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Olthuis, E.

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WERK IN UITVOERING

The role of attitudes in the professional judicial decision-making process: a work in progress

Elke Olthuis

1 Introduction

A judge sits down in court and looks at the defendant in front of her.¹ She sees a neck tattoo peeking through the defendant's white button-down shirt and thinks: I really dislike tattoos, let alone neck tattoos. In everyday life this evaluation made by the judge might influence a decision she makes, but does this evaluation also affect her professional judicial decision-making process?

There is still little known with regards to the professional judicial decision-making process.² In a large way it can still be referred to as a black box.³ It has been accepted, generally speaking, that there is a subjective element in the professional judicial decision-making process, which is still unexplained. Research on our daily decision-making processes shows that these processes are highly affected by attitudes.⁴ An attitude is an evaluation of an object (e.g. issue, person, object) on the basis of cognitive, affective and behavioural information. An attitude is inherently personal and subjective.⁵ The current research tries to answer the question whether attitudes play a role in the professional judicial decision-making process.⁶

1 In this article female reference words will be used for the judge. Everytime a female reference word is used the male counterpart can be read as well. This article is part of a PhD research where the empirical part of the research will be conducted among Dutch judges working in district courts. In 2018, 63,13% (976 out of 1546) judges within the Dutch district courts were female (Raad voor de Rechtspraak 2019, p. 39). For that reason, female reference words will be used when referring to the judge in this article.

2 With the professional judicial decision-making process this article is referring to the the process leading up to the decision that is in the final ruling.

3 LJzermans 2011, p. 20.

4 Maio & Haddock 2015, p. 82-103.

5 Maio & Haddock 2015, p. 3-4.

6 Some studies on attitudes and the professional judicial decision-making process have been conducted (for example Hogarth, 1971 and Ten Kate & Van Koppen, 1984). A larger body of work, however, has been done on the effect of the political beliefs of appellate judges, mostly in the United States, and the decisions they make (see Sunstein et al. 2006 and Gibson & Caldeira 2009). The current research looks at attitudes, which are different from (political) beliefs (Maio & Haddock 2015, p. 108). The choice for researching the role of attitudes on the professional judicial decision-making process instead of (political) beliefs stems from the fact that research has shown the large effect attitudes have on decision-making and that they form the basis for bias and prejudice (Maio & Haddock 2015, p. 61-67).

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In sections 2 and 3 the theoretical aspect is presented. Then, in section 4, the methodology and empirical aspect of the research is explained. Finally, in the conclusion the potential added value of this research is depicted.

2 The subjective in the professional judicial decision-making process

The acceptance of the subjective element of the professional judicial decision-making process is not self-evident. According to the dominant perspective in the 19th century the law has, and is, the answer to any legal issue. This view rests on the notion that the judge is an unbiased decision-maker; the professional judicial decision-making process is seen as a nearly syllogistic move from basic premises to an undeniable conclusion.⁷ The law is seen as determinate,⁸ and the subjective element is perceived as almost non-existing.⁹

In the beginning of the 20th century this perspective started to receive critique.¹⁰ This critique was presented in two forms: empirical and moral.¹¹ The empirical critique was mainly voiced by the Legal Realists,¹² stating that judges primarily respond to the underlying facts of the case rather than to the applicable legal rules and reasoning. They claimed that the professional judicial decision-making process is subjective and the law is indeterminate: the law does not account for why judges decide the way they do.¹³ A certain relation between an accepted rule and the behaviour of judges can be found. However, to determine what this relation is empirical investigation is required.¹⁴

Likewise, the moral critique disagreed with the notion that the law is determinate. It examined how judges could still make a just decision where the law is logically incomplete.¹⁵ The law always leaves a gap, and, in her decision-making, the judge fills this gap left by the law.¹⁶ But, even though the professional judicial decision-making process has a subjective element, a judge still bases her decision on so called objective, sociological data, e.g. social realities, needs, values, and the nature of things,¹⁷ and thus her decision-making process is not arbitrary.

The critiques lead to accepting that the professional judicial decision-making process is more complex than solely applying the law in a syllogistic manner to a spe-

7 Bix 1996, p. 152-154; Soeharno 2005, p. 236; Guthrie, Rachlinski & Wistrich 2007, p. 2.

8 Bix 1996, p. 152-154; Leiter 1999, p. 1145-1146; Guthrie, Rachlinski & Wistrich 2007, p. 2.

9 Leiter 1999, p. 1149.

10 Soeharno 2005.

11 Van Toor, Soeharno & Smits 2013, p. 3148.

12 Due to the purpose of this article the American version of Legal Realism will be discussed, while acknowledging that this is not the only version that was prevalent in the 20th century (Leiter 2006, p. 50).

13 Leiter 2006, p. 51-52.

14 Llewellyn 1930, p. 444.

15 Herget & Wallace 1987, p. 413-414.

16 Herget & Wallace 1987, p. 403, 407, 410.

17 Herget & Wallace 1987, p. 410-411. A question that might arise is whether a judge is receptive to this objective, sociological data. The moral critique voiced by the German *Freies Ermessen* remains on a theoretical level and does not always engage with the practical implications of this perspective on the professional judicial decision-making process.

cific legal issue. Within the judiciary, behavioural norms exist to assist the judge in navigating this complex process of decision-making.¹⁸ These behavioural norms are also ‘codified’ on a national and international level into (core) professional values.¹⁹ Impartiality is prominently present as a professional value; we expect a judge to separate herself from her personal ideas and opinions.²⁰ However, if attitudes play a role in the professional judicial decision-making process, is this impartiality obtainable? The subjective element could be the attitudes of a judge that affect her professional judicial decision-making process. Knowledge from research on the role attitudes play in daily decision-making processes can potentially help to provide more clarity to the question whether attitudes play a role in the professional judicial decision-making process.

3 The subjective in daily decision-making processes

In general, we aim to make decisions without spending too much energy and time.²¹ We want decision-making to be as easy as possible,²² which is exactly what attitudes facilitate.²³ It is an overall evaluation of an object,²⁴ or anything else evaluated along a dimension of favorability. This evaluation is based on thoughts people have about the attitude object (cognitive information), on emotions or feelings (affective information), and on past behaviors or experiences (behavioral information).²⁵ Attitudes help us to process, notice and interpret information. Yet, due to the fact that we are selective, attitudes can also bias the information we pay attention to, and how we interpret and remember information. This selectiveness can additionally be influenced by attitudes.²⁶

Attitudes are paradoxical; we need them for our decision-making, but they can also create prejudice and bias in, and through, the information we use for our decision-making. If attitudes indeed play a role in the professional judicial decision-making process, for instance with the example of the judge who sees the defendant with the neck tattoo, what could this mean for the professional judicial

18 Bauw e.a., 2019, p. 80-82.

19 Soeharno 2009, pp. 129-130; Dijkstra 2016, p. 24.

20 At 2.3 NVvR-Rechterscode. Similar articles can be found in international codes of conduct such as the Basic Principles, the Bangalore Principles, Recommendation No. R (94) 12, Opinion No 1 (2001) and Recommendation CM/Rec (2010). The NVvR-Rechterscode even specifically states at 1.3 the overlap and similarities. The value of impartiality can also be found in international and (Dutch) national law (art. 4, 10 UDHR; art. 6 ECHR; art. 116, 117 Grondwet; art. 7, 12, 23, 24, 96 Wet op de rechterlijke organisatie; art. 19, 44, 46c, 46l Wet rechtspositie rechterlijke ambtenaren).

21 Damasio 1995/2000; Chen & Chaiken 1999, p. 74; IJzermans 2011, p. 157; Maio & Haddock 2015, p. 7.

22 Fazio 2000.

23 Maio & Haddock 2015, p. 47.

24 Fishbein & Ajzen 1975, p. 11; Maio & Haddock 2015, p. 4; Van der Pligt & Vliek 2017, p. 17.

25 Maio & Haddock, 2015, p. 4; 30.

26 Maio & Haddock 2015, p. 61-67. An example of how this selectiveness works is a study on how neutral information can be interpreted differently by people with opposite attitudes (Vallone, Ross & Lepper 1985).

decision-making process and the value of impartiality? The judge could be influenced by her attitude towards neck tattoos; it could influence the information she is processing and seeking out, and the information she actually perceives, how she encodes and interprets what she sees and hears in court, and what information she remembers from the hearing.²⁷ In essence, it could affect the decision-making process of the judge, similarly as attitudes affect day-to-day decision-making. This, however, is a conclusion based on theory. To fill this gap in empirical knowledge, empirical data is required. Therefore, this research can be a start to filling the empirical knowledge gap on whether attitudes play a role in the professional judicial decision-making process that now exists. This is, however, easier said than done.

4 How: the methodology

The central research question, combined with the research that has already been done, leads to an exploratory research question. Qualitative methodology is therefore most appropriate, more specifically semi-structured interviews. With these interviews the aim is to see the phenomenon through the eyes of those who are being studied,²⁸ e.g. those who utilize the professional judicial decision-making process. Potentially, these participants can shed light on whether attitudes play a role in this process. The interviews will provide an insight into the decision-making process which takes place before the final vote or verdict.²⁹

To support the semi-structured interviews a survey based on a fictitious legal case will be distributed to participants. Survey data will support the data gathered from the semi-structured interviews to understand whether it can be assumed that attitudes play a role in the professional judicial decision-making process.³⁰ Participating judges will be asked, after they read the scenario, to first answer the question whether they would grant compensation to the claimant, and, if so, which amount. Then they are asked to answer a few questions on how they perceived the two parties involved and how they perceive the professional judicial decision-making process. There are two versions of the fictitious legal case. This difference between the two versions has no effect on the legal aspects of the

27 Maio & Haddock 2015, p. 56-67.

28 Bryman 2016, p. 392-394.

29 There is a body of work solely looking at the final verdict and the voting behaviour of judges (for example see Miles & Sunstein 2008, p. 836-837; Van Wingerden 2014; Johnson et al. 2010). The final verdict and the voting behaviour are end results of the professional judicial decision-making process. The end result is not the focus point of the current research. The focus point is the process that comes before the end result and could be described as the heuristic phase (Nieuwenhuis 1976; similar distinctions can be found in Kennedy 1986; Kennedy 1997; Schauer 2010).

30 When using qualitative and quantitative methods this can result into what is referred to as triangulation. Through triangulation the benefits of each method are supposedly utilized (Maxwell 2013; Ansems 2019, p. 89).

scenario,³¹ and the two versions will be randomly assigned amongst the participating judges.³²

The research will be conducted at three different district courts in the Netherlands, in all areas of law. At each of the three courts the research will be conducted within six consecutive weeks.³³ These six weeks will consist of creating familiarity with the day-to-day business of the court and with the professional judicial decision-making process through attending hearings and meeting with the judges who are employed at the court and those who will be participating in my research.³⁴ During these weeks the participating judges (who are all employed at the district court and preside all areas of law) will also be interviewed. The judges that take part in the interviews will also be asked to participate in the scenario survey.

Although this method is highly beneficial, there are some pitfalls. First is social desirability, which is (potentially) amplified due to the sensitivity of the topic being researched.³⁵ To counter this, different measures can be taken. One measure is to ensure that the questions used in the interviews do not lead the participants. Another measure is through ensuring that the questions in the interviews are addressed in a way that the participants feel safe enough so they do not feel obliged to give the socially desirable answer. However, this pitfall cannot be completely taken away and will always be an aspect that needs to be into consideration. Second, interviewees might think they would do one thing and not state what they would actually do. Thus, their ideas on what they would do are potentially misaligned with their actual actions. With the scenario survey there is a potential to capture 'real-world decisions',³⁶ to counter this pitfall. However, also this pitfall cannot be completely countered due to the fact that the respondents are human.

This methodological approach has potential pitfalls and inherent shortcomings. However, this approach seems most appropriate, even with its methodological pitfalls, and the data will hopefully provide an insight into whether attitudes play a role in the professional judicial decision-making process.

31 To validate the two versions of the case a survey was conducted among psychology students. The two versions were randomly assigned among the participants. This validation is done to ensure that when the two versions of the fictitious legal case are presented to the participating judges the intended effect is measured.

32 A similar approach has been used by Guthrie, Rachlinski & Wistrich (2002).

33 In total the empirical aspect of the research will be a total of 18 weeks, of which six weeks per different district court.

34 Some might refer to this part of my research as participatory observation (see for example Simon Thomas 2019). Even though I will be using the insights of these two initial weeks to conduct the interviews in the best way possible, I will not be discussing those two weeks in my research as a separate research method at this point.

35 Bryman 2016, p. 696.

36 Hainmueller, Hangartner & Yamamoto 2015, p. 2395.

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5 To conclude

This is an explorative research on whether attitudes play a role in the professional judicial decision-making process can result into four things. First, a better insight into the subjective element of the professional judicial decision-making process. Second, a potential stepping stone to further this insight, and to continue research into the role of attitudes in the professional judicial decision-making process. Third, if we can assume that attitudes play a role at the conclusion of this research, this research could potentially have an effect on how we perceive the value of impartiality, and the court process as a whole. And finally, this research could be the start of bridging the gap that now exists between the empirical knowledge we have on the role attitudes play in daily decision-making and the theoretical acceptance of the subjective element in the professional judicial decision-making process. Because whether we can assume that attitudes also play a role in the professional judicial decision-making process is yet to be explained.

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