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Holvast, N.L.; Doornbos, N.

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## Exit, Voice, and Loyalty within the Judiciary: Judges' Responses to New Managerialism in the Netherlands

Nina L. Holvast  
Nienke Doornbos\*

### 1. Introduction

'We are deeply concerned about the organisation of the judiciary and the adverse consequences for the internal independence of judges and the quality of the administration of justice. (...) Increasingly, courts are managed like large companies, in which output figures are leading, the Council for the Judiciary acts as a "Board" and court managers as "Divisional Boards". (...) Over the past few years, output norms and budgets have become dominant. Every year a greater production has to be realised with the same persons and means. (...) As a consequence, the quality of the administration of justice is under pressure, many cases do not receive the attention they deserve, and irresponsible choices have been made to meet outcome criteria. The judiciary is not a place for production workers, but for professionals instead. (...)'<sup>1</sup>

This statement is part of a manifesto initiated at the end of 2012 by judges from the Court of Appeal in Leeuwarden, a northern city in the Netherlands. The manifesto was signed by approximately 700 out of a total of 2,500 judges and supported by the President of the Dutch Supreme Court.<sup>2</sup> The manifesto is a remarkable proclamation bearing in mind that judges, among all human service professionals, are known for their unrestrained work ethic and their dedication and loyalty to their profession. Dutch judges are usually reluctant to express any criticism in public, given that it is an implicit rule that judges express their views exclusively via their judgments.<sup>3</sup>

The manifesto can be viewed as a response to what in the eyes of the judges involved is a creeping process of ongoing managerialism, which they understand to be an *indirect* attack on their positions as independent judges. The judges fear that the introduction of new management layers, the stress on efficiency and the high caseloads may lead to a deterioration of the quality of adjudication. In addition

\* Nina Holvast is a PhD candidate at the Paul Scholten Centre of the University of Amsterdam's Faculty of Law, e-mail: [n.l.holvast@uva.nl](mailto:n.l.holvast@uva.nl). Nienke Doornbos is Assistant Professor at the same research centre, e-mail: [n.doornbos@uva.nl](mailto:n.doornbos@uva.nl). An abridged Dutch version of this article has been published in *Recht der Werkelijkheid*. N.L. Holvast & N. Doornbos, 'Loyaliteit binnen de rechterlijke macht', 2014 *Recht der Werkelijkheid*, no. 1, pp. 23-41. We would like to thank Henk van de Bunt, Leny de Groot-van Leeuwen, Albert Klijn, Dorien Pessers, Rob Schwitters, André Verburg, Marc de Wilde and the anonymous reviewers for their comments on earlier drafts of this article.

1 Translated from Dutch. Published (in Dutch) in *Trema*, February 2013.

2 'The Netherlands' top judge warns of legal system overload' 4 February 2013 – See: [http://www.dutchnews.nl/news/archives/2013/02/the\\_netherlands\\_top\\_judge\\_warn/](http://www.dutchnews.nl/news/archives/2013/02/the_netherlands_top_judge_warn/) (last visited 4 June 2015).

3 This rule is not entirely implicit. The *Code of Conduct of the Association for the Judiciary* (the professional association for judges and prosecutors) declares that judges should be aware of their professional role when acting in public and that judges, other than in the capacity of the judge who is responsible for briefing the press or in academic publications, should not express their views on the judgments of colleagues.

to the manifesto, a recent survey commissioned by the Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*) exposed that approximately 73% of the total of 684 respondents (judges and prosecutors) consider their workload to be too high. The quality of adjudication is 'sometimes' or 'often' compromised, according to almost three-quarters of the respondents.<sup>4</sup>

It is interesting that, despite their deep concerns regarding managerialism in the judiciary, judges prove to be remarkably faithful to their work. To wit, the aforementioned survey reveals that over 97% of respondents (strongly) agree with the statement 'loyalty towards my work is high'.<sup>5</sup> This apparent contradiction – publicly expressed criticism by judges and, yet, a great level of loyalty expressed towards their work – motivated us to investigate this matter in more detail.

In this article, we attempt to understand the concerns of judges and the conditions that initiated the establishment of this manifesto, by examining the recent developments within the judiciary from an institutional perspective.<sup>6</sup> We realise that including economic insights in the study of the court organisation is valuable and that it is important that the judiciary is cautious in spending public money. However, in this article, we mainly focus on the more problematic effects of managerialism, as the concerns of judges form the starting point of our analysis and we believe that their fear regarding conceivable adverse consequences of managerialism should be taken seriously.<sup>7</sup> We do not aim to give the impression that the concerns expressed by judges are representative of the entire judiciary. There are also judges who take an opposite stance and believe that more could be done to enhance efficiency.<sup>8</sup> However, we do believe that the concerns are widespread among judges and it is therefore important to pay attention to them.

Following Hirschman's theory of loyalty in organisations,<sup>9</sup> we specifically examine the effect that the developments could have on the loyalty of judges. We will argue that a distinction should be made between different features of the work towards which (or whom) loyalty is expressed; i.e., does it involve loyalty towards the organisation, towards the profession, and/or towards colleagues?

In order to understand how the apparent contradiction came into existence, this article begins by presenting some key theoretical insights on loyalty within the judiciary. Thereafter, we will analyse the concerns of judges against the background of the introduction of new public management (NPM) values such as transparency, effectiveness, efficiency, and client-orientation in the Dutch court organisation over the past two decades.

We draw upon the prolonged debate in the Dutch literature on several changes in the judiciary, the results of two recently conducted surveys,<sup>10</sup> the manifesto, a file with 119 e-mail reactions by judges and judicial assistants regarding the issues raised in the manifesto,<sup>11</sup> and studies on loyalty and sociology of professions. The portrayal of the daily routines in courts is partly informed by observations from fieldwork conducted in two Dutch courts by Nina Holvast.<sup>12</sup> Although in this article we focus on the Dutch situation, we believe that several of the discussed issues are equally relevant to other judiciaries.

We argue that even though the introduction of NPM principles resulted in a more transparent (and conceivably more efficient) process of adjudication, too strong a focus on these principles can also have

4 Nederlandse Vereniging voor Rechtspraak, 'Kwaliteit van de rechtspraak is mensenwerk', position paper 10 September 2013; B. Fruytier et al., *Werkdruk bewezen. Eindrapport werkdrukonderzoek rechterlijke macht*, 2013, p. 46; see also H. Lensink & M. Husken, 'De rechter is het zat', *Vrij Nederland*, 10 December 2013.

5 Fruytier et al., supra note 4, p. 47.

6 An 'institutional perspective looks at the judiciary as a collective and examines the way in which the structures of the career and organisation of judges, as well as legal processes, affect the judiciary as a social institution', see J. Bell, *Judiciaries within Europe. A comparative review*, 2006, p. 2.

7 For more positive contributions see e.g.: W.S. Martin, 'Court Administrators and the Judiciary: partners in the Delivery of Justice', 2014 *International Journal for Court Administration* 6, no. 2, pp. 3-18; R. Foster, 'Towards Leadership: The Emergence Of Contemporary Court Administration In Australia', 2013 *International Journal for Court Administration* 5, no. 1, pp. 4-14; C. Baar 'The Emergence of the Judiciary as an Institution', 1999 *Journal of Judicial Administration* 8, pp. 216-231.

8 See, e.g., R. Otte, *De nieuwe kleren van de rechter: Achter de schermen van de rechtspraak*, 2010.

9 A.O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States*, 1970.

10 Fruytier et al., supra note 4; Lensink & Husken, supra note 4.

11 An unpublished compilation of 119 e-mail responses, which were made anonymous, regarding the Leeuwarden manifesto addressed to the initiators of the manifesto dated 21 January 2013. With the exception of two e-mails, these responses were all in favour of the manifesto.

12 Her research focuses on the role of judicial assistants in judicial decision-making, a subject which in this article will only indirectly be touched upon when we discuss the increasing tendency to delegate tasks within the judicial organisation. See also N.L. Holvast, 'Considering the consequences of increased reliance on judicial assistants. A case study on Dutch courts', 2014 *International Journal of the Legal Profession* 21, no. 1, pp. 1-21. The collected data will be elaborated on in her dissertation [forthcoming].

an eroding effect on traditional ‘rule of law’ values such as independence and autonomy.<sup>13</sup> The introduction of managerial principles to public service organisations was first observed in the 1980s in countries such as the United Kingdom and Australia.<sup>14</sup> Connell, Fawcett & Meagher argue that ‘a deep transformation of culture is at work, though the exact process is hard to formulate and the impact is uneven.’<sup>15</sup> The influence of managerialism is, as stated, also observed in the court organisation. Heydebrand & Seron, for example, witness a new mode of administration in the United States’ federal district courts that ‘seeks to maximise systemic flexibility, informality, decentralisation, “results” in terms of disposition and termination, efficiency, reduction of delay, productivity, speed, and cost-effectiveness.’<sup>16</sup> According to these authors, this new approach results in a crisis in the rule of law.<sup>17</sup> Regarding judiciaries in Europe, Bell observes that the criterion of accountability, which implies the possibility of political authorities issuing guidelines and controlling budgets, is of increasing importance.<sup>18</sup> The precarious balance between NPM principles and classic rule of law principles in European courts and in the judiciaries of France, Germany and the Netherlands was also analysed by Mak. Mak proclaims that we should aim to make the NPM principles compatible with the classic ‘rule of law’ principles.<sup>19</sup> However, Mak also foresees ‘an ongoing tendency toward the realisation of “new public management” principles’ and she emphasises that ‘guaranteeing classic “rule of law” principles still requires a more concrete protection at the European level.’<sup>20</sup>

Since judges regard the traditional rule of law values as essential to their profession, an organisational focus on NPM principles might in the long term also affect the loyalty of judges towards the organisation which proclaims these principles (see Section 3). Loyalty towards the judicial organisation, profession, and colleagues is furthermore influenced by the manner in which judges are selected and socialised. We indicate several recent alterations in the selection and training of judges that are significant for the commitment of judges (see Section 4).

## 2. Theoretical perspectives on loyalty within the judiciary

The most renowned and still relevant theory on loyalty in organisations is Albert Hirschman’s classical study *Exit, Voice, and Loyalty*. Although his treatise was not written with reference to the judiciary, it has been applied to this setting on several occasions.<sup>21</sup> As an economist, Hirschman was interested in the reactions of members or clients to the decline of organisations, especially in ‘repairable lapses,’ i.e., declines that can be corrected with the right balance of information, incentives, and flexibility of response. Hirschman criticises the prevailing school of thought within the field of economics that members or consumers will easily ignore organisations that are facing a loss of quality and will transfer to other organisations. Instead of immediately choosing the *exit* option, highly motivated quality-oriented workers will often refrain from exiting and will express their dissatisfaction or criticism in various ways in order to change the organisation from within (the *voice* option). Whether employees opt for the exit

13 See E. Mak, ‘The European Judicial Organisation in a New Paradigm: The Influence of Principles of New Public Management on the Organisation of the European Courts’, 2008 *European Law Journal* 14, no. 6, pp. 718-734; W.V. Heydebrand & C. Seron, *Rationalizing Justice: The Political Economy of Federal District Courts*, 1990, pp. 194-206.

14 See, for example, the special issue of the *Journal of Sociology* 2009, 45, no. 4 on Neoliberalism, New Public Management and the human service professions. On NPM, see e.g., C. Hood, ‘A Public Management for All Seasons’, 1991 *Public Administration* 69, no. 1, pp. 3-19; M. Barzelay, ‘Origins of the New Public Management: An International View from Public Administration/Political Science’, in K. McLaughlin et al. (eds.), *New Public Management: Current Trends and Future Prospects*, 2002, pp. 15-33.

15 R. Connell et al., ‘Neoliberalism, New Public Management and the human service professions: Introduction to the Special Issue’, 2009 *Journal of Sociology* 45, no. 4, p. 333.

16 Heydebrand & Seron, supra note 13, p. 14.

17 Ibid., p. 194.

18 Bell, supra note 6, p. 10. See also various contributions to the *International Journal for Court Administration*. E.g., A. Lienhard et al., ‘Status of Court Management in Switzerland’, 2012 *International Journal for Court Administration* 4, no. 3, pp. 1-27; T. Kirat, ‘Performance-Based Budgeting and Management of Judicial Courts in France: an Assessment’, 2010 *International Journal of Court Administration* 2, no. 2, pp. 1-9; A. Eicher & K. Schedler, ‘Management Response to Multiple Rationalities in Courts: A Review’, 2012 *International Journal for Court Administration* 4, no. 3, pp. 20-34.

19 E. Mak, *De rechtspraak in balans. Een onderzoek naar de rol van klassiek-rechtsstatelijke beginselen en ‘new public management’-beginselen in het kader van de rechterlijke organisatie in Nederland, Frankrijk en Duitsland*, 2007.

20 Ibid., p. 734.

21 K. Groenendijk, *Een venijnig proces*, 2008; K. Groenendijk & A. Terlouw, *Tussen onafhankelijkheid en hiërarchie. De relatie tussen vreemdelingenrechters en de Raad van State 2001-2007*, 2009; E. Köhne-Hoegen, ‘De raio-opleiding als socialisatieproces: uittrekkers aan het woord’, 2008 *Recht der Werkelijkheid* 29, no. 1, pp. 11-34.

or voice option depends on their loyalty towards the organisation which employs them. The options can be regarded as communicating vessels: in situations in which exit is difficult or even impossible, for instance, because the organisation holds a monopoly, voice is the only way in which one can attempt to change the current organisation. Likewise, when expressing voice is highly problematic due to the fact that the organisation's culture is bureaucratic or not tolerant towards criticism, exit is the only remaining option. Hirschman indicates that those employees who actually leave the organisation are usually the ones who deliver the best services, thereby causing a downward spiral. Yet, even after their resignation, most employees express a commitment toward the organisation. The more loyalty an employee displays, the smaller the possibility that he will exit the organisation. Instead, he will decide to express his concerns or criticism (voice). According to Hirschman, the ultimate form of voice is the *threat* of exit.

Hirschman argues that loyalty among employees is the glue that holds organisations together. However, he does not offer a clear definition of the concept nor does he elaborate on how loyalty within organisations can be achieved or maintained. He describes loyalty in terms of a 'special attachment to an organisation';<sup>22</sup> an attitude or state of mind that may or may not activate certain behaviour, such as the expression of voice. In this article, we too define loyalty as a special attachment or a feeling of involvement. Loyalty, we believe, is a subjective concept; it concerns a feeling of involvement or attachment experienced by the person involved. Hirschman's theory focuses exclusively on loyalty toward the organisation, on a meso-level. However, loyalty can also be directed, on a macro-level, at the profession and, on a micro-level, towards colleagues. Particularly within the judiciary, we consider all these types of loyalty as highly important.

These three categories of loyalty – organisational, professional, and collegial – are specifically valid for the judiciary, as the judiciary is in various aspects not an ordinary organisation. The literature on professionalism characterises the legal occupation as a typical profession.<sup>23</sup> This also holds true for the Netherlands, where, as is typical for a profession, most functions in the legal sector require extensive expertise and knowledge, obtained via a necessary university qualification and prolonged and specialised training. Employment as a lawyer, furthermore, entails a large degree of autonomy, which is also typical of the work of professionals. Additionally, the legal profession employs several internal committees that supervise and control the quality of the profession.<sup>24</sup> Although theories of professionalism are applied predominantly to lawyers who work in legal practice, judges can, to a certain extent, also be regarded as part of the legal profession, and courts, likewise, as professional organisations.<sup>25</sup> Dutch judges have considerable occupational autonomy and the judiciary features a professional code of conduct. Decisions regarding the recruitment, selection, and training of novices are made internally. Judges belong to the judicial branch of the government, but they occupy a special position. They are perceived as independent adjudicators and are, therefore, appointed for life and can only be dismissed by a rarely used procedure at the Dutch Supreme Court.<sup>26</sup> In the Netherlands, judges and prosecutors are both part of the judiciary, which is a result of the traditional inquisitorial criminal justice system.<sup>27</sup> This article is confined exclusively to judges.

The significance of loyalty or commitment towards the profession has also been emphasised in the literature on the sociology of professions. Traditionally, authors indicate an inherent conflict between organisational goals and values on the one hand, such as hierarchy, efficient division of labour, and following procedures, and goals and values of the profession, e.g., autonomy, independence, and a belief

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22 Hirschman, *supra* note 9, p. 77.

23 R.L. Abel, *The Legal Profession in England and Wales*, 1998; E. Freidson, *Professionalism, the Third Logic. On the Practice of Knowledge*, 2001.

24 L.E. de Groot-van Leeuwen, *De rechterlijke macht in Nederland; samenstelling en denkbeelden van de zittende en staande magistratuur*, 1991.

25 See on judges as professionals: A. Paterson, 'Becoming a Judge', in R. Dingwall & Ph. Lewis (eds.) *The Sociology of the Professions: Lawyers, Doctors and Others*, 1983, pp. 263-285, and courts as professional organisations: H. Fix-Fierro, *Courts, justice, and efficiency: a socio-legal study of economic rationality in adjudication*, 2003, p. 145.

26 L.E. de Groot-van Leeuwen, 'Merit selection and diversity in the Dutch Judiciary', in P.H. Russell & K. Malleson (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world*, 2006, pp. 145-158.

27 Today, the pre-trial phase in the Netherlands still has a moderately inquisitorial character; however, the trial phase is progressing toward an increasingly adversarial character, see P.J.P. Tak, *The Dutch Criminal Justice System*, 2008.

in self-regulation, on the other.<sup>28</sup> They suggest a negative relationship between commitment to the profession and the organisation: when the loyalty of an employee towards the profession is high, his or her loyalty towards the organisation will be low and vice versa. Recently, more nuanced viewpoints have drawn attention to the fact that loyalty is also determined by the type of organisation (bureaucratic or professional) by which one is employed.<sup>29</sup> As previously stated, courts – and likewise the entire judiciary – can to a certain extent be regarded as professional organisations. ‘To say that courts are professional organisations implies an internal hierarchy, a precedence in authority: the professionals – in this case, the judges – perform the central tasks for the organisation (...) [.] The non-professional roles in the organisation – provided they can be clearly distinguished from the professional ones – are supposed to act only in support of the core professional functions.’<sup>30</sup> However, the courts, especially in civil law judiciaries such as the Dutch judiciary, also have several bureaucratic and hierarchical features.<sup>31</sup>

Furthermore, Lipsky argues that conflicts between management’s views and the professional views of public service workers in so-called ‘street-level bureaucracies’ (bureaucracies that deal directly with citizens) may result in pursuing personal strategies such as ‘not working (excessive absenteeism, quitting), aggression toward the organisation (stealing, cheating, deliberate wasting) and negative attitudes with implications for work (alienation, apathy).’<sup>32</sup> An important interest of street-level bureaucrats is to maintain and expand their autonomy.<sup>33</sup> It is interesting to study whether Dutch judges also use such strategies to deal with their workload. Whereas Hirschman only differentiates between an exit and a voice option, Lipsky sheds light on other possible responses, such as non-compliance.

In addition to loyalty towards the organisation (meso) and towards the profession (macro), we also wish to emphasise the importance of considering loyalty towards colleagues (micro). In this context, loyalty has the meaning of collegiality or solidarity. Loyalty towards colleagues is especially significant as important judicial decisions are often made by panels of judges, making adjudication a collective enterprise.<sup>34</sup> In the Netherlands, however, there is a tendency towards adjudication by single judges. At present, the majority of district court decisions (more than 80% in criminal cases) are made by single judges; in the appellate courts and the Supreme Court, adjudication commonly takes place in panels of three, or occasionally five judges.<sup>35</sup> When an individual judge adjudicates, collegiality is predominantly relevant in relation to the clerk (or judicial assistant) of the judge. In the Netherlands, these judicial officers frequently work closely with judges in handling court cases. It can be advantageous for the judiciary to acquire collegiality, as this can also form a motivation for employees to refrain from exiting the organisation: ‘Organisations are actually interested in more than newcomers just gaining the requisite knowledge and skills for their jobs – they care whether individuals become committed and stay longer in the organisation.’<sup>36</sup> For example, collegiality, expressed as support for colleagues, is proven to be an important foundation for job satisfaction in the Dutch judiciary.<sup>37</sup> Solidarity between colleagues is especially fostered when newcomers are thoroughly selected and trained, as occurs in the Dutch judiciary. Before elaborating on recent developments regarding this topic, the next section will discuss current changes in the organisation of the judiciary.

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28 See E. Freidson, *Profession of Medicine: a Study of the Sociology of Applied Knowledge*, 1988; R.H. Hall, ‘Some Organisational Considerations in the Professional-Organisational Relationship’, 1967 *Administrative Science Quarterly* 12, no. 3, pp. 461-478; T. Parsons, ‘The Professions and Social Structure’, in T. Parsons (ed.), *Essays in sociological theory*, 1954, pp. 34-49.

29 J.E. Wallace, ‘Organisational and Professional Commitment in Professional and Nonprofessional Organisations’, 1995 *Administrative Science Quarterly* 40, no. 2, p. 231.

30 Fix-Fierro, *supra* note 25, p. 146.

31 M.R. Damaska, *The Faces of Justice and State Authority*, 1986; see on bureaucracy in the U.S. Courts e.g., J.M. Cohen, *Inside appellate courts. The impact of court organisation on judicial decision making in the United States Courts of Appeals*, 2002, pp. 1-20.

32 M. Lipsky, *Street-level bureaucracy, Dilemmas of the individual in public services*, 1980, p. 17.

33 *Ibid.*, p. 18.

34 L.A. Kornhauser & L.G. Sager, ‘The One and the Many: Adjudication in Collegial Courts’, 1993 *California Law Review* 81, no. 1, pp. 1-59.

35 R. Baas et al., ‘One of More Judges in the Courtroom? Adjudication by Sigle or Collegial Courts’, *Nijmegen Sociology of Law Working Papers Series*, 2012, no. 3.

36 S. Ashford & S. Nurmohamed, ‘From Past to Present and Into the Future: A Hitchhiker’s Guide to the Socialization Literature’, in C.R. Wanberg (ed.), *The Oxford Handbook of Organisational Socialization*, 2012, pp. 8-24.

37 Fruytier et al., *supra* note 4, p. 40.

### 3. Loyalty in light of the court organisation

During the last two to three decades, the Dutch judiciary has gone through considerable transformations. From the late 1970s until the 1990s, several committees and auditing bodies evaluated the judiciary and provided strong criticism on the state of the judicial organisation. They concluded that the judiciary had evolved to be archaic, inefficient, and fragmented.<sup>38</sup> It was broadly acknowledged that satisfying the requirements of *modern* society necessitated substantial revisions to the court system. During this period the autonomy of judges was at its maximum, but this resulted in an inefficient process of adjudication and a lack of effective management.<sup>39</sup>

These remarks eventually led to the enactment of two new laws – the Dutch Organisation and Management of Courts Act (*Wet organisatie en bestuur gerechten*) and the Council for the Judiciary Act (*Wet Raad voor de rechtspraak*). The ratification of these laws resulted in the modification of the Judiciary Organisation Act (*Wet op de rechterlijke organisatie*). The newest alteration in the court organisation was implemented at the beginning of 2013; it involved the consolidation of the former 27 courts into 18 new large-scale courts. Most of the courthouses will remain in operation; however, courts will become more specialised and more collaboration on case management and operational management is anticipated.

Mak and Ng, who analysed the developments within the Dutch judiciary, conclude that many of the features fit perfectly in neoliberal policy and demonstrate a preoccupation with NPM principles.<sup>40</sup> Yet, several of these principles are far removed from the principles which are regarded as important to the profession. This introduces certain dilemmas in the work practices of judges, as will be clarified in the next sections. First, the alteration in managing and financing structures of the judiciary will be discussed, followed by an examination of changes in the division of labour.

#### 3.1. Changing management structures

In the 1980s, management in Dutch courts was almost completely absent. Virtually all the relevant decisions were made by a body which included all judges of that particular court (the so-called *gerechtshofvergadering*). After having experimented with different management constructions, in 2002 an integrated management structure was introduced. Each court now has one executive board responsible for the administration and management of the court. Until recently, the board members were judges who performed their management duties part time alongside their judicial duties. From 2013 onwards, membership of this board has become a full-time occupation. The management of all courts is currently overseen by the Council for the Judiciary. The introduction of a Council for the Judiciary forms part of a broader tendency that has been occurring in European judiciaries over the last few decades.<sup>41</sup> The Dutch Council for the Judiciary's responsibilities are in this respect rather far-reaching, as the Dutch Council has duties in the coordination and supervision of administrative and policy aspects and has several managerial responsibilities as well. The Council acts as the link between the Ministry and the courts on these issues.<sup>42</sup> It is also in control of the budget and the distribution of resources among the courts. The executive boards of the different courts are subsequently responsible for the distribution of resources among different divisions of the court.

Although the purpose of creating a Council for the Judiciary was to enhance the independence of the judiciary, the Council is frequently criticised for acting too much in alignment with the Ministry of Security and Justice and lacking individual safeguards to act independently of the Ministry.<sup>43</sup>

38 E. Brommet, *Van rechterlijke macht naar de rechterlijke organisatie: Kroniek van achttien jaar verandering 1983-2001*, Ministry of Justice, 2002.

39 Brommet, *supra* note 38; M. Boone et al., *Financieren en verantwoorden, het functioneren van de rechterlijke organisatie in beeld*, 2007.

40 Mak 2007, *supra* note 19; Mak 2008, *supra* note 13; G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007.

41 W. Voermans, 'Councils for the Judiciary in Europe: Trends and Models', in F.R. Segado (ed.), *The Spanish constitution in the European Constitutional context*, 2003, pp. 2133-2144.

42 W. Voermans & P. Albers, *Councils for the Judiciary in EU Countries*, 2003, pp. 102-103.

43 L.E. de Groot-van Leeuwen, 'Judicial Reform in the Netherlands: Perception and Reception in the Judiciary', in B. Hess (ed.), *Judicial Reforms in Luxembourg and Europe, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law*, 2014, pp. 173-180; P.P.T. Bovend'Eert, 'De Raad voor de Rechtspraak, de Minister van Justitie en de Hoge Raad: drie kapiteins op een schip. Over toezicht en rechters', in P.P.T. Bovend'Eert et al. (eds.), *De rechter bewaakt*, 2003, pp. 59-89; W.J. Witteveen, 'Modernisering van de rechterlijke macht: vijf risico's', 2002 *Nederlands Juristenblad* 77, no. 16, pp. 793-796.

A photograph taken on the occasion of the appointment of new presidents of the newly established courts after their consolidation generated further concern. This photograph shows the Minister of Security and Justice and the chairman of the Council for the Judiciary surrounded by the newly appointed presidents of the courts. Two justices of the Court of Appeal of Amsterdam voiced their objections to this image in a newspaper: in their view, the photograph symbolised the decreased independence of judges within the *Trias Politica*.<sup>44</sup> Another judge also considered the photograph to be ‘a worrisome signal from the perspective of the separation of powers and independence of judges.’<sup>45</sup>



*The Minister of Security and Justice I. Opstelten and the chairman of the Council for the Judiciary F.W.H. van den Emster surrounded by newly appointed court presidents, 15 October 2012. (photograph: Floren van Olden)*

The previously mentioned manifesto additionally indicates the existence of a gap between judges and the executive boards of the courts.<sup>46</sup> Due to the full-time management positions of board members, they have become less aware of issues that arise in the workplace. Simultaneously, the body of judges that used to play a significant role in all decisions regarding the court has lost its key position. This has resulted in a feeling of dissatisfaction among judges with the way in which their voice is taken into consideration.<sup>47</sup> For instance, a judge in his response to the manifesto, says he is ‘worried about the distance between people at the workplace and the Council for the Judiciary.’<sup>48</sup>

Bearing in mind Hirschman’s theory, we believe that the sense of a loss of *voice* in the organisation could ultimately result in judges exploring new ways of attempting to influence the court organisation. As Hirschman explained, the notion that someone’s views are taken seriously within the organisation is a

44 *NRC Handelsblad*, 18 October 2012.

45 E-mail response regarding the Leeuwarden manifesto, supra note 11.

46 B. van Lierop, ‘De kloof tussen rechters en hun bestuur, zorgen over de interne onafhankelijkheid van de rechters in Nederland’, 2012 *Nederlands Juristenblad* 97, no. 37, pp. 2616-2619.

47 An inherent conflict between the administrative management’s aims and the aims of the judge as an adjudicator was previously observed in the roles of chief justices and state court administrators in the U.S., see J.D. Cameron et al., *The Chief Justice and the Court Administrator: The Evolving Relationship*, 1987 *Federal Rules/Decisions* 113, no. 439.

48 E-mail response regarding the Leeuwarden manifesto, supra note 11.

key condition for restraining the expression of *voice* publicly or threatening to exit the organisation. The disapproval of judges with certain values, propagated by the Council for the Judiciary, also affects this process. As the manifesto emphasises, several judges are convinced that the court management focuses too much on productivity and efficiency and pays too little attention to the autonomy of judges and their discretionary powers.<sup>49</sup> This observed misdirected focus is reflected in the manner in which courts are financed.

### **3.2. Output financing**

One of the main criticisms in the manifesto is that the judiciary bears an increasing resemblance to a 'biscuit factory' in which production figures are guiding the organisation.<sup>50</sup> This objection is related to the new financing structure, in which a specific amount of time is assigned for handling each case type and the courts are financed with a sum which is proportional to this amount of time, regardless of the actual time spent by judicial officers. This output-based financing structure is not unique to the Dutch judiciary, along with many of the other results of the new managerial approach, it is observed in other judiciaries.<sup>51</sup> Based on the aforementioned calculation, judges are scheduled to handle a specific amount of hearings (and connected cases). The schedule of hearings therefore guides the time that judges devote to handling cases. As a result, little room remains for doing justice to the specific features of a case. The current timetables of judges, moreover, leave barely any room for additional facets of the judges' profession, such as keeping abreast with recent developments in legislation and case law.<sup>52</sup> In a recent study, almost 88% of judges and prosecutors indicated that they did not have any time during working hours to read recent case law. Some 53% stated that they felt pressured to meet production targets.<sup>53</sup>

The pressure to deliver output is most severely felt by judges in the criminal divisions of district courts. A judge in the criminal division, explains:

'I also think that large caseloads affect the quality of judging. I work four days a week, two of which are filled with hearings. Schedules never include a break in order to reflect on your own judgments or to catch up with recent case law, new legislation or literature. As a judge you are left no choice but to conform to this ruthless pace. As a result, it is common for my days to last twelve hours and I very often work during the weekends as well. I frequently have to cancel courses as the timing is incompatible with the scheduled hearings. There is barely time to confer with colleagues, because everyone works behind closed doors in order to get the work done without disturbance.'<sup>54</sup>

Conversely, a justice from the civil section of a court of appeal has a different experience:

'I experience the workload as high, but not unacceptably high and I don't have the impression that it affects the quality of our judgments. Besides, I also see positive effects of the pressure to deliver output: the management functions more effectively and the work is done much more efficiently than a few years ago, problems are tackled and solved, and the time for the processing of cases was shortened. (...) However, I often hear disturbing voices from our criminal division about high caseloads and consequently, the practice (born out of necessity) of only one out of three justices reading all casefiles. I reject such a practice.'<sup>55</sup>

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49 See also: H.L.C. Hermans & H.F.M. Hofhuis, 'Productienormen en aanspreekbaarheid van de rechter op kwantitatieve prestaties', 2009 *Trema* 32, no. 6, pp. 228-230.; C. Brinkgreve, 'Het tanende gezag van de Toga', 2013 *De Groene Amsterdammer*, no. 8, pp. 18-21; C. van der Wilt, 'De mammon in de rechtszaal', 2011 *Trema*, 96, no. 4, pp. 120-126.

50 P.H.A. Frissen et al., *Governance in de rechtspraak*, 2014.

51 See e.g., on the French Judiciary, T. Kirat, 'Performance-Based Budgeting and Management of Judicial Courts in France: an Assessment', 2010 *International Journal of Court Administration* 2, no. 2, pp. 1-9.

52 According to e.g., Van der Wilt, *supra* note 49.

53 Fruytier et al., *supra* note 4, p. 35.

54 E-mail response regarding the Leeuwarden manifesto, *supra* note 11.

55 *Ibid.*

One judge specifically proclaims that the problems are caused by the new financing structure:

‘The source of the problems mentioned in the manifesto, in my opinion, is the way in which the public sector is financed. Since it changed from a budget model into an output model, the emphasis has been on quantity. Everyone is expected to be concerned about the statistics. More and more, judges are constrained in their judicial duties in order to produce and be accountable. Consequently, there are too many management layers and the top layer has completely drifted away from the workplace.’<sup>56</sup>

With Lipsky’s ideas on professionals in mind, this resistance to the new financing structure is not very surprising.<sup>57</sup> The strict schedule of hearings reduces the autonomy of judges and their power to allocate their time to cases. Furthermore, it results in a standardisation of the judicial process in which the complexity of a case is no longer paramount and considerations of effectiveness and efficiency have prominence. Unlike Lipsky’s observations in other public service bureaucracies, non-compliance or shirking is uncommon among judges; judges rather work late than pass their work on to colleagues. However, they do experience dilemmas when faced with clashing organisational and professional values. An example is found in the fact that certain interim judgments made during court proceedings are not qualified by the management as ‘output’ and are therefore not financed. Issuing these judgments can, therefore, become a costly exercise.<sup>58</sup> These incentive and disincentive structures create an environment in which efforts to increase output are threatening the independent positions of judges in deciding concrete cases. These structures are difficult to reconcile with the professional and ethical standards of judges. Illustrative is the reaction from the following judge. He pronounces:

‘As a judge, I never allowed myself to be influenced by remarks of managers concerning production et cetera. In the past ten years, I was confronted with my attitude only once and at that time I made it very clear that as far as I am concerned, only one thing matters: a good judgment that pays attention to the interests of all parties in a justifiable manner. Unfortunately, I see too many colleagues who give in and don’t take a stance against managers.’<sup>59</sup>

### 3.3. Division of labour and the delegation of judicial duties

Managerial perspectives frequently focus on the efficient division of labour. One way to achieve this goal is to delegate additional tasks to assisting staff members, a tendency that is observed in the US, for example.<sup>60</sup> In this regard, Judge Richard Posner speaks of ‘the age of the law clerk.’<sup>61</sup> Other authors observe an increased delegation to law clerks, too. This is frequently perceived as a result of the bureaucratisation or rationalisation of the courts, due to increasing caseloads.<sup>62</sup> A search for new ways to allocate the workload of the courts is also notable in several European countries. Some European countries have introduced a new quasi-judge function inspired by the German *Rechtspfleger*.<sup>63</sup> Other countries, such as Ireland, England and Wales, and Belgium, have created new judicial assistant functions.<sup>64</sup>

In the Netherlands, judicial assistants have always had a firm position within the court organisation. In the last 10-15 years their position has further strengthened.<sup>65</sup> Although the NPM approach was not the

56 Ibid.

57 Lipsky, supra note 32.

58 See on this subject also: G. Corstens, *De rechtsstaat moet je leren*, 2014, p. 138.

59 E-mail response regarding the Leeuwarden manifesto, supra note 11.

60 See e.g., A. Ward & D.L. Weiden, *Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court*, 2006; T.C. Peppers, *Courtiers of the Marble Palace: the Rise and Influence of the Supreme Court Law Clerk*, 2006; Cohen, supra note 31.

61 R.A. Posner, *How Judges Think*, 2008, p. 61.

62 See for an overview: Cohen, supra note 31, pp. 9-11.

63 European Commission for the Efficiency of Justice (CEPEJ), ‘Report on European judicial systems – Edition 2012 (2010 data): efficiency and quality of justice’, 2012, pp. 165-166.

64 See G. Connan, ‘The role of judicial research assistants in supporting the decision making role of the Irish judiciary’, 2006 *Judicial Studies Institute Journal* 6, no. 1, pp. 171-196; A. Paterson, *The Final Judgment: The Last Law Lords and the Supreme Court*, 2013; C. de Busschere, ‘De referendarissen bij de rechterlijke orde: schets van hun statuut, opdracht en deontologie’, 2012 *Rechtskundig Weekblad* 76, no. 15, pp. 562-576.

65 See Holvast, supra note 12; S. Praagman & N. Doornbos, ‘De “vierde macht” binnen de gerechten’, 2012 *Trema* 35, no. 2, pp. 42-46;

only driver of the increasing reliance on judicial assistants, it did enhance it. The courts have gradually introduced guidelines regarding the duties of judicial assistants in the judicial process. In the majority of court divisions, it is currently common practice for judicial assistants to write draft judgements. Judicial assisting staff members frequently outnumber the judges and are often assigned more time than judges to spend on preparing cases.<sup>66</sup> These circumstances emphasise their key role in the judicial process. Judicial assistants are not just performing administrative duties, they are involved in the judicial decision-making process as well, providing judges with their views on the merits of cases and occasionally acting as partners in deliberation.<sup>67</sup> Hence, the courts are arranged less as professional organisations in which professional and supportive (administrative and managerial) duties are conducted separately and more as businesses, in which labour is divided based on the principle of efficiency.

Although the role of judicial assistants in judicial decision-making has increased, the delegation of duties to judicial assistants remains a controversial issue which is rarely discussed among judges.<sup>68</sup> Little information is available regarding the manner in which judges make use of the products of their assistants. Research on this issue carried out by Holvast reveals that according to the professional standards of the majority of judges, judges should at all times read the original case files; merely working with on a summarising memo produced by an assistant in preparation for a hearing is not regarded as acceptable.<sup>69</sup> This is underscored by a statement of a judge to two journalists who conducted research at a Dutch court: 'If I notice that one of the judges of my panel is not familiar with all the files, his goose is cooked.'<sup>70</sup> At the same time, judges agree that being provided with a summary does save time. Some judges also point to certain colleagues who they believe rely too extensively on memos. This reveals the difficulty for judges to uphold their professional standards in an organisation which places great demands on productivity.

A similar issue arises regarding the division of labour between judges on a panel. In the majority of Dutch courts, the role of the chairperson of the hearing rotates between the three judges on the panel when multiple cases are heard. This is a relatively new development, as in the past it was common for the senior judge to chair all case proceedings. This development can be seen as an indication that courts are becoming less orientated towards hierarchy, but it can also be considered as a method for advancing efficiency. A chairman has on average to be more prepared, so by rotating the chairmanship, the work is divided more equally among all panel members. This issue appears to be just as controversial as the issue of delegation to judicial assistants. Judges' professional attitudes mean that all judges ought to be equally familiar with the details of a case prior to a hearing; a review by three judges instead of one is the entire purpose of panel judgments.<sup>71</sup> Yet, in practice, this ideal appears to be difficult to realise. A long tradition of research on group decision-making reveals that dividing the reading of sources of information can be problematic for deliberation. Group members tend to attribute greater weight to shared information while information which is only known to one member frequently remains unmentioned or is not taken seriously.<sup>72</sup> A justice from a Court of Appeal illustrates:

'From time to time the question arises whether all three justices are required to read the casefiles or whether it would suffice when only the chair reads the original files and the two panel members prepare themselves by reading a summarising memo. The only reason for this question being raised is due to cost effectiveness. After all, if we would do this, we would save

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Visitatiecommissie Gerechtten, *Rapport Visitatie Gerechtten 2010*, p. 25; T. Abram et al., *Partners in crime. De juridisch medewerker in de strafrechtspraak, een professional naast de rechter*, 2011.

66 In 2013, the judiciary consisted of 2,182 FTE judges and 6,495 FTE non-judges, see Raad voor de Rechtspraak, *Jaarverslag 2013*. Of this last category, a little over one third are assistants that assist judges in the judicial content of their work and do not only perform administrative duties.

67 Holvast, *supra* note 12.

68 Delegation has also been a sensitive issue at the Office of the Public Prosecutor. See H.G. van de Bunt, *Officieren van Justitie. Verslag van een participierend observatieonderzoek*, 1985, pp. 86 and 106-109.

69 The results of this research will be published in her dissertation.

70 J. van der Meer & H. Rottenberg, *Opwaaiende toga's*, 2013, p. 93.

71 See Baas et al., *supra* note 35.

72 F.S. ten Velden & C.K.W. de Dreu, 'Groups as motivated information processors: Implications for decision making among judges', in R.W.M. Giard (ed.), *Judicial Decision Making in Civil Law*, 2012, pp. 59-86; G. Stasser & W. Titus, 'Pooling of unshared information in group decision making: Biased information sampling during discussion', 1985 *Journal of Personality and Social Psychology* 48, no. 6, pp. 1467-1478.

time (as we would only thoroughly prepare the cases which we would chair), so we would be able to process even more cases during one session.<sup>73</sup>

It seems as if judges sometimes compromise their professional standards in their attempts to meet the aims of efficiency. The fact that the key values of the organisation have drifted away from several of those of the profession can also affect the loyalty of judges toward the organisation. Simultaneously, loyalty towards colleagues, judges as well as judicial assistants, becomes increasingly important. When judges partly divide the work, mutually and with assistants, it is of key importance that they trust their colleagues and feel comfortable in collaborating with them. In this respect, it has been noted that judicial assistants do not always feel that they receive enough recognition for their efforts. Yet, 91% of judges in a recent study acknowledged the importance of judicial assistants, referring to their occupation as (very) important.<sup>74</sup> Although loyalty towards colleagues does not also imply loyalty towards the organisation, high levels of collegiality are among the reasons why judges stay committed to the organisation and decline to consider the exit option.

It has become clear that alterations in the judicial organisation have caused judges to face several dilemmas in their daily activities, as they attempt to maintain high professional standards and simultaneously meet efficiency criteria. This friction between conflicting standards has resulted in strong expressions of voice. It potentially also bears the risk of exit, especially when judges feel that they are not taken seriously and do not feel represented by their superiors. In a recent survey, 24% indicated that, in the past five years, they considered quitting the judiciary due to high workloads and other reasons.<sup>75</sup>

Jeopardising broadly supported professional values could prospectively also bring the professionals closer together as they can feel united in their struggle to maintain professional standards. The alterations might result in more loyalty towards direct colleagues, while a detachment of managing judges and other judges could cause a dichotomy in the judicial organisation. As previously mentioned, the selection and training of judges are also important in enhancing loyalty. This issue is discussed in greater detail in the next section.

#### 4. Loyalty in light of the selection, training and socialisation of judges

The commitment of judges to their occupation originates largely from the way in which they are selected, trained, and socialised. Loyalty towards the profession and loyalty towards colleagues in particular is created during the intense selection and training period that new members of the judiciary experience when they enter the ranks of the judicial corps. This process is essential for conveying the professional standards and ethical values which make the profession unique. In the past few years, several adjustments have been made to the selection, training, and socialisation of new members. These changes were specifically made in order to meet the needs of society. Budget cuts were an additional driver of the alterations and the changes also aim to create more diversity in the judicial corps. The question addressed in this section is whether these changes will alter the originally entrenched feelings of loyalty among judges.

##### 4.1. *Developments in the diversity of the judiciary*

Diversity policy in the Dutch judiciary has a long history, during which the focus of the diversity policy changed over time from the representativeness of different regions to religious diversity, the representativeness of various social classes, and gender equality.<sup>76</sup> The composition of the judiciary largely reflects the developments in society concerning the emancipation of certain groups.<sup>77</sup>

73 E-mail response regarding the Leeuwarden manifesto, supra note 11.

74 Fruytier et al., supra note 4, p. 31.

75 Lensink & Husken, supra note 4.

76 A. Böcker & L.E. De Groot-van Leeuwen, 'Ethnic minority representation in the judiciary: diversity among judges in old and new countries of immigration,' 2007 *The Judiciary Quarterly* 51, no. 1, pp. 3-51.

77 For instance, in 1990, women constituted just one-fifth of all judges; today they make up more than half. The policy to promote the entrance of ethnic minorities to the judiciary has been less successful. Up until now, very few ethnic minority judges entered the ranks of the judiciary. Exact figures are not available. Böcker & De Groot-van Leeuwen, *ibid.*; J.D.A. den Tonkelaar, *Optimus Iudex, Over het belang van de selectie van onze rechters*, 2009, pp. 33-34.

In the past, the legal profession undeniably had elitist traits; members were recruited from the higher ranks of society,<sup>78</sup> even though, in the Netherlands, the status of a judge was never comparable to that of judges in, for example, England and Wales.<sup>79</sup> In all Western European countries including the United Kingdom,<sup>80</sup> elitism in the judiciary now appears to be on the wane. Given that judges in these Western countries are increasingly selected by merit, it is expected that judges will more frequently have middle-class backgrounds.<sup>81</sup> This trend towards a lesser degree of elitism is also observed in the Netherlands. However, judges can currently still not be considered to represent society in terms of class and social and ethical background.<sup>82</sup>

The risk of so-called 'cultural reproduction'<sup>83</sup> (the process by which recruiters within organisations, consciously or unconsciously, are inclined to select like-minded people in order to create a pleasant working environment in which social and ethical norms can easily be passed on) appears to be prevalent in judicial selection as well. In the Netherlands, the judicial corps has a reputation of being a fairly homogeneous, traditional, and conventional society. The image of the Dutch judiciary as a homogeneous society is substantiated by the results of a survey among members of the judiciary which has been conducted by the Dutch weekly magazine *Vrij Nederland* every five years since 1991. The first survey revealed uniformity among judges regarding the newspapers and magazines they read, the TV programmes they watched, and the opinions they expressed. A relatively high percentage of judges also voted for the same democratic party.<sup>84</sup> These findings have dominated the public image of judges. The alteration of the selection and training of judges in the Netherlands partly emerged from the yearning for greater diversity. New entry criteria were formulated to increase diversity within the profession. 'We are looking for excellent judges who are firmly rooted in society,' proclaims Jansen, President of the Board of the Training Centre for Judges.<sup>85</sup>

The aim to create a more diverse composition of the judiciary is, in our view, overall a positive one. Diversity might prevent biased and one-dimensional decision-making. It also has a symbolic function, as it can avoid the appearance of partiality.<sup>86</sup> However, a more diverse group of judges, and perhaps a less status-based selection process, could result in weaker ties to the other members of the judicial corps. This is not immediately problematic, as loyalty solely based on conformity with other members is, in our view, not desirable in an organisation which is required to offer impartial judgements.

#### **4.2. Selection and training of judges**

The Netherlands has a so-called 'mixed recruitment system' which combines a traditional continental career judiciary with a common law system of the appointment of experienced members of the legal profession.<sup>87</sup> This follows a European trend. Continental European judiciaries are increasingly recruiting not just among recent graduates but also among experienced legal practitioners.<sup>88</sup> Judges in the Netherlands are never elected and, contrary to most other European judiciaries, the Dutch judiciary consists almost exclusively of professional judges (in contrast to lay judges or juries).

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78 De Groot-van Leeuwen 2006, supra note 26.

79 Regarding the English judiciary, Paterson in the 1980s noted that it was 'almost as though to become a judge is to attain a status that is higher than that of a profession'. Paterson, supra note 25, p. 265.

80 D. Nicolson, 'Demography, Discrimination and Diversity: a New Dawn for the British Legal Profession?', 2005 *International Journal of the Legal Profession* 12, no. 2, pp. 201-228.

81 Bell, supra note 6, p. 19. See also P. Russell, 'Judicial Recruitment, Training, and Careers', in P. Cane & H. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research*, 2010, pp. 532-533.

82 L.E. de Groot-van Leeuwen, 'De samenstelling van de rechterlijke macht', in E.R. Muller & C.P.M. Cleiren (eds.), *De rechterlijke macht: Rechtspraak en rechtshandhaving in Nederland*, 2013, pp. 65-82.

83 O. Patterson, 'The Mechanisms of Cultural Reproduction. Explaining the Puzzle of Persistence', in J.R. Hall et al. (eds.), *Handbook of Cultural Sociology*, 2010, p. 142.

84 M. Josten & J. Van Tijn, 'De rechterlijke macht van Nederland: een geruuststellend gezelschap', *Vrij Nederland*, 2 November 1991, pp. 18-32. See also F. Bruinsma, 'Rechters in Nederland. Een NJB-enquête', 2001 *Nederlands Juristenblad* 86, no. 40, pp. 1925-1934.

85 'Nieuwe opleiding rechters met voeten in de klei', News item Council for the Judiciary, 15 November 2011.

86 L.E. de Groot-van Leeuwen, 'De rechterlijke macht in beweging', in R.J.S. Schwitters (ed.), *Recht en samenleving in verandering: inleiding in de rechtssociologie*, 2008, pp. 151-152.

87 De Groot-van Leeuwen 2006, supra note 26, p. 150.

88 Bell, supra note 6, p. 19.

During the last few decades, the selection process for appointing judges has been demanding.<sup>89</sup> Candidates are required to hold an LLM and have to perform well in several intelligence and psychological tests as well as in several different selection interviews. Up until 2012, three routes were available for pursuing a career as a judge in the Netherlands. The first route to enter the ranks of the judiciary was open to graduates directly out of law school. They could apply for a six-year programme of courses and apprenticeship-based training. The second route was available to lawyers with at least six years of legal experience. For them, a shorter period of apprenticeship and coursework was sufficient. In 2007, a third route was designed especially for (senior) judicial assistants who desired a judicial position. This last route was seldom pursued.<sup>90</sup>

In January 2014, these routes were merged into one route (with several possible variations). The previously included obligatory two-year internship outside of the judiciary for recent graduates lapsed. Instead the route was shortened by a minimum of two years and is now only open to candidates with at least two years of work experience outside of the judiciary.<sup>91</sup> The period of required training for prospective judges in this new programme is determined on an individual basis depending on the work experience of the candidate. In addition to the fact that candidates are expected to have worked outside the judiciary, candidates should also be able demonstrate their previous societal engagement, either professionally or voluntarily.

The shortening of the duration of the overall training for entrees who previously entered via the first route might result in slightly less collegial and professional loyalty among prospective judges. Former trainee judges were prepared to invest six years in specialised training. That commitment alone already created a high level of loyalty towards all features of the work, especially considering that this six-year period was universally regarded as a period of hard work and under constant pressure from the evaluation process.<sup>92</sup> At present, prospective judges commit themselves to a shorter period of training. It is also more likely that they will enter the judiciary as a next step in their career rather than as a vocation for life. It, furthermore, leaves less time for socialisation.

#### 4.3. Socialisation

According to Freidson,<sup>93</sup> training is an important way in which solidarity and loyalty toward the profession can be established. Newcomers commonly commit themselves to a long period of training that will mould them into specialists. Solidarity among members is also supported by the fact that newcomers are frequently trained in cohorts rather than individually.<sup>94</sup> The education of professionals is not just aimed at obtaining knowledge but also at stimulating ethical values and attitudes that are important to the profession.<sup>95</sup> Prospective members are initiated (socialised) into the norms, values, attitudes, and rules of the profession.<sup>96</sup>

The literature on socialisation acknowledges that socialisation begins in early childhood and advances in school, work and training settings.<sup>97</sup> Law schools teach students to study cases from a primarily legal perspective. As Mertz has convincingly argued, in ‘case dialogues’ between professor and students, students are encouraged to shift their attention from moral and emotional approaches to conflict within frameworks of legal authority. They are ‘learning to think like a lawyer,’ a process which is observed in the United States as well as the Netherlands.<sup>98</sup>

89 P.M. Langbroek, ‘Recruitment, Professional Evaluation and Career of Judges and Prosecutors in the Netherlands’, in G. Di Federico & E. Lo Scarabeo (eds.), *Recruitment, professional evaluation and career of judges and prosecutors in Europe*, 2005, p. 166.

90 See Holvast, supra note 12.

91 S. Roos & E. van Amelsfort-van der Kam, ‘Een nieuwe werving, selectie en opleiding van rechters’, 2012 *Trema*, no. 9, pp. 310-315.

92 Köhne-Hoegen, supra note 21; Den Tonkelaar, supra note 77, p. 46.

93 Freidson, supra note 28.

94 *Ibid.*, pp. 100-101.

95 *Ibid.*, p. 95.

96 M.W. Kramer, *Organisational Socialization: Joining and Leaving Organisations*, 2010; C.R. Wanberg (ed.), *The Oxford Handbook of Organisational Socialization*, 2012.

97 Kramer, *ibid.*; Wanberg, *ibid.*

98 E. Mertz, *The Language of Law School: Learning to ‘Think like a lawyer’*, 2007. Mertz’ research was reproduced in the Netherlands by F. Bruinsma, ‘Rechten studeren als socialisatieproces’, 2009 *Recht der Werkelijkheid* 30, no. 1, pp. 103-108; F. Bruinsma, ‘De verborgen agenda van de rechtenstudie’, in W.M.J. Bekkers et al. (eds.), *Rechten in Utrecht, heden, verleden en toekomst*, 2002, pp. 143-170.

In the Netherlands, the socialisation process during judicial training has always had a reputation for being particularly intense, especially for recent graduate trainees.<sup>99</sup> During this process, the importance of professional and ethical values and principles such as independence, impartiality, and integrity is emphasised in addition to other rule of law values such as coherence in decision-making and equal treatment of equal cases. These values are closely related to the professional values and, therefore, they stimulate loyalty towards the profession.

Collegial bonds and loyalty are also formed during this period of initiation and training. The programme commonly began with an induction week in which the prospective judges spent time together in a hotel. This feature remains the same in the new programme. During this week, intensive courses are combined with all kinds of social activities such as 'paintballing' and visits to a bar. As the selection process has been strict, the candidates are usually excited about being admitted. Their privileged position is also emphasised by the trainers. One of the candidates remembered that the first announcement to the group was: 'You are the *crème de la crème* of the legal profession.'<sup>100</sup> During this induction week, the early bonds of collegiality are shaped.

After the induction week, the candidates start their apprenticeships in various courts where they meet candidates from other cohorts. They become familiar with the daily judicial practice and with the informal norm that working during the weekends can be part of the job.<sup>101</sup> During their apprenticeships, the candidates are monitored by different supervisors (judges) who further initiate them into the norms and culture of the judiciary. The supervisor both acts as a role model and assesses the development of the candidate. This combined position of the supervisor makes it difficult for candidates to express discontent (voice) about the routines within the division. This clarifies why the socialisation process – albeit important for loyalty at the professional and collegial level – might also lead to conformism on the organisational level.<sup>102</sup> One of the candidates who resigned from the training explained in an interview that he could still not fully understand why he did not pursue the course. He stated: 'I have a strong impression that I am just out of step, that I am not able to align myself with the organisation or am unwilling to do so.'<sup>103</sup> Hence, the former training programme appeared to reinforce the effect that the selected candidates were cast in the same mould. The trainees were encouraged to express loyalty towards colleagues and towards the manner in which the organisation functions and were discouraged from being critical about existing court practices.

The new training programme explicitly aims at creating judges with a critical attitude. The requirement of possessing relevant work experience in the new programme, however, implies that currently *all* newcomers are previously socialised in another part of the legal profession before entering the judiciary. Those who enter from law firms in particular might have become familiar with principles such as partiality and the pursuit of profit which are diametrically opposed to judicial principles such as independence and justice. Currently, approximately 28% of judges have been previously engaged as legal practitioners.<sup>104</sup> This percentage will probably increase due to the new requirements. Given that their primary socialisation occurs in a more profit-orientated setting where values such as efficiency and productivity are significant, it is possible that these values – which are so strongly contested by current judges – will gradually become more accepted by the new generation of judges.

Selection, training, and socialisation are powerful devices for creating loyalty among new judges and they could counterbalance the decrease in loyalty caused by organisational changes. It partly explains why judges remain devoted to their work, despite high caseloads and the existence of several policies they object to.

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99 See e.g., De Groot-van Leeuwen 1991, *supra* note 24; H. Gommer & M. Meuleman, 'De afhankelijke en belangeloze rechter', 2007 *Recht der Werkelijkheid* 28, no. 1, pp. 7-25; Böcker & De Groot-van Leeuwen, *supra* note 76; Köhne-Hoegen, *supra* note 21; De Groot-van Leeuwen 2008, *supra* note 86.

100 Köhne-Hoegen, *supra* note 21, p. 18.

101 *Ibid.*, p. 24.

102 *Ibid.*, p. 29; Den Tonkelaar, *supra* note 77, p. 33.

103 Köhne-Hoegen, *supra* note 21, p. 29.

104 Lensink & Husken, *supra* note 4.

## 5. Conclusion

In a recent manifesto, judges in the Netherlands expressed their concerns about the organisation of the judiciary and the pressure they experience in delivering output. Concurrently, in a recent survey, they proclaim to be highly committed to their work.<sup>105</sup> In this article, we have explored this apparent contradiction by studying recent developments in the organisation of the judiciary and in the selection and training of judges. We considered the consequences that these developments could have on the loyalty of judges and we distinguished between loyalty toward the organisation (the meso-level), the profession (the macro-level) and colleagues (the micro-level).

The manifesto of the Dutch judges springs from the discontent with several organisational changes which occurred during the last decade. It is a strong demonstration of *voice* by the judges, who obviously are dissatisfied with the current manner in which the judiciary is organised.

We believe that the commitment which is displayed in the survey for the most part does not refer to feelings of loyalty towards the judicial organisation. It is more likely that this expressed commitment refers to loyalty towards the judicial profession, which appears to be invariably high. Judges function as guardians of rule of law principles such as independency and impartiality, which are strongly rooted within the profession. This loyalty developed while the judicial profession emerged and professional principles are transmitted to new judges every year during their training. It appears that this solid belief in professional values is at the heart of a disinclination towards the organisation, which asserts certain managerial values that frequently conflict with professional values. Although there is not much hankering among judges to return to the good old days in which judges were functioning as entirely autonomous entities, judges believe that the current NPM-driven management policy is a bridge too far. The loyalty of judges towards the judicial organisation appears to be affected by this.

Loyalty towards colleagues has always been strong in the Dutch judiciary, partly due to the thorough training and the socialisation during apprenticeship-based training. This type of loyalty has become more important as collaboration between colleagues has increased and further delegation to judicial staff is established. At the same time, the pressure placed on individual judges to deliver output can also threaten their ability to act loyally toward colleagues. Furthermore, the new selection and training of judges have been shortened and aim to produce a diverse group of new judges. This could reduce uniformity and, as a drawback, weaken collegial ties.

The concerns that are raised in the manifesto require a follow-up for several reasons. In particular, this article reveals that if the Council for the Judiciary and court managers do not respond properly to the critique of the judges, the lack of a response has the potential to cause judges to exit the judiciary. To prevent this from occurring, it is of key importance that an effort is made to enhance the loyalty of judges towards all different aspects of their occupation: the judicial organisation, the profession, and their colleagues. ¶

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<sup>105</sup> Fruytier et al., *supra* note 4, p. 47.