are not up to a vital part of their job.'* [RS1 District Court, Administrative Sector (Migration)]

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12 Of the 26 respondents, six held a managerial position.

13 For instance: Local policy court of Utrecht – Plural settlement of cases 2-4-2007; Code distribution cases CBb; 'Way of allocation of cases to judges in the criminal sector', court of Haarlem.

The question whether a mixed court is preferable in a rape case, without one of the parties having requested as such, was regarded differently by the respondents. Most of them, 18 respondents, were explicitly against any way of considering the gender of the judge in the allocation of a rape case. As one respondent replied:

*'It implies that female judge's sentence differently than male judges.'* [RS4 District Court, Criminal Sector]

Of an opposite view were six respondents, three men and three women, who said they would prefer a mixed court in a rape case. Two respondents were indecisive.

In the case of the preference policy for male medical students, sixteen respondents were against considering the gender, eight respondents advocated in favor of it (four men and four women) and two judges had some doubts. One of the advocates of a mixed court held the opinion that in general, regardless of the kind of cases, there was something in favor of constituting a diverse mixed court in terms of gender. Another respondent wrote:

*'In case of sexual intimidation, porn stuff etc. or in a case where equal treatment m/f plays a part, the instruction with us contains the remark "preferably mixed composition".'* [RS7 Highest judicial instance Court, Administrative Sector]

The advocates of a mixed court and those who had their doubts mentioned three kinds of arguments. First, they were concerned with confidence in the administration of justice in general. Second, the procedural justice and acceptance of the sentence by the offender or the victim was important. Third, they raised a possibility that female and male judges really would give different verdicts, especially in a rape case. One of the advocates of the mixed court advocated an internal arrangement, implying that a mixed court in a rape case is always diverse in composition:

*'Not because I would think that an exclusively male court would not be able to treat a rape case well, but to prevent reproaches and arguments in this sphere in advance.'* [RS2 Highest judicial instance, Administrative Sector]

Another respondent reacted as follows:

*'I think it is important that there is a mixed composition if possible, but not because I think that men and women would sentence differently. For the pro-*

*fession and the law and the enforcement of the law, I think that eventually men and women feel the same about that. But sometimes you read that the confidence in the quality of the administration of justice would decrease if there were only women. I myself do not think that is true at all, but you have to consider that it plays a role in image creation.’ [RM8 District Court, Criminal Sector]*

A third respondent considered image creation as well as the substantive review important:

*‘We sometimes have only female courts or only male courts and then I think that is a bit funny, that is not very okay, you should mix a little. When you have a rape case, choose a woman and two men or two women and one man. I think it is very important for the image (of the court), but it can also matter in the verdict. A woman may be more easily able to put herself in that position when it concerns a woman who was raped.’ [RM2 District Court, Administrative Sector (Migration)]*

A fourth responded as follows:

*‘Yes, if you are talking specifically about criminal cases where the victim gets an increasingly important role in court, it is good from that perspective when a crime has so much to do with the gender that in court there is at least one woman. I can imagine that such a person can put herself into the victim’s position very well, perhaps even better.’ [RM12 District Court, Civil Sector]*

In the case of the preference policy he indicated the importance of acceptance:

*‘Such a male student may after a session be in a bar (...) and there he will of course say: there were only women there, what’s in it for me.<sup>14</sup> So, where it concerns the outward image and the extent to which that may influence the level of acceptance of a negative verdict for this student. That would be important to me. I am talking about procedural justice, so the extent to which someone feels treated fairly. I realize more and more that it is very important. And I can imagine that in these kinds of cases, well, the composition of the*

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14 After I had conducted the interviews, the ETC actually dealt with a case of preferential treatment of male medical students. The case had been instituted by association acting in the interests of female doctors against an educational institute. The mixed court consisted of two men and one woman, the clerk was a woman (ETC 23 October 2007, judgment 2007-183).

*court could contribute to that and if that is the case, I would surely do so.'*  
[RM12 District Court, Civil Sector].

## ETHNICITY AS A FACTOR IN ALLOCATION

With regard to a question whether the judge's complexion may, under certain circumstances, play a role in allocation, I submitted a case to the respondents of a suspect with a dark complexion and asked if a judge with a dark complexion should, if possible, be part of the mixed chamber. In their answers, most respondents incorporated the remark that this would be impossible within their court because of the lack of judges with a dark complexion. 'Black judges, they don't exist', one of the respondents having a dark complexion himself said.<sup>15</sup> Because of the overrepresentation of respondents with a dark complexion, he doubted its coincidence: 'Three foreigners, how is that possible? That is interesting, that cannot be a coincidence. Are they moved forward? I would investigate that further. Of 1,800 judges there are perhaps five foreigners.'<sup>16</sup>

Another respondent remarked:

*'Not one court has so many judges of another ethnicity that you can "tune in" a little on the ethnic origin of the suspect. I mean that a suspect of, for instance, Iranian origin may have as much, or even less affinity with a judge of, say, Antillean or West-African origin than with the white judges.'* [RS4 District Court, Criminal Sector]

Furthermore, there were quite a number of respondents who thought that the situation was somewhat different in the case of ethnicity than in the case of gender, without explaining clearly why and how:

*'I cannot explain why. Irrational, but I would rather be inclined to take ethnicity into account than gender ... The sign "toilets for women" must be allowed, but when it says only for blacks, that goes against the grain with me. With regard to certain aspects ethnicity is more sensitive to me than gender.'*  
[District Court; Administrative Sector, ETC]

Another respondent reacted as follows:

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15 Until I met this judge for the interview I did not know about his complexion. This also applied to the second judge with a dark complexion.

16 In the Netherlands there are no figures available on the representation of (ethnic) minorities in the judiciary, according to A.G.M. Böcker & L.E. de Groot-van Leeuwen, o.c., note 8, p. 25.

*'Here, the appearance of partiality plays a larger role in my opinion. From criminal law I know that foreigners are disproportionately overrepresented among suspects. Suspects often complain about racism by, for instance, the police. In my previous court we had to deal with a public prosecutor of Moroccan origin. In a sense, things are more balanced when at that moment the suspect is also of Moroccan origin. Yet, I think that the outcome of the case will not be different. A verdict or a sentence does not change by it. The difference might even be that a sentence is more easily accepted by the convict.'* [RS4 District Court, Criminal Sector]

Of the 26 respondents, four thought that a non-white judge should preferably be part of the mixed chamber, 5 had doubts and 17 thought that cases should not be allocated on the basis of the judge's complexion. Those who did want to take complexion or ethnicity into account, together with those who had their doubts in this case, all used in one way or another the argument of image, appearance of partiality or acceptance. One of them wrote:

*'For (certain) foreigners it is good and for some necessary that they are also judged by foreigners. That is also an expression of equality.'* [RS8 District Court, Criminal Sector]

One respondent referred to the ethics guideline of his court. This contains: 'look from the outside in, that is: consider what the outside world might think of it'. [RM4 District Court, administrative sector] Someone else said it was an issue in her court to get more people from non-white communities into the judiciary, 'in order not to maintain the image of whites judging blacks.' [RM6 District Court, Administrative sector (Migration)]

The two doubtful respondents both had a dark complexion, although the third judge with a dark complexion was firmly against deviation of blind allocation.

From these reactions, I gather that various factors are the reason that allocation on the basis of ethnicity is considered differently from allocation on the basis of gender. First, it is important to note that, with regard to ethnicity, there is no descriptive representation in the judiciary, whereas there is in the case of gender. Second, ethnicity is a far less clear criterion than gender. Does it concern complexion, belonging to an ethnic minority or national origin? Do Moroccans feel represented by a Surinamese judge? Third, there was, different from gender, not one respondent who thought that complexion or ethnicity could play a role in the judgment, although the remark of one of the judges with a dark complexion goes a little in that direction:

*'most white judges will have little to do with people with a dark complexion in daily life and that, as regards culture and communication, a dark judge may be better able to put himself in the position of parties with a dark complexion.'* [RS4 District Court, Criminal Sector]

All judges emphatically denied that ethnicity had any influence on their verdict and they stressed that the judiciary should not raise the impression that this might be the case either. For instance, one of them thought that weighing the complexion of the judge:

*'could add fresh fuel to the thought that independent administration of justice is getting harder c.q. might work out unfavorably for the suspect if the judge does not belong to the same ethnical or racial group – without there being research results that indicate that this is the case in the Netherlands.'* [RS1 District Court, Administrative Sector]

## ESSENTIALISM<sup>17</sup> OR DECEPTIVE APPEARANCES?

Many respondents proffered the view that they found diversity within the judiciary important and they stressed that there were still too few black judges. The recognition of the importance of diversity does, however, not mean that they also think that diversity should play a role in the allocation of cases. My inventory shows that most respondents think that the ethnicity or gender of the judge should not be taken into account in the allocation of cases. In their view it does not make a difference what the gender or ethnicity of the judge is, nor should it. They also point to practical problems. At present, it is inconceivable in the Netherlands that every suspect with a dark complexion could be tried by a court in which there is at least one judge with a dark complexion. There are simply too few black judges in the Netherlands.<sup>18</sup> Furthermore, it would be hard to determine when the nature of the case is such that diversity in a mixed chamber would be desirable. For instance, is this the case in all criminal cases or in certain criminal cases, or in all cases where discrimination plays a role, in

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17 B.P. Slood, o.c., note 7, p. 51, defines 'essentialism' as 'the supposition that members of certain groups own an essential identity shared by all members of the group and in which others cannot become participants'.

18 In the Netherlands 55.7% of the detainees does not have Dutch nationality. According to data from the CBS in 2006, of the 16,230 detainees in the Netherlands 7,815 had Dutch nationality and 9,045 another nationality. The chance that they were tried by white judges is extremely great. The number of allochthonous judges is not known exactly but it is undisputed that it concerns an as yet negligible number.

criminal, civil or administrative law?<sup>19</sup> Are demands of trust and acceptance met when only one female or only one black judge takes part in the court? Does this raise the need for a discussion on the question whether there should perhaps be two black judges or two female judges? What about allocation in a magistrate's court?

There is a substantial minority among the respondents who think that, one way or another, account may, or should be taken of ethnicity and gender when allocating cases. A number of them are of the view that diversity of the mixed courts regarding gender and ethnicity is desirable anyway, while a number of others think this is desirable in particular cases. They put forward four kinds of arguments: 1) it is relevant for the judgment; 2) it is favorable for the citizen's confidence in the judiciary; 3) it is important for the acceptance of the verdict by the litigant; 4) it is favorable for understanding, and communication with parties in a trial.

Most respondents feel an aversion to any idea that the judge's complexion or his ethnicity might influence his verdict. And with regard to gender these feelings are slightly, but hardly, different. There are some respondents who think that the judge's gender should be taken into account in the allocation of cases, because this influences his verdict.

The following can be raised against this latter argument. First, there is – to my knowledge – no research showing that the differences between the judgments of female judges or male judges are smaller than the differences between judgments by female judges on the one hand and male judges on the other.<sup>20</sup> There is therefore no scientific basis for an essentialist point of view. Second, even if the judge's gender would have some influence on the judgment, it is not clear what this should mean for allocation. Does it mean that certain cases should or should not be submitted to him?

If a female judge can identify herself better with a female than a male suspect, should she be deployed in cases with female suspects or not? Furthermore, if the judge's gender influences his judgments, it is impossible to predict in which way, without further knowledge of his personality. A judge may be touched in a rape case because his or her child has been raped or has committed a rape. In addition, nearly every conscious choice can be interpreted as being in the interest of one of the parties. Therefore it is hard to imagine that courts would stipulate in their regulations concerning allocation that, for instance, in all rape and sexual harassment cases there should be a mixed male-

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19 During the interviews the emphasis came on criminal law but in civil and administrative justice the question of desirability of diversity in the mixed court can of course also play a role.

20 In as far as research has been conducted in the Netherlands into the question whether the judge's sex influences the judgment, the outcome is negative. Cf. M. de Rooij, o.c., note 8, p. 2477.

female chamber, let alone that such cases should be tried by an entirely female joint chamber. Such a provision would also be at odds with the equal treatment legislation, because the criterion gender is used in the allocation of certain tasks. Not a single respondent, including the most essentialist ones, has argued that a male judge *cannot* decide on rape cases. Fortunately for that would be based on a triple stereotype: first that men decide differently from women, second that in rape cases there always is a male suspect and a female victim, and third that the judge who can best put himself in the position of the victim can decide the case best. Equal treatment legislation aims at removing or reducing such stereotypes.<sup>21</sup> Of course, a judge has to be aware that his personal background may influence his decision, and when that influence affects his impartiality, he will have to excuse himself.

A number of respondents think that diversity of joint chambers with a view to the citizen's faith in the administration of justice or in the interest of acceptance by the litigant by means of specific allocation should be strived for. In their view, it prevents the appearance of partiality.

In fact, this argument can be reduced to the essentialist point of view that it makes a difference for the verdict whether a man, a woman, a black or a white judge decides, at least in the eye of the public. A choice has to be made. Either the judge's gender or ethnicity influences his judgment, in which case the above applies. Alternatively, gender and ethnicity do not influence the decision-making of the judge(s). In this case, taking into account a possible appearance of partiality because of a judge's gender or ethnicity as a factor in the allocation could have a counterproductive effect as it confirms or even reinforces that appearance. When gender and ethnicity really don't make any difference, the courts should not lend an ear to sentiments about a false appearance of partiality.

In my view, there is another, better way to counter an appearance of partiality and that is to avoid even a semblance that improper criteria have played a role in the allocation of cases. This can be done by greater transparency, showing the public at large how allocation takes place, and by following the rule that judges are as matter of principle linked to cases *at random*.<sup>22</sup> There may be exceptional reasons to deviate from this principle, for instance in cases that require specific expertise. However, to promote the public's faith in

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21 Cf. for instance CGB 22 December 2005, judgment 2005-242.

22 Although some courts have published the criteria for allocation or put them on the internet, only 15 respondents answered affirmative to the question whether the criteria were known internally and only 7 affirmed the question whether they were known externally. To the first question, 6 respondents gave a negative answer while 5 did not give a (clear) answer. To the second question, 12 gave a negative answer while 7 did not give a (clear) answer. In addition to the external recognisability of the allocation criteria, the internal recognisability therefore still needs some improvement.

the administration of justice it is advisable to disclose in which situations a court finds deviation from the principle necessary, as well as the criteria and basis upon which the allocation takes place in those cases.<sup>23</sup> The present regulations in the Netherlands are still not sufficiently known and insufficiently clear for that purpose.<sup>24</sup>

As to acceptance of the verdict by the litigant, various studies have shown that the judge's attitude in session is of great importance.<sup>25</sup> Attention for this attitude therefore could have a greater influence on the acceptance than attention for the composition of the court.

## CONCLUSION

Is it always unacceptable to stand trial as a black man before a completely white or completely female court? If the judiciary would be racist or sexist, the answer to this question is affirmative. However, a lack of diversity in full courts is no reason to assume that the judiciary in the Netherlands is racist or sexist.<sup>26</sup> However, there still is insufficient descriptive representation. Its necessity must however be explicitly distinguished from the desirability to take external features into account in the allocation of cases. It is not a contradiction to strive for descriptive representation on the one hand and to be extremely critical about considering ethnicity and gender in the allocation of cases on the other hand. The consequence in the long run could be that the judge's independence is questioned beforehand, if she/he does not have the same essential identity as the litigant. This is incompatible with the assumption that judges judge impartial and with the idea that Justice is blindfolded.

There are better ways to avoid even the semblance that essential features such as ethnicity and gender play a role in the administration of justice. This can be done by guaranteeing and emphasizing that the opportunities to become a judge become the same for everyone, so and by using a public guideline that cases are in principle allocated to judges *at random*. This also implies that, in

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23 Justiciables apparently find an independent judge important in all cases, cf. L.E. de Groot-van Leeuwen, *Rechters tussen Staat en Straat* [Judges between State and Street] (inaugural lecture), Nijmegen: Wolf Legal Publishers 2005, p. 23.

24 Cf. N. Huls, *Rechter ken uw rechtspolitieke positie! Een rechtssociologisch pleidooi voor een herkenbare rol van de rechter* [Judge know your legal position! A legal sociology plea for a recognisable role of the judge], Utrecht: Lemma 2004, who also advocates more transparency in the way in which judges are scheduled for sessions.

25 E.g. P. Ippel & S. Heeger-Hertter, *Sprekend de rechtbank. Alledaagse communicatie in de Utrechtse zittingszaal* [Just like the court. Everyday communication in the Utrecht court in session], Nijmegen: Wolf Legal Publishers 2006.

26 T.P. Spijkerboer points out though that the legal system too is an expression of a certain culture and that the relation between the judiciary and the multiform society should be considered. T.P. Spijkerboer, 'Over de neutraliteit van de rechter' [On the judge's neutrality], *Trema*, May 2005 special, p. 239-242.

incidental cases where specific allocation is advisable, this takes place with motivation and in all candors. In short, allocation has to take place in accordance with recognizable criteria in a diversely composed judiciary. I realize that such requirements are potentially subject to internal (hidden) bias and that there is a danger that exceptions become the norm, but at least these should in my view be the direction of the ambitions.