In the shadow of the judge

The involvement of judicial assistants in Dutch district courts

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Publication date
2017
Document Version
Final published version
License
Other

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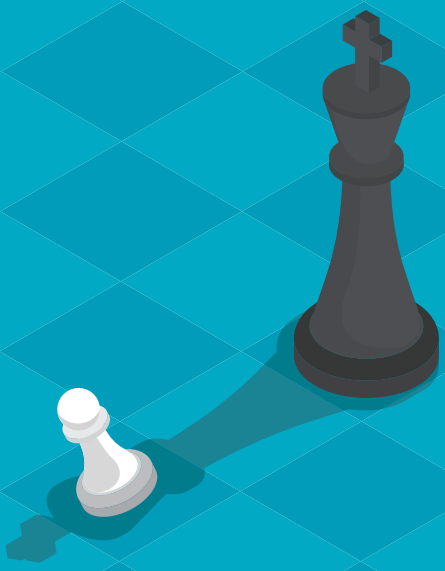

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eleven
international publishing

In the shadow of the judge

The commercial edition of this book is published by Eleven International Publishing.

ISBN 978-94-6236-777-7
ISBN 978-94-6274-745-6 (e-book)

Published, sold and distributed by Eleven International Publishing
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@budh.nl
www.elevenpub.com

Sold and distributed in USA and Canada
International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786, USA
Tel.: 1-800-944-6190 (toll-free)
Fax: +1-503-280-8832
orders@isbs.com
www.isbs.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

Printed in The Netherlands

IN THE SHADOW OF THE JUDGE

The involvement of judicial assistants in Dutch district courts

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de
Rector Magnificus prof. dr. ir. K.I.J. Maex
ten overstaan van een door het College voor Promoties ingestelde
commissie, in het openbaar te verdedigen in de Agnietenkapel
op vrijdag 22 september 2017, te 12.00 uur
door
Nina Leonie Holvast
geboren te Groningen

Promotiecommissie

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1 Introduction

When thinking of the judiciary, we usually picture the hearing, as this is the main public aspect of the judicial process. During the hearing, the judge is positioned at the centre of the proceedings. Judicial staff members are usually absent or merely performing recording duties at the hearing. Yet, backstage – in the courthouse – an entire different dynamic can be observed, one in which judicial assistants frequently play an important role. Virtually all judicial systems employ some kind of judicial assisting staff members. Nonetheless, the contribution of these staff members to the process of adjudication remains largely unknown, even though their involvement can have significant effects on the perceived quality and credibility of adjudication. This research aims at unravelling the involvement of this group of judicial officers in judicial decision-making, as well as their respective effect thereon.

This research ties into a large body of research that, since the 1970s, has challenged the formalistic image of the judge as an autonomous decision-maker, unaffected by external influences.[1] While the attention to non-legal features in the decision-making process has grown, the effect of non-judge court personnel – such as (law) clerks, staff lawyers and legal assistants – on adjudication remains understudied, especially in Europe. This study focuses particularly on the staff members who are directly involved in judicial decision-making by assisting judges in the judicial content of their occupation. This is a varied group of officials (e.g. some are unqualified, while others are lawyers) known by differing names throughout numerous legal systems. In this study, these court officials will be referred to as judicial assistants.

The phenomenon of highly qualified professionals being assisted by subordinates who perform extensive parts of the work is clearly not unique to courts. Globally since the 1980s, under the influence of the *New Public Management* movement, various public service organisations have been orienting themselves towards private-sector principles and practices (e.g. Hood, 1991). The allocation of duties to subordinates is an important element of this movement. Dependence on subordinates is

1. Also known by the name *Critical Legal Studies*, which builds on the work of the legal Realism movement in the 1920s and 1930s.

observed in all types of public professional organisations: hospitals, universities, government agencies, etcetera. Similarly, in various areas of the legal profession, for instance at law firms and in the prosecution office, legal assistants also occupy an increasingly important position.[2] In all these instances, it is not the professional with the final responsibility – the partner, professor, representative, doctor – who performs the majority of the work. Rather, the work is completed by a subordinate (the assistant) under the supervision of his superior. In this setup, it is essential that the superior trusts the work of his subordinate to be of sufficient quality, but at the same time, this is problematic, as theories on principal-agent relations emphasise the inevitable distrust that is related to the different goals that the superior and subordinate often pursue (Moe, 1984; Eisenhardt, 1989; E. Posner, 2007). Still, this arrangement is expected to increase the efficiency of organisations. Additionally, the division of labour can also provide the superior with the opportunity to devote more time to his or her core duties. Particularly in professional settings, employing assistants can, in some instances, also function as a selection process or training for the subordinates to eventually become superiors themselves.[3] Last but not least, the input of (occasionally highly specialised) assistants can also improve the overall quality of the products of these organisations.[4]

Concurrently, this partly new arrangement also affects the status of the professionals.[5] Professionals are the symbolic shields of their organisations: when people go to the hospital, they expect to be treated by a doctor, and, similarly, when they go to court, they expect their cases to be heard by a judge. The public trust in professional institutions is based on 'a project of successful persuasion' (Freidson, 2001, p. 214) steered by the professionals. This trust can potentially be undermined when the public becomes aware of the circumstance that major parts of the work are in fact performed by assistants (see more in section 1.1). In accordance with this, literature on professionalism suggests that professionals themselves will also attempt to protect their professional statuses from internal powers that may affect them, such as the division of labour between the professionals and other personnel (see Abel, 1988, p. 188; Freidson, 2001, chapter 2). They may also accommodate internal stratification while maintaining the façade of homogeneity (Abbott, 1988, p. 106; Francis, 2001, p. 22-24). Some related drawbacks of employing assistants are the prospect of deterioration of the quality of the products when a major portion of the

2. See Lindeman, 2017; for an earlier account, see Van de Bunt, 1985. For paralegals in the US and England, see e.g. Johnstone & Flood, 1982.
3. For example, in the medical sector, where it is common for physicians in training to complete some years of medical internships before becoming professionals. A similar setup is in place for legal practitioners in most countries.
4. Especially when this results in more sharing of information in decision-making; with respect to the deliberation sessions, see Ten Velde & De Dreu, 2010. On the benefits of knowledge sharing in the judiciary, see Taal, 2016.
5. By 'professionals', I refer to an occupational group in possession of special knowledge and abstract skill, usually required by extensive training, which in a large part controls their own work. For definitions of professionalism, see e.g. Abbott, 1998, p. 7; Freidson, 2001, p. 17.

work is performed by lower-qualified assisting personnel and the fact that the sense of responsibility of the superior can deteriorate (see also section 1.2).
The involvement of assistants in the judiciary is, in several ways, a unique and particularly sensitive issue. Even more than is the case for many other professions, judges occupy a special position within society. The judiciary is one of the three independent pillars of government, as described in Montesquieu's (2006 [1748]) concept of the *Trias Politica*. Judges are specially appointed by law with the sole responsibility to adjudicate cases, and the judicial office is surrounded with several safeguards to, inter alia, ensure its independent position. In most judicial systems, judges are, for instance, appointed for life or are tenured for a set period of time, and strict constraints are in place for the dismissal of judges. Furthermore, the judge, as the individual who administers justice, has to possess specific competencies to accomplish his adjudicative duty. Stringent selection procedures, intense training programmes and internal socialisation processes are intended to enhance the likeliness of the judge possessing such competencies (see more in section 4.1). When large parts of the judicial duties are in fact performed by judicial assistants who have not completed comparable training and selection procedures and who are not surrounded by the same safeguards, this raises fundamental questions about the legitimacy of the allocation of duties to these subordinates and the presumed right to a lawful judge.[6]
To be able to discuss the position of judicial assistants, it is of key importance to gain an understanding of the involvement of judicial assistants in the judicial decision-making process and to explore what the consequences of employing judicial assistants are for judicial decision-making. This research provides insights into these matters by exploring the position of judicial assistants in different assistance models, particularly the Dutch model, and by empirically studying the involvement of judicial assistants in courts in the Dutch judicial system. This topic has recently become more pressing due to increasing caseloads and declining resources which have, over the last decades, pressured courts to aim for more efficient ways of organising work processes (see e.g. Fix-fierro, 2003). One manner in which this seems to be accomplished is by assigning more duties to assisting staff members (Holvast, 2014; R. A. Posner, 1985, p. 97).

This introductory chapter first provides more insight into the reasons for employing judicial assistants, as well as the main objections that can be raised against this development. Section 1.1 describes the rise and expansion of the employment of judicial assistants in courts. Section 1.2 defines the key concerns that exist in aca-

6. This right to a lawful judge is not explicitly part of many constitutions (for instance the Dutch constitution) or international treaties, but it is considered to be implicitly included it the notion of access to justice. In the Golder-case (Golder v United Kingdom, ECtHR, Judgment of 21 February 1975, Series A, No 18), the European Court of Human Rights reads this right into Article 6 of the ECHR.

demic and legal discussions regarding judicial assistants' involvement in adjudication. Section 1.3 then formulates the research questions and research approach, after which section 1.4 provides an insight into the structure of this book.

1.1 Rise and expansion of the employment of judicial assistants

Just as the model of judicial assistance differs from jurisdiction to jurisdiction (see more in chapter 3), the establishment of judicial assistance in different court systems also seems to have different origins. In the United States (the jurisdiction in which the most information regarding the role of judicial assistants is available), having qualified judicial staff members perform administrative and secretarial duties is not as prolonged or as strongly interwoven into the judicial system as it is in civil law judiciaries such as the Netherlands.

In the US, increasing workloads and caseloads were the most frequently cited reasons for the creation of law clerk positions at the Supreme Court at the beginning of the 20th century. Increasing caseloads are also mentioned as the main reason for continuing to expand the number of law clerks and for the increased allocation of duties to law clerks (Cohen, 2002, p. 5; McCree, 1981; Rubin, 1980).[7] The fact that judges employ law clerks for research purposes and as sparring partners suggests that they also expect the quality of judgments to benefit from the contributions of the clerks. Supreme Court justices were assisted by one clerk per judge in the beginning; currently, the justices have each four law clerks at their disposal. Concurrently, the duties of the law clerks also expanded from mainly secretarial duties to being involved in all aspects of the judicial decision-making (Peppers, 2006; Ward & Weiden, 2006, see more in section 3.2.1). At present, law clerks are highly involved in the drafting of judicial opinions, among other duties.

At other federal-level courts, the development of judicial assistance is somewhat less studied, but they appear to have followed a rather similar pattern to the Supreme Court.[8] Particularly in the 1960s to the 1980s, when the number of cases at the federal level doubled (R. A. Posner, 1985, p. 59), the principle method used to cope with this increase in caseloads was to expand the number of supporting staff members (R. A. Posner, 1985, p. 97). In this regard, Judge Richard Posner (2008, p. 61) expressively refers to the current era as 'the age of the law clerk'.

In the Netherlands, the employment of judicial assistants has been part of the judicial organisation for centuries. So-called *griffiers* have been employed since the French legal system was adopted in the early 1800s (after the French occupied the Netherlands in the Napoleonic era). As the proceedings in this civil law system exist mostly of exchanging written documents, assistance from court officials is

7. Although, Ward and Weiden (2006, p. 5) conversely state that the establishment of the law clerks position is actually an outgrowth of the apprentice model of legal education.
8. On judicial assistants in other federal courts, see e.g. Cohen, 2002; Swanson & Wasby, 2008.

essential for the processing of cases.[9] In the Netherlands, the occupation of the judicial assistant has gone through various transformations. Until 1957, an assistantship was an apprenticeship for becoming a judge. In the decades thereafter, judicial assistants were lower-qualified court officers who mainly functioned as 'court secretaries'. In the 1990s and 2000s, the function of judicial assistant was professionalised, and the duties of assistants were expanded (see more in section 3.1.1).

While the creation of the Dutch assistant position is not directly linked to any efforts to cope with rising caseloads or to achieve more efficient adjudication, court efficiency has become a dominant theme in the public debate about the Dutch judiciary. This is a development which is also recognised in numerous other jurisdictions (Fix-fierro, 2003). This course of events has placed the issue of the division of labour on the agenda. Various judiciaries responded by changing the type and amount of assistance in courts.[10] In several judiciaries, even new judicial-assisting or semi-judge functions were created, such as the German-inspired *Rechtspfleger* (European Commission for the Efficiency of Justice (CEPEJ), 2012, p. 165–166), *Judicial research assistant* and *Judicial Assistant* positions in Ireland and the UK (Coonan, 2006; Paterson, 1983 p. 247–257) and the position of *Referendaris* in the Belgian courts (De Busschere, 2012).
The Dutch judicial organisation has not created a new assisting position, but the judiciary has been subject to numerous other transformations over the last 20 years. These transformations were not the result of a severe rise in cases, as the Netherlands did not face an increase in caseloads comparable to the US. However, the judiciary did face some firm criticism in the eighties and nineties which required the judicial organisation to change. Several evaluation committees and auditing bodies[11] investigated the judiciary, and they concluded that the judiciary had evolved to be archaic, inefficient and fragmented (Brommet, 2002). To retain its legitimacy, the judiciary had to modernise and become more efficient, transparent and productive. This eventually led to the enactment of two new laws in 2001, altering the judicial organisation.[12] The modernisation exercise of the judiciary was predominantly based on managerial concepts originating from economic theories (Mak, 2008b; Ng, 2007). This approach corresponds to the earlier-mentioned movement labelled the 'New Public Management' (Hood, 1991; Osborne & Gaebler, 1992 see more in section 4.2).

9. See more in the introduction of chapter 3.
10. On the changed position of the Clerk of the Court in Spain due to the reintroduction of jury trials, see e.g. Jimeno-Bulnes & Hans, 2016.
11. E.g. the Dutch Court of Audit, 1981, 1992; Consultants of Berenschot, 1985 and ZM 2000, 1993.
12. *The Dutch Judiciary Organisation and Management Act* (Wet Organisatie en Bestuur Gerechten) and the *Act on the Council for the Judiciary* (Wet Raad voor de Rechtspraak). The ratification of these laws resulted in the modification of the *Judicial Organisation Act* (Wet op de Rechterlijke Organisatie).

Although it did not occur as noticeably as in other jurisdictions, it still seems that – within this context – in the last two decades the essentials of the function of judicial assistant in the Netherlands have changed, and the allocation of duties to assistants has increased (Abram et al., 2011; Visitatiecommissie Gerechten, 2010). At the same time, Dutch judicial assistants have progressively become more qualified; at present, most new judicial assistants possess law degrees (Abram et al., 2011, p. 8). In an internal research report on judicial assistants in the criminal law divisions, Abram et al. (2011) noticed a development from judicial assistants primarily performing secretarial and procedural duties to assistants gaining additional duties such as preparing memos for hearings,[13] acting as sparring partners in deliberation and drafting judgments. Another publication provides some insight into the substantial contribution of judicial assistants at the Dutch Supreme Court (Niessen & Pieterse, 2009). The fact that judicial assistants are providing judges with advice in their memos and are acting as sparring partners suggests that their contributions are also expected to enhance the quality of judicial decision-making. It is interesting to observe that the modifications to the duties of judicial assistants were not driven by substantial modifications to law or policy. Rather, they appear to be practical responses to changes at the workplace, a course which emerged tacitly within the practices in courts (Holvast, 2014).

Hence, the employment of judicial assistants has always been part of the Dutch court organisation, and the original arrangement fits well into the Dutch judiciary developed under the rule of law. Nevertheless, managerial influences in the last two decades appear to have gradually reformed the position. This newly modified type and degree of involvement of judicial assistants has also been subject to criticism. Some of the main concerns regarding the employment of judicial assistants are noted in the following section.

1.2 Concerns regarding judicial assistants' involvement in judicial decision-making

Due to the occupation of judicial assistant long being interwoven into the Dutch court system, and because the modifications of the function occurred tacitly, to date, the issue of the involvement and influence of judicial assistants in judicial decision-making has never been subject to a great public discussion in the Netherlands.[14] This lack of open discussion is in stark contrast to the US, where the

13. In this research, the term *memo* (borrowed from the term used in US courts) is used to refer to a document prepared by judicial assistants in order for judges to prepare for the hearing. This document usually includes all relevant information about a certain court case. In Dutch courts, different names are given to this document, e.g. *instructie, voorbereidingsformulier* or *checklist*.
14. Modest exceptions to this are formulated by Supreme Court Justice (and previous criminal law professor) Ybo Buruma and by professor in jurisprudence, Ton Hol (2001); see more of their concerns in the following sections. The employment of judicial assistants has received some internal attention within courts and court divisions.

involvement and potential influence of judicial assistants, especially of law clerks at the Supreme Court, has been a topic of research and ethical discussions for decades (for a detailed description of this discussion, see Peppers, 2006, chapter 1).
As the debate regarding this issue has most prominently been taking place in the US, the majority of concerns are professed by American scholars. Some of the issues described below are therefore partly specific to the American jurisdiction, but most are equally relevant to other jurisdictions, such as the Dutch jurisdiction. To complement the American-centred focus, this section especially attempts to include literature of scholars from other jurisdictions.

1.2.1 The judicial position and its safeguards

As mentioned in the beginning of this chapter, a key concern regarding the involvement of judicial assistants and their influence on judicial decision-making is the fact that, in democratic societies functioning under the rule of law, judges – as the core adjudicators – are regarded as a special group of officers who are appointed with the sole responsibility of administering justice. Judges enjoy a superior status and are surrounded with special mechanisms to assure that they will perform their adjudicative duties in independent, impartial and just manners. First of all, judges are specially selected on the basis of their legal expertise and professional experience. They are additionally trained to strengthen their competencies and become socialised into their privileged positions (Cook, 1971; Köhne-Hoegen, 2008). McCree (1981, p. 789) recalls that judges are men and women who receive 'special trust and confidence' because of their 'wisdom, uprightness and learning'. Additionally, judges are surrounded with various institutional measures to safeguard their special positions and, in particular, their independence and impartiality. Judges are, for instance, afforded reasonable incomes and usually have set terms of appointment, sometimes even appointment for life (see more in section 4.1.2). Furthermore, in certain countries, such as the US, the selection of judges is often a political process, accommodating judges with a certain amount of democratic legitimacy. These institutional safeguards, which are regarded as important for just adjudication in democratic nations under the rule of law, are largely non-existent for judicial assistants.[15] For that reason, extensive involvement and – especially – influence of judicial assistants in judicial decision-making is regularly regarded as problematic.
Bieri (2016) accordingly mentions judicial independence as one of the main problems regarding the involvement of judicial assistants in Swiss courts. According to McCree (1981, p. 789), extensive involvement and influence of law clerks in adjudication would result in *'a product shaped by people other than the men and women chosen*

15. See more regarding institutional and other safeguards for Dutch judges and judicial assistants in section 4.1.2.

because of their "wisdom, uprightness, and learning"'. With regard to the role of Magistrate clerks in England and Wales, Darbyshire (1999) correspondingly mentions that the clerks are not selected in accordance with special procedures and set criteria with the purpose to be judges, but – on the contrary – they are hired to serve judges. For that reason, she argues, they should not be allocated any judicial powers.
This argument, though not often explicitly mentioned, appears to be one of the main reasons for authors to object to any substantial influence of judicial assistants in judicial decision-making.

1.2.2 Sense of responsibility for the adjudication

It is further in line with the notion of the right to a lawful judge that the judge is charged with the final responsibility for a judgment. For that reason, it is not only important that the judge can be held responsible but that he or she feels responsible, as well. As a consequence, an issue that concerns various academics is the fear of a diffusion of the sense of responsibility due to the involvement of judicial assistants. This problem is in the literature on public accountability, referred to as 'the problem of many hands' (Thompson, 1980).[16] In the context of the allocation of duties to judicial assistants, this concern was first mentioned by Fiss (1983), who cites the work of Arendt (1963) on bureaucracy and the diffusion of responsibility during the Second World War.[17] Fiss states that having large proportions of the judicial work, such as drafting opinions, being performed by subordinate staff members can dilute the individual's sense of responsibility. When *'the work in an organization is divided among many people, and is shaped by the organizational structure, the individual need not accept full responsibility for the decisions or actions of the organization'* (Fiss, 1983, p. 1456). A sense of responsibility in the judge for his or her decision is important, as it is a way to guarantee the quality and morality of his decisions. Furthermore, it functions as a check on his powers. The sense of responsibility necessitates judges to listen to legal arguments, participate in dialogue and explain their decisions.
One of the few Dutch authors who published on judicial assistants, Hol (2001) also fears a reduction of the sense of responsibility when a judge only limitedly assesses the work of his assistants. This fear was also voiced by Buruma at a senate debate on the state of the *Rechtsstaat* in the Netherlands, to which he was invited as an expert.[18]

16. For a representation of the wide range of literature on this topic, see e.g. Bovens, Goodin & Schillemans (eds.), 2014.
17. For an example of how decision-making in multi-layer organisations can go wrong, see also Vaughan, 1997.
18. Eerste Kamer, vergaderjaar 2013–2014, 33 750 VI, O, p. 19–20.

Conversely, it is also argued that judges would not feel less responsible for a judgment that has been partly prepared by assistants. The fact that the judgments are still issued in the judges' names and authority would ensure that judges feel responsible for the judgments (see e.g. Edwards, 1983).

1.2.3 Judges as editors of the assistants' work

In relation to the loss of a sense of responsibility of judges, it is also mentioned that the extensive employment of judicial assistants could affect the form and comprehensiveness of judges' decision-making.[19] Being supported by judicial assistants could result in judges being less actively involved in the primary process of decision-making. This development causes the *'transform[ation of] the judge from a draftman [in]to an editor'* (Posner, 1985, p. 104), as judges lack the time to write judgments themselves. When a judge no longer functions as the drafter of judgments, but conversely coordinates and edits the work of subordinates, that circumstance can affect the judicial decision-making process. It threatens what Kronman (1993) calls the 'deliberative imagination' of the judge. This is *'the capacity to entertain a point of view defined by interests, attitudes, and values different from one's own without actually endorsing it'*. A reviewing-judge is no longer directly confronted with the plurality of claims of the parties as, for example, presented in the court files, but receives a shortened representation of the case from the viewpoint of his judicial assistant. According to Kronman, this would make his perspective of the court cases 'more monocular'. Hol (2001, p. 99) similarly points out that this undermines the practising of the judge's 'practical wisdom' to decide a case by taking into account all complexities of the context. Kronman (1993, p. 330) and Posner (2008, p. 286) correspondingly argue that the process of writing an opinion serves as a natural avenue from which to reconsider one's initial judgments. Bruinsma (1995, p. 105-107) draws the same conclusion in his study on Dutch adjudication in civil cases regarding temporary arrangements. The judgment writing forces the writer to consider both sides of the argument for a second time and to justify the taken position. It precludes judges from making intuitive decisions based on improper visions. In relation to the often-politically associated decision-making at higher courts in the US, Posner (2008, p. 285-286) and Stras (2007, p. 962) suggest that, as current law clerks possess the skill to defend whatever position is taken, having law clerks draft judgments increases the propensity for justices to decide cases established by their policy preferences instead of legal arguments.

19. This point can also be made with regard to other trends within the legal world, such as the digitalisation of courts. On this trend, see Susskind, 2013.

1.2.4 Divergent goals and attempts to influence the outcome of cases

Apart from the abovementioned concerns regarding judges being less engaged in decision-making, a commonly mentioned issue related to the concern for the judicial safeguards is the issue of judicial assistants' views influencing the outcome of the judicial decision-making. This fear is supported by literature in sociology and economics, concerning street-level bureaucracy (e.g. Lipsky, 2010) and agency theory (e.g. Eisenhardt, 1989; Moe, 1984). These theories point out that the goals which a 'street-level worker' or 'agent' pursues will not always match the goals set by his or her superiors. In fact, the theories suggest that the idea of a neutral manner of assisting judges is a fiction; assistants will always partly pursue different goals than judges. Therefore, they will, either actively and purposely or subconsciously, attempt to influence decisions that are made by the judge. This can also result in judges facing difficulties in trusting the work of their assistants.

Regarding this issue, people in the US are particularly concerned about the possible ideological influence of assistants on the outcome of cases. Employing law clerks with political ideologies different to those of the judges could cause judicial decisions to resemble the law clerks' ideologies in instead of the judges'.[20] In America, where the political colour of a judge is frequently an important aspect in the appointment procedure, this potential influence is regarded as a real threat. A substantial amount of the research on law clerks aims to unravel this (political) influence (e.g. Peppers & Zorn, 2008; Rosenthal & Yoon, 2006; Swanson & Wasby, 2008).

With regard to English and Welsh Magistrates' clerks, Astor (1986) mentions that within the Magistrates' courts – which are under considerable amounts of pressure to deal with the caseloads – forces of the court organisation (such as an aim for efficiency) could result in Magistrates' clerks influencing adjudication as they intend to bring adjudication in line with the organisational goals (for a similar account, see also Posner, 1985, p. 133 on staff attorneys).

Conversely, Edwards (1981, p. 260) argues that the above-mentioned concerns are 'much ado about nothing'. He remarks that the process of persuading judges in American courts is based on professional and judicious arguments based on case law, logic, morality, public policy and other authority and that the judges can decide for themselves whether they are persuaded by these arguments. According to Edwards (1983, p. 888), competent and conscientious judges will provide their law clerks with fairly detailed instructions for drafting judgments and will *'not allow an opinion to issue in their name until the words constituting the opinion precisely reflect their views on the proper disposition of the case'* (Edwards, 1983, p. 888).

20. This can lead to judgments either becoming more liberal or more conservative. Yet, as it is conceived that law clerks would, in majority, be more liberal than the justices, this would lead to adjudication based on a more liberal ideology overall.

In the Netherlands, the judicial office is not principally regarded as a political position, as judges are – in accordance with the civil law tradition – typically not considered to be lawmakers but primarily applicants of the law. The influence of political ideology is thus less of a concern in the Dutch context. Nevertheless, the risk of more general ideological influence of judicial assistants on case outcomes applies to all judiciaries, regardless of their political entity, as everyone – hence, also assistants – will have certain ideological preferences which may consciously or subconsciously affect one's work. Similarly, as was observed by Astor (1986) in the UK, organisational pressures could also affect the goals which judicial assistants pursue in their work.

1.2.5 Reliance on statute, case law and judicial guidelines

In the Netherlands, a concern (also cited by American scholars) is the fact that the employment of judicial assistants will result in case law in which conformation to formally recognised and existing rules and procedures is regarded as the primary justification of decisions, thereby undermining more general principles of morality. This is related to the fact that the hierarchical relationship of judges (as superiors) with their assistants (as subordinates) requires judges to monitor the work of the assistants and apply certain control mechanisms (see, e.g. Peppers, 2006). An commonly used way to accomplish this is by establishing general guidelines which require follow-up. This way, the employment of assistants enhances the decision-making based on general rules (Fiss, 1983, p. 1454; Hol, 2001). Relying on general guidelines can also be a coping mechanism (see Lipsky, 2010) for clerks to deal with large numbers of cases. This mechanism enhances the uniformity in judicial decisions, which can partly be regarded as a positive development, as this is important for equality before the law. However, in the literature, this situation is mainly raised as a problem, as it would inhibit the law-making abilities of judges and the – also important – principle of always taking into account the (moral and societal) circumstances of a particular case (R. A. Posner, 1985).
The standardisation of decision-making due to the increased role of assistants was indeed observed in the Dutch Prosecution Office, when mandating duties to assistants was extended in the 1980s. Van de Bunt (1985, p. 87, 106) found that allocating more duties to assistants resulted in the formulation of more rules, as instructions for the assistants. Buruma, who repeatedly voiced his concerns regarding the role of judicial assistants,[21] also mentions this issue – in passing – in an academic annotation regarding a judgment ruled by the Dutch Supreme Court in 2009 (dating back to the time when Buruma was a professor of law).[22] The annotation concerned what appeared to be a standard assault case for which clear prosecution

21. See Kamerstukken I 2013–2014, 33 750 VI, O (verslag van deskundigenbijeenkomst), p. 20.
22. HR 8 September 2009, NJ 2010, 391, met noot Buruma.

directives were applicable, outlining under what circumstances prosecution should follow. However, according to Buruma, the specific circumstances of this case[23] required that an exception to the standard proceeding to conform to the directives should have been made (as was eventually confirmed by the Dutch Supreme Court). In this case, however, at first, the general prosecution guidelines were followed. Buruma argues that this happened due to the involvement of assisting staff members at the Prosecution Office, who are in charge of making the primary decision to prosecute. These assistants would not have the sensibility to recognise that this particular case 'had a funny taste' and would rather follow the guidelines without contemplating. This course of events, reasons Buruma, obstructs the careful consideration of the righteousness of the decision to prosecute – in the Netherlands, an important legal issue. Although this example concerns an assistant at the prosecution office,[24] it demonstrates the more general fear that far-reaching involvement of assistants is related to an omission of fundamental and moral considerations in making judgments.

According to Posner (1985), there is another reason why reliance on judicial assistants results in stronger reliance on statutes and case law and a more legalistic type of adjudication. US law clerks are young and have not acquired any substantial experience in legal practice. They would, therefore, be more likely to build up an argument by referring to authority. Clerks are 'timid jurists' (R. A. Posner, 1985, p. 108) who *'feel naked unless they are quoting and citing cases and other authorities'* (p. 109). This is due to the clerks themselves not possessing any authority. They merely draft a judgment for the judge, who is the authority behind the judgment. Judicial and societal experience are, especially in common law jurisdictions, important selection criteria for judges. Judges, therefore, are able to look beyond the strict legal construct and understand a case within a broader social context, while clerks are less able to do so. As Dutch judicial assistants, on average, also possess less experience than judges, this is a risk for the Dutch judiciary, as well (also according to Hol, 2001). An indication of this actually occurring in the US is that judicial decisions have become lengthier, more technical and contain more footnotes (R. A. Posner, 1985, p. 112).

1.2.6 Questioning the effectiveness and efficiency of judicial assistant employment

Even though efficiency appears to be an important reason for the rise and expansion of the body of judicial assistants worldwide, the premise that the employment of judicial assistants always increases the efficiency of judicial decision-making is also questioned. Especially in the United States, some scholars mention that the intent to employ assistants in order to provide the judge with additional time to

23. A fight in which two parties were involved and made attempts to hurt each other.
24. Which in the Netherlands is also part of the judicial branch and has to pursue its duties in accordance with certain judicial values.

spend on his core duties can backfire when the judge starts to turn into a manager and is required to spend considerable time selecting (Vining, 1981, p. 251), supervising and coordinating the work of assistants (see R. A. Posner, 1985, p. 103-104). When judges do not trust the quality of the work of assistants, this can especially be a problem. This issue is predominantly pressing at the US Supreme Court, where every justice is assisted by four law clerks, who, due to their terms being only one year, have to be selected and trained in their duties every year. This is the reason that some judges choose to appoint (part of the) assistants for a longer period than one year.
An issue that is of particular concern in the Netherlands is somewhat different to that previously stated, namely the inefficiency of under-utilising the assistants. Especially from the 1960s to 1980s, there appeared to be a large social and physical distance between judges and judicial assistants in Dutch courts. They used to have little interaction with each other, resulting in the work of judicial assistants not always being valued highly (Bevers, 2004, p. 8-9; see also Van de Bunt, 1985, p. 142). This potentially inhibits productive collaboration between the judge and assistant. A report by Abram et al. (2011), as well as an evaluation report on Dutch courts (Visitatiecommissie Gerechten, 2010), suggest that these problems are still partly an issue, yet, this appears to be less of an issue than in the past.

1.2.7 Legitimacy and trust in the judicial office

Lastly, it is relevant to point to an overarching concern already briefly mentioned: when a large part of the judicial work is actually performed by assistants, this may also affect the credibility and legitimacy of the judicial office, especially when this information becomes public.[25] The general public commonly assumes that judicial decisions are made by the authority of the judge. When and if people realise that assistants are actually performing the majority of the writing of (and reasoning behind) judicial decisions, this knowledge could damage the public trust in the functioning of the judiciary. As Bieri (2016, p. 33) mentions, the professional image of the judge and the clerk are currently linked. Corresponding to this issue, Van de Bunt (1985, p. 106-107), in his study on Dutch prosecution officers, observes a concern among prosecution officers about what he calls the 'disenchantment'[26] of the exalted magistratical function, when more duties are mandated to legally unqualified assistants. This might also result in a decrease in lawyers' reliance on judicial opinion for guidance and authority, which could increase uncertainty and litigation (R. A. Posner, 1985, p. 110). The awareness of judicial assistants' involvement, moreover, can affect the reputation of the judicial office, and it could diminish the

25. Resnik 2000, p. 932, also points to this issue with regard to the increased delegation of duties to judges who are not appointed, according to Article III of the US constitution.
26. '*Onttovering*'.

status of the judicial profession (Abbott, 1988, part I; Francis, 2001, p. 22-24). This chain of events can also have consequences for the accreditation of future judges.
In summary, various concerns exist regarding the involvement of judicial assistants in judicial decision-making. Many of the concerns derive from a rule of law perspective on adjudication (see more in section 4.1). As such, it is mostly not the *involvement* that is considered worrisome; the concerns mainly focus on the probable *effect* that judicial assistants might have on the decision-making.
However, it is first of all questionable whether the involvement of judicial assistants will inevitably result in their influencing the decision-making. Additionally, it is debatable whether all influence is necessarily problematic or if judicial assistants could also help to improve the efficiency and quality of the decision-making.
Moreover, the involvement of assistants can occur in different degrees, and judicial assistants do enjoy some measures to ensure their competence and independent positions. Perhaps these measures suffice for the degree in which they are in fact involved. In order to assess whether the aforementioned concerns are fair, it is important to first gain information regarding the involvement and influence of judicial assistants in judicial decision-making practices.

1.3 Research questions and approach

Previous studies conducted on the topic of judicial assistance largely focus on the specific situation of law clerk assistance at the US Supreme Court. This research extends the focus by concentrating on judicial assistants in a civil law jurisdiction (the Dutch judiciary) and at courts of first instance.
To attain further insight into the matter of judicial assistance, this PhD research aims to answer the following research question:

In what ways are judicial assistants involved in the judicial decision-making process, and what consequences does their involvement have for the manner in which adjudication takes place?

Sub-questions that will be investigated to answer the main research question are:
1. What are the formal duties of judicial assistants, and how is their involvement in adjudication regulated?
2. What characterises the judicial assistance model in Dutch district courts, and what distinguishes it from other models?
3. What is the involvement of judicial assistants in the different stages of the judicial decision-making process?
4. Which factors affect the type and degree of involvement of judicial assistants in judicial decision-making?
5. Do judicial assistants affect the manner in which the judicial decision-making takes place and, if so, in what way?

6. How should the current manner in which judicial assistants are involved in judicial decision-making be valued, and should additional safeguards be incorporated into the system to prevent too much influence?

Half of the set of questions (c., d. and e.) are empirical questions, which require obtaining thorough information about how adjudication occurs in practice. Therefore, the research will not just build on interviews or general information that is available to the public, but it will offer an understanding of the issue by examining the court practices as they occur behind the scenes. In order to achieve this, fieldwork was conducted in two Dutch district courts for a duration of eight months.
The first and foremost goal of the fieldwork has been to discover the types and gradations of involvement of judicial assistants. This directly links to questions regarding the consequences or effects that this involvement might have on the manner in which adjudication takes place. The research also addresses that issue. It is therefore important to highlight that the impact that certain endeavours of judicial assistants have on adjudication is not an easy-to-measure variable that can be marked on a scale from zero to ten. For instance, when assistants perform numerous tasks, this does not necessarily result in assistants having a large impact on the judicial decision-making. The assistants' possible effects on decision-making will depend on various factors, such as the nature of the duties, the autonomy which assistants are allowed in performing their duties, their proactivity in executing their work and the manner in which judges make use of their work. Being a qualitative study, this research does not provide quantifiable results regarding the exact influence of judicial assistants in individual cases. Rather, the research focuses on discovering factors that cause the variation in involvement and potential influence of judicial assistants. It thereby exposes various decision-making patterns which provide more or less room for the wielding of influence by assistants. In certain situations, the observations and interview materials enable one to distinguish how these practices resulted in judicial assistants affecting the adjudication. In many other situations, the research brings information to the surface from which it is possible to generate indirect statements about the likely effect of the employment of assistants by consulting the field of psychology of law and studies on decision-making. The applicable elements of the consulted literature are mentioned at the relevant places in the chapters that display the results of the fieldwork. For readers who wish to also consult a unified version of the employed literature, an overview can be accessed in Appendix 12.

In addition to the empirical questions, other types of questions are posed. Question a. is primarily answered in chapters 3 and 4. Question b., regarding the characteristics of the Dutch district court model of judicial assistance, is partly a descriptive question which also entails looking beyond Dutch district courts and investigating assistance models in other settings. Accordingly, the research also consists of a

modest comparative element in chapter 3. Different assistance models are not compared as equal models in an empirical manner. Rather, the Dutch assistance model is taken as a starting point, and the organisational setups of assistance models in the US and England and Wales are explored in order to better understand and reflect upon the Dutch conditions.
Lastly, question f. addresses the normative issue of how to value the current practices in the Dutch district courts. Formulating an answer to this question requires establishing a normative framework to evaluate the empirical findings. For that reason, the research introduces two perspectives, the rule of law and the managerial perspective; the first perspective has been strongly rooted in the Dutch legal system since the period of the enlightenment, and the second perspective is a newer perspective that has gained a prominent position in the judicial organisation only relatively recently. The involvement and influence of judicial assistants is assessed by making use of the core values related to these perspectives.

1.4 Structure of the book

This book aims to elucidate the position of judicial assistants in courts and to provide an understanding of their involvement in and effect on the judicial decision-making process. Chapter 2 explains the choice for the selected research method and describes how the empirical research was conducted.
In the third chapter, the judicial assistance model as it currently exists in Dutch district courts is introduced. An overview of the official documentation regarding the judicial assistant position is presented. In order to characterise the Dutch model and understand the specifics of this model, three other models are explored, and the similarities and differences between the systems are discussed.
Chapter 4 presents the two normative perspectives – the rule of law and the managerial perspective – which are employed for evaluating judicial decision-making and, in the case of this study, the involvement of judicial assistants therein. The chapter introduces these perspectives and demonstrates the manner in which they are currently incorporated in the judicial organisation.
Chapters 5, 6 and 7 encompass the core of the book: the empirical findings of the fieldwork in the two Dutch district courts. Chapter 5 describes and analyses the involvement of judicial assistants in the stage prior to a hearing[27] and during the hearing itself. Chapter 6 does the same for the post-hearing phases, when deliberation takes place and when the judgment is written. While chapters 5 and 6 describe the involvement in different stages, chapter 7 defines the factors which determine the type and degree of judicial assistant involvement. This chapter also considers

27. The general term *hearing* is used to describe the stage in a legal procedure in which parties are invited to illustrate their arguments in open court. The Dutch translation is *zitting*.

the similarities and differences between the studied courts and court divisions (being the administrative law and criminal law divisions).
The last chapter, chapter 8, provides the main conclusions of the research. The chapter discloses the three main empirical findings of the research, and it subsequently reflects upon the findings using the normative perspectives and the results of the exploration of different judicial assistance models.

2 Method of the empirical research

To gain a broader understanding of the topic of judicial assistance, particularly the involvement of judicial assistants in the judicial decision-making process, this research approaches the topic from several angles. The core of this research consists of an empirical field study in two Dutch district courts. This chapter focuses on the methodology of this empirical part of the research. Section 2.1 explains the general approach of the fieldwork and discusses some of the challenges related to this approach. Section 2.2 describes how the fieldwork in the two Dutch district courts was conducted. Section 2.3 elaborates on additional research that has been conducted to complement the data from the fieldwork. In addition to the empirical component, the research also contains a comparative component (see chapter 3) and a normative component (see chapter 4). Methodological issues related to the latter two components are discussed in the respective chapters.

2.1 The qualitative multi-method approach and its challenges

The involvement of judicial assistants in adjudication and its consequences is a complex matter, comprising many facets which are context dependent. Furthermore, this is a topic which is largely unexplored (see also section 1.3). To gain in-depth knowledge on the interaction between judicial assistants and judges and on the manner in which judicial assistance affects adjudication, a qualitative research approach was deemed most appropriate. In qualitative research, understanding a phenomenon is the central goal, and emphasis is placed on seeing the phenomenon through the eyes of the subjects being studied and on paying attention to the social context in which the studied topic exists (Bryman, 2012 p. 399-402). Qualitative research is usually less concerned with testing hypotheses and more concerned with the idea of explaining phenomena from the viewpoint of the research population and deriving theory from the empirical data. This also results in theory and data standing in a close relationship to one another, and the method requires that data collection and data analysis occur simultaneously to some extent (Strauss & Corbin, 1998). The research was conducted over a period of four and a half years. During the research period, data-collection, data-analysis and verification of the data have alternated (see more in section 2.1.5).

In the following section, I elaborate on the methodological issues that played a role in the research, and I explain how these issues were addressed in the research. Sections 2.2 and 2.3 provide more detailed information on the how methodological choices affected the manner in which the research was conducted.

2.1.1 Multi-method approach

In choosing a research method, I intended to avoid the pitfalls that previous researchers have encountered when conducting related research. In previous qualitative studies on law clerks at the US Supreme Court,[1] the researchers were limited in their methods because of issues of access (no researchers are allowed behind the scenes at the Supreme Court) and confidentiality agreements (law clerks are bound by a Code of Conduct) (Miller, 2014; Ward & Wasby, 2010). Therefore, these researchers primarily employed the methods of conducting surveys and interviews among (mainly former) law clerks. This method has been criticised for presenting a coloured image of the role and influence of law clerks (Miller, 2014; Ward & Wasby, 2010). It is also problematic that the credibility of the statements of the respondents cannot be verified (Ward & Wasby, 2010, p. 129).
I realised that it was important to not only interview judicial assistants but also judges in order to maximise the internal validity of the results. In addition, to avoid being presented with socially desirable responses (see also section 2.1.4), I realised I would have to gain access to the work settings of the judges and assistants to experience the process of judicial decision-making first hand by performing participant observations. The complexity of the decision-making process can never be fully captured in interviews (Beyens & Vanhamme, 2008, p. 353). That is why it is preferable to complement interviews by studying judges and assistants in action and, when possible, conducting interviews based on concrete cases. Hence, a multi-method approach, also referred to as methodological triangulation (Brewer & Hunter, 2006), was used to gain a comprehensive set of data regarding judicial assistance in Dutch district courts. Collecting data using a variety of methods has more validity, as the shortcomings of one method can partly be overcome by the use of other methods (Nielsen, 2010).

2.1.2 Modification of the research approach and research focus during the data collection

A typical characteristic of qualitative research is that data collection and data analysis affect one another. Such an approach is required to cover largely unexplored phenomena in their full complexities. At the same time, altering the research

1. Most elaborated works are by Peppers (2006) and Ward and Weiden (2006), but various other attempts to gain information were made too.

approach and focus during the data collection also results in data which are less comparable, affecting the external validity of the data. In order to draw conclusions based on a relatively wide and comprehensive set of data, I strove to collect data from document analyses, participant observations and interviews which are focused on the same aspects to the largest extent possible. During the exploratory phase of the research (see more in section 2.3) I designed the topic lists and the checklists for the fieldwork. During the fieldwork, the main topics discussed with respondents did not vary. The lists were only slightly adjusted according to specific features of the dissimilar work processes of each of the court divisions. The same applies to the checklists.
Even so, new insights occasionally resulted in asking different (follow-up) questions during the interviews or the addition of different examples while discussing topics with respondents. The insights also resulted in conducting some additional interviews during the fieldwork with respondents who were not linked to any of the followed cases but did appear to have interesting additional information to share. Thus, the analysis of the first research results informed the manner of data collection later on in the research.

2.1.3 External validity and verification of the research results

The extent to which the research can be generalised is always a challenge in qualitative research. The fact that the studied sample is not selected at random makes statistical generalisability impossible. However, that does not preclude some extrapolation to other settings than those studied. The research aims to reach a level of 'analytical or theoretical generalisability', whereby the main goal is to find data to confirm a theory or conceptual model and build on it (Yin, 2013).
Several steps were taken to increase the external validity of the research. First, the research was conducted at diverse locations (two different courts and, within each court, two court divisions) to expand the contexts in which data were collected. I also intended to select a wide variety of hearings to follow and respondents to interview (see more in section 2.2.1). In addition, a considerable number of court cases were followed (137) and respondents were interviewed (83 in Dutch courts and 10 in English courts) to provide a solid base to build the theory on.
To substantiate the external validity of the results, I made several efforts to verify the results by presenting the findings of the research to judges and judicial assistants of courts other than those included in the study. This process enabled me to validate the broader scope of the research, especially with regard to Dutch district courts. The research was monitored by a steering committee consisting of three members of the judiciary (from courts other than those studied) and a professor with extensive knowledge on the Dutch court system (for the composition of the steering committee, see Appendix 5). In addition to their support in planning the research, an explicit purpose of the steering committee meetings was to ascertain

whether the members recognised the findings of the research. Whenever certain members could not identify with certain results, I made additional assessments to verify the reliability and relevance of the results in order to determine whether the findings should be included. Points on which significant differences were recognised but which were nonetheless included are explicitly mentioned as such.
Towards the end of the research, I also presented the main results of the study to judges and judicial assistants during three seminars and workshops in courts different to those researched. These meetings were very interactive and were attended by approximately 30, 40 and 70 participants in the respective courts. During these meetings, I received feedback on the results and on the comparability to those courts. These efforts strengthened my impression that most of the results of the study in the two courts could be extrapolated to other (district) court settings.

2.1.4 Respondents' behaviour related to the presence of the researcher

The interaction of the researcher with the respondents which occurs during data collection can result in the research setup possibly influencing the outcome of the data collection. The presence of the researcher could provoke respondents to alter their behaviour. Therefore, during the observational part of the research, I intruded as little as possible in the normal course of events in order to observe the situations as they would occur under normal circumstances. I thereby largely occupied an observer-as-participant role (Gold, 1958). I tried to blend in with the situation and not act in a manner that would draw attention to my presence. The fact that I could generally understand the legal issues at hand, being a lawyer, and the fact that I was familiar with the court setting from a previous occupation as *buiten-griffier*[2] in a district court helped to achieve this. The process was also aided by the fact that I participated in the other events of the court division, such as shared lunch sessions and court division meetings. Especially during deliberation sessions, I interrupted as little as possible. During other phases of the process, I occasionally engaged in small talk and sometimes asked clarifying questions. When asked about my view on cases or on the research topic, I responded by stating that I preferred answering such questions at a later point. In a handful of situations, this resulted in discussing some preliminary findings of the research or my personal views with respondents when the data collection had finished, for example, at the end of an interview.
On a few occasions, judges or judicial assistants would reveal their awareness of being observed by making comments on my presence during different phases of the decision-making. This occurred mostly at the beginning of a day of hearings and deliberations. While the day continued, respondents often gave the impression of being too occupied with performing their adjudicative and assisting duties to be aware of my presence. Some officials made informal remarks or jokes that could be

2. This is a part-time assistantship for students who are in their final years of law school.

conceived as socially inappropriate; I interpreted these as indications that they did not feel required to act differently in my presence.
During the interviews that occurred after the observations, I also asked respondents whether the decision-making process as I observed it had reflected the usual course of events. In most instances, respondents did not mention that anything out of the ordinary had occurred. On a few occasions, respondents did mention that parts of the process had gone differently. One assistant (resp. 39) mentioned that a judge had suddenly asked the assistant to present her views first during deliberations, which she almost never did normally. Two other assistants (resp. 8 and resp. 30) also expressed that the judge seemed a bit more prone to have them voice their views, even though they were rather unsure of what the outcome of the cases should be. A judge (resp. 64), on the contrary, said that he was more reserved in asking an assistant to reveal her views on a case because he did not want to pressure her in front of me. Another judge (resp. 60) looked back on the deliberations and recalled that she acted more dominant and less cooperative towards the assistant due to my presence. These comments reveal that a small bias in the data might have occurred due to the research setting. However, the effects thereof do not point in one direction; in some instances, this resulted in judges providing more room for assistants to be involved in the decision-making, while in other instances, the opposite occurred. This also links to the fact that the general views of respondents vary regarding what the appropriate collaboration with assistants entails (see sections 7.2.1 and section 8.1.1).

2.1.5 Research timeline

I began the empirical research by conducting exploratory interviews with Dutch judges and judicial assistants working in a wide range of court settings in order to acquire a general idea of the work processes in the courts and the involvement of judicial assistants therein (see section 2.3). These interviews were conducted during the period of May to December 2012. After this period, the courts and court divisions for the main study were selected, and the final topic lists for the interviews were produced. The four different parts of the fieldwork (at four court divisions divided over two courts) were conducted during the period of March 2013 to January 2014. Because of the limited time of access to the work places, there was not much opportunity to physically go back for verification of certain data at later times. However, missing information could usually be traced by emailing or calling the courts, which I did a handful of times. In the period of March to June 2014, during a research visit at University College London, some additional observations and interviews were held in England (see section 2.3). The analysis of the data from the fieldwork largely occurred afterwards, during the period of July 2014 to September 2015. During that period and while writing down the results, I presented my first findings to three Dutch district courts to verify the findings. Through-

out the research period, the aforementioned steering committee (also see Appendix 5), which was assigned as a condition of the Council for the Judiciary for being permitted to conduct research, provided me with advice and comments regarding the research. The committee met approximately every six months.

2.2 Following cases in the Dutch district courts

To gain an in-depth understanding of the involvement of judicial assistants in the overall judicial decision-making process, I decided to follow the decision-making in a number of court cases from the beginning to the end of the process. I followed 27 hearings, at which 137 court cases were heard. Of the followed hearings, I analysed the produced documents related to the cases (usually memos and draft judgments). I also observed all gatherings and (informal) contacts between judges and judicial assistants related to the cases (commonly the hearing, the deliberations sessions and sometimes also pre-trial meetings). In addition, I interviewed 66 judges and judicial assistants during the fieldwork, 51 of which were involved in the observed hearings. Before describing how the fieldwork was conducted, I will elaborate on the selection of the courts and how I gained access.

2.2.1 Court selection and access

Selection of the courts and court divisions

To explore all possible types of judicial assistant involvement in judicial decision-making, I employed a sampling strategy that gave me insight into a wide selection of decision-making settings. Dutch district courts are a suitable choice of study, because these are the courts that handle all cases that enter the court system in first instance. Conducting research in these courts provided me access to judges and judicial assistants that handle routine as well as complex cases in various setups.

To be able to comprehensively follow the decision-making within its natural setting, I needed sufficient time to become familiar with the organisational and social construction of the different court divisions and to give the judicial officers time to get accustomed to my presence at their work place. At the same time, I wished to observe different courts and different court divisions in order to obtain a broad set of data and to be able to observe possible differences between the courts and court divisions. For this reason, I selected two district courts: one in the *Randstad*, the western part of the Netherlands, which is the most populated part of the country, and one in a less dense part of the country. Due to the limited timeframe of the research, it was not possible to also select courts of a higher hierarchy in the judiciary. It would be interesting to conduct similar research in these courts in the future. Within the district courts, I decided to study two of the three areas of law that are present in district courts: administrative law and criminal law. The civil law division was not included in the study due to time constraints.

Criminal law is an interesting field to study because it is one of the legal arenas that has traditionally been part of the courts and is strongly rooted in the civil law tradition. The exploratory interviews and conversations with court officials made clear that, as criminal law comprises a relatively large portion of routine cases, judicial assistants are acknowledged for having quite a substantial administrative role. Criminal law assistants are known for being less strongly involved in the content of decision-making. Assistants in the administrative law division were, on the other hand, recognised for being extensively involved in the decision-making process, which may be related to the different position that administrative law occupied in the court system until recently (see section 7.3.2) and its historically strong relation to the government. Criminal and administrative law are also the extremes in employing the least (criminal law, 0.97) and the most (administrative law, 1.70) judicial assistants per judge.[3] Administrative and criminal law are additionally both public law divisions. The inherent inequality in the relation between the government and the accused/litigant in public law makes proper judicial protection by courts in these fields of law especially important.

Access to the courts

To be granted access to confidential court documents and settings, I had to obtain permission from the Dutch Council for the Judiciary and the Boards of Presidents of the criminal law and administrative law divisions of Dutch courts. These bodies agreed to the research after I explained the purpose and the research design and after I signed two of their statements regarding the use of data collected via document study and via interviews for research purposes. After this, I contacted the courts and later the court divisions; they also agreed to my conducting of the research. To enable me to be present during deliberation sessions, I was sworn in as a *buiten-griffier*, a special position normally reserved for law students who conduct part-time assisting duties in the court. After consultation with the Council for the Judiciary, it was decided not to reveal the locations of the studied courts, as it is not essential for the reader to be familiar with this information. This anonymity and the explicit permission appeared to make it easier for individual judges and judicial assistants to agree to participate in the study.

Selection of and access to the studied hearings and to the respondents

In the first week of my stay in a court division, I selected the cases that I planned to follow. The easiest way to do that was to select certain hearings at which cases were held and follow all the cases handled at those hearings. I followed six to

3. Numbers are for the year 2013 and were provided by the Council for the Judiciary. These numbers only include assistants that have substantive roles in assisting judges in the judicial content of their work. Staff members who primarily assist on administrative aspects of the process are excluded. This explains why the number may differ from overviews presented by the Council for the Judiciary.

seven hearings per division (27 hearings in total) and aimed to obtain a mixture of hearings handled by single-judges (the majority, as most first instance cases are adjudicated by single-judges) and panels, also including a few preliminary hearings. Given that I wanted to observe as many different judges and judicial assistants as possible, I also selected hearings to which different judges and judicial assistants were assigned. I ensured that all hearings followed consisted of distinct chairs and judicial assistants.[4] Furthermore, I made sure that the sample included judges and assistants of diverse ages and experience. In addition to ensuring variety of the judges and judicial assistants, I also ensured that a diverse set of cases were studied. First, I followed some simpler cases that were handled at the hearings in a relatively short timeframe. The largest number of cases dealt with during one hearing was 21 cases during a so-called police-judge hearing at the criminal law division.[5] I also followed more complex cases. The hearing with the fewest number of cases assigned to it consisted of only one case, handled by an administrative law panel during a specially planned preliminary hearing to provide temporary arrangements in an administrative case (V*oorlopige Voorzieningsprocedure*). In total, I followed 137 cases. Appendix 1 shows the main information regarding the studied hearings.

The content of the cases was not a selection criterion. I followed a diverse selection of criminal cases varying from shoplifting and burglary to sexual abuse and aggregated assault. At the administrative law divisions, I only followed general administrative cases, including a broad selection of cases regarding, for example, social security law, building and planning law, dismissal of civil servants, etcetera. Immigration law cases, a separate subdivision of the administrative law division, were not included in the selection. In two of the four selected court divisions, I was able to select the hearings myself, using the courts' time tables as a starting point. In the other court division, court managers made the selection for me, based on my preferences.[6] In those divisions, I did alter their suggestions by exchanging a few of the suggested hearings for others in order to have a selection that was not solely made by the court managers. The managers did not object to this.

After the hearings were selected, I contacted all of the judges and judicial assistants involved to ask for their permission to observe the hearings and deliberation sessions and to analyse the related documents. I made clear that all the information gathered would be anonymised. In most instances, my research was already preannounced, and the research subjects readily consented to participating. A few respondents had some additional questions before they agreed to participate. In one of the court divisions, my request raised a discussion regarding the issue of

4. Apart from two hearings in one court in which the morning and the afternoon sessions were assisted by different assistants.
5. The police-judge is a single-judge who hears cases which can be penalised with up to one year of imprisonment.
6. As mentioned before, aimed at reaching a broad selection of hearings and respondent types.

allowing me to be present during deliberation sessions, which is usually only open to the judges and judicial assistants who are assigned to the particular hearing. These members are limited to strict confidentiality codes. One of the judges, not part of my selection, opened a discussion with other judges regarding this issue via email, stating that he objected to my presence during the deliberations. Three of the selected judges subsequently also had their doubts. Two of these judges changed their minds after speaking to me and taking note of the conditions under which the research was conducted, such as anonymity and confidentiality regarding the specifics of the cases. One judge still had objections and was therefore excluded from the study. In another court division, the announcement of my forthcoming arrival to the division prompted one of the judges to send an email to all the judges' colleagues. In this email, the judge drew everyone's attention to the fact that, although the judge believed informal relations might cause confusion, in the view of this judge, the law is very clear in that the judgment is the sole decision of the judge. These responses to my research reveal the sensitivity of the topic and the fact that there are concerns among some judges about revealing certain court practices to the general public (on this topic, see also section 8.1.1). Both of the judges who raised concerns were interviewed as part of the additional interviews held at the courts (see section 2.2.4). Other than the one judge who rejected my presence during deliberations, all the selected judges and judicial assistants consented to being part of my research.

2.2.2 *Participant observations and document analyses in the followed cases*

In total, 27 hearings were followed, 14 in court A and 13 in court B; 14 criminal and 13 administrative hearings. Of these, 15 were single-judge hearings and 12 were panel-hearings of three judges (see Appendix 1). In the following section, I describe how I conducted the different parts of the fieldwork in chronological order (for information about the followed methods per hearing, see Appendix 2).

Analysing the memoranda[7]

I was able to analyse memos related to 23 of the observed hearings.[8] The memos were analysed using a checklist (see Appendix 6). Among other aspects, I checked the scope of the memo and the references to various legal sources. I specifically included points of analysis that could provide insight into whether the judicial assistant was including his or her own views on the case and whether the assistant

7. The term *memo* is used to refer to a document prepared by judicial assistants in order for judges to prepare for the hearing. This document usually includes all relevant information about a certain court case.
8. For one hearing, only half of the memos were analysed because the other half were not handed over, even after sending reminders. In three hearings, no memos were produced because it was common procedure of the court divisions to not prepare memos for these types of hearings. See Appendix 2.

was communicating about the case with the judge via the memo. The memos were analysed in combination with of the court files (except for four instances in which this was not possible).

Observing pre-trial consultations
In the administrative law divisions, the concept of having a pre-hearing consultation between the judge(s) and the assistant was recently introduced. In eight of the followed hearings, these consultations were held. I was able to observe seven of them.[9] The observations during these consultations were conducted using a similar method as was used to observe the deliberation sessions (see the subsection below).

Observing the hearings and adjournments
I observed all the hearings of the followed cases. In the administrative law divisions, the hearings usually lasted half a day. In the criminal law divisions, some hearings also took half a day, but several hearings lasted the entire day (with a lunchbreak).
During the hearings, I made notes, writing down everything that I believed might be relevant for my research. I also included some information about the content of the cases, as that information was beneficial for the following interviews. In addition to these reports, I collected universal information about all hearings (see Appendix 7 for the checklist of the hearings and deliberation sessions).
I always asked the assistant if we could walk to the courtroom together. In various instances, the judge(s) would also walk with us, which created a good opportunity to observe the informal conversations between judges and judicial assistants. In other instances, I could observe how the assistant prepared him or herself for the hearing, what materials he or she would bring, etcetera.
An additional issue to consider was the position from which I would observe the hearing: would I sit behind the bench with the judge(s) and assistant, or would I sit with the audience? In three of the court divisions, I decided to sit with the audience to emphasise my independent position as a researcher and observe the hearing from an outsider's perspective. In one of the (criminal law) divisions, the management of the court division requested, in order for me to be able to join the deliberation sessions, that I attend the hearings in the capacity of a *(buiten-)griffier*. That meant that in this division, I observed the hearings from behind the bench. The advantage was that it enabled me to observe from up close what happened behind the bench. I could, for instance, closely observe the ways in which judges used the assistants' memos during the hearing. It also resulted in being able to attend the adjournments of these hearings.

9. The first consultation occurred before the research at the court was started, which is why it was impossible to observe that consultation.

Regularly, the hearings were adjourned for a moment to enable the judge(s) or parties to discuss the case (also see section 5.2.5). The adjournments were observed in a manner similar to the regular deliberations. In administrative cases, an adjournment results in the parties leaving the courtroom to discuss their issues in the corridor of the court. In those instances, I remained seated in the courtroom and was able to observe the informal conversations between the judge and the assistants. In criminal cases, an adjournment meant resigning to a special room behind the courtroom. During the hearings that I observed from behind the bench, I was able to be present to observe the deliberations regarding the adjournments, as I was regarded as one of the court officers. With regard to the other criminal hearings, I was mostly not invited to observe the adjournments. Of all hearings that were adjourned, I was present during the adjournments of 5 hearings, and of one hearing, I observed half of the adjournments (see also Appendix 2).

Observing the deliberation sessions

Not all hearings are followed by a deliberation session (see more in section 6.1). For that reason, no deliberation sessions could be observed for five hearings. For one of the hearings with a deliberation session, the second half of the deliberation session was postponed to a time when I was unable to observe it. In all other instances, I was present to observe the deliberations. I also observed the meetings of administrative law assistants with single-judges. These meetings are not official deliberation sessions (see 6.1.4) but do progress similarly to panel deliberations. The deliberations were usually held immediately or shortly after the hearing. In a few instances, the deliberations were held on a different day than the hearings. During most deliberation sessions, 1–4 cases were discussed.[10] Most sessions lasted 45–75 minutes, but a few took longer (max. 3 hours) or shorter (min. 20 minutes). Just as for the hearings, I made a report of each deliberation session, writing down how the discussion developed. I also reported some universal details for all the deliberations followed (e.g. duration, usage of the memo and order of turns in speaking; see Appendix 7 for the checklist used in the deliberation sessions).

Most deliberation sessions were held in the office of one of the judges; however, occasionally deliberations were held in the court room after the hearing was finished or in the special deliberation room behind the court room. All participants[11] would usually sit at one table. To emphasise my observant role, I could have decided to observe the deliberations from a distance. However, I decided to take a place at the same table as the judge(s) and assistant. After spending half a day or a day with the couple or panel, they had often become used to my presence, and purposefully taking a different position would only have emphasised that the participants were being observed. This position also provided me with a good view of

10. Most of the hearings with a lot of cases were not followed by deliberations, and some cases did not require a full deliberation, as they were adjourned.
11. Either three judges and an assistant or one judge and an assistant.

the files and documents that were consulted by the participants during the sessions.

Analysing the draft judgments and adjustments therein
In all the followed cases, the judicial assistant wrote a draft judgment, which was adjusted by the judge(s). In police-judge cases, the judgment is merely a report of what the judge has pronounced at the hearing. I did not analyse those reports.[12] Regarding a few other hearings, I was also unable to analyse the judgments.[13] For 15 hearings, I analysed all of the written draft judgments and adjusted judgments, and for 4 other hearings, I analysed a portion of the judgments. To gain insight into the process of adjusting the draft judgments in panel cases, I also collected information regarding the order in which the judges altered the judgments.
I analysed the drafts and adjustments using a checklist (see this list in Appendix 8), paying particular attention to the quantity and type (more factual, procedural or content-related) of adjustments that were made by the judge(s). I also compared the drafts to my notes from the deliberation sessions to check whether they reflected what had been decided during deliberations. Furthermore, I studied the memos to check whether parts of them were used in creating the draft judgments.

2.2.3 Interviews with the judges and judicial assistants involved

I approached the judicial assistants and judges involved in the hearings with the request to interview them after the observations were finished. All of the 27 judicial assistants involved were approached and consented to being interviewed, with 26 of the interviews being analysed for the research.[14] Of the 40 involved judges, I approached 25 to reach a similar number. All the respondents consented to being interviewed. This selection included all of the chairs of the hearings, except for one chair who was unavailable.[15] Several of the chairs were not observed only as chairs but also as panel members in different hearings. Two judges were observed exclusively in the role of panel member (see Appendix 3 for further details).

Conducting the interviews
The interviews always took place after the observations of the hearings were conducted, and, as much as possible, the interviews were also planned after I analysed the judgments. The interviews usually lasted about 1 to 1.15 hours. The shortest interview was 35 minutes; the two longest interviews lasted 2 hours. The semi-

12. As these documents did not reveal any information that is relevant for understanding the involvement of judicial assistants.
13. In one administrative hearing, none of the cases required a judgment to be written. In two other instances, I was not able to get access to the (adjusted) judgments. In four cases in which judgments were written, I could only get access to part of the judgments.
14. One of the interview transcripts went missing and was therefore not included in the data analyses.
15. One judge was chair in two hearings, as the second hearing was a continuation of the first one.

structured interviews were conducted using a topic list which was mostly the same for each interview but was slightly altered for the person interviewed (judge or judicial assistant) and the court and court division the respondent was working at (for an example of a topic list, see Appendix 9). The largest part of the topic list focused on gaining further knowledge of how the judicial decision-making takes place and how judicial assistants are involved in this process. By interviewing the respondents, I could gain information not only regarding the visible aspects of the decision-making but also on aspects that would remain largely unknown through observations, such as in what manner judges make use of the memos produced by assistants in preparing for hearings. Moreover, the list also included various topics not directly related to the process, for example, regarding the professional and social relationships between judges and assistants and their role perceptions.
In the interviews, I asked respondents about the actual course of events but also about how they perceived these themselves. I asked open-ended questions and let the respondents speak as much as possible on their own account. Whenever the answers did not suffice, I asked follow-up questions. When I had noticed remarkable aspects during the observational stage, I questioned the respondents about these in the interviews. The respondents also frequently used the observed events as illustrations when explaining certain processes. The fact that I had observed the decision-making practices partly deterred respondents from presenting socially desirable answers, as they were aware that I was familiar with the course of events in the court.

Recordings and transcribing the interviews
All of the interviews were audio recorded, except for one interview in which the respondent objected to this.[16] Afterwards, a comprehensive transcription of the interviews was made. As I guaranteed the Council for the Judiciary, I offered to send the transcripts to all of the respondents in order for them to check whether they were accurate accounts of what had been said during the interviews. A little more than half of the interviewees were interested in receiving the transcripts. All of these respondents confirmed the accuracy of the transcripts. In some cases, the respondents corrected the orthography of names or other aspects of the transcript. In a few other cases, some of the respondents responded by elaborating on or further explaining certain elements of the transcript. I included these additional comments in my analysis of the interviews. None of the respondents suggested removing information from the transcript. Quotations from the interviews are included in the empirical chapters to illustrate the findings of the research. The quotations are translated from Dutch to English. A list with the original Dutch quotations is available and can be provided upon request.

16. This interview was recorded on paper.

2.2.4 Additional gathering of information during the research stay

During my research stay at the court divisions, I also gathered supplementary information concerning the functioning of the court divisions and what role judicial assistants play within the divisions.

Additional interviews
Apart from the hearing-related interviews with judges and judicial assistants, I conducted several additional interviews during the fieldwork. I usually started my stay at the court divisions by interviewing the managers of the division.[17] I also interviewed the general managers of the courts, who were in charge of human resources. All of these court managers (6 in total) were interviewed primarily about organisational aspects of the court divisions.
During the fieldwork, I occasionally came across other people who, for various reasons, caught my attention, for instance because they expressed striking views about the position of judicial assistants or because they appeared to occupy an important position in the court division (which was the case for several staff lawyers). Eight of these people were also interviewed. These interviews were analysed in combination with the interviews conducted with respondents involved in the hearings.

Additional observations
I was provided with a desk in an office in all the different court divisions; thus, I was also able to observe the broader work settings in which the decision-making occurred. I shared a room with an administrative law judicial assistant for one month, with a criminal law staff lawyer for another month and with a judge of the criminal law division for three weeks. This provided me with insight into what an average day of these officers consisted of. I also attended 20 total internal meetings that took place during my stay at the courts, and I made field notes during all of these meetings. Additionally, I had several informal conversations with judges, judicial assistants and other court officers. I produced field notes for all of these additional observations, which were also employed to grasp a clearer understanding of how the court divisions were operating.

2.2.5 Data analyses

Comparing the studied courts and court divisions was not the core intention of the research. Rather, I followed hearings in different courts and court divisions to broaden my data set, which was then analysed in its entirety. Nonetheless, wher-

17. At one of the courts, there were separate managers for judicial assistants and for judges; at the other court, judicial assistants and judges were managed by a combination of two judges. One manager was also interviewed in the capacity of being involved in one of the hearings.

ever relevant, the observed differences were also noted. Section 7.3 is devoted to the similarities and differences between the courts and court divisions.
The interviews were analysed with Atlas-ti software. An initial list of codes was derived from the topic list for the interviews, which was informed by several exploratory interviews and consisted of several hypotheses regarding factors that might affect the involvement and impact of judicial assistants (e.g. their experience, the type of cases they were working on and whether it concerned single-judge or panel decision-making). This list was complemented with extra codes that arose while reading and coding the interviews. The coding was informed by several insights from earlier research on judicial assistants (also in other jurisdictions) and from literature on (court) organisational studies and (judicial) decision-making. This sometimes resulted in going back to interviews that were already coded to recode them. The list of codes that was used is included in Appendix 10. The data collected from the memos and the draft and adjusted judgments were analysed in two Excel files, including all the aspects that were noted down in the checklists.
All the additional information that was gathered in the courts was primarily used as backup information to consult when writing about particular parts of the decision-making, for example, while writing the section on internal meetings and committees. During the analysis, I sometimes also remembered certain interesting occurrences and would search for the details in the field notes.

2.3 Additional interviews with respondents outside of the Dutch district courts

To be able to place the data collected in the district courts in perspective, I conducted several extra interviews with judicial officers from different courts. First, I interviewed seven Dutch (former) judges and judicial assistants prior to the fieldwork. Second, I conducted another set of 10 interviews with Dutch judicial officers after the fieldwork was conducted (see Appendix 4). Finally, I also conducted 10 interviews with judges and judicial assistants during a research stay in England.

2.3.1 Exploratory and broadening interviews in other Dutch court settings

As little information regarding the involvement of judicial assistants in Dutch courts was available in the literature or in policy documents, I conducted eight exploratory interviews with three judicial assistants and four (former) judges working in different Dutch courts and divisions of these courts (see Appendix 4 for detailed information). I held the interviews to familiarise myself with the topic and to discover relevant aspects to study. I also used these interviews to create the topic list for the fieldwork interviews. Later in the research, I consulted the information gathered in these interviews to reflect on the similarities and differences between

the studied courts and other courts and to verify the broader scope of the results of the research (see also section 2.1.3).
An additional 10 interviews were held after the fieldwork had finished. These interviews were predominantly aimed at gaining more knowledge on the involvement and influence of judicial assistants in settings other than those studied. Due to respondents frequently mentioning that the three courts of highest appeal in administrative cases all have different organisational setups for judicial assistance and that, in those courts, the involvement of judicial assistants is regularly far-reaching, I decided to conduct additional interviews with judges and assistants in those courts (see Appendix 4). I interviewed at least one assistant and one judge per court. Further, I conducted an interview with a judge in the criminal division of the Dutch Supreme Court to gain information about judicial assistance in that court.
The respondents interviewed for the exploratory and broadening interviews were selected and approached using my informal network.[18] The interviews lasted a similar amount of time as the hearing-related interviews.

2.3.2 Interviews and observations conducted in England and Wales

To better understand the judicial assistance models in Dutch courts and to reflect on them, I analysed a number of judicial assistance models in other jurisdictions: the US and England and Wales (see chapter 3). Chapter 3 explains the choice for the three studied models within these jurisdictions. A substantial amount of information on the law clerk model at the highest courts in the US was available in the literature. This was less so for the Magistrates' clerk model and the Judicial Assistant model (within this model written in capital letters) in England and Wales. Several interviews were conducted, and observations were held in courts in and around London to gain additional information about these models.
I interviewed two district judges and briefly spoke to a Magistrates' clerk. I also conducted an interview with a Magistrate. In seven (collective) interviews, I spoke with three Supreme Court justices (of which, one was a former justice), two justices of the Court of Appeal, three Supreme Court Judicial Assistants and four Judicial Assistants at the Court of Appeal (of which, one was a former assistant). These interviews were explorative and sometimes lasted a short time (about half an hour) and other times much longer (about 2.5 hours). The interviews provided me mainly with factual information about the work of Judicial Assistants in the courts. They also offered some context. These data were mainly used to enhance my own understanding but also to provide an accurate description of the organisational setup in the courts, as described in the following chapter.

18. For instance, via academic colleagues and members of the steering committee.

3 Reflections on the Dutch judicial assistance model from an inter-jurisdictional perspective[1]

The previous chapters highlighted that essentially all judiciaries employ judicial staff members. An inquiry into the involvement and effect of judicial assistants on judicial decision-making is therefore beneficial not only to the Dutch judiciary but to other jurisdictions as well. Although the fieldwork for this study was conducted in two Dutch district courts, the majority of the results presented in this book are also significant to other court settings within and outside of the Netherlands (see section 2.1). In order for one to understand the specific setting in which this research took place, this chapter first outlines the judicial assistance models in Dutch courts with particular attention to the model in the district courts (in section 3.1). Then, in section 3.2, it contrasts these models to three entirely different judicial assistance models. The selection of models to which the Dutch models are contrasted includes one American model and two models of the system from which the American system originates: the judiciary of England and Wales. First, the most studied type of assistant in the US is analysed: the law clerk (as organised in the Court of Appeals and the Supreme Court). Additionally, two English and Welsh models are analysed: Magistrates' clerks, who play a remarkable role in the system of lay adjudication, and the new function of Judicial Assistants, who are currently employed at the Court of Appeal and Supreme Court. By providing this contrast, the chapter illustrates the various ways of organising judicial assistance which go beyond the confines of the legal system one is acquainted with, and it provides materials to critically reflect on one's own system. Section 3.3 introduces six features by which judicial assistance models can be distinguished. Given the concerns mentioned in section 1.2 regarding judicial assistants being too involved in judicial decision-making, the ways in which these features affect the involvement and potential influence of judicial assistants are particularly addressed. This section is followed by the conclusion in section 3.4, which recapitulates the main features that can instigate or impede the involvement of assistants.

1. This chapter is partly based on the article "The power of the judicial assistant/law clerk: Looking behind the scenes at courts in the United States, England and Wales, and the Netherlands", *International Journal of Court Administration*, 7(2), p. 10–28, 2016.

The chapter does not claim to present a representative selection of all the possible models of judicial assistants that exist globally. The choice of the studied models was primarily made because they illustrate various types of assistance models. Moreover, detailed information is available for these models. This does introduce the complexity of the selection including models which are set at different levels of courts. It is important to realise that the settings in which the models are implemented are diverse and not completely comparable. The judicial assistance models are therefore analysed to discover possible variations therein, not primarily to understand the relationship between the judicial traditions of the studied judiciaries and the judicial assistance models. Even so, it is beneficial to briefly typify certain characteristics that mark the legal traditions and procedures of the studied jurisdictions. As the reader is presumed to possess a certain level of knowledge on this matter, what follows is a rudimentary summary.

Characteristics of the studied jurisdictions

It is of foremost importance to note that we are dealing with the US and English and Welsh systems, which share a common law tradition. The Dutch legal system, on the other hand, is based on a civil law tradition. In the Dutch civil law judiciary, the law is, to a great extent, codified. Judges are traditionally not considered lawmakers; they primarily apply the law. Given that statutes require judicial interpretation, judicial decisions still have a considerable legal impact (Merryman, 2007, p. 40-49). Judges in the Netherlands speak as one unit, and individual opinions on a case are not shared with the public.[2] The Dutch judicial process is primarily based on 'mediacy'; indirect evidence in the form of reports (e.g. produced by the police) is widely employed. The procedure usually consists of a series of communications, both written and during oral hearings. A large part of the process occurs through written reporting (see Merryman, 2007, p. 121-123; M. Shapiro, 1981). In the Dutch system, with various inquisitorial features, the judge's role is relatively active. He or she controls the legal process prior to the trial and also in court. Lay people participation hardly occurs (Malsch, 2009, p. 69). The Dutch judicial review system is – with few exceptions – a system of review 'as of right', meaning that every case that is issued will also be decided upon.

In common law countries such as the US and England and Wales, the judiciary is considered a body that has the ability to create law (Eisenberg, 1991; M. Shapiro, 1981, p. 28-29). Judicial decisions are, therefore, an important source of law. Dissenting or concurring opinions can be issued, and senior judges are usually dominant public figures (see Bell, 2006, p. 39, 341). The US and England and Wales have adversary systems, which are, to a great extent, based on 'immediacy'. This entails that the oral hearing occupies a central position in the judicial process, especially at the appellate level (but see Galanter, 2004). Evidence is presented during the hear-

2. Similar to other civil law judiciaries, see Merryman, 1969, p. 38.

ing ad hoc, and relatively little additional background documentation is produced at this point in the process.[3] Trial by peers, via jury trials and lay people participation, is another important element of these judicial systems (Neubauer & Meinhold, 2010, p. 105). The legal processes in England and Wales and in the US are, to a large extent, controlled by the adversarial parties, with courts occupying a more passive, monitoring position.[4] Another aspect relevant for this research is that the Supreme Courts in these judiciaries exercise mainly discretionary review. This results in only a small number of the cases requesting appeal actually being heard and adjudicated by the Supreme Courts.

3.1 The organisation of judicial assistance in the Netherlands

The Dutch judiciary has a long history of employing judicial staff members. Dutch district courts (the first instance courts for all regular criminal, administrative and civil cases) are empirically studied in this book, and, therefore, the assistance model of these courts is described rather elaborately. Judicial assistance models at Dutch criminal and civil Courts of Appeal are rather similar to those at the district courts, so these courts are described together with the district courts in section 3.1.2. Administrative Courts of Appeal and the Dutch Supreme Court are organised fairly differently. A somewhat briefer description of these models can be found in section 3.1.3. A diagram displaying the hierarchy of Dutch courts is included in Appendix 11. This section starts with a general history of the function of judicial assistants in the Dutch jurisdiction.
Little literature has been devoted to the involvement of judicial assistants in Dutch courts.[5] This section is primarily based on the available literature and additional policy documents produced by the Council for the Judiciary and individual courts. To obtain supplementary information, 17 additional interviews were conducted with (former) judges (n=10) and judicial assistants (n=7) from different courts than the district courts where the fieldwork took place.[6]

3.1.1 The history of Dutch judicial assistants

As mentioned in the introductory chapter, the occupation of *griffier* (still the official term used for assistants when they perform their recording duties in court) dates back to Napoleonic times, when the Netherlands adopted the French legal system in the early 1800s. Until 1957, the judicial assistantship was, in essence, an appren-

3. In comparison to civil law judiciaries. This does not mean that in US courts there is no paperwork involved whatsoever. Parties do have the right to submit papers/briefs in support of their oral arguments, and appellate judges review records of proceedings in the lower courts.
4. This adversarial model is most present at the highest courts of the countries.
5. Exceptions are Abram et al., 2011; Praagman & Doornbos, 2012; Holvast, 2014; and Holvast, 2016.
6. See more on these interviews in section 2.3.

ticeship to become a judge (or prosecutor). Newly graduated lawyers would make inquiries for a voluntary position as *griffier* at one of the courts. Depending on their connections in the judiciary and their ability to manage to be employed without financial compensation, they would acquire and continue the clerking position. Subsequently, after a few years of working for the court, they would be promoted to become a judge (De Groot-Van Leeuwen, 1991, p. 35). This practice changed when, in 1957, a separate judicial training was designed.[7] With the introduction of this new judicial training, judicial assistance evolved into a separate function for which a law degree was no longer required. Over the years, it became a customary route for assistants to begin working for the court by performing an administrative function and, over the years, developing into a 'court secretary' (as judicial assistants were called at the time). This could be achieved by attending a special internal training programme which required the court personnel to follow various courses to require legal knowledge and assisting skills. In the 1960s through the 1980s, judicial assistants formed a distinct group that functioned separately from judges with little social interaction (Bevers, 2004, p. 8-9). The fact that judicial assistants had not graduated from law school and had a different social background than judges appeared to be a clarification for this separation.[8] During the 1990s, Dutch courts were gradually professionalised, and the process of adjudication required more collaboration. Judges and judicial assistants began to work more closely together, and judges' appreciation for the judicial assistants' work improved (Bevers, 2004, p. 9). In 2005, the enactment of two new legal acts[9] resulted in an alteration of the organisation of the judiciary. This alteration resulted in the creation of new standards regarding the distribution of the workload between judges and assistants.[10] The new financing structure inspired several courts to create additional guidelines to delineate the allocation of duties and the time spent on cases. In the next year, the internal training programme for judicial assistants deteriorated, and the minimum requirement of holding a diploma from an institute of higher professional education was introduced.[11] The terms used to refer to judicial assistants were aligned nationwide to more closely resemble their function: 'judicial staff member'[12] for the majority of assistants and 'staff lawyer'[13] for a

7. This track existed next to a track for experienced lawyers from outside the judiciary. It remained as such until 2013, when a new training was introduced. Roos & Van Amelsfort-Van der Kam, 2012.
8. A similar segregation was also observed by Van de Bunt (1985, p. 86–86, 119, 142) in his dissertation on prosecution officers, and he also refers to differences in social background and the lack of education of the assistants.
9. The Dutch Judiciary Organisation and Management Act (*Wet Organisatie en Bestuur Gerechten*) and the Act on the Council for the Judiciary (*Wet Raad voor de Rechtspraak*), resulting in the modification of the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*).
10. The Lamicie-model. Courts can also create their own models, provided that they stay within their budgets.
11. In Dutch *Hoger Beroeps Onderwijs*, Abram et al., 2011, p. 8.
12. *Juridisch medewerker*.
13. *Stafjurist*.

small, specialised group (see next section). In that year, the judiciary also introduced a nationwide programme which provided outstanding judicial assistants with the opportunity to follow a special route (mainly consisting of gaining practical experience working at different court divisions) to become a judge. However, this route was rarely used, and, with the introduction of again a new judicial training programme in 2013, this route was abolished. Judicial assistants who wish to become judges should currently follow the same selection process and training as people from outside the judiciary.

3.1.2 *The Dutch judicial assistance models in district courts and criminal and civil Courts of Appeal*

Judicial assistance models in the 11 Dutch district courts and four criminal and civil Courts of Appeal are rather similar.

Characteristics of this assistance model

Judges and judicial assistants represent approximately half of the total number of employees of these courts. The other half consists of administrative, secretarial and managerial staff members. The ratio of assistants to judges varies between different courts and divisions of courts: the average ratio in 2013 was just over one judicial assistant per judge.[14] District courts employ slightly more judicial assistants (ratio around 1.3 assistants per judge) than criminal and civil Courts of Appeal (ratio around 0.8 assistants per judge). The administrative law divisions employ the most assistants (1.71 assistants per judge) and criminal law divisions employ the least (0.97 assistants per judge). There are more women (69 percent) than men (31 percent) employed as judicial assistants, and also as judges (56 percent women and 44 percent men). On average, judicial assistants are younger than judges. In 2014, 29 percent were under the age of 35, compared to 2,5 percent of judges.[15]

It is typical in these courts that judicial assistants are not assigned to individual judges. Instead, they are associated with specific cases (of a certain hearing) with which they assist different judges of the division they work at from the beginning up to the writing of the judgment. As a result, the role of judges in the selection of judicial assistants is limited, as it does not entail selecting their personal assistants.

14. These numbers are derived from a set of data on judicial employees provided by the Council for the Judiciary. The data only included assistants that have a substantive role in assisting judges in the judicial content of their work. Staff members who primarily assist with administrative aspects of the process are excluded. This explains why the number may appear to differ from overviews presented by the Council of the Judiciary. The Council commonly takes all non-judge staff members as one group.
15. As no specific information was available, these numbers include all non-judge court personnel. See Jaarverslag Rechtspraak 2014. More information about the personnel composition of the Dutch judiciary can be found in the annual reports of the Judiciary.

The largest part of the selection and recruitment of assistants is completed by court managers (see more in section 4.1.2).
Employment as a judicial assistant is, furthermore, not a temporary position as, for example, is common for US law clerks (see section 3.2.1); rather, it can be a lifelong career. Several judicial assistants have been employed by the court for decades. During the periods of their employment, these assistants can attain more experience in court than most judges. In the past, a large number of judicial assistants were internal transfers (e.g. promoted from administrative functions); currently, the majority of new assistants are entrees from outside the judiciary. Given that the judicial assistant position became more challenging at the same time that opportunities to enter legal practice or the training to become a judge reduced, judicial assistantships have become popular among law school graduates. While the minimum educational requirement for new judicial assistants is a degree from an institute of higher professional education, most entrees possess a university law degree (Abram et al., 2011). As the follow-up career perspectives in the judiciary are limited, several new judicial assistants only work for the court at their career-starts (see also section 7.1.4). For them, a judicial assistantship serves as a decent way to gain the required legal experience to apply elsewhere. Judicial assistants are recruited primarily from among recent law school graduates, although young professionals with a few years of work experience also apply for the position. In order to attract new assistants, courts have developed associations with universities and offer internships or part-time judicial assistant positions[16] for students in the final year of their studies. The fact that courts currently still also employ various judicial assistants who followed the internal training programme results in a mixed corps of judicial assistants with respect to their legal qualifications and court experience (Abram et al., 2011, see also section 7.2.2).

Duties of judicial assistants
It is characteristic for judicial assistants in Dutch district courts and Courts of Appeal that they perform duties in all stages of the judicial process. Typically, one and the same assistant performs all these duties with regard to one particular case.
Prior to the hearing, judicial assistants generally create a document – which is referred to as the *memo* – in order for judges to prepare for the hearing. This memo summarises all the important information relating to the case (see section 5.1.4). Before the hearing, judicial assistants are also frequently involved in making preliminary decisions on procedural matters, for example, whether a case is handled without a hearing or whether a case is assigned to one judge or a panel (see section 5.1.1). During the hearing, Dutch judicial assistants still perform their traditional duty of making a record of the court hearing. According to the law, it is a combined responsibility of the judicial assistant and the judge to provide a correct tran-

16. The so-called *buiten-griffierschappen*.

script of the hearing (for criminal law see Corstens, 2005, p. 553-554). After that, unlike judicial assistants in many other (particularly common law) judiciaries, Dutch assistants are also present during the deliberation sessions, and they are usually even invited to be involved in the discussion (see section 6.1).[17] Judicial assistants also often play a role in conceiving judgments. Furthermore, throughout the entire decision-making process, judicial assistants also give advice and function as a sounding board. Staff lawyers are a special group of assistants who have some specific duties, defined in the following section.

Legislation and guidelines regarding the judicial assistants

Legislation traditionally mainly focuses on the judicial assistants' oldest function of recorder during hearings and on some of their administrative duties.[18] Most other duties are not legally codified, as such. For a long time, other duties and responsibilities of judicial assistants in adjudication were not captured in any overarching policy documents either.[19] This partly changed in 2007 when general function profiles for judicial assistants were introduced. These are short (one-page) documents which delineate some of the main duties and required competencies of judicial assistants. Since then, the function of judicial assistants in district and civil and criminal Courts of Appeal has been divided into five different categories: junior judicial staff members, judicial staff members, senior judicial staff members, staff lawyers and senior staff lawyers (see P-instrumentarium, 2007).

The function profiles generally describe that judicial assistants assist judges in the preparation for hearings, during the hearings and in the processing and conceiving of judgments. In the run up to the hearing, they may contact parties in order to attain necessary information. Cases which require assistance are allocated among judicial assistants so that juniors primarily handle the simple, routine cases; 'normal' judicial staff members are permitted to assist judges in common, but not routine, cases and senior staff members assist in complex cases. Senior judicial staff members are additionally expected to be involved in the coaching and training of new assistants, new judges and deputy judges. The staff lawyers comprise a distinct category of judicial assistants. A staff lawyer position is typically a follow-up function for the best and most experienced senior judicial staff members. Staff lawyers are usually specialists of a particular sub-field of law. They are currently required to possess a law school degree (an LLM from a Dutch law school). The staff lawyers partly perform similar duties to senior judicial staff members. Additionally, they have various other tasks, differing from court to court. According to their function profile, staff lawyers may give advice on complex legal issues that may involve new topics or cases in which strong social or economic interests are at

17. In administrative law cases, single-judges even commonly plan a meeting to discuss a case solely with the assistant, see section 6.1.4.
18. E.g., in several provisions of the *Code of Civil Procedure* and the *Code of Criminal Procedure*.
19. Individual courts often did have internal documents regarding the duties of judicial assistants.

stake. Furthermore, they can contribute to the creation of new case law and serve as sounding boards for judges and judicial assistants on certain matters. Sometimes, they also complete certain managerial duties.
The financial compensation given for the different functions is, at the start, similar to salaries offered to other entry levels in the legal profession or in the government, but, due to limited career opportunities, the salaries do not continue to follow a similar growth curve.[20] Most judicial assistants are compensated substantially less than judges. However, at the top, a senior staff lawyer receives roughly the same compensation as a starting judge.[21]

Even though the function profiles provide some clarity regarding the responsibilities of judicial assistants, they remain rather abstract. The profiles do not mention in what way judicial assistants are supposed to assist prior to the hearings or how they should give advice. And while it is common for judicial assistants to participate in the judicial deliberations, the function profiles do not mention their role in the deliberation room.
It also does not help to consult the judges' function profiles to acquire a broader image of how the collaboration between judges and judicial assistants is meant to be organised. Although these profiles are more elaborate than the assistants' (six pages long, see section 4.1.2), the only reference to the collaboration with assistants is that the judges *'work together with assistants and have contact with them'*.
An analysis of the main policy documents of the Council for the Judiciary[22] reveals that the position and duties of judicial assistants and their collaboration with judges are issues that also receive little attention in countrywide policy documents. This is remarkable, given that several allocation-models developed along the lines of a managerial approach expose that much is expected of judicial assistants' part in gaining court efficiency (see more in section 4.2).

To supplement the limited guidelines on a national level, courts and court divisions have developed additional guidelines. Some courts have even established their own more-detailed function profiles for judicial assistants. At the court division level, the documents that prescribe the duties of judicial assistants are most specific. These often include rules regarding what products (memos, draft judgments, etc.) judicial assistants are required to produce, and they set guidelines for

20. Starting salaries for legal practitioners increase sharply after they finish their three-year period of internship/pupilage.
21. For the exact salaries, see the salary scales for government officials for judicial assistants and the salary scales for judges belonging to the collective labour agreements of the judiciary.
22. E.g. Agenda van de Rechtspraak 2005–2008, Agenda van de Rechtspraak 2008–2011, Agenda van de Rechtspraak 2011–2014, Agenda van de Rechtspraak 2015–2018 and Visie op de Rechtspraak 2020; Jaarplan 2010, 2011, 2012, 2013, 2014 and 2015; as well as several studies, papers and other documents concerning projects such as *Herindeling Gerechtelijke kaart, RechtspraaQ* and *Kennis en Innovatie*.

the included information. Courts vary in the organisation of some of these aspects (see section 7.2). Nonetheless, these local policies remain primarily focused on providing guidelines for the minimum requirements for different documents. As previously mentioned, judicial assistants are also supposed to give advice and/or function as sounding boards for judges, and they participate in the discussion during deliberation sessions. Particularly regarding those duties which require judicial assistants to be further involved in the content of judicial decision making, the local policies commonly also set few guidelines.
Recently, criminal law judges have organised amongst themselves to set up some professional standards (first published in February 2016) regarding their work.[23] This document, on a few topics, also set standards regarding the involvement of judicial assistants. The standards state that single-judges who just started at a court division are to be accompanied by experienced assistants and that a memo produced by the assistant functions as a means to chair the hearing, and they emphasise that every judge in a panel should read/be familiar with all the court files regarding a case (and thus cannot completely rely on summaries prepared by assistants).[24] These are, according to the observations in this research, indeed the norm in the courts (see chapters 5 and 6). The civil and administrative law sections are also currently creating professional standards specific to their fields of legal expertise.

The Dutch *Judiciary Organisation Act* contains several provisions which require judicial officers to maintain confidentiality regarding discussions during deliberations and the content of case files.[25] Article 14 states that judicial assistants should be appointed by the board of a court and are required to take an oath prior to their appointments.
Standards for their ethical conduct are further set in a code of judicial conduct, developed in 2010 by the Dutch Council for the Judiciary, which is also applicable to judicial assistants. This code is formulated in general terms and emphasises the values of independence, impartiality, integrity and professionalism. The implications of this code are discussed more elaborately in chapter 4.

3.1.3 Judicial assistants at the courts of final appeal

The judicial assistance models at the courts of final appeal in the Netherlands – the Dutch Supreme Court and the three Courts of Final Appeal in Administrative

23. See https://www.rechtspraak.nl/SiteCollectionDocuments/20160220-professionele-standaarden.pdf.
24. For these standards, see sections 2.2. sub 4, 2.4 sub 4 and 2.5 sub 3 of the professional standards.
25. Articles 7 and 13.

Law[26] – have rather different setups than the lower courts. Each of these courts has its own specific way of organising judicial assistance.

The Dutch Supreme Court

The first assistants who assisted judges in the judicial content of their work at the Supreme Court were employed in 1978 (Van Dorst, 1988, p. 322). Currently, the court employs about 95 judicial staff members to assist 32 judges and 23 Advocate-Generals.[27] The corps of judicial assistants which is employed at the court is referred to as the 'scientific bureau'.[28] Advocate-General of the Supreme Court Verkade (2007, p. 710), describes this bureau as a 'high quality research centre'.

Unlike at the lower-level courts, the Dutch Supreme Court judges are appointed personal assistants who rotate within the court every few years. Judges of the criminal and fiscal divisions are assisted by one judicial assistant. Civil division justices possess of two assistants each. Advocate-Generals – a special position in the Dutch judiciary for renowned lawyers who advise the justices in the cases they have to decide – are appointed three judicial assistants per person.[29] The Supreme Court also differs from the lower courts in that the the assistant positions are temporary and only intended to last for five to six years.[30] The Supreme Court selects mainly young lawyers, preferably with a few years of work experience and with good academic credentials, as large parts of their work consist of conducting legal research (see Corstens, 2009; Niessen & Pieterse, 2009, p. 10). There is no special training available for becoming a judicial assistant at the Supreme Court.

The Administrative Courts of Final Appeal

The Dutch judiciary currently consists of three different courts of final appeal in administrative law: the *Afdeling bestuursrechtspraak Raad van State* (Administrative Jurisdiction Division of the Council of the State), The *Centrale Raad van beroep* (Higher Social Security Court) and the *College van Beroep voor het Bedrijfsleven* (Administrative Court for Trade and Industry).[31] Each court organises judicial assistance in its own manner.

The Administrative Jurisdiction Division of the Council of the State is known for being organised in a manner that relies heavily on its judicial assisting staff members. The Administrative Jurisdiction Division employs by far the most assistants

26. The Administrative Jurisdiction Division of the Council of the State, the Higher Social Security Court and the Administrative Court for Trade and Industry.
27. See Appendix of the yearly report over 2014: Jaarverslag Hoge Raad der Nederlanden, 2014.
28. In Dutch *Wetenschappelijk bureau*.
29. See the website of the Supreme Court; http://www.rechtspraak.nl/Organisatie/Hoge-Raad/wetenschappelijk-bureau-hoge-raad/Pages/default.aspx (visited on 8-7-2014).
30. This is clarified in the job description of a vacant post. Dutch employment law does not provide the courts with any legal means to enforce judicial assistants to leave after this period.
31. Plans have been made by the government to perhaps change this situation and merge some of the courts. See the consultation version of the *Wet splitsing RvS en opheffing CRvB and CBb*. The latest status is that the plans were withdrawn.

per judge of all Dutch courts. The approximately 50 judges of the division are assisted by a group of about 300 judicial assistants,[32] all of whom are required to possess a university law degree, preferably with a specialisation in administrative law. The relatively small group of judges are generalists who adjudicate in a wide variety of cases, while the judicial assistants are highly specialised. This setup becomes pretty clear from the appointment of the assistants to the different (sub)divisions of the court. The court is structured into three chambers. These chambers are divided into units, and the units are further divided into sub-units. Judges are usually appointed to two of the chambers; judicial assistants are only appointed to one specific sub-unit. Hence, the assistants have an important role in dispensing their expert knowledge to the judges. In order to be able to offer high-quality assistance in this model, the Council has established a unique training and coaching route for judicial assistants. In the first years of their employment, assistants are supervised by a senior assistant who monitors all the documents they produce. It takes about three years before judicial assistants are permitted to assist judges without supervision.

The ratio of judges to assistants at the other two administrative courts of appeal is similar to that of the lower courts. The Higher Social Security Court employs 1.5 assistants per judge. At the Administrative Court for Trade and Industry, the ratio is about 1 to 1. The Administrative Court for Trade and Industry is a relatively small court with about 20 judges and 20 judicial assistants divided over two divisions. The Higher Social Security Court is somewhat bigger, with approximately 65 judges and 45 judicial assistants, divided into four divisions. In addition to the assistants employed at the divisions, the court also possesses a specific 'Scientific Bureau' which consists of judicial assistants who do not assist in specific cases but can be consulted to conduct research or advise in more general legal issues. This court is further distinctive for employing junior assistants (often students) who only create the recordings of the hearings, so that the regular judicial assistants do not have to perform this duty. No specific training for judicial assistants exists at either of these courts, and the positions of judicial staff members are not bound by any employment duration restrictions.

A large portion of the judicial assistants at these courts of final appeal (and all of the assistants at the Supreme Court) are appointed as *gerechtsauditeur*. This is the same position that trainee-judges occupy in the period previous to their appointments (for life) as judges. In order to be appointed as a *gerechtsauditeur*, one is required to possess a university law degree. Different than in the district courts, it

32. For the numbers, see the website https://www.raadvanstate.nl/ and the Annual Reports of the Council of the State.

is a wide-spread supposition that an assisting position is a good stepping stone to becoming a judge at one of the lower courts.[33]

3.2 Judicial assistance models in the US and England and Wales

This section analyses different judicial assistance models in the US and England and Wales, beginning with US law clerks, followed by Magistrates' clerks and finishing with Judicial Assistants in England and Wales.

Table 1 Assisting models included in the study

Judiciary	**US**	**England and Wales**	
Judicial assistant type	Law clerks at the US Supreme Court and federal and state Courts of Highest Appeal	Magistrates' clerks – positioned at Magistrates' Courts	Judicial Assistants – positioned at the Court of Appeal and Supreme Court
Court level	Highest level and level just below	First instance level	Highest level and level just below

3.2.1 US law clerks: young and ambitious personal assistants to judges

The US judicial system consists of many facets and, likewise, various types of judicial staff members, but the most well-known is the law clerk. The law clerk, as analysed in this study, is employed at the state courts of highest appeal, the federal appellate courts[34] and the US Supreme Court. Primary jurisdiction courts and administrative courts usually have different organisational structures.[35] Since the 1950s, a great amount of research has been devoted to these law clerks.[36] This information forms the foundation for the following portrayal.

A brief history of the US law clerk

The first law clerks date back to the late 19th century at the Supreme Court (Oakley & Thomson, 1980). Peppers (2006) and Ward and Weiden (2006) draw a clear picture of the development of the position of law clerks in the US Supreme Court. Until about 1920, law clerks performed primarily secretarial and clerical duties;

33. Although several of the interviewed respondents mentioned this has more recently become more difficult.
34. The second-level courts that are just beneath the federal Supreme Court.
35. Occasionally, they also employ law clerks; however, the models are rather different.
36. E.g., books by Peppers, 2006, and Ward & Weiden, 2006, are based on data from surveys and interviews with former members of the Supreme Court. See also Oakley and Thompson, 1980, on law clerks at federal courts. A volume by Cohen, 2002, contains a chapter on law clerks at federal appellate courts, as does work by Wasby, 2005; 2008, and Swanson & Wasby, 2008. Perry, 1991, offers insight into the role of law clerks in the certiorari process.

from 1920 to 1940, their role increasingly resembled that of a research assistant; and from 1940 to 1960, law clerks became involved in all stages of the judicial process. This increased role probably relates to increased judicial workloads (R. A. Posner, 1985, p. 102-119). Beginning in the late 1950s, the suitability of the law clerks' involvement and influence became the focus of public debate. This topic gained more attention in the early 1980s after publication of *The Brethren* (1979), a book by two journalists that provided vivid insight into the practices behind the closed doors of the Supreme Court. Following *The Brethren*, law clerks remained a popular research topic (see Peppers, 2006, p. 1-10). During the last 50 years, law clerks' involvement in judicial decision-making increased, and so did the number of law clerks.[37]

The history of law clerks at the state courts of highest appeal and the federal appellate courts, while not as well-studied, appears to have followed a rather similar pattern.[38]

Institutional embedding and guidelines for law clerks

Unlike Dutch judicial assistants, law clerks do not perform any formal (procedural) duties. For that reason, their duties and responsibilities are not recorded in legislation. However, after publications revealed confidential details about court practices, judges were urged to set guidelines for law clerks (Ward & Weiden, 2006, p. 16). All law clerks at federal courts are obliged to follow the *Code of Conduct for Federal Judicial Employees*. This code includes general statements regarding the integrity and independence of judicial employees and the avoidance of impropriety. It also provides guidelines regarding conflict of interest and activities outside the judiciary and states that political activities, in particular, should be avoided.[39] Several courts have adopted additional codes of conduct for law clerks. In 1989, the Supreme Court created the *Code of Conduct for Law Clerks of the Supreme Court of the United States*. This code, which has never officially been published, includes six canons which focus on topics related to the code for federal employees. As a result of incidents in which confidential information was leaked by (former) clerks, the code specifically emphasises the confidentiality of the clerking position (Peppers & Ward, 2012, p. 104-105). It also explicitly allows for individual judges to set additional rules.

37. In 1941, Supreme Court justices were permitted to hire a second law clerk, and in the 1970s, a third and fourth one.
38. Given that the rise in caseloads in appellate courts was problematic earlier in time, the increased delegation of duties might have happened there at an earlier stage. Also, to release some of the pressure on law clerks, additional central (permanent) attorney staff members were employed at courts of appeal and state high courts in the 1970s. The Supreme Court later introduced a legal office, modelled on the central staff models (Ward & Weiden, 2003, p. 44). See also Hellman, 1980.
39. See http://www.uscourts.gov/rulesandpolicies/codesofconduct/codeconductjudicialemployees.aspx, visited on 21-07-2014. *The Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges*, 2nd Edition, Eds. S.A. Sobel, d.d., 2007 provides some additional information to (new) federal law clerks.

Organisation of law clerk assistance

Judges throughout the US are assisted by substantive numbers of law clerks in performing their judicial duties. Supreme Court justices are assigned four law clerks each, and federal appellate court judges will generally be assigned two to three law clerks. State high court judges are attended by approximately three legal assistants (not necessarily all being law clerks) (Cohen, 2002, p. 87; Swanson & Wasby, 2008, p. 26). The clerk corps consists of the brightest recent law school graduates from elite law schools. A clerkship is a highly coveted position and a stepping-stone to a successful legal career.[40] Clerkships at the Supreme Court and federal appellate courts are the most highly sought after, but there are also large numbers of clerkships available in other courts. As law clerks are personal assistants to the justices, the justices are in control of the selection of their clerks. They often personally interview candidates.

In addition to only employing recent graduates, the courts also place strict time limits on clerkships. One-year clerkships are the rule in most of the highest courts. Though, to save time on selecting and training new clerks, some federal and state appellate courts have partly abandoned the one-year clerkships and look to hire clerks for a longer period (Cohen, 2002, p. 88; Oakley & Thomson, 1980, p. 107-139; Wasby, 2008, p. 33-36).

Duties of law clerks

The duties of law clerks are diverse and dependent on the judges to whom they are appointed. As the Supreme Court has the authority to exercise discretionary review, deciding on which motions for appeal to review (writs of certiorari) is a major obligation of the Court. Since caseloads started to increase in the 1950s,[41] law clerks have been preparing certiorari memoranda (cert. memos) for judges in order for them to screen the writs of certiorari (Black & Boyd, 2012; Perry, 1991). These documents summarise the facts of the case and contain a recommendation to grant or deny the writ. Law clerks point to this as their area of the most influence (Ward & Weiden, 2006, p. 145). Other appellate courts do not normally have the broad discretionary review powers of the Supreme Court; hence, in those court, no cert. memos are written (Swanson & Wasby, 2008; Wasby, 2008).

Another important duty of law clerks is to conduct research on the legal issues in cases and to prepare bench memoranda. These memos help judges prepare for the hearings. The specific content of the memos depends on the judges' preferences. Usually, the memos include a summary of the relevant facts and laws, the legal questions and the arguments for both sides of the case. Several appellate court

40. E.g. several large law firms give signing bonuses of up to 350,000 US dollars to former clerks who join the firm.
41. The current docket consists of over 10,000 requests for appeal, approximately 100 of which are granted each year.

judges[42] referred to the bench memos as 'road map[s] of the case'. Conversely, some judges do not assign this duty to their clerks, as they do not regard it as valuable.

Similar to Dutch memos, the law clerks' bench memos can also function as springboards from which judges discuss the case with their clerks (Cohen, 2002, p. 92). Participating in case review discussion is another key feature of most clerkships. Relationships between judges and their law clerks are frequently intense (see contributions to Peppers & Ward, 2012). Several Justices and clerks have referred to the relationship as 'like family' (Peppers, 2006, p. 201). Some judges hold formalised pre-oral argument meetings with their clerks, and most judges also meet with them after the conclusion of the hearings (see regarding appellate courts Cohen, 2002, p. 109-112). This is especially important if the law clerk will later draft the opinion or judgment – the most controversial duty of law clerks. From the 1960s onward, Supreme Court justices began entrusting parts of judgment drafting to their clerks (Peppers, 2006, p. 148-152). Today, most Supreme Court and appellate court justices have grown comfortable with this practice (Cohen, 2002, p. 112; Peppers, 2006, p. 192; Peppers & Ward, 2012, p. 8). This does not entail law clerks making decisions regarding the content of opinions on their own. Most judges provide detailed instructions, and drafts go back and forth between judges and clerks. A final way in which law clerks can assist judges is very unfamiliar to the Dutch civil law system; it comprises their participation in the so-called 'clerk network' (see Cohen, 2002, p. 139-146; Ward & Weiden, 2006, p. 159-170). During the coalition-forming stage of decision-making, the clerks – who interact regularly with their fellow clerks in other judges' chambers – can function as intermediaries between the judges in forming coalitions. Some judges send their law clerks to the chambers of other judges to speak with their law clerks to discuss less significant issues than would occur between the judges directly (Cohen, 2002, p. 140). Other judges reject this process, as they consider it to be inappropriate lobbying (Cohen, 2002, p. 144; Ward & Weiden, 2006, p. 168-169).

3.2.2 Traditional clerks as legal advisers of lay Magistrates

The judiciary of England and Wales – where there is a strong tradition of immediacy and a large dependence on the adversaries to direct proceedings and, therefore, relatively little judicial document collection – historically had little need for employing judicial assistants. Judges at most lower courts still do not receive any assistance from non-judicial staff, and the assistance at the highest level is also minimal.[43] The clerks in the Magistrates Courts, analysed in this section, have

42. Interviewed by Cohen, 2002, p. 91–93.
43. On rare occasions, a lower court judge can ask for assistance. However, this is uncommon.

always been an exception.[44] This is not that odd, as in these first instance courts, panels of lay judges hear the vast majority of cases. Two separate doctoral studies (Astor, 1984; Darbyshire, 1984) were conducted on this subject. Although published in the 1980s, insights from these studies are still relevant. In addition, Magistrates' clerks are also referred to in several other publications.

A brief history of Magistrates' clerks

The presence of clerks in Magistrates' Courts dates back to the beginning of the Magistrates' Courts in the 14th century. The function was not created by statute; the first clerks were simply assistants who happened to be literate (Darbyshire, 1984, p. 5). In the 17th century, the clerkship had developed into a part-time function, often occupied by attorneys who were paid in the form of fees. The position of the Justices' clerk as a full-time public servant was eventually formalised in 1877. At that point in history, the Justices' clerks would not perform their duties alone. Rather, they would employ assistants, currently referred to as court legal advisers. It was not until halfway through the 20th century that these assistants held full-time positions. In 1980, minimum qualifications for assistants were introduced. However, research by Darbyshire and Astor in 1984 reported that a large number of the clerks were still unqualified.[45] Several alterations in the last two decades have changed the organisation of Magistrates' Courts, gradually making them more professional. Reforms in 1999 required all new court legal advisers to have completed the exams to become barristers or solicitors.[46] Since 2005, all Magistrates' Courts have been administered by Her Majesty's Court Service,[47] reinforcing the professionalisation of the selection and training of Magistrates (Elliott & Quinn, 2009, p. 257-260).

Organisation of the function of Magistrates' clerks

England and Wales are divided into about 330 justice areas, each with its own Magistrates' courthouse. At these courts, Magistrates without legal training hear about 95 percent of the criminal cases and decide in several civil matters as well (Ministry of Justice, 2012, p. 31). Magistrates usually sit in panels of three, assisted by a court legal adviser. This circumstance of working with non-legally trained judges makes the position of Magistrates' clerks rather different than that of the studied Dutch and American judicial assistants. Currently, there is a trend to

44. The term Magistrates' clerk is used to label all judicial assistants at the Magistrates' Courts, including Justices' clerks, Deputy Justices' clerks, and court legal advisers.
45. About half of the clerks interviewed by Darbyshire (1984, p. 135) did not possess any professional qualifications; see also Astor, 1984, p. 53.
46. It furthermore required all existing advisers under 40 to gain this requirement in 10 years' time.
47. Before the administration of Magistrates' Courts was locally defined.

appoint salaried and professional district judges, who hear cases sitting alone. Still, the vast majority of Magistrates' Courts' judges are volunteers.[48]
Approximately 50 Justices' clerks are allocated to two or more courthouses.[49] Their main responsibility is to provide the Magistrates with advice about the law. In addition, they have several administrative and managerial responsibilities, and they are in charge of arranging the Magistrates' training . The Justices' clerks delegate a large part of their duties to court legal advisers.[50] About 2,000 legal advisers frequently perform the duties of the Justice clerk – particularly duties in court – in his or her place. Since all new Justices' clerks and legal advisers are required to have passed the academic requirements of the barrister or solicitor training, the corps of Magistrates' clerks is slowly but steadily becoming increasingly qualified. After entering the court, the trainee legal advisers are required to follow an on-the-job training program for up to two years. Similar to judicial assistants in the Netherlands, court legal adviser positions are not temporary. Another similarity is the limited career opportunities for legal advisers.[51] It is expected that the qualified clerks are more inclined to leave the Magistrates' Court after a few years.

Institutionalisation of Magistrates' clerks and guidelines
For a long time, legislation did not take note of Magistrates' clerks. Beginning in the 1950s, several court cases occurred that accused Magistrates' clerks of interfering with the conduct of proceedings, acting out of bias and retiring with the bench uninvited. These cases highlighted the controversial nature of the advisory role of the clerks (Darbyshire, 1984, p. 2-3, 30-60). Nonetheless, considerable time passed after the publication of these cases before real changes occurred. Only in the 1990s were various legal documents produced that delineated the duties of the Justices' clerk. The most important one is the *Crime and Disorder Act 1998*, which particularly enlarged the managerial duties of Justices' clerks. To further determine the duties of the Justices' clerks, the 2000 *Practice Direction (Justices: Clerk to the Court)* was issued. This direction also officially records the duties of court legal advisers. It aims to provide more transparency of the manner in which legal advice is given to Magistrates by stating that advice should be presented in open court.[52] Guidelines for the conduct of Justices' clerks and assistant Justices' clerks are currently also available. The latest version, dated October 2007, specifically stresses the independence and impartiality of clerks.[53]

48. In April 2011, there were 26,966 Magistrates, 137 district judges and 143 deputy district judges operating in Magistrates' Courts. Ministry of Justice, 2012, Judicial and Court Statistics.
49. In the past, each courthouse had its own Justices' clerk.
50. Previously called clerk assistants or court clerks.
51. They can only be promoted to one of the few Justices' clerk positions or to a court management function.
52. And advice given in private should be repeated in court.
53. By referring to the *Bangalore Principles of Judicial Conduct*.

Duties of Magistrates' clerks

Formally, all assisting responsibilities in Magistrates' Courts are appointed to the Justices' clerk. In reality, the vast majority of duties in court are delegated to court legal advisers (Darbyshire, 1984; Gibson & Watkins, 2009, p. 80-81). Justices' clerks previously had many administrative duties, but these are currently largely delegated to administrative staff. With the introduction of the *Crime and Disorder Act 1998*, Justices' clerks at present function primarily as court managers. They are also afforded various pre-trial judicial powers that can be exercised by a single justice (Elliott & Quinn, 2009, p. 263). These include extending bail, requesting pre-sentence or medical reports, extending custody time limits and granting legal aid for an appearance in Crown Court. These powers are regularly further delegated to legal advisers.

However, the main duty of Magistrates' clerks remains that of advising the Magistrates on questions of law, mixed law and facts and practice and procedure. Therefore, they are present in court and are frequently called into the retiring room. Their influence is constrained in that they are not permitted to become involved in decisions on matters of facts or in the level of sentence. Yet, Darbyshire's research disclosed that the clerks did not always stay within these boundaries.[54] In court, an important duty is to formulate the court record.

Another remarkable responsibility of Magistrates' clerks is to provide assistance to unrepresented defendants (see Astor, 1986). When a defendant is unrepresented, the Magistrates' clerk is the person in court with the legal understanding to ensure that the defendant receives a fair trial. Their key responsibilities in these cases are to explain to the defendant the course of events in court, the rules of procedural law and what their legal position entails. Though, in this capacity, the clerk should restrain him or herself from acting as a representative.

There is ongoing debate regarding whether or not to expand the tasks of Magistrates' clerks. It has even been suggested that legal advisers be appointed as members of the bench (Cox, 2010). On the contrary, others have argued to restrict their powers (Darbyshire, 1999).

3.2.3 The recently introduced function of Judicial Assistants

In 1997, the function of Judicial Assistant was created at the Court of Appeal of England and Wales. This model was later extended to the UK Supreme Court. Given that Judicial Assistants are a rather new phenomenon, their role is still developing, and relatively little information is available on the specifics of the occupation.[55] For this research, several interviews were conducted with judges and

54. Many clerks would retire with the bench uninvited, even though case law emphasised that clerks should be asked to retire.

55. However, a few publications are (partly) dedicated to Judicial Assistants. See Nesterchuk, 2013; Paterson, 2013.

their assistants to complement the available information (see on these interviews section 2.3.2).

A brief history of Judicial Assistants

Judicial Assistants play an entirely different role than Magistrates' clerks, as they assist experienced lawyers. They also have a much shorter history in the judiciary. The first Judicial Assistants were appointed to the Civil Division of the Court of Appeal in 1997. The Judicial Assistant position was initially presented as a temporary response to the backlog of applications for leave to appeal.[56] In the early years, the courts experimented with different forms of organisation. During the first year, a pool of 16Judicial Assistants was appointed for a period of one year on a part-time basis of two and a half days a week. The following year, in addition to the part-time assistants, some of the Judicial Assistants worked full-time and stayed for three years. From that year onward, Judicial Assistants would also be assigned to one or two particular senior Justices (Jamieson, 1998). Currently, the Court of Appeal offers eight positions for full-time assistants every half a year.

In 2001, the House of Lords[57] followed in the footsteps of the Court of Appeal and also began to employ Judicial Assistants. At first, there were only four Judicial Assistants, who were assigned to the four Senior Law Lords for the duration of one year. When the House of Lords transformed into the UK Supreme Court in 2009, it employed four additional Judicial Assistants, bringing the total to eight (Paterson, 2013, p. 247). Nesterchuk (2013, p. 101) and Paterson (2013) suggest that the changes in quantity and location of the Judicial Assistants facilitated the expansion of their role.

Organisation of the Judicial Assistant system

The Supreme Court currently still employs eight Judicial Assistants to assist its twelve judges, seven assistants with one-year contracts and one with a permanent position.[58] The assistants are either assigned to one of the four senior judges or to two others. The Court of Appeal employs eight full-time Judicial Assistants for a spring or an autumn term of about four months. Hence, each year a judge in the Court of Appeal will be appointed two assistants successively. These assistants are assigned to the most senior judges of the court of 38 judges. The number of Judicial Assistants at these courts is thus limited, compared to the other studied models.

56. It followed the recommendations of the reports by Lord Woolf (1995; 1996) to the Lord Chancellor on the English and Welsh Civil Justice system. Press release, Lord Chancellors' Department, November 28, 1996, http://www.prnewswire.co.uk/news-releases/lord-woolf-to-blitz-court-of-appeal-backlog-158755375.html, visited on 29-04-2014. See also Munday, 2007, p. 458.
57. The UK's highest Court of Appeal before it became the Supreme Court.
58. The latter is a source of information for new Assistants and helps to bring continuity.

Judicial Assistants are selected by their managing judges from bright young (pupillage) barristers and (trainee) solicitors.[59] The managing judge attempt to provide diversity in the professional, educational and cultural background of the assistants. More recently, attempts have been made to match the Judicial Assistants to the preferences of the particular Justices. Some Supreme Court Justices appear to prefer Judicial Assistants who are specialised in an area different from their own, so they can provide extra support in that area (Paterson, 2013, p. 248). There is no training available for Judicial Assistants; they are required to learn on the job.
A position of Judicial Assistant in the Supreme Court has developed into a popular way to enhance one's CV.[60] Nevertheless, a Judicial Assistantship in England is not as coveted as a US law clerkship. This is possibly due to it being a relatively new function of which the benefits of the experience are not yet established. Moreover, young lawyers have to take a year off from practice to fulfil a position, and not all law firms are enthusiastic to provide this permission.[61] It is emphasised by the judges that their assignment is intended to benefit the assistants. The judges, some more than others, will tutor the young lawyers during their court apprenticeship (Paterson, 2013, p. 251).[62]

Institutional embedding of Judicial Assistants and guidelines
Given that Judicial Assistants do not perform any formal legal procedural duties, their position is not recognised in legislation. In fact, hardly anything is recorded regarding their duties. There are similarly no codes of conduct or confidentiality specifically relating to Judicial Assistants. However, the assistants do owe a duty of confidentiality, as covered by the provisions of the *Civil Service Code*. They are additionally bound by the *Official Secrets Act* and the *Data Protection Act*. Judicial Assistants are recognised as being civil servants. Yet, they are headed by the Chief Executive of the court and not directly by the Minister. During the passing of the *Constitutional Reform and Governance Act 2010*, it was made clear that the administration of the Supreme Court (including Judicial Assistants) occupies a special position and is not accountable to the UK Ministers (Arnold, 2014).
The judges who are now appointed an assistant had previously been accustomed to performing their work without any assistance. Therefore, most judges are still investigating how to make the most of Judicial Assistants. The majority of the existing proceedings are informally shaped.

59. At the Supreme Court, the Judicial Assistants are required to be fully qualified. At the Court of Appeal, candidates who have not completed their pupilage or training period are also considered.
60. In 2013, over 300 candidates applied for the seven open positions at the Supreme Court. See *The Times* (London), 14 Okt 2010, 'A supremely good start to your career'. See also 23 May 2013, 'A supreme chance to spend a year with the country's finest legal minds'.
61. These reasons were mentioned by several of the interviewed respondents.
62. See also the judgment of Lord Woolf in the case of Parker v the Law Society [1998] 143 S.J. L.B. 45.

Duties of Judicial Assistants

The duties of Judicial Assistants in the Supreme Court are diverse. They partly serve the court as a whole and partly serve the individual judges (Nesterchuk, 2013). A duty that benefits the entire court is the writing of the press summaries of judgments for publication on the Supreme Court website. Another core task is to provide the judges with memos on petitions to appeal. These memos typically are a maximum of four pages and are aimed at providing the judicial panel with a neutral summary of the case. It has gradually become common for Justices to ask their Judicial Assistants to write additional notes to help them make decisions on granting leaves to appeal and to prepare for the hearings (Paterson, 2013, p. 249). These notes usually reflect the views of the Assistants. The Judicial Assistants who are involved in writing memos also acquire the opportunity to attend the petition to appeal hearings, which take place in private with a panel of three judges. At the end of the hearings, when the judges have reached their decision, Judicial Assistants are occasionally invited to present their views. According to Nesterchuk, on one or two occasions, a plea at the end of the hearing actually changed the minds of the Justices and resulted in the appeal being granted (Nesterchuk, 2013, p. 106). However, this is not common practice.

An additional duty of most Judicial Assistants is to perform legal research. The types of research questions vary among justices and are often open-ended. Assistants are also encouraged to attend related hearings to become familiar with issues that arose during oral argument.

Finally, Judicial Assistants can contribute to adjudication by discussing cases with judges. Not all judges appear to employ their Judicial Assistants in this manner, but several indicated this as an important duty; these judges emphasised the benefits of thinking out loud and taking note of the views of Judicial Assistants (Paterson, 2013, p. 251-252). Some judges also send draft judgments to their assistants for comments (Paterson, 2013, p. 251), but the judges make very clear that Judicial Assistants are not allowed to individually draft judgments.

Judicial Assistants can also be of benefit to judges by providing them with information regarding events happening in the courthouse. A Judicial Assistant-network, similar to the US law clerk-network, does not exist. Though, as the Judicial Assistants work together in one room, they often are well aware of what is going on in the Justices' chambers.

The duties of Judicial Assistants in the Court of Appeal resemble those of their counterparts in the Supreme Court in many ways, although in the Court of Appeal, a similar number of assistants must be shared by a considerably larger group of judges. It is also expected that Judicial Assistants in the Court of Appeal will spend more time on preparing petition memos, as the court deals with about 20 times as many petitions to appeal.[63] Another difference is that in the Court of Appeal, Judi-

63. See Ministry of Justice, 2012, Judicial and Court Statistics 2011.

cial Assistants are also invited to attend the private deliberation meetings of the judges before and after hearings. At these meetings, the assistants will occasionally be asked to elaborate on their views regarding a case.[64] Because there are fewer Judicial Assistants per judge than at the Supreme Court, the assistants primarily assist the senior judges.

3.3 Distinguishing features of the judicial assistance models

The previous section reveals that although judicial assistants' functions are similar in certain respects, the judicial assistance models retain their individual characteristics. The conclusion of this chapter will discuss several parallels in the models. In order to draw conclusions about the models, this section first distinguishes six key features by which assistance models can differ. These features determine the position judicial assistants can occupy in various court settings and their prospects to wield influence. The cited features were demarcated as key features after having analysed and compared all models included in this chapter.[65]

Table 2 Features on which judicial assistance models can be distinguished

Distinguishing features
Reasons for employing judicial assistants
Ratio of judicial assistants to judges
The qualifications of judicial assistants and the terms of their employment
Duties of assistants and their participation in various stages of the judicial process
Judicial assistants' assignment to individual judges or the entire court
Judicial assistants working with professional or lay judges

3.3.1 Reasons for employing judicial assistants

The first aspect that determines the judicial assistants' position is the reasoning behind employing them. With regard to US law clerks, the increase in caseloads is the most frequently cited reason for the creation of law clerk positions and for continuing to expand their numbers.[66] It is also cited as a motivation for the increased allocation of duties to law clerks (Cohen, 2002, p. 9; McCree, 1981; Rubin, 1980). This is essentially a motive based on efficiency, as employing assistants is assumed to save judges time. It enables them to handle more cases than would be possible without assistance. The Dutch judiciary is also increasingly focused on the efficiency of adjudication. The creation of guidelines which delineate the time that

64. However, given that they have already laid out their views in the bench memo, this rarely occurs.
65. In order to do so, a selection was made. Other feasible features can also be recognised.
66. According to Bieri, 2016, this is also the main reason for increasing the number of law clerks in Switzerland.

judges and assistants are allowed to spend on cases, reveals a consciousness about the economic benefits of employing assistants. A backlog of applications for leave to appeal was also cited as the main reason for starting to employ Judicial Assistants in England and Wales. Magistrates' Courts have also been repeatedly evaluated on their costs, but these studies appear to focus on the (in)efficiency of the employment of lay judges instead of professionals and not on the clerks (see e.g. Morgan & Russell, 2000).

Ward and Weiden (2006, p. 5) conversely state that the establishment of the law clerks position is actually an outgrowth of the apprentice model of legal education. The Dutch judicial assistant model also originated in an apprenticeship model for becoming a judge, but this model was abandoned in the 1950s. From then on, the educational element seems to have vanished. Currently, this is of relatively little importance, just as it is for Magistrates' clerks. The apprentice component and the unique experience of gaining a deeper understanding of judicial decision-making are currently regularly mentioned by law clerks and by Judicial Assistants as reasons for applying for the position. Judges emphasise this aspect as well (see Paterson, 2013, p. 251; contributions to Peppers & Ward, 2012).

A third motive for employing judicial assistants is their plausible contribution to the quality of adjudication. Research contributions of assistants and their involvement as sparring partners can undoubtedly be seen as endeavours to support the improvement of judicial decision-making. All of the studied assistants seem to perform these duties to a certain degree. Most assistants,[67] for instance, present their views on cases in memos, which can serve as vehicles for discussion. Dutch judicial assistants are frequently also involved in the discussion during deliberation sessions. Law clerks and Judicial Assistants primarily serve as sparring partners for the individual judges in their chambers. Yet, the impact on the legal quality is perhaps most obvious at Magistrates' Courts, where it is the responsibility of the clerks' to advise the Magistrates on questions of law.

Finally, judicial assistants in the Netherlands and Magistrates' clerks also perform several administrative and recording tasks independent of the judge. Ensuring that these tasks are performed is an additional reason for employing the assistants.

The prospect of greater involvement and, feasibly, influence of judicial assistants in adjudication is likely to be prominent when assistants are employed for efficiency reasons. Especially when this entails that judicial assistants are allocated many duties and the number of assistants per judge is high (see next section). When assistants are employed for reasons of quality improvement, it is intended that they also have a certain influence on the content of judgments, which is not the case for performing administrative assistance.

67. Magistrates' clerks are an exception.

3.3.2 Ratio of judicial assistants to judges

Another aspect in which judicial assistance models differ substantially is the ratio in which judicial assistants are employed. Employing larger numbers of assistants increases the likelihood of them being highly involved. Judges in that situation have less time to perform various duties themselves or to carefully check the work of the assistants, as they are mostly busy supervising and coordinating the assistants (R. A. Posner, 1985, p. 103-104; Vining, 1981, p. 251).
In the Dutch district courts and criminal and civil Courts of Appeal, judicial assistants generally slightly outnumber the judges. This ratio of assistants to judges is in between the ratio in the US (where the largest numbers of laws clerks are positioned at the top of the judiciary)[68] and the highest courts in England and Wales. It is remarkable that the US judiciary has evolved into a system with high reliance on law clerks at the highest-level courts (every Supreme Court Justice has four personal law clerks),[69] while the highest court judges of its predecessor system in England and Wales did not adopt any judicial assistance until very recently. At present, the English Court of Appeal (38 judges) and Supreme Court (12 judges) still both employ a modest eight judicial assistants, resulting in English and Welsh judges having to perform most of the work themselves. This is different from Magistrates' Courts, where every panel of Magistrates is assisted by one Magistrates' clerk to provide them with legal advice, which is rather similar to the Dutch situation.

3.3.3 The qualifications of judicial assistants and the terms of their employment

The study of judicial assistance models in this chapter highlights roughly two types of judicial assistants in relation to terms of employment, experience and credentials. The first type is referred to as the career assistant. This type is represented by Dutch judicial assistants, in particular at the lower level courts, and by the Magistrates' clerks. These judicial assistants are not necessarily young lawyers; they can be seniors as well. Moreover, they are employed by the courts for an indefinite time. In the past, these assistants would typically not be legally qualified, but both judiciaries tightened the entry requirements, and currently, most new assistants are qualified lawyers.
The second type, referred to as the temporary assistant, is represented by the US law clerks and English Judicial Assistants in the Courts of Appeal and Supreme Court. These are young, recently graduated lawyers who typically only occupy the position for a brief period of time. The choice for temporary assistants serves several purposes. First, it is considered an important check for preventing the assis-

68. Lower courts do employ different types of assistants.
69. Judges at other federal Courts and State Highest Courts have about two to three judicial assistants. See Swanson & Wasby, 2008, p. 26; Cohen, 2003, p. 87.

tants from gaining too much influence, given that the short-term law clerks will never fully master the job and therefore will not be able to build up considerable power (Peppers, 2006, p. 207-208; Ward & Weiden, 2006, p. 36). In addition, an important motivation for employing recent graduates is that these assistants can present the judges with the latest academic insights on recurrent discussions (Oakley & Thomson, 1980, p. 67; Ward & Weiden, 2006, p. 48). By providing young lawyers the opportunity of a rather short clerking experience, the justices also assure themselves of getting the best students who are willing to work exceptionally hard during their year of employment.[70] It also fits the concept of the position as an apprenticeship.

However, temporary assistant positions entail spending large amounts of time and effort on selecting and training new assistants. Selecting new assistants each year also comes at the expense of continuity in the assistance model and of building expertise. Career assistants, such as the clerks at Magistrates' Courts and the specific assisting position of staff lawyer in the Dutch judiciary, are employed for their legal knowledge and extensive experience. Furthermore, Dutch staff lawyers are, every so often, involved in producing court policies. Since these judicial assistants are increasingly legally qualified, their knowledge can contribute to creating high-quality judicial decisions. Though, in the Dutch as well as the English and Welsh systems, a lack of career perspectives is observed. This can result in well-qualified judicial assistants leaving the judiciary for better job opportunities elsewhere. Experienced assistants also stand in a powerful position in relation to judges. Regarding Magistrates Courts, Astor clarifies:

Most lay Magistrates spend half a day, or a day, in court once a week or once a fortnight. They are, in a sense, regular visitors to a complex organisation which they play little part in running. It is the Clerk to the Justices and the Clerk's staff, who control this organisation and who ensure that the hundreds of cases scheduled to be dealt with each day are properly processed (Astor, 1984, p. 3).

To a lesser degree, this can also be the case in the Netherlands, in particular in relation to new judges. Evidently, this introduces the risk of career assistants having too much influence and judges relying too much on their expertise, thereby preventing judges from fully considering the merits of cases themselves (see also Kenney, 2000, p. 619). The potential occurrence of this is elaborated on in the empirical chapters (5, 6 and 7) of this book.

70. Oakley & Thomas (1980) discovered that judges agree that career clerks are not of the same quality as short-term clerks.

3.3.4 *Duties of assistants and their participation in various stages of the judicial process*

When comparing the duties of judicial assistants, those of the Dutch assistants seem to be the most wide-ranging, as duties of Dutch assistants generally include participation in all stages of the judicial process. A historically important responsibility of Dutch judicial assistants is that of creating the court records. In the US and England and Wales (except for in Magistrates' Courts), administrative staff perform this duty. Dutch assistants have, over the years, also attained an important role in the preparations for hearings and in drafting judgments, thereby also becoming involved in the content of judicial decision-making. US law clerks are also, to a large extent, involved in performing these duties. In the Supreme Court, their role is particularly far-reaching in the process of deciding what cases will be reviewed (the certiorari process), a feature which is not part of the Dutch mandatory review system. As mentioned in the introductory chapter, using memos prepared by assistants (in the review process or in preparation for the hearing) can result in judges no longer being directly confronted with the plurality of claims of the parties but, rather, receiving a representation of the case from the viewpoint of a subordinate (Hol, 2001, p. 99; Kronman, 1993). This is likely to affect the judges' decision-making (see Guthrie, Rachlinski, & Wistrich, 2007). Drafting judgments also provides the assistants with potential room to influence the decision-making, and it could potentially change the entity of judicial decision-making (see section 1.2). In the studied US courts, it is strictly forbidden for anyone other than the judges to enter the deliberation room. This rule limits the actual influence as well as the appearance of law clerks wielding influence. This is different for Dutch judicial assistants, who regularly participate in deliberations (see more in section 6.1).

The duties of the two types of English judicial assisting staff members are different in many ways. The Magistrates' clerks play a key role in the courtroom and during deliberations. Darbyshire made the interesting observation that various court actors viewed court clerks to be more in control of the proceedings than the chair of the Magistrates' panel (Darbyshire, 1984, p. 151-183). Magistrates' clerks are also afforded various pre-trial judicial powers, for instance, related to case management. According to Darbyshire (1999), this extends the role of the Justices' clerk too much.

Judicial Assistants assist judges primarily in preparing memos for applications for leave to appeal and, to a lesser degree, in preparing bench memos and acting as sounding boards. Although the function of Judicial Assistant is less than 20 years old, during its existence, the duties have expanded, and the contribution of Judicial Assistants to the decision-making process seems to have increased (Paterson, 2013, p. 253-257). In England and Wales, judges appear to be less rigorous about the presence of Judicial Assistants at deliberations than in the US. However; they are

more restrained in having assistants play a part in drafting judgments.[71] Although the Judicial Assistant model was loosely based on the US law clerk model (Jamieson, 1998; Munday, 2007), there is a strongly held belief among judges in England and Wales that Judicial Assistants should not attain the influence that American Law Clerks appear to have (see Paterson, 2013, particularly the footnote at p. 256).

3.3.5 Judicial assistants' assignment to individual judges or the entire court

In common law judiciaries, adjudication by appellate court judges is more strongly perceived as a personal endeavour (e.g. by being able to display their individual views on cases through dissenting and concurring opinions), whereas in civil law judiciaries, judges are, to a larger extent, regarded as anonymous representatives of the court. This circumstance is reflected in the manner in which assistants are employed in these jurisdictions. That is, in the Dutch judiciary, the majority of judicial assistants work with various judges, which provides the assistants with a broad overview of how judges of the court adjudicate. This setup possibly also results in the assistants being extra concerned with upholding organisational aims, such as court efficiency (see Astor, 1986; R. A. Posner, 1985, p. 133). In the US, law clerks are assigned as individual assistants to the judges rather than as assistants to the entire court. England and Wales began their Judicial Assistant model by constructing a pool of assistants available to all judges; however, soon after its creation, assistants were assigned to individual judges. In that situation, judges are afforded better opportunities to monitor their assistants. Peppers, for instance, indicates several monitoring mechanisms which US Supreme Court justices apply to control the work of law clerks and to prevent them from shirking or wielding undue influence (Peppers, 2006, p. 206-212). This type of arrangement also creates a situation in which assistants frequently have personal relationships with their judges. This enhances their loyalty to the judges (Peppers, 2006, p. 211), and it can cause judicial assistants to primarily associate themselves with professional judicial values held by their judge and be less concerned with organisational aims.
Similar to most Dutch judicial assistants, English Magistrates' clerks are not assigned to a specific judge. Astor observes a process of balancing organisational aims and procedural rights and legitimacy, which Magistrates' clerks experience when assisting unrepresented defendants (Astor, 1986). In all judicial systems, the judicial assistants are employed by the judicial service. As a consequence, the management of the court has more power over the assistants than over the judges, who obtain special provisions to ensure their independence.

71. Several judges and Judicial Assistants with whom I spoke emphasised this.

3.3.6 *Judicial assistants working with professional or lay judges*

Being an assistant to panels consisting exclusively of adjudicators without legal training marks the position of Magistrates' clerk as a rather unique one. It is exceptional to have adjudication exclusively by lay judges; most countries that employ lay participation utilise systems that cluster lay and professional judges (Malsch, 2009). In the English and Welsh system, it is the judicial assistant who is required to enhance the legal knowledge of the panel. This is different from judicial assistants who work with professional judges, such as the Dutch judges; in that situation, the judges normally retain more legal knowledge than their assistants. A study revealed that Magistrates' justices seek advice more frequently than the professional district judges, and Magistrates regard the contribution of legal advisers more highly, as well (Morgan & Russell, 2000).[72] Their superior legal knowledge combined with their greater experience with court procedures provides Magistrates' clerks with unique room to wield influence, which is very different from systems in which assistants support professional judges. Given that Magistrates' clerks provide legal advice to justices who are not legally qualified, it seems that decisions on law and procedure *'[are] invariably that of the clerk'* (Darbyshire, 1984, p. 223).

3.4 Conclusion

This chapter offers a reflection on the Dutch judicial assistance models by comparing the models to models that exist in the US and England and Wales. This serves the purpose of better understanding the manner in which the judicial assistants' involvement in judicial decision-making is institutionalised. The study of the different judicial assistance models revealed a great difference in the organisational structures of the assistance. The duties of the studied judicial assistants were also found to vary, although many duties are actually remarkably similar. This chapter also contributes to the understanding of how different judicial systems attempt to diminish the risk of assistants being too influential in judicial decision-making. This seems to be an issue which all systems are struggling with, to a greater or lesser extent, even though the concerns partly concentrate on different aspects of the decision-making (e.g. in the US, participation in deliberation sessions is particularly inconceivable, while English and Welsh High Court judges consider participation in judgment drafting as inappropriate).

Limited regulations regarding judicial assistants

A remarkable observation – which appears to hold for all the studied models – is that the involvement and responsibilities of judicial assistants are rather scarcely

72. For similar conclusions regarding clerks in Spanish jury trials, see Jimeno-Bulnes and Hans, 2016.

mentioned in legislation and official policy documents. The majority of the assistants' duties are informally established. Possible mechanisms to prevent assistants from exercising too much influence are generally also not cited as such in official policy (although the development of certain guidelines and codes of conduct seems to be a response to events in which judicial assistants appeared to act outside of their powers). This limited regulation might be related to the sensitivity which exists regarding an extensive involvement of judicial assistants in judicial decision-making (as described in section 1.2). A more elaborate discussion of this matter (performed after comparing the information from the official Dutch regulations on judicial assistance to the empirical findings of this research) can be found in section 8.1.2.

The shortage of official regulations, however, makes understanding the involvement of judicial assistants in judicial decision-making – and the benefits and pitfalls related to this involvement – difficult. This is particularly true for judicial assistant systems on which little research has been conducted, such as in The Netherlands and England and Wales. This issue has become increasingly problematic as, partly due to worldwide concerns with regard to the efficiency of adjudication, the involvement of judicial assistants in most systems seems to have increased over time (see section 1.1).

Features which affect the potential to have influence

The search for features that define the judicial assistance models has shown that certain features of assistant positions result in further-reaching involvement of judicial assistants in the decision-making than others. A greater involvement of assistants is also accompanied by a larger potential for the assistants to have room to influence the judicial decision-making. This is the case, for instance, when a large number of assistants are employed or when assistants are highly qualified and experienced. Other features shield judicial systems from too much allocation of duties to assistants; for example, employing assistants on a temporary basis and the employment of young and inexperienced assistants. Each model includes its own individual mix of features that, on one hand, enable judicial assistants to make a contribution to the efficiency and quality of the judicial process, and on the other hand, contain safeguards to prevent assistants from gaining too much power.

For further analysis and evaluation of the Dutch judicial assistance models, and to understand what the empirical findings of the research mean to other judicial systems, it is important to be aware of the specifics of the different systems and their effects on the judicial assistants' involvement. Furthermore, it is important to understand that the models consist of bundles of features which have been shaped within specific judicial and societal contexts. Judicial systems should be cautious of cherry picking features from other judicial systems, as these features might not be transferable into their system without adjustments.

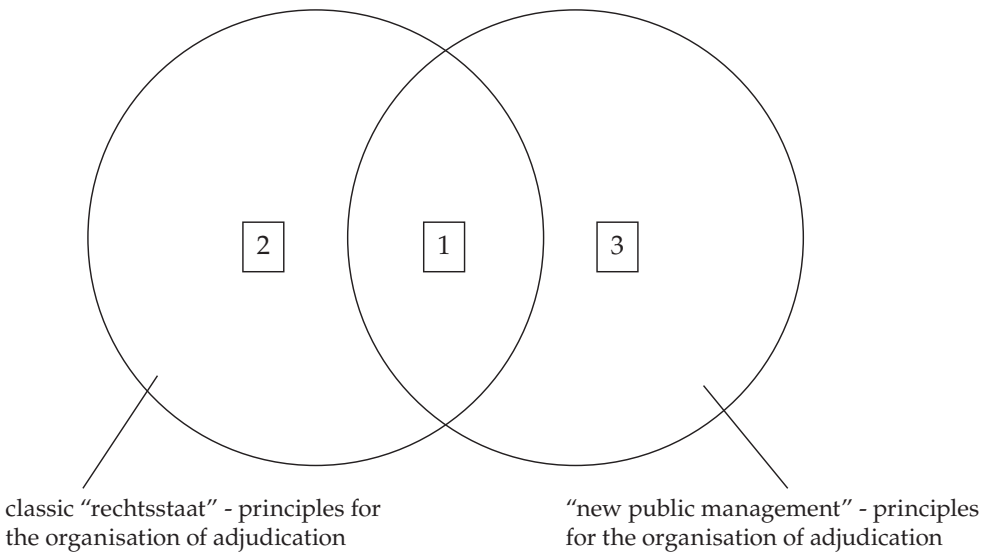
4 Normative viewpoints on the involvement of judicial assistants: the rule of law versus the managerial perspective

This chapter aims to determine the normative stances that can be taken when evaluating the values and risks of employing judicial assistants. It also explores how the principles and values related to these normative ideas are incorporated into the law and policy in Dutch courts. In order to accomplish this, this chapter introduces two perspectives which can help to better illuminate the organisation of the judiciary: the (classical) rule of law perspective and the (novel) managerial perspective. The first offers a classical legal theoretical perspective on adjudication, based on principles and values that were established during a century-long history, particularly shaped through theories founded during the period of enlightenment. The second perspective provides newer – somewhat more controversial – insights, largely from economic theory regarding organisations, which arose particularly in the second half of the 20th century as a response to a widely held belief that court organisation needed to better reflect the needs of modern society.
Both perspectives are present in the normative debate on how the judiciary should function. They also provide ideas regarding how the judiciary should be organised in order to best meet the connecting principles. The principles related to these perspectives have provided important guidance for the manner in which the Dutch judiciary is organised. Many provisions in Dutch law regarding the institutional establishment of the judicial process and the judiciary find their origins in the notion of the rule of law; managerial views on the judiciary can particularly be recognised in recent policy documents and projects of the Dutch Council for the Judiciary, as well as individual courts.

The manifestation of a modern, managerial perspective alongside the traditional rule of law model in the judicial organisation has been previously observed by various authors. Mak (2008a; 2008b) and Ng (2007) were among the first to explicitly recognise this development in the Dutch judiciary. The movement towards managerialism can largely be acknowledged as a response to the traditional, elitist and out-dated manner in which the Dutch judiciary was organised, which caused an inefficient judicial organisation that was far removed from the larger public (see Boone, Kramer, Langbroek, Olthof, & Van Ravesteyn, 2007; Brommet, 2002).

A development towards managerialism was also identified in jurisdictions outside the Netherlands prior to the research on the Dutch judiciary, for example, in the US by Resnik (1982) and Heydebrand and Seron (1990, p. 194-204) and in Australia by Freiberg (2005). It was also recognised in European jurisdictions such as England and Wales (Raine & Willson, 1995; Raine & Willson, 1997), France (Mak, 2008b) and Belgium (Vining, 1981).
The values and principles connected to the two perspectives are not incompatible but partly overlap and could mostly supplement or consolidate each other. Yet, regarding certain principles, tensions are palpable (see Mak, 2008b, chapter 3). This is clearly illustrated by Mak in the figure below.

Figure 1



1: legitimate based on the classic "rechtsstaat" and "new public management"
2: legitimate based on the classic "rechtsstaat" but not on "new public management"
3: legitimate based "new public management" but not on the classic "rechtsstaat"

Mak (2008), p. 100. Simplified version, translated from Dutch by Holvast.

While governments and court organisations have rather enthusiastically incorporated managerial interpretations into court administration, pointing to its positive effects on the number of handled cases, a major portion of the academic literature concerning this topic problematises the recent rise of managerialism in courts. The literature points particularly to conflicts that could arise between the two perspectives. Authors seem especially concerned about the risks of too-extensive managerialisation of the courts, which could result in the erosion of certain rule of law val-

ues by the new managerial values (see on the crisis of the rule of law Heydebrand & Seron, 1990, p. 194-206). Resnik (1982) recapitulates:

> *Management is a new form of 'judicial activism,' a behavior that usually attracts substantial criticism. Moreover, judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions. Finally, because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. In short, managerial judging may be redefining sub silentio our standards of what constitutes rational, fair, and impartial adjudication.*

Concerns are not raised only by academics. With managerial values gaining an increasingly important role in court organisation in the Dutch judiciary (see section 4.1.2), a sizeable group of Dutch judges recently exposed their discontent with the direction in which the judiciary is heading. In 2012, justices of the Court of Appeal in the northern city of Leeuwarden created a manifesto[1] in which they proclaim that courts are increasingly managed like large companies that prioritise output to other values. They fear negative consequences for the internal independence and quality of adjudication (see Holvast & Doornbos, 2015). This manifesto was signed by approximately 700 out of a total of 2,500 judges and was supported by the President of the Dutch Supreme Court.[2] Although these concerns regarding the excesses of managerialism are prominently present within the Dutch judiciary, managerial values such as efficiency and social relevance are also acknowledged and endorsed by the present-day Dutch judges to be worth striving for (see Frissen, 't Hart, de Hoog, van Oorschot, & Chin-A-Fat, 2014, chapter 4).

While the scope of the debate regarding the desirability of managerialism of courts is much broader than the issue of the allocation of duties to subordinates, the two perspectives are presented in this chapter primarily for their relevance to the discussion on the collaboration between the judge and the judicial assistant.
The potential issues that can arise when managerialism is applied in a far-reaching manner are acknowledged. Yet, the motives for taking a more managerial approach to the judiciary are also acknowledged. This book embraces the idea that both perspectives can provide valuable parameters for shaping and evaluating the judiciary, thereby following other authors (Mak, 2008b, p. 95-101; Vining, 1981, p. 248) in their accountings that it is important to balance both perspectives and to incorporate safeguards to avoid the clashing of the values related to the perspectives.

1. Published in *Trema*, February 2013.
2. 'The Netherlands' top judge warns of legal system overload'. February 4, 2013. See: http://www.dutchnews.nl/news/archives/2013/02/the_netherlands_top_judge_warn.php#sthash.MdZugORQ.dpuf

Section 1 elaborates on the normative ideas underlying the rule of law perspective and the implementation thereof in legislation and court policy. Section 2 does the same for the managerial perspective. In section 3, a theoretical evaluation of the potential involvement of judicial assistants based on the two perspectives follows.

4.1 The rule of law perspective on the judiciary[3]

The historically leading normative stance for understanding the position of judges and judicial assistants in Western societies is to identify their position from a rule of law (or rechtsstaat) perspective. This perspective views the judge – the core adjudicator – as being the personification of the judiciary,[4] one of the three independent branches of the government. From a rule of law notion, the position of the judicial assistant is a less apparent one. Although the assistant is employed by the judiciary, he or she is not, as is the judge, appointed with the special duty to administer justice. In many jurisdictions, the assistant does not have any formal responsibilities in the judicial process. In the Dutch judiciary, the assistant does have some formal procedural duties, and he or she also has the important responsibility of making the official reports of what occurs during the hearings. Still, it is clear that, formally, the assistant does not have any adjudicational responsibilities; adjudication occurs under the sole authority of the judge. This does not mean, however, that the judicial assistant does not play an important role in court practice (see chapters 5, 6 and 7).

4.1.1 The notion of rule of law

The notions of the *rechtsstaat* and the *rule of law*, in essence, stand for a similar idea, but they originate in different jurisdictions: the rule of law under the common law tradition and the *rechtsstaat* under the civil law doctrine.[5] The early foundations that shaped the notions were laid during the classic times and the middle ages (see Tamanaha, 2004, p. 7-31), particularly in England, with the creation of the *Magna Carta* in 1215. However, the ideas only reached their full scope with the birth of liberalism in the 18th century. It is important to understand the notion of the rule of law within this context, as it underscores that the essence of this notion lies in the protection of individual liberty, which only allows limited and controlled interference from the government in the lives of citizens. The role of the judiciary is – in this setting – primarily to protect this liberty (Tamanaha, 2004, p. 32-33). In Eng-

3. This section is partly based on the article "Considering the consequences of increased reliance on judicial assistants: A study on Dutch courts". *International Journal of the Legal Profession*, 20(1), 39-59, 2014.
4. This view is particularly leading in civil law jurisdictions.
5. This results in the notion of the rechtsstaat – developed under the civil law doctrine with written constitutions – being slightly closer linked to constitutionalism, whereas rule of law focuses more on legal procedure (Chesterman, 2008, p. 336–338).

land, the work of Locke (1690) was especially important in the development of the notion of the rule of law. In the United States, the Federalist Papers (1787–1788) were essential. For the Dutch judiciary – which is rooted in the French legal system – the ideas of the French thinker Montesquieu (2006 [1748]) on the separation of state powers were key.[6]

However, the rule of law is, in itself, 'an essentially contested concept' (Waldron, 2002, p. 15). Various versions and definitions of this concept circulate at present. To understand the differences in the versions, Tamanaha (2004, p. 91) makes a distinction between formal and substantive versions on the one hand, and thinner and thicker versions on the other. In its most basic (formal and thin) interpretation, the rule of law functions as a restriction of the power of the government by stating that the government should rule through law and that everyone, including the government itself, is bound by the law (see e.g. Hayek, 1944, chapter 6). This is often explicated by the expression 'government of law not man'. This formal definition of the rule of law does not require any form of morality of the law.[7] Most authors who endorse this version believe that it requires some (minimum) standards for the legal system. The rule of law, in their view, is driven by the principles that laws should be prospective, open and clear and that the same should account for the process of making the law (Fuller, 1964, chapter 2; Hayek, 1944, chapter 6; Raz, 1979, p. 214-216). This version of the rule of law, most importantly, requires an independent judiciary, but it also sets some additional standards for the judiciary and judges, which are elaborated on below.

Thicker formal versions commonly include democracy in the concept of rule of law. According to Habermas (1995), formal legality loses its legitimacy without democracy (see Tamanaha, 2004, p. 99). Only when the law is made through pursuant democratic procedures it is a 'good' law. However, democratic legitimacy is still 'merely' a formal requirement which does not offer any indications regarding the morality of the legal system (see Tamanaha, 2004, p. 99–101). Substantive theories, conversely, also include content specifications. Most common theories include individual rights or human rights in the concept of the rule of law, as, for instance, Dworkin (1985) does (see Tamanaha, 2004, p. 102). These rights are recorded in various treaties and declarations, the most significant of which is the European Convention on Human Rights (ECHR). Also in relation to a thicker version of the rule of law, the ECHR, Article 6 (the right to a fair trial), Article 7 (no punishment without law) and Article 13 (right to an effective remedy) are of particular relevance.

6. Although the Dutch judiciary is one which is developed under the rechtsstaat principle, this book uses the term *rule of law*. Most literature regarding the conceptualisation is developed by reference to the rule of law, which is frequently used as the English term to translate the concept of the rechtsstaat in international treaties. Therefore, and for reasons of coherence, the term rule of law will be used.
7. In fact, according to Raz, 1979, chapter 11, any non-democratic legal system based on the denial of substantial human rights can fall under this definition.

The Dutch legal system is generally indicated as being a 'democratic rechtsstaat' (see e.g. Burkens, Kummeling, Vermeulen, & Widdershoven, 2012). The Dutch version of the democratic rechtsstaat is typically identified as one that includes a democratic procedure to make the law and the perception of the protection of human rights being an imperative aspect of the legal system. Different to other judiciaries, the democratic legitimation in the Netherlands exists exclusively within the legislative and executive power. Dutch judges are, for instance, not elected, and they are in fact primarily regarded as neutral interpreters of the law. There is no constitutional court in the Netherlands; in fact, constitutional review is prohibited. Human rights protection is also incorporated into the Dutch legal system via the constitution and other statutes. The Netherlands, furthermore, is a member state of various international conventions on human rights, including the ECHR.

Returning to the topic of this book, it can be stated that the issue of the employment of judicial assistants and the delegation of certain judicial duties to these assistants relates to even the most basic (or thinnest) notions of the rule of law. According to this perspective, furthermore, the legal profession should consist of lawyers – and especially judges – who are competent and knowledgeable about the law, the legal system and its procedures (see Tamanaha, 1999, p. 58–59). Various provisions are commonly included in judicial systems, such as the Dutch one, to assure that these standards are met. In some instances, these provisions relate to the judiciary as a whole (and include all its employees). However, a large part of the provisions are mainly and most firmly related to the judge.

4.1.2 Rule of law principles incorporated into the Dutch judicial organisation

This section explores which provisions concerning judges and judicial assistants in the Dutch judicial system are derived from the notion of rule of law.

Rule of law principles within the institutional arrangement of the judiciary and the judicial process

First, the principle of an independent judiciary implies that judges who administer justice are to be independent of the government and without bias towards any particular societal group. To ensure the independence, impartiality and integrity of the judiciary, several legal provisions are incorporated into Dutch law to prevent other governmental branches from interfering with the process of adjudication. As a member state of the ECHR, the Netherlands has to comply with Article 6 of the convention, which ensures the right to a hearing by an independent and impartial tribunal established by law.

With regard to the institutional independence of the judiciary, the Dutch Constitution names the judiciary as a separate branch of the government. Additionally, Article 116 sub 4 states that the supervision of judges should be an internal affair,

thereby limiting the opportunities for the executive branch to exert control over the judiciary. The organisation and administration of the judiciary are further codified in other acts, most significantly in the *Judiciary Organisation Act*. To prevent undue interference of the Minister of Justice, Article 109 prohibits the Minister from interfering in procedural case management or decision-making in court cases. The internal independence of individual judicial officers from other parts of the court and government is further safeguarded by two articles (Article 23 sub 3 and 96 sub 1), which stipulate that the board of the court and the Council for the Judiciary are prohibited from interfering in procedural case management or decision-making in cases.[8] These articles accentuate how important the independence of the adjudicator is considered to be.

The aforementioned legal provisions do not distinguish between judges and other judicial officers. Several more specific regulations do. The most outstanding differences between judges and judicial assistants can probably be found in the terms of appointment and dismissal. A fixed period of tenure and strict terms for dismissal are important mechanisms to ensure the independence and autonomy of a judge (Tamanaha, 1999, p. 124). In the Netherlands, all judges are life-tenured (Article 116 of *the Constitution)*.[9] Judges can be dismissed only in a restricted set of situations codified by law. The Dutch Supreme Court is the body that exercises the deciding vote in this matter (see Bovend'Eert, 2000; De Lange & Mevis, 2005). This unique legal status confers to a judge a position that fundamentally differs from that of a judicial assistant. Judicial assistants are regarded as classic public officers, for whom normal conditions for employment and dismissal apply. This indicates, for example, that they can be employed under temporary contracts which will not routinely be renewed. Considerations regarding the effect that short-term contracts could have on the independence and impartiality of judicial assistants do not seem to play any part in the formation of these contracts.

To further guarantee that judges act impartially, Dutch law provides them with the opportunity to disqualify themselves from proceedings when their impartiality is in doubt. Similarly, litigants are granted the opportunity to request the recusal of a judge when legitimate doubt concerning his or her impartiality exists.[10] To prevent litigants from exerting influence on a judge, Article 12 of the *Judiciary Organisation Act* stipulates that it is prohibited for judges to establish contact with litigants outside of the court during proceedings. When a judge violates this rule, a disciplinary

8. Even though a questionable issue is whether this provision offers sufficient protection, given that the *Judiciary Organisation Act* also assigned the Minister and the Council for the Judiciary wide-ranging tasks in the management of courts. See Bovend'Eert, 2008, p. 26–27.
9. Which effectively means that they can administer justice until they are 70 years old (Article 46h of the *Judicial Officers Legal Status Act*).
10. Each court has its own protocol for this. An example of the most common protocol can be found in the recommended protocol: Aanbeveling wrakingsprotocol gerechtshoven en rechtbanken (2006).For removal, the judge must pass subjectivity and objectivity tests in accordance with the case law of the ECHR. See ECHR, *Daktarasvs. Lithuania*, 2000, paragraph 30.

sanction can be imposed (Article 46c of the *Judicial Officers Legal Status Act*). Judicial assistants can similarly withdraw from a case when they consider it necessary. However, litigants do not have the privilege of asking for the recusal of a judicial assistant.[11] This has been confirmed in judgments of Dutch courts.[12] Furthermore, the guideline on impartiality (and extra-judicial functions) for judges and judicial officers (*Leidraad onpartijdigheid en nevenfuncties*, 2014) specifically recommends that judges withdraw from handling cases in several occasions, for example, when they are personally related to a litigant or when their extra-judiciary functions could make them appear biased on the matter at hand. These recommendations are not cited to be applicable to judicial assistants. This exemplifies fairly well how the appearance of the impartiality of a judge is regarded as truly important, whereas the appearance of impartiality of a judicial assistant, due to their more limited role, seems to be considered less relevant.

It is questionable whether this attitude holds under international treaty law. In the 2011 case of Bellizzini versus Malta before the ECHR,[13] the impartiality of the court was questioned due to the participation of someone who was a judicial assistant during the hearing of the case. The assistant had previously participated on the team of defence lawyers of the same case while employed at a law firm previous to his appointment as judicial assistant to the court. The court reasoned that: *'while court officials are not impervious to the requirement of impartiality, the applicability of this condition is dependent on the specificities of the role of the court official in question within the domestic legal and judicial.'* Regarding the Maltese judiciary, where tasks of judicial assistants can be quite far-reaching, this meant that: *'the tasks entrusted to a judicial assistant in the Maltese system may be of important significance to the judicial process, and consequently, an individual performing the abovementioned tasks must be impartial for the proceedings to be Article 6 compliant.'* It is unclear what tasks are precisely significant enough to require the principles established in the Court's case law to be applicable to judicial assistants, but preceding case law suggests that the writing of memoranda by judicial assistants could be among these tasks (see also De Groot-van Leeuwen, 2015).[14]

Although there is no legal provision for a litigant to have a judicial assistant removed from a case, all Dutch courts have implemented a procedure for handling complaints concerning the treatment of litigants by court employees. Furthermore, it is interesting to remark that, given that judges are prohibited from contact with litigants outside of the hearing, all the exchanges necessary for proceedings are carried out by their judicial or administrative assistants (see section 5.2.6). This makes

11. See also Aanbeveling wrakingsprotocol gerechtshoven en rechtbanken (2006), p. 2.
12. See Hof Arnhem, 6 July 2010, ECLI:NL:GHARN2010BN1679, Court of Alkmaar, 22 July 2010, ECLI:RBALK:2010:BN4880.
13. ECHR, 22 June 2011, Bellizzi v. Malta, 46575/09.
14. See also EHCR 13 October 2009, Huuhtanen v. Finland, no. 44946/05.

assistants more vulnerable to being influenced by a given party and results in the concerns regarding their impartiality being more compelling.

Another way to safeguard the judiciaries' independent position is by placing restrictions on the extrajudicial functions of its officers. In the Netherlands, extrajudicial functions are normally allowed. The law provides for only a limited set of strict incompatibilities for judges (Article 44 *Judicial Officers Legal Status Act*). A guideline on impartiality and extrajudicial functions provides judicial officers with extra guidance on what functions are appropriate. Most of the recommendations in this guideline apply to both judges and other judicial officers, but in a few instances, the guideline is more stringent for judges. This stringency towards judges is observed in particular in the registration and publication of extrajudicial functions. All the judges' functions are listed and made public (this is also recorded in Article 44a of *the Judicial Officers Legal Status Act*), whereas the extrajudicial functions of judicial assistants are not.

Finally, certain symbolic features also mark the independent position of judicial officers. One way to mark that judicial officers are conscious of the key principles related to their position is by having them take an oath (Soeharno, 2013). Both judges and judicial assistants take an oath, although the latter's pledge is a more modest version of that of the judges.

Another important tradition is that judges wear robes to symbolise their independence. The precise requirements of how the robes should look are even included in legislation (*the Decree on the costumes and titles of Judicial Officers*). In the Netherlands, advocates, prosecution officers and judicial assistants – while active in the court room – also wear robes. The robes of these participants are very similar to those of judges; for lay persons, they are indistinguishable. However, they do differ in some minor details.[15]

For a lay person, distinguishing the judge from the assistant on sight becomes even more difficult during the hearing. In various countries, judicial assistants will sit on a different table than the judges; sometimes this table is even placed at a lower level. In Dutch courts, however, the judge(s) and the assistant usually sit next to each other at the bench.[16] As a result, at first glance, the appearance of the judge and the judicial assistant is very similar in the court. Though, the difference between the two comes to the surface when the hearing begins and the judge is chairing the hearing while the judicial assistant is writing the court record. Some courts also have signs indicating the functions of the different officers in court.

15. Such as the incorporation of several small black knots on the judicial robes and a difference in material of the sleeve cuffs.
16. To make it even more complicated, the prosecution officer (in criminal cases) will usually also sit behind this table (or sometimes a different table placed against it) which is located at the same level but usually rotated one-quarter.

To recapitulate, some provisions to safeguard the principles of independence and impartiality make little or no distinction between judges and judicial officers. However, several other provisions highlight the significant position that the judge takes within the legal system and underline the fundamental difference between the judge and all other non-judge officers working within the judicial organisation.

Enhancing rule of law principles via selection, training and setting professional standards
The concept of the rule of law also requires judges (and other law officials) to be knowledgeable and competent in applying the law. Furthermore, when – as in the Dutch rechtsstaat – it is believed that the judiciary is not only bound by formal legality but also to an idea of the morality or justice of the legal system, this requires some additional virtues of the judge (see e.g. Solum, 1990). In addition to legal knowledge, judges, who are appointed with the special responsibility of making judicial decisions in concrete cases, should also possess certain character traits or virtues which make them suitable for adjudication. The virtues required can inter alia be found in legislation, judicial oaths and – most importantly – codes of conduct. Among these are virtues such as wisdom, uprightness, competence, integrity, courage and decisiveness.[17]
In the Netherlands, there are two separate codes of conduct for the judiciary (see Van Emmerik, Loof, & Schuurmans, 2014). Both were developed quite recently. One was developed in 2010 by the Dutch Council for the Judiciary; this code is applicable to all officers working within the judiciary. The other was established in 2011 by the Dutch Association for the Judiciary (the professional association for judges and prosecutors); this code applies only to judges and prosecutors. Apparently, it was deemed necessary to develop a code specifically for judges and prosecutors, even though the values stated in both codes are fairly similar. Both codes emphasise the earlier-mentioned independence and impartiality of the judicial officers. The code of conduct for judges also mentions autonomy of the judges/prosecutors as one of the core values. The fact that this value is only present in the code of conduct for judges is consistent with the idea of the judge as the personification of the judiciary.[18] Both codes also specify certain (personal) qualities that a judicial officer or judge should possess. The code of the Council for the Judiciary upholds the values of uprightness and diligence, while the code for judges and prosecutors speaks of the values of diligence, competence and integrity. These values are closely related to those included in other codes of conduct, such as the internationally recognised Bangalore Principles of Judicial Conduct (Mak & Ayrir, 2011).

17. See e.g. the Model Code of Judicial Conduct of the American Bar Association, the international Bangalore Code of Judicial Conduct and the Dutch *NVvR-rechterscode*. The virtues one finds important are partly related to whether one considers adjudication as a moral exercise or not. For various publications, see e.g. Mak & Ayrir, 2011; McCree, 1981, p. 780; Rosenberg, 1966, p. 224–257; Solum, 1990; Solum, 2003; Wistrich, 2010.
18. This value is, in this capacity, not found in many codes of conduct of other judiciaries.

In general, an important way of upholding the quality and autonomy of lawyers is by maintaining a strong legal profession which holds its own professional standards (Friedson, 1970; see also Tamanaha, 1999, p.58-59). The legal occupation is often labelled as a profession (see e.g, Abel, 1998; Freidson, 2001; Larson, 1977); lawyers possess a distinct expertise, and they adopt several professional and ethical values in exercising their (partly) societal responsibilities (Abbott, 1983; Parsons, 1964, p. 454-476.). The ranks of the legal profession can only be entered by partaking in prolonged training and after gaining the approval of current members of the profession. Although literature on the legal profession predominantly focuses on attorneys, judges also fit the profile of legal professionals (Frissen et al., 2014; Paterson, 1983). In the Netherlands, the idea of the legal profession as a special occupational group is clearly present. Lawyers learn from the early beginnings of their university careers to 'think like a lawyer' (Mertz, 2007). In the civil law tradition of the Netherlands, this occurs with a particular focus on the judge (Bruinsma, 2008; Bruinsma, 2009). Selection, training and involvement in professional associations are of key importance in retaining a strong legal profession. An interesting question with regard to this topic is whether judicial assistants should also be considered as members of the legal profession. As professionals are often concerned about protecting the status of their profession, it would be in line with the literature on professionalism that judges would be reluctant to accept judicial assistants as a new part of judicial professionals (see e.g. Abbott, 1988; Freidson, 2001, chapter 2).

Selection and training

During several decades, the selection process for appointing judges has been demanding; only a small percentage of the total number of applicants is appointed (Langbroek, 2005, p. 166). Candidates should hold a four-year degree (LLB and LLM) from one of the law faculties of a Dutch university. They are, furthermore, required to pass several intelligence and psychological tests, as well as two or three selection interviews. The Netherlands is, from an international perspective, rather unique in its long history of retaining a mixed recruitment system. It combines the recruitment of recent graduates, as is common in continental career judiciaries, with a common law system of the appointment of experienced members of the legal profession (Groot-van Leeuwen, 2006, p. 150). Up until 2012, one could enter the ranks of the judiciary directly after finishing law school. These judicial candidates applied for a six-year-programme of courses and apprenticeship-based training. Alternatively, a second route was available to lawyers with at least six years of legal experience. For them, a shorter period of apprenticeship and coursework (at least two years) was sufficient.[19] In January 2014, these routes were merged into

19. In 2007, a third route was designed especially for (senior) judicial assistants who desired a judicial position. This last route was seldom pursued; see Holvast, 2014.

one route, open for lawyers with at least two years of work experience outside the judiciary.[20] The period of required training for prospective judges in this new programme is determined on an individual basis, depending on the experience of the candidate. The training of judges currently takes one year and three months to four years and consists of course work and, most importantly, training on the job (during several court internships). The qualities that the recruitment and training are intended to enhance are based on the Council for the Judiciary's function profile for a judge.[21]

Freidson (1988) emphasises that training is an important manner by which solidarity and loyalty toward a profession is established. Newcomers commonly commit themselves to a long period of training that will mould them into specialists. The professional education is not just intended at obtaining knowledge but also at stimulating important ethical values and attitudes (Freidson, 1988, p. 95). Prospective members are initiated into the norms, values, attitudes and rules of the profession (Kramer, 2010; Wanberg, 2012). This also appears to occur during the judicial training in the Netherlands. The judicial training has a reputation for being intense and consisting of a strong socialisation facet. This applies especially to the training for recent graduate trainees (see e.g. De Groot-van Leeuwen, 1991; Gommer and Meuleman, 2007; Böcker and De Groot-van Leeuwen, 2007; Köhne-Hoegen, 2008; De Groot-van Leeuwen, 2008). Especially during internships at courts, prospective judges are made familiar with the importance of professional and ethical values and principles such as independence, impartiality and integrity, in addition to other rule of law values, like coherence in decision-making and equal treatment of equal cases (see also Holvast & Doornbos, 2015). Senior judges are appointed as trainers who guide the judicial trainees during their internships.

The selection and training of judicial assistants differs significantly from the aforementioned processes, although it should be mentioned that the criteria for hiring judicial assistants are currently more stringent than in the (recent) past. Here it is noteworthy to refer to section 3.1.1, which describes the historical development of the position of judicial assistants. It could be argued that before 1957, when a position as *griffier* was in fact a provision to become a judge (De Groot-Van Leeuwen, 1991, p. 35), that judicial assistants were considered part of the legal profession. After the introduction of a separate training for judges in 1957, the judicial assistant function devolved into a primarily administrative function. During this period, assistants quite clearly were not considered members of the legal profession. In the 1990s, the function changed once again, and the duties and qualifications of judi-

20. The previous program for recent graduates included an obligatory two-year internship outside of the judiciary. This requirement is abandoned in the new program. Instead, it is shortened by a minimum of two years. See Roos & Van Amelsfort-Van der Kam, 2012.
21. The function profile of the judge and assistant are published on the website of the Judicial organization, www.rechtspraak.nl.

cial officers increased. Currently, mostly LLM graduates are employed as judicial assistants.[22] Still, the selection process for assistants is more modest than that for their fellow graduates who intend to become judges. Judicial assistants are typically hired on the basis of an application letter and an interview. No additional nationwide tests require completion.[23]

A function profile also exists for judicial assistants. This profile is substantially shorter than that of judges. It includes mainly practical competencies, such as analytical and writing skills, whereas the judges' profile also includes elements relating to impartiality, societal engagement, authenticity and integrity. The judges' profile also points to the responsibilities of the judge during various stages of the judicial process; a similar section is not found in the function profile for assistants. Moreover, as clarified before, future judges are in training for several years, thereby providing them the opportunity to become acquainted with the formal and informal rules of court work (Köhne-Hoegen, 2008). By contrast, judicial assistants start immediately, with no compulsory prior training. They largely learn on the job by observing other judicial assistants, frequently supported by a senior judicial assistant or judge who acts as a mentor, comments on their work and is available for consultation. In addition to the training on the job, numerous new judicial assistants follow an educational program consisting of several introductory courses at the Training and Education Centre of the Judiciary. Several courts direct all their new assistants to these trainings, whereas some others prefer to offer in-house training courses. It is not mandatory to pass this (or any other) programme in order to be employed as a judicial assistant.

As mentioned, in the Netherlands, employment as an assistant is generally not intended to be a common provision for becoming a judge, at least, not in the district courts and civil and criminal Courts of Appeal.[24] Nonetheless, in 2007, an official route was created which also enabled a small selection of excellent judicial assistants to enter a relatively short training programme to become judges. This route was not employed much (see Holvast, 2014). Still, it offered judicial assistants a limited career perspective. With the introduction of the new judicial training programme in 2013, this additional route was abolished (as all attendees now have to have at least two years of work experience outside of the judiciary).

To ensure that judges and judicial assistants keep their education up to date, it is compulsory for both to attend a set number of courses each year at the Judiciaries' Training and Education Centre. This centre offers a wide selection of courses with legal content and also several courses that focus on improving particular compe-

22. The function is scaled officially as one for students with higher education, though not necessarily meaning university (*Hoger Beroeps Onderwijs*).
23. The precise procedure for hiring judicial assistants varies across courts and sections of the courts.
24. At the Supreme Court and the specialised Courts of Appeal in administrative cases, this is a different story; see sections 3.1.2 and 3.1.3.

tencies. Certain courses are designed exclusively for judges or judicial assistants, emphasising their different functions, but an increasing number of courses are available to both.

Professional associations

Professional associations are also important settings in which the virtues of judges and judicial personnel are defined and enhanced. Dutch judges (and prosecution officers) are united in the Dutch Association for the Judiciary, founded in 1923. About 70 percent of all Dutch magistrates (judges and prosecution officers) are members of this association, which also functions as a trade union. It thereby aims to fulfil a public function, yet it also aims to represent its individual members. Maintaining the quality of the profession is significant for both functions. The association guards the competence of its members particularly by creating guidelines and by establishing the previously mentioned code of conduct. The association is also regularly asked to advise the government when new proposals for legislation are drafted, which exposes its important position. The requirement that the association must be consulted in certain situations is codified by law, and the association even enjoys the right of assent in issues regarding their own legal position (see Article 51 of the *Judicial Officers Legal Status Act)*. Until recently, there was no overarching organisation that gave guidance to the judiciary. With the establishment of the Council for the Judiciary in 2002, the Association lost its exclusive position as representative of the judiciary as a unit, in deliberation with the government. Nonetheless, it is still powerful, especially due to its completely independent position in relation to the government.

Judicial assistants and other judicial personnel are not organised in any form of professional association or trade union, resulting in their position not being represented, for example, in the consultations with the government. An interesting development occurred at the beginning of this century, when it was discussed within the Dutch Association of the Judiciary whether judicial assistants should also be able to become members of the Association. However, given the fact that the Association also functions as a trade union, and, in that respect, the legal position magistrates and judicial assistants fulfil is rather different, they decided against the inclusion of judicial assistants.[25]

To recapitulate, when the positions of judges and judicial assistants are compared, it is instantly visible that the selection and training of judges is much more intensive than that of assistants. Furthermore, judges are united in a professional organisation which represents them in several official settings; judicial assistants are not.

25. Information from an interview with the former president of the Dutch Association for the Judiciary, 2001–2007.

However, the position of the judicial assistant, especially more recently, has received more attention. Among other aspects, part of the judicial guidelines and codes of conduct also apply to judicial assistants, and judicial assistants are required to follow a set number of courses each year to keep their education up to date.

4.2 The managerial perspective on the judiciary

Besides the fundamental issues mentioned above, administering justice also raises more pragmatic questions regarding how the judiciary should function. In order to understand the functioning of the judiciary and its members, courts are also often depicted as being organisations or even corporations. This perspective offers a different take on what values are important for a well-functioning judiciary. In this section, the leading values include efficiency, effectiveness, transparency, accountability and consumerism. In line with the New Public Management movement which took place more broadly in public service organisations (see e.g. Hood, 1991; Osborne & Gaebler, 1992), private-sector principles and techniques have become increasingly applied to the court organisation. The allocation of labour and the creation of internal stratification are important ways in which administering justice can be organised more efficiently. Consequently, subordinate staff members, such as judicial assistants, occupy an important position in courts from a managerial narrative.

Managerial values have become central principles, alongside the rule of law principles, in the Netherlands (Mak, 2008b; Ng, 2007). They are communicated to the public via various means of external communication (see Dijkstra, 2016, p. 163-168), they are included in many policy documents of courts and the Council for the Judiciary (see e.g. Raad voor de Rechtspraak, 2006; Raad voor de Rechtspraak, 2010b; Raad voor de Rechtspraak, 2012) *and* they are even codified in official Acts (such as the *Judicial Organisation Act*). The first part of this section sheds light on the origin and ideas behind this managerial perspective. The second part explores how managerial principles have become incorporated into the judicial organisation and what the consequences are for the position of judicial assistants.

4.2.1 Managerial concepts regarding court organisation

As mentioned previously, understanding courts not only from a rule of law perspective but also from a managerial perspective only really emerged during the second part of the 20th century. The incorporation of managerial values into the organisation of courts emerged from broader developments in the study of public service organisations. During the 1960s, several authors began to develop (now leading) theories on public administration and bureaucracies taking an economical

viewpoint (Hood, 1991, p. 5). These theories underscore the idea that it can be beneficial to use economic assumptions in improving public settings.
This awareness ultimately resulted in the emergence of theories of New Public Management in the late 1980s and 1990s, which, in essence, apply managerial concepts from the private sector to public-sector organisations. The New Public Management paradigm was originally developed in the UK and later in Australia and New Zealand (Barzelay, 2002). In these countries, managerialism of courts has also been observed, particularly in the criminal justice sector and in lower courts (Fitzpatrick, Seago, Walker, & Wall, 2000; Freiberg, 2005; Jeffries, 2005; Raine & Willson, 1995; Raine & Willson, 1997). Raine and Wilson (1997, p. 82), for instance, describe a three-pronged strategy being employed in criminal justice policy in the UK:

> *'…[C]ash limits and emphasis on efficiency to engender a more financially aware and prudent approach; greater standardisation in policies and practices to curb the autonomy of the professionals and reduce their idiosyncrasies; and reorganisation of the agencies into stronger hierarchies, supported by target setting and performance monitoring to effect.'*

Among other aspects, Raine and Wilson recognise more judicial powers being delegated to Magistrates' clerks. An increased focus on accountability, effectiveness and productivity in court systems has also recently been distinguished in various European civil law judiciaries (Bell, 2006, p. 7; Kirat, 2010; Mak, 2008a; Vigour, 2009).
A similar development can be recognised in the US. From the 1950s onwards, it became progressively popular for economists to study the law using theories and methods from the field of economy under the label 'law and economics'.[26] Appellate Court judge Richard Posner is one of the leading scholars in this movement. He has not only studied the law using economic insights, he also published specifically on court organisation and adjudication (e.g. R. A. Posner, 1985; 2008). In the 1980s, Posner (1985) and other authors (e.g. Heydebrand & Seron, 1990 ch. 2) observed an explosion in caseloads in the US which had been occurring since about 1960, especially at the federal courts. According to Posner this resulted in a crisis in the (federal) judiciary. A crisis is also observed by Kronman (1993) in the chapter on the judiciary in his book on the legal profession in the US (although Kronman does not regard a more economical approach to the judiciary as the answer). These authors recognise (over)delegation of judicial duties to law clerks as an important consequence of this crisis (Heydebrand & Seron, 1990, p. 155-158; Kronman, 1993, p. 347-351; R. A. Posner, 1985, p. 102-119). In this context, Resnik (1982) introduces the term 'managerial judges'. She notices that *'judicial management has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality and*

26. This was not the first time that economic insights were used to understand the law, but during these years, it became a widespread movement; see Mackaay, 2000.

fairness' (p. 424–425). Resnik (1982, p. 382-383) contrasts this new managerial role of judges to the classical idea of the judicial role in which there was more physical distance between the judge and the litigants, and the image of the judge was one of a 'blindfolded goddess'. Heydebrand and Seron (1990) also witness a new mode of administration in the United States in their book on federal district courts. This new mode is not bureaucratic in the traditional sense of a hierarchical organisation with many formal and procedural rules and strict division of labour; instead, it pursues more technical and social rationalisation. It *'seeks to maximise systemic flexibility, informalism, decentralisation, "results" in terms of disposition and termination, efficiency, reduction of delay, productivity, speed, and cost-effectiveness'* (p. 14). Thus, managerialism of, predominantly, courts at the bottom of the judicial hierarchy, seems to be a trend in numerous judiciaries throughout the world (see also Fix-fierro, 2003).

Principal-agent theory

One element of the broader economic/managerial movement that is especially relevant for the study of judicial assistants is principal-agent theory. Principal-agent theory is concerned with the phenomenon of a superior, referred to as the principal, who delegates work to a subordinate, the agent, who is required to perform the work. This situation can become problematic because (1) the goals or interests of the agent can differ from those of the principal and because (2) the principal will encounter difficulties controlling the work of the agent since the agent possesses more information about his or her own functioning than the principal does (see e.g. Moe, 1984; E. Posner, 2007; Ross, 1973). Agency theory therefore concentrates on the efforts taken by the principle to control the agent in order to prevent him or her from 'shirking'. This model can be applied to a wide range of situations.[27]

When the principal-agent relationship is studied from an exclusively economic perspective, the issues at stake are rather narrowly defined. Principal-agent theory was criticised for that precise reason by researchers from other disciplines (Perrow, 1990; Eisenhardt, 1989). Broader versions of the theory have since been introduced in political science and sociology. These accounts usually include several notions from the classical sociological thinkers on administration and organisations, such as Weber (1922) and Merton (1940), for example, regarding goal displacement or goal ambiguity, bureaucratisation and reliance on rules and dependence and trust (see for an overview Kiser, 1999; S. P. Shapiro, 2005).

Principal-agent theory has been applied to the judge–judicial assistant relationship before. Peppers (2006) made use of the theory to define the relationship between US Supreme Court Justices and their law clerks, and Kenney (2007) has applied the concept to *référendaires* at the European Court of Justice (see also Peppers & Zorn,

27. The theory has not only been employed to understand principal-agent relationships on a micro-level, but it has also been applied on a meso- or macro level. For instance, in a judicial context, it has frequently been used to model the relationship between appellate courts, such as the US Supreme Court, and courts of a lower hierarchy. See e.g. Kim, 2011.

2008; Wahlbeck et al., 2002; Ditslear & Baum, 2001). Peppers notes that, due to the substantive responsibilities that are allocated to law clerks, justices are forced to apply mechanisms to prevent them from shirking. The justices should devote significant resources *'(1) reducing the likelihood that the justice and the law clerk have different preferences, (2) monitoring the law clerks' job duties, and (3) increasing the benefits/penalties associated with the incentive/sanctioning structure'* (Peppers, 2006, p. 207). They accomplish this, for example, by limiting the clerkships to one year, formulating confidentiality rules and introducing intra-chamber review by multiple clerks. On average, Peppers observes an increase in such controlling measures. He argues (2006, p. 210-211) that the only aspect of modern clerkships that might promote shirking is the weaker personal bonds of loyalty he observes between justices and clerks.

4.2.2 Managerialism in court practice in the Netherlands

Although managerial influences on court organisation have been widely observed all over the world, the Dutch judiciary was kept from these influences longer than other judiciaries. Ng (2011, p. 110) suggests that this is possibly due to the originally strong professional autonomy of Dutch judges and the institutional independence. Additionally, Dutch courts did not face a severe increase in caseloads as seen in the US (see Holvast, 2014, p. 11). This does not mean, however, that no managerial influences were felt in the Netherlands. This section describes and analyses various new developments in the Dutch court organisation which evidently have managerial components.

From the seventies onwards, several committees and auditing bodies have evaluated and criticised the Dutch judiciary. Their reports displayed similar criticisms as were expressed in many other countries, describing the judiciary as fragmented, non-transparent and inefficient (Brommet, 2002). This resulted in a search for new, more economically oriented ways to organise the courts. This occurred particularly with the enactment of two new laws, the Dutch Judiciary Organisation and Management Act (*Wet Organisatie en Bestuur Gerechten*) and the Act on the Council for the Judiciary (*Wet Raad voor de Rechtspraak*), that modified the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*) in 2001.
These laws introduced an integrated management structure to the Dutch courts, which purpose is to improve the speed, accessibility, openness and legal uniformity (among other aspects).[28] Each court now has one executive board responsible for the administration and management of the court.[29] The Acts also formed the basis for the creation of an overarching Council for the Judiciary. This matches a

28. See Memorie van Toelichting Wet Organisatie en Bestuur Gerechten, TKII 27181, nr. 3, vergaderjaar 1999–2000, Kamerstukken 27181, nr. 3.
29. Since 2013, membership of this board became a full-time occupation.

broader trend of introducing such councils in European judiciaries over the last few decades (Voermans, 2003). The Council acts as the connection between the Ministry and the courts on organisational issues (Voermans & Alberts, 2003, p. 102-103). The Council is also in control of the budget and the distribution of resources among the courts. It is relevant to note that the Dutch Supreme Court and the Administrative Court section of the Council of State occupy independent positions and are not controlled by this Council.

Another important alteration which followed due to these new laws was the introduction of a new output-based financing structure; a specific amount of time is assigned for handling each case type, and courts are financed with a sum proportional to this time, regardless of the actual time spent by judicial officers. Court budgets are consequently reliant on the amount of cases the courts process. This results in more awareness of individual courts regarding their productivity and the time management of judges and judicial assistants.

The newest alteration in the court organisation was implemented at the start of 2013; it involved the consolidation of the former 27 courts into 18 new large-scale courts (in the context of the *Herindeling Gerechtelijke Kaart* project). Most of the courthouses will remain in function, but courts are expected to become more specialised, and more collaboration on case management and operational management is anticipated (Van den Emster, Van Amelsfort, & Van Dijk, 2011).

Efficiency, effectiveness and productivity

To implement the output-based financing structure of the judiciary, a model was created which specifies how much time (measured in minutes) a judge and a judicial assistant are estimated to work on a particular type of case: the so-called *lamicie-model*.[30] The model determines what compensation courts subsequently receive for handling the cases, taking into account the supposed time spent on handling those cases by the judicial officers (see Van der Torre et al., 2007). The figures are based on actual time writing surveys that were conducted among judges and judicial assistants at the beginning of this century. The lamicie-model is supposed to reflect the way that division of work occurs in reality within the courts. In line with efficiency efforts, in most types of cases, the model reveals that less costly judicial assistants spend considerably more time working on the cases than judges. Particularly in criminal law and administrative law cases, the lamicie-model allocates significantly more time to judicial assistants than to judges. A single-judge case at a district court in the criminal law division, for instance, provides budget for 45 minutes of work by a judge and 142 by a judicial assistant. On a social insurance

30. See more on the lamicie-model and the financing of the judiciary in Van der Torre, Jonker, Van Tulder, Steeman, & Paulides, 2007.

case at the same court, a judge is expected to spend 387 minutes and the assistant 983.[31]
Although the system suggests a certain distribution of time among judges and assistants, individual courts can decide how they allocate the time in practice. In the district courts studied for this research, the allocation of time followed a similar distribution as suggested by the lamicie-model. This further emphasises the important role courts assign to judicial assistants in the judicial process. The fact that, in most court divisions, the vast majority of judgments are currently drafted by the judicial assistant is probably one of the most noticeable results (on the drafting, see section 6.2).[32]

In contrast to distributing more duties to assistants, some courts also withdraw certain duties from judicial assistants in order to cut costs when the tasks can be performed more efficiently by judges. In several district courts, judges are no longer provided memos by judicial assistants in simple (criminal) cases (see section 5.1.4). Preparing such a memo can be a time-consuming duty for the assistants and may not always save the judges much time.[33] This sheds light on the fact that, from an economic perspective, it is not necessarily cost-efficient to allocate additional work to judicial assistants. According to principal-agent theory, delegation of duties also involves extra effort from judges, as supervising their assistants and monitoring their work also takes up time. In some instances, it could be more efficient not to delegate certain duties.

A different way in which the efficiency and effectiveness of courts could be improved is by specialisation (see also Abram et al., 2011, p. 20). Creating more specialised courts and court divisions was in fact one of the main reasons for consolidating some of the courts. In the past, the accessibility of the courts was an important reason to require generalist courts. Presently, because people are more mobile and communication techniques are improved, it seems that this could also be satisfied concurrently with having fewer, more specialised, courts.[34]
Although specialisation seems to be gaining some ground over generalisation recently, it is still largely court policy to have generalist judges. Judges are trained to be able to adjudicate in at least two fields of law, and they are required to circulate between different divisions of courts every four to six years. This safeguards their impartiality and assures that judges review cases with a fresh pair of eyes.

31. In civil cases, the numbers differ substantially per type of case. Family law cases reveal a similar allocation as described above. Tax law is one of the few areas in which the judge is compensated for more time. See lamicie-model 2005, attachment to Van der Torre, et al., 2007.
32. Another part of the process in which the involvement of judicial assistants seems to have increased is the pre-hearing phase (see section 5.1).
33. Given that the cases are often trivial, and, therefore a summary might not add much value.
34. See Memorie van Toelichting Wet Herziening Gerechtelijke Kaart, TKII 32891, nr. 3 vergaderjaar 2010–2011.

However, it can also result in losing valuable knowledge. For that reason, some judges are excluded from obligatory circulation.[35]
It is interesting that, in contrast to judges, judicial assistants are not required to circulate. A possibility of changing divisions is increasingly offered by courts as a development opportunity for assistants. Still, the majority of assistants do not circulate and are regularly employed at one court division for long periods of time.
Achieving specialisation and preserving knowledge can, thus, not only be realised by creating specialised judges, but also by transforming judicial assistants into experts and having the assistants function as advisors. At district courts, this is particularly the case for staff lawyers who are commonly specifically employed to be highly qualified advisors in specific fields of law (section 3.1.2; see more in section 7.1.3). Another court in which this approach is executed in a far-reaching manner is the Administrative Law division of the Council of State, the highest general court of appeal in administrative law cases. As mentioned in section 3.1.1, at the Council, the judicial assistants are highly specialised, while the judges are truly generalists.
When judicial assistants are intentionally the persons with the most specialised knowledge, it is questionable from a managerial perspective whether this allows judges to properly control and monitor the work of the assistants (see the previous section on principal-agent theory).

Transparency and focus on 'clients' and the public
Yet another aspiration of the Dutch judicial organisation has been to be more accountable and accessible to the general public and to pay more attention to the needs of society. These aims are frequently mentioned in various policy documents (Raad voor de Rechtspraak, 2006; Raad voor de Rechtspraak, 2010a; Raad voor de Rechtspraak, 2010b). In achieving this aim, an increasingly important driver is the explanation and clarification of judicial decisions within written judgments, as well as in the media.
At the beginning of the 21st century, a pilot programme started called *Promis* at several criminal law divisions of district and appellate courts to improve the intelligibility of judgments. At the same time, an obligation to include further reasoning in judicial decisions (under certain circumstances) was added to the Code of Criminal Procedure (*Wetboek van Strafvordering*). In addition to achieving more credibility and understanding of judicial decisions, Promis judgments also function as an extra mechanism to monitor the deliberations (Sterk & Ficq, 2008). The programme was a success and has been extended to all other criminal courts (see De Groot-van Leeuwen, Laemers, & Sportel, 2015; De Rechtspraak, 2006; De Rechtspraak, 2008). Currently, courts are expected to write 50 percent of all panel judgments in Promis

35. Figures regarding the percentage of judges that rotate are not available.

style (De Rechtspraak, 2015, p. 53).[36] Since most judgments are drafted completely by judicial assistants, Promis especially results in considerably more work for the assistants. Research discloses that judges in district courts spend 29 percent more time revising judgments; judicial assistants spend 42 percent more time (Franck, Ten Have, & Bockstael-Blok, 2009). Writing a Promis judgment offers a judicial assistant more discretion than a normal judgment, as motivations for the convictions and associated punishments are open for different interpretations. Depending on the instructions given by the judge(s), this can provide the judicial assistant with more room to shape the judgment.

Special attention of courts is also being given to the 'clients' of the judicial organisation: litigants and their representatives. For example, an extensive program, *Kwaliteit en Innovatie*, shortened to KEI, has been set up which concerns the entire judiciary. The program intents to make it easier for litigants to start judicial proceedings. This will primarily be achieved by digitalising the procedure to file a case, which currently still occurs on paper. This process of digitalisation is expected to be finished in 2020.[37] The first courts are already working with digital files. This especially affects the work of judicial (and administrative) assistants, who are the most involved in the procedural aspects of courts.
Another example of a project that focuses on the needs of litigants occurs in the administrative law divisions of the district courts: the *Nieuwe Zaaksbehandeling* project. The project is intended to bring about a considerable change in the way that administrative law cases are handled by providing a faster procedure that focuses on the core of the conflicts and offers tailor-made and final solutions (see Marseille, 2007; Verburg, 2013). This new approach of handling court cases is partly based on Tyler's (1988) idea of procedural justice (Verburg, 2013, p. 21).[38] At first sight, it appears that this new method requires several changes to be made in the approach of the judge in handling cases. In order to discover and resolve the core of the conflict (often not exclusively a legal matter), the judge has to employ a more active approach. Broadening the span of the procedure to underlying (perhaps non-legal) issues, however, brings along increased risks regarding the (perceived) impartiality of judges. In this context, the judicial assistant, who frequently has contact with litigants on behalf of the court, can function as a buffer between the judge and the parties (see more in section 5.2.6). This function can be of extra importance when dealing with a judge who is more active during the procedure.

36. This percentage was met by the district courts, where 69 percent of cases were written in Promis style; the Courts of Appeal are slightly behind with 44 percent of Promis judgments. These numbers have been rising over the past three years. See Rechtspraak, 2015.
37. See on KEI, e.g.: http://www.rijksoverheid.nl/onderwerpen/rechtspraak-en-geschiloplossing/vernieuwing-in-de-rechtspraak/programma-kwaliteit-en-innovatie-rechtspraak-kei, visited 11-05-2015.
38. Which assumes that the fairness of the procedure is more important for people's acceptance of a court decision than the actual outcome of the procedure.

4.3 A theoretical assessment of different types of involvement of judicial assistants

Both perspectives emphasise the importance of various values which are incorporated into legal provisions and the judiciary and court policy. However, in doing so, they place different weight on these values. Legitimacy of the judiciary is also important from both perspectives, but in a rule of law judiciary, the authority of the judge is assumed by the fact that he or she is a judge, who was selected carefully and is surrounded by institutional and professional safeguards. The managerial view on adjudication conversely contests this presupposed authority of the judge and aims at creating more objective quality standards to be able to measure the functioning of judges and courts.[39] Hence, in the current judiciary, in which values from both perspectives are equally important, it is significant to pay attention to preserving both forms of legitimacy.

In order to evaluate whether the involvement of judicial assistants is in line with the two perspectives, it is first important to differentiate the types of involvement under review. For this purpose, two core types of judicial assistant involvement in decision-making are introduced: 1) administrative and/or secretarial involvement and 2) advisory and/or discussion-related involvement. These are ideal types in the Weberian sense.[40] For analytical purposes, these are presented as distinguishable types, while the later chapters of this book will disclose that, in reality, they frequently intertwine. However, in their pure form, these types of involvement have quite different consequences for the (potential) influence of judicial assistants, and they therefore deserve a separate discussion. Before starting the assessment, both types of involvement are defined.

Administrative and/or secretarial involvement

Administrative and secretarial involvement entails that assistants essentially provide support in the administrative, organisational and communicative duties that are inevitably part of the judicial process. Administrative and secretarial assistance primarily consists of creating the court record and performing administrative duties during the hearing. Writing memos and drafting judgments are also partially administrative and secretarial in nature; memo writing is largely secretarial when it entails neutrally summarising the court files, and drafting judgments is administrative in the facet that entails including procedural and factual information in the judgment. However, there is also an advisory and discussion-related component to these duties (see below).

39. See also Mak, 2008, p. 44–49 on this issue.
40. Meaning that these are abstract or 'pure' constructions of extremes, used as methodological devises to analyse reality. These are not *ideals* in the normative sense of the word. Weber, 1988 [1922], p. 191.

By performing these not-essentially judicial tasks, the judicial assistant ideally enables the judge to focus on his or her core responsibility of adjudication without being directly involved in taking the judicial decisions. It is important to realise that this type of involvement does not entail judicial assistants being involved in the decisions made regarding the judicial content. Thus, judicial assistants are not afforded opportunities to directly influence the adjudication.

Advisory and/or discussion-related involvement
This type of involvement entails judicial assistants actually taking part in the decision-making regarding the content of judgments and, thereby, also being directly provided with the opportunity to influence the judicial decision. Throughout the judicial process, judicial assistants can provide judges with advice or function as discussion partners. Judicial assistants involved in this role, for instance, include their own views on cases in their memos, participate in the deliberation sessions and draft judgments with limited instruction from judges.

4.3.1 Rule of law evaluation

The fact that judges are appointed with the special duty of administering justice has resulted in them enjoying several unique safeguards to assure their independence, impartiality, integrity and competence. The process of being appointed as a judge is extensive and thorough, and, when judges are appointed, legal provisions such as lifelong appointment ensure their independent position. These provisions justify why they are entrusted by society with the responsibility to adjudicate. Under the current circumstances, this means that the involvement in adjudicational duties of those other than judges, such as judicial assistants, who are not surrounded with the comparable safeguards, may be regarded as inappropriate or at least problematic. Consequently, at first glance, the rule of law perspective leaves relatively little room for the involvement of judicial assistants in adjudication.
However, it can be argued that the rule of law perspective does not reject *all* involvement of judicial assistants in adjudication. As long as the actual decisions are made by judges, employing assistants is actually not problematic. Accordingly, with respect to the rule of law, assistants that perform administrative and secretarial duties are permissible. This also clarifies why the duty of creating the court record has been part of the duties of Dutch judicial assistants since long before managerial values started to be an issue.[41]
Conversely, when assistants perform advisory and discussion-related duties, this is considered more problematic from a rule of law perspective. Judicial assistants are then performing duties in relation to the content of the judicial decision-making,

41. This duty is especially important, as this official document can contain statements which can be used as evidence in the judgment.

which potentially results in entities other than judges influencing the process and content of adjudication. When the public becomes aware of this situation, this can also harm the authority of the judge and the legitimacy of the judiciary.
This does not mean that – from a rule of law point of view – this advisory and discussion-related involvement should under all conditions be avoided. A flexible interpretation of the rule of law perspective implies that the acceptability of certain advisory or discussion-related duties depends on the circumstances in which the duties are performed. It depends on the degree to which the assistants are involved in performing the duties *and* the type of measures which are in place to safeguard the judicial assistants' independence, impartiality, integrity and competence. When judicial assistants are surrounded with stronger safeguards regarding the aforementioned values, this authorises them to have a greater involvement in the content of the decision-making.
This chapter demonstrates that currently, judicial assistants also enjoy various provisions that enhance rule of law values. However, the safeguards applicable to assistants are, in various respects, still more limited than those applicable to judges. This means, in theory, that when assistants are performing significant advisory and discussion-related duties, a potential conflict is present with the rule of law perspective. Whether a problem exists in reality depends on the degree to which the Dutch judicial assistants are actually involved in playing such a role.
This potential problem is furthermore not insoluble. If judicial assistants obtained more training, were selected in a different manner and were surrounded by more institutional safeguards, further involvement of judicial assistants would be conceivable. This does raise the question of what would actually differentiate the assistants from judges. Moreover, it brings up some issues from a managerial perspective (see next section).

4.3.2 Managerial evaluation

The managerial perspective sets partly different standards for adjudication than the rule of law perspective, although these values also arise from certain public demands and are related to the legitimacy of the judiciary (Mak, 2008b, p. 44-45). Society demands that adjudication occurs in due time and in an effective manner without imposing any disproportionate pressure on government budgets. Especially in achieving more efficiency and cost-effectiveness, judicial assistants can play a key role.
From a managerial perspective, the added value of judicial assistants is most evident when it concerns administrative and secretarial duties. When lower-qualified – and consequently less compensated – assistants perform many of the more trivial duties, judges are able to spend their valuable time on the duties that are indispensable to their function. This reduces the costs of administering justice, which is particularly important since judiciaries have to increasingly cope with limited

budgets. The previous chapter revealed that Dutch judicial assistants are indeed compensated considerably less than judges and that their selection process and training are also less comprehensive and, hence, less costly. Principle-agent theory states, as a counter argument against the involvement of judicial assistants in adjudication, that allocating work to assistants has the disadvantage of judges spending considerable time and effort controlling the assistant to prevent shirking, which might negate the efficiency advantages. However, administrative and secretarial duties will frequently be rather clear cut, resulting in – on average – not much monitoring being required. Assuming that assistants are indeed capable of performing these duties in an efficient and effective manner, this type of involvement seems to contribute positively to judicial decision-making. This conclusion can less easily be drawn with regard to advisory and discussion-related involvement.

Allocating additional duties to judicial assistants can, from a managerial point a view, be regarded as an extra way to enhance the efficiency of the decision-making. Additionally, when judicial assistants are giving advice or participating in legal discussions, their contributions could improve the decision-making[42] and, thus, improve the quality and effectiveness of the judicial decisions. Quality improvement (when this entails clearly measurable quality standards) is also an important goal of managerialisation. However, when judicial assistants are expected to fully engage in the judicial discussions regarding cases, they are required to possess a wide variety of competencies and knowledge. That correspondingly demands that the assistants should be selected carefully and be required to have proper education and training. This inevitably involves deploying additional resources. Alternatively (but occasionally also additionally), judges need to spend considerable time monitoring the work of the judicial assistants. The latter conditions remove part of the efficiency benefit. Consequently, from a managerial perspective, it is less evident that assistants performing advisory and discussion-related duties will be an improvement to the adjudication. The perspective suggests that this is only the case under strict conditions in which the right balance is found between investing time and effort in guaranteeing the competence of judicial assistants and staying cost-efficient. Therefore, whether their involvement in this manner is overall beneficial also depends on the assistants' actual impact on effectiveness and efficiency.

Furthermore, balancing both managerial *and* rule of law values brings about extra complications. It is already established that the rule of law perspective demands that for advisory and/or discussion-related involvement, several additional measures should be taken to safeguard, among other aspects, the impartiality and integrity of judicial assistants. However, incorporating provisions to improve the impartiality and integrity of assistants is costly, which makes it even more difficult to

42. Assuming that introducing new information or extra arguments is advantageous for the quality of the decision-making. For literature on sharing information in group decision-making, see e.g. Strasser & Titus, 1985; Ten Velde & De Dreu, 2012.

reach the managerial goal of (cost) efficiency. Hence, a possible tension between the two perspectives becomes visible.

In order to determine whether the current organisation of judicial assistance in Dutch courts fulfils the requirements that are set by both perspectives, it is important to learn what the involvement of judicial assistants in judicial decision-making actually entails. The following chapters will elucidate the manner in which judicial assistants take part in judicial decision-making during the day-to-day activities in Dutch district courts. A comprehensive evaluation of the observed involvement of judicial assistants in practice will follow in section 8.2 of the concluding chapter of this book.

5 Collecting the materials for reaching the judgment: the run up to the hearing and the hearing

This chapter is the first of three chapters in which the results of the fieldwork at the criminal and administrative law divisions of two Dutch courts of first instance are presented. The first two chapters (5 and 6) describe and analyse the judicial decision-making process in chronological order to illuminate what part judicial assistants play in different phases (pre-hearing, hearing, deliberations and judgment writing) and how this affects the way in which adjudication takes place. In reporting about the findings in the first two chapters, there is not much distinction between the findings regarding the different courts or court divisions; rather, all data are taken together. Occasionally, when it is relevant for the analysis and external validity of the results (see section 2.1.3), it will be specified when practices differ between the studied courts.[1] Chapter 7 offers a more abstract analysis of the findings. It distinguishes the factors which determine the types and degrees of involvement of judicial assistants in adjudication. Chapter 7 also illuminates the observed similarities and differences between the studied courts and court divisions.

Throughout the chapters, empirically informed literature on the occurrence or prevention of social and cognitive biases in (judicial) decision-making is consulted to reflect on the observations. This literature contributes to unveiling the consequences that certain involvement of judicial assistants might have on adjudication. The applicable components of the literature are explained at the relevant places in the chapters. An overview of the literature consulted for this purpose is available in Appendix 12.

5.1 The run up to the hearing

The first phase in the decision-making process is the run up to the hearing. Before a case is adjudicated by judges on its legal content, the court first has to check and decide upon practical and procedural matters. Once all procedural requirements

1. When members of the steering committee or judges and assistants, who the research was presented to, pointed out differences between the court(s) (divisions), this is also mentioned. See section 2.1.3.

are met, the case is scheduled for a hearing. When the case files are complete, the judge(s) and judicial assistant can then prepare for the hearing. A memo created by the judicial assistant regarding the case frequently has an important role at in this stage.

5.1.1 Deciding if, when and how to adjudicate a case

In criminal procedures, the prosecution office is the body that decides which cases are prosecuted.[2] When the prosecution office decides that a case should go to court, the office will schedule a hearing and estimate the time needed for hearing the case. In accordance with guidelines agreed upon with the courts, the office will appoint cases for hearing by a single-judge (referred to in first instance criminal cases as the 'police-judge') or a panel of three judges.
In more serious cases, an examining judge will be involved to lead the pre-hearing investigations and interrogate witnesses. These examining judges are also assisted by judicial assistants. The prosecution office employs assistants as well. Both types of assistants have many duties which are similar to those of the judicial assistants studied for this research (for more information about the involvement of judicial assistants at the prosecution office, see Lindeman, 2017). Several of the results of this research will therefore most likely also be relevant in relation to these assistants.[3]

In administrative court procedures, the decision whether a case should be heard and, if so, by a single-judge or a panel, is made by the court with the judicial assistants playing an important role. The cases enter the system at the administration office of the court. Administrative officers then scan the cases to check the procedural requirements, such as whether the court fees are paid and whether the present courthouse is authorised to handle the case. If they notice a case that does not fulfil the necessary requirements, they can refer the case to a judicial assistant who is involved in writing the judgments of cases without hearings (see next section). With regard to the remaining cases, the administrative officers can request parties to send additional information when needed. When the case files are complete, they are assigned to one of the judicial assistants out of a pool of 'filtering assistants'. These assistants are (in addition to their regular responsibilities) appointed with the duty to screen cases and assess their complexity in order to decide whether a case requires a panel or a single-judge and how much time should be scheduled for hearing the case. These assessments are made using court-specific guidelines. These guidelines provide room for interpretation on certain topics; for example, the criteria for defining a case as suitable for panel judgment

2. The office also has a special power to settle certain cases without involvement of the court.
3. It goes beyond the scope of the research to include an in-depth analysis regarding these assistants.

are vague. In one of the courts, the guidelines include criteria such as 'a strong principle character' or 'of great public interest', leaving substantial room for the filtering assistants' individual interpretations. When the assistants are uncertain how to allocate a case, they are provided the option of contacting a staff lawyer or a judge to discuss the matter. When a case is subsequently assigned to single-judges, they are, at that point in time, still provided the opportunity to refer the case to a panel if they believe the case is better suited for panel adjudication. Though, commonly, these decisions are made by the assistants individually and not revised by the judges.

5.1.2 Judgments without a hearing

In criminal procedures, all court cases are dealt with during a public hearing (even though some hearings take only 10 minutes). In administrative law, for a small portion of cases (in which the outcome of a case is evident), the court decides to produce a judgment without having a hearing (Article 8:54 of the Dutch General Administrative Law Act).[4] In 2012, 8 percent of all administrative cases were decided without a hearing (De Heer-de Lange, Diephuis, & Eshuis, 2013, p. 234). These are cases, in which certain procedural rules preclude their being handled by the court, for instance, the principle of territoriality. One or two specific junior judicial assistants are usually assigned the duty of writing these types of 'standard' judgments. These assistants have usually received less legal training than the assistants who assist in cases that require a hearing.

It is interesting to note that judgments without a hearing progress almost entirely outside the scope of the judge. An administrative assistant commonly sends the case to the junior assistant without consulting a judge, and this assistant will normally also continue to write the judgment without discussing the merits of the case with a judge. Only when they doubt what the judgment should be will a judge be contacted. The judge still has the formal and final authority to decide these cases; all decisions must be signed off by the judge. Before signing, the judge decides whether he or she approves of the judgment or if it needs to be adjusted. Thus, regarding these 'simple' cases, the concerns of scholars such as Kronman (1993) and Posner (2008) and, in the Netherlands, Hol (2001) and Buruma[5], about judges turning into 'editors' or officials who only assess the work prepared by others (see section 1.2) seem to be affirmed. A different question is whether this 'editing role'

4. Cases regarding administrative agencies who have not met the terms for responding to a request from a citizen (Art. 6:2 of the Dutch General Administrative Law Act) will often also be handled without a hearing. When a complainant lives abroad, the court will also ask parties whether they agree to not have a hearing (Art. 8:57 of the Dutch General Administrative Law Act). Some immigration cases are also handled this way.
5. HR 8 September 2009, NJ 2010, 391., m.nt. Buruma.

of the judge should be regarded as problematic when it concerns simple, mostly standard, decisions (see more in section 7.1.5).

5.1.3 Allotment of cases

The allotment of cases in the Dutch judiciary, compared to other judiciaries, is an informal process which occurs partly at random and is partly based on specific considerations (Baas, 2015).[6] In the allotment of cases, two types of information are important (as mentioned by one of the court managers (resp. 14)): 'hard information' (availability of the officers, their working hours, the team that someone is assigned to, etc.) and 'soft information' (experience, expertise and – to a certain extent – personality). In all studied court sections, criminal and administrative, the hard information was leading in determining the allotment. The majority of cases are allocated to the hearing of a certain judge-assistant combination at random. However, in some circumstances, alterations are required. Regarding the type of judicial officer, alterations are most commonly made when an individual judge or judicial assistant is new to the field of law and is still adjusting to his or her new position. In this circumstance, court managers believe it is important to select the right types of cases.[7] The composition of the judge-assistant combination or panel is, in this instance, also important. One of the managers (resp. 14) explains how new judges are provided with experienced judicial assistants during their first single-judge hearings. This custom was recently also included in the professional standards that criminal law judges set for themselves.[8] This manager sporadically also takes into account the personality of the officers involved:

> *'Very occasionally, let me think, how should I say this… There are some judges with whom no one really enjoys doing a hearing. Then you try to spread it out a bit. But when you're dealing with a judge who everyone enjoys working with, it doesn't matter if one has a hearing with this judge more frequently.'*[9]

The idea of the random allotment of cases is also occasionally abandoned when it concerns larger cases or cases which receive a lot of media attention. For those cases, court managers often compose a specific team, and the experience and expertise of the judge(s), and also of the judicial assistant, are considered. In addition, judges' personal preferences regarding assistants they enjoy working with are occasionally also taken in account. A manager (resp. 11) explains:

6. See also Langbroek & Fabri, 2007.
7. Not too complex cases but challenging enough to progress in learning.
8. See https://www.rechtspraak.nl/SiteCollectionDocuments/20160220-professionele-standaarden.pdf.
9. All quotations are translated from Dutch into English. A list of the original Dutch text of the quotations can be provided by the author on request.

> *'When it concerns a 'mega' [a large criminal case], several pre-trial hearings already took place with presiding judge [name]. We then look for additional judges to assign to the case. These people should be available on the date of the hearing, and they should be part of our knowledge group on [content area]. When the judges are settled, they often specify their preference for a judicial assistant. Sometimes they don't really mind, but when the panel is not very experienced, they frequently prefer a very experienced judicial assistant. Because then that really complements the team.'*

Although it is largely regarded as inappropriate for officers to request to be appointed with specific judges or assistants, on rare occasions, some judges do ask this (according to resp. 20 and resp. 46). This occurred particularly at one of the court divisions where several judges complained about the variation in quality of judicial assistants.

In the past, the most senior (presiding) judge would act as the chair for all cases, but currently, the chairing-duty is commonly distributed among the judges of a panel (typically with the exception of deputy judges). The presiding judge[10] divides the cases among the judges. This is an interesting development which seems to have been instigated to divide the workload more equally. Yet, it is also an indication of courts becoming less hierarchically orientated (see Holvast & Doornbos, 2015, p. 58-59).[11]

5.1.4 Preparing the memo and structuring the files

When the cases and judicial officers are assigned to a hearing, the actual adjudication process begins. In the Dutch system, this phase of the process is especially important because – unlike in common law systems, where the hearing is the central place to present the arguments and evidence – the case files hold all the relevant legal information (Damaska, 1986; Shapiro, 1981; see also chapter 3). In administrative law, the focus on the information in the case files arises from the fact that the judicial proceedings are in fact a review of an earlier decision (including the documentation therefore) by a government agency. In criminal law, the proceedings also largely focus on the information in the case files, since a landmark ruling[12] by the Supreme Court in 1926 permitted hearsay statements to function as evidence in criminal proceedings.[13] The files of both fields of law frequently

10. The presiding judge is normally a senior judge, who sometimes followed a special presiding course.
11. The execution of this habit appears to differ slightly between courts and court divisions. In some court divisions, the presiding judge still has a leading role, e.g. remains seated in the middle seat during the hearing and also takes the lead in deliberation. In other court divisions, the chairing judge performs all these duties.
12. The *de Auditu* ruling, HR 20 December 1926, NJ 1927.
13. The hearings currently consist of a formal repetition and discussion of the material collected during the preliminary investigations by the police and/or an examining judge; see Garé, 1994, p. 103.

include lengthy case files.[14] The judge is required to filter the legally relevant information out of these records.

It is common practice for judicial assistants to prepare a document supplementing the case files in order to assist the judges in their preparation for hearings (see also Van Oorschot, 2014). Several judicial assistants mention preparing this document as being their key duty. It will become clear in this section that this document, which is referred to as the 'memo', regularly plays an important role in the process of decision-making.

The memo functions in different ways depending on its format, the substance it has been given by the judicial assistant and the way in which it is used by the judge. Judges are regularly also provided with other documents that presume to summarise a case, for example, briefs of a lawyer or a summary by the police or prosecution office. These documents can also be employed by judges in getting on top of cases, but the memo of the assistant is particularly valuable, as it serves the purpose of providing an impartial take of a case.

Some judges use the memo mainly as a roadmap for the case, whereas others are mainly interested in the memo to get a grasp of the views of the assistant regarding the case, using the memo primarily as a vehicle for discussion. This corresponds to how comparable memos are used in other jurisdictions, such as the US and the UK (see section 3.2).

Arranging the files

Although occasionally exceptions are made due to organisational obstructions causing time-management issues, the regular procedure is that the judicial assistant is the first of all court officers to receive the case files and start to work with them.[15] The first step the assistant takes is to see what the case is generally about, if information is missing and whether it requires special attention. Then the assistant will commonly 'sticker' the files, using various color-coded sticky notes. This makes it easier for a judge to find certain documents while preparing for the hearing and also to find documents during the hearing itself.

The stickering potentially provides judicial assistants with power to draw the judge's attention to particular information. In the case files studied for this research, the stickers usually merely pointed out the type of documents that were included (e.g. yellow stickers for victim statements and green for statements of witnesses, etc.). They did not seem to strongly direct the judge, content-wise. However, it is not unlikely that this practice does have some (unintended) effect on the judicial decision-making, as it might place certain emphasis on the stickered docu-

14. In criminal proceedings, these are, for instance, statements by the accused, witnesses and experts and reports of investigations by the police. In administrative law, the case files present the information on which the decision of the government agency was based, which can also be a large quantity of materials.
15. Except for cases which are not prepared by an assistant.

ments and thereby withdraw attention from others. In one instance, it was observed that a judicial assistant had drawn the attention of the judge to a particular page of the files by stickering it and writing an exclamation mark on the sticker.

Format of the memo

The document referred to as a 'memo' has different names in different courts and divisions of the courts, namely 'instruction', 'preparation form' or 'draft judgment'. The content of the memo also differs substantially per division. Furthermore, the divisions have diverse guidelines regarding what type of memo should be produced for what type of case. In one of the courts, no memos are produced for most police-judge cases, due to cost-saving and retrenchment measures. The idea is that these cases are usually so simple (and the files so minimal) that the judges' saved preparation time due to having memos does not outweigh the time charged by the judicial assistants in creating the memos. As a result of this policy, the involved judicial assistants also do not usually read the files, and, therefore, they are not familiar with the content of the cases.[16] Consequently, they cannot act as fully informed discussion partners to the judges.

In the two administrative law divisions, it was, and still is, common practice to prepare a draft judgment as a memo. This entails that the memo has the format of a judgment. Mostly, only the first section of the judgment (consisting of the facts regarding the procedure, the applicable legal rules and the positions of the parties) is written as a draft judgment, and the following section (concerning the courts considerations) is left blank. The latter section is then substituted by an analysis by the judicial assistant marking various possible routes the court can take in deciding the case and the arguments for and against. In other instances, the draft judgment memos already include several court considerations (written by the judicial assistant) and occasionally a proposal for the final judgment. A senior judicial assistant (resp. 56) with a lot of experience with the latter practice, explains:

> *'In nine out of ten cases, the memo is a draft judgment. Only what you do is, out of piety, you remove 'judgment' at the top. I always scratch it out. And then I write 'instruction' instead. But really, it is just a judgment. And then after the hearing, you adjust it a bit. And, look, in nine out of ten cases, that thing can really just stay as it was drafted in the pre-trial phase.'*

Regarding the memos for two hearings (hearing 10 and 11), the word *judgment* was not even scratched out but was still the heading of the memo. Another judicial assistant (resp. 46), who has worked for approximately 10 years at the court, clarifies how she decides what the format of the memo should be:

16. Some assistants do scan through the files. However, they are not assigned any time for this. For that reason, this does not seem to happen often.

> *'Most of the time, I make a draft judgment. In cases in which I really don't know which direction it will go, I prepare such a 'half-instruction'. So, then I write down the legal context and the case law, and then I start discussing: 'I think the case concerns the following…'. Then I look for aspects that should be discussed during the hearing, and maybe I will write down a few questions, and I leave the rest blank. Because you can't always write a draft judgment. There are cases of which you immediately think, 'I have never dealt with this before', or 'this is complicated; this can go in any direction'. Over the years, you do get a sense for it.'*

Of the 65 analysed memos in the sample, 22 were written as draft judgments.[17] Most of these memos were not completed drafts but had some blank segments which were supplemented with small memo-style sections. About two thirds of the draft judgments already included a suggested judgment.
In the administrative law division of court A, this routine of writing drafts was recently partly abandoned, as it was considered inefficient to prepare a draft judgment every time. The new policy in this court is to alter the type of memo one writes to the needs of the judge. However, some senior assistants who were accustomed to writing memos as draft judgments still almost exclusively create these types of memos. In the administrative section of court B, writing memos as draft judgments is still the usual procedure. From a managerial perspective, preparing these kinds of memos is efficient in the sense that it saves time after the hearing, when the judgment has to be written. Several judicial assistants mention this as an advantage: *'my personal preference is to do as much as possible during preparation. That saves time during the finishing stage'* (resp. 27). Given the fact that preparing memos frequently takes up a large amount of the assistants' time, and some judges only make marginal use of them, it is practical to create a memo which can be used as a draft for the later judgment. This procedure is also beneficial for ensuring that the judgments are completed shortly after the hearing, which is valuable to the litigants. On the contrary, having a judgment (largely) completed before the oral arguments are presented could also inhibit the judge (and the assistant all the more) from entering the hearing unbiased. If litigants became aware of this, it might suggest that the case had already been decided. In that sense, it could be a threat to the appearance of the neutrality of the judge. Furthermore, in administrative law cases, it is not uncommon for parties to settle a case during the hearing (this is, in fact, encouraged in recent judicial policy).[18] Having completed a draft before the hearing can consequently be a waste of time, or it could demotivate judicial officers to encourage the parties to reach a settlement.

The criminal law divisions create different memos. These memos list the practical information about a case: whether the accused has confessed, the evidence presen-

17. Four of these draft judgments were written for special types of criminal cases. The rest were all drafted at the administrative law division.
18. See Verburg & Schueler, 2014.

ted in the files, the criminal record of the accused, personal circumstances (including possible psychological reports written on the accused) and a section to include the orientation points for sentencing. These memos are usually largely written in a neutral, descriptive style.
In one of the criminal court divisions, the memo is referred to as the 'evidence overview'. Here, the memo primarily focuses on the incriminating evidence. The form does not include a specific section to record possible exculpatory evidence. In both courts, the memo does include a section where the assistant can add an analysis of the case and/or report remarkable aspects of the case. The focus on incriminating evidence and the absence of room to report exculpatory evidence cause a risk of presenting the judge with a memo that is one-sided and primarily designed to reach a conviction (see also section 5.1.7).

Including extra material
The judicial assistants can also include additional documentation to their memos when considered valuable. This includes case law, regulation, legal literature or any other form of information that supports understanding the case and reaching a decision. Sometimes judges request additional materials (see next section), but mostly, judicial assistants add materials on their own accord. Time constraints seem to play a role in whether judicial assistants will make the effort to perform this kind of additional work. Furthermore, their professional attitudes towards their work also play a role. Some judicial assistants take a great interest in the cases they are working on and truly aim to participate in the decision-making. These assistants often take great efforts to understand all legal issues at hand in the case. Other assistants are perfectly comfortable with cases being discussed without their views being considered (see more in section 7.1.2).

In administrative law, it is common to include extra information. Due to the extensive volume of regulation in this field of law, judges frequently consider it useful when the judicial assistant includes the regulation that the case concerns and sometimes the regulators' explanatory memorandum. Assistants normally also include case law that is referred to by parties in their briefs. In addition, judicial assistants sometimes conduct legal research and include supplementary case law they consider relevant. New judges occasionally ask assistants to include a case which has a similar precedent as the case at hand to function as an example. The choice for such a case can potentially steer the judge in a particular direction. Some judges, therefore, prefer to also search for case law themselves. Certain judges also favour searching themselves because it provides them with results straight away. A judge says:

> *'I find it difficult to delegate, because I can usually do it faster and better myself. At least, that is what I think. I'm all in the middle of it then anyway, and then I can just as well search for some case law on my*

> *computer. Or look into a legal Act. That is so quick; it suits me better than waiting for someone to bring me something that is of no use anyway. Because that also often happens.'* (Resp. 64)

In criminal law, it is a rare exception for assistants to include information apart from the applicable 'orientation points for sentencing'. These orientation points are agreements established by judges all over the country[19] that list suggested sentences for various offences which can be consulted when establishing a sentence.
The Dutch Criminal Code is more compact than the administrative regulations, and it is more widely assumed that criminal judges are familiar with the relevant case law. Some respondents even hint at it being considered inappropriate to include case law, as that would suggest that the judge's legal knowledge is not up to standard. In three criminal cases that were followed, it was observed that the judicial assistants had found case law but did not include it in the memo. In two of these instances, the assistants did mention this case law during the deliberation sessions.
When judges are confronted with a novel legal question, they occasionally also ask a judicial assistant or a staff lawyer to write a specific memo regarding this issue. During one of the attended hearings, an exceptional procedural situation occurred that made it necessary to adjourn the hearing. The presiding judge then contacted a staff lawyer and asked the staff lawyer to write a memo listing relevant (case) law and, based on the case law, to provide advice for how to deal with the situation.

Revealing the vision of the judicial assistant
Judges as well as assistants differ in their opinions about the extent to which a memo should be neutral or should disclose the assistant's views. The two studied court divisions differ in this respect as well. Criminal law memos are primarily written in a neutral manner, and they mainly include objective information directly taken from the files, sometimes complemented with some minor remarks that hint at the judicial assistant's views. This is consistent with the formal principle of immediacy, which prescribes that the judges have to reach their decisions based on the evidence presented during the hearing (see section 5.1.3). As a consequence of this principle, the importance of entering the hearing open-minded is stressed in criminal law divisions. It is largely considered inappropriate to articulate preliminary judgments before the hearing. When remarks are included by assistants, they are commonly accentuated by writing them in italics or in between brackets. As an experienced judicial assistant notes:

> *'Occasionally, I will add some small NBs [nota benes]. 'Here is something strange' or 'Is this correct?' I do try to refrain myself from giving my opinion in the memo. It has to be a neutral memo. I try to… If I think that something is wonky, I will write it down. That is, of course, the idea. But I'm not going to*

19. By the Council of Presidents of the criminal law divisions of all courts.

write down in my memo: 'I believe this to be a credible statement'. Those kind of opinions, I will not put in there.' (resp. 1)

In the criminal law division, it is considered essential that the judge can clearly distinguish the factual information in the memo from the reflections of the assistants. Including one's own views is typically regarded as 'something extra'. Several judges mention that only 'the better' assistants make this effort. Most judges consider this to be a positive contribution. A criminal law judge responds to the question of whether she appreciates this:

'At least it means that someone has thought the case over, instead of just mechanically making a memo. Therefore, you could, in principle, invite any fool who can read and write, to put it harshly. You should prepare a case and make a memo having an idea of what it is about. I quite like it if somebody does that, when the situation requires it.' (resp. 7)

A way in which judicial assistants in criminal cases sometimes do work ahead of the judgment is by already crossing out certain elements of the charges which, according to the assistant, cannot be proven by the evidence in the files (see also Van Oorschot, 2014, p. 448). Two judicial assistants whose memos were studied (related to hearings 17 and 18) also included possible defence strategies they expected the representative of the accused to employ.

In the administrative law divisions, it is not considered problematic to take an initial stance on a case; on the contrary, it is often regarded as beneficial to discuss the merits of a case before the hearing (see also section 5.1.5). Disclosing one's views in the memo is largely regarded as compulsory. A judicial assistant explains:

'It is expected of us to disclose our opinions. That is about it. Especially in hearings with a single-judge, the judicial assistant is really the only person with whom a judge can talk about it. He can also talk to colleagues afterwards, but leading up to the hearing, you are the sounding board.' (resp. 27)

Another judicial assistant explains how she once refrained from giving her opinion, but this was not appreciated:

'I have had a case at hand which I didn't know what direction it would go. In my view, it was really fifty-fifty. So, I kept vague what my opinion about the case was. And then, sometimes I was told: 'what is missing in your memo is your opinion regarding this case' (…). Judges, then, actually do like to know your opinions, even though it can go in a completely different direction after the hearing. I would rather wait for that moment.' (resp. 30)

The memos often represent legal analyses of the cases, and they are structured in a way which emphasises the information that the assistant believes to be most rele-

vant. Several judges (e.g. resp. 42) refer to the fact that most judicial assistants are currently legally qualified and, therefore, are capable of making such analyses: *'I always think: We do not employ lawyers for nothing.'*

Usage of the memo by the judge
Whether judges believe the memo to be a valuable contribution varies greatly. This is partly due to the normative ideas of judges about what their duties entail and partly due to differences in character and propensities to trust the involved judicial assistants (see sections 7.1.1 and 7.1.2). The following four respondents represent two of the extremes regarding this issue. One criminal law judge does not use the memos at all, for moral reasons:

> *'I don't do anything with the preparations of the judicial assistant. Nothing (…) because I believe that I'm responsible for the decision that is made. And I'm not going to delegate that responsibility, not even implicitly, to a judicial assistant by trusting an assistant's memo blindly. When a suspect ends up with me, he has the right, which is also captured in the constitution, to get the judge offered to him by law. (…) So he has a right to see me. Not a judicial assistant, but me! And a right to see me means: a judge who does his work conscientiously.'* (resp. 38)

Another judge uses the memo only rather limitedly: *'Well, for a quick scan of the case, I find it quite useful. But I don't do much more with it.'* (resp. 40)

On the other end of the spectrum are judges who believe the memo to be of great value. A judge comments about creating a memo:

> *'It is so important that it happens; otherwise, you can't keep up with the tempo. If you don't have a memo, you can't run through four or five cases in one day. You just don't have the time for it. (…) I would not know how to do it without a memo, to be honest. So, I'm very happy that they are made.'* (resp. 3)

Another judge remarks: *'The memo is an important crutch for me. I do look at the files, but the memo is, for me, the core of the preparation.'* (resp. 62)

It is frequently mentioned that being provided with a memo saves time. Yet, a clear social norm also exists in the courts which limits the usage of the memo. Interviews and informal conversations made clear that exclusively reading the memo and not the files is regarded as inappropriate among the vast majority of judges and assistants. The professional standards set by criminal law judges, published in 2016, also point to the fact that all members of a judicial panel should read and be familiar with all documentation regarding a case.[20] A judge cites:

20. See https://www.rechtspraak.nl/SiteCollectionDocuments/20160220-professionele-standaarden.pdf

> *'I may hope that it [only reading the memo] doesn't occur… It probably happens occasionally, but I think that the people who do that hide it scrupulously. It should absolutely not happen. I think that for your own experience of your duty, your work, you shouldn't do it. Just work late for an evening in that case.'* (resp. 45)

In accordance with this, none of the interviewed judges reported doing this themselves, although some said they were acquainted with other judges who do it.[21] During the research, one situation was observed in which a judge in a panel admitted, during deliberations, that she had only read the memo. Colleagues of this judge later responded disapproving of this course of events. In another instance (hearing 19), a judge on a panel had become ill at the last moment. The replacement judge, who was only found the day before, also had only read the memos. This meant that this judge participated in deliberations without having read the files.
There are also several judges who experience difficulties in relying on memos due to the lack of trust they have in the quality of judicial assistants' work. Various judges report checking almost all the information written in the memo in the files, a practice also observed by Van Oorschot (2014, p. 440, 444). Others simply do not pay much attention to the memo.

That fact that several judges believe that having a memo at hand saves them considerable time necessarily means that they rely on the memo to a certain extent. This is confirmed by a judge (resp. 47) who mentions that he wishes to be notified if assistants do not have time to prepare a memo, because then he will schedule an extra day to prepare for the hearing. From a managerial perspective, this division of tasks seems favourable, as it is efficient when less-qualified personnel perform tasks which save judges time. However, the lack of trust in the assistants' work noted among various judges seems to result in duplication of work, which devalues the work produced by the assistants. Various judges indicate that the extent to which they rely on a memo partly depends on the judicial assistant who wrote it, even though many believe that it should not be so. A criminal law judge explains:

> *'In secret, I also look at which of the assistants prepared the memo. Because you work with all of them, you also have an idea of who is very experienced and who a bit less. There are always quality differences, hence, also in making memos. Some are more precise and reliable than others. Some cycle a bit too fast. So when you know who made the memo, you can also value it a bit better. Let me say it like this: when I know that it is prepared by someone good, I trust it a bit quicker.'* (resp. 10)

21. This may partly be a socially desirable answer; see on that topic section 2.1.4.

The manner in which the memo is used also differs from judge to judge. Several judges (e.g. resp. 41) say they use the memo as a roadmap: *'I use it as a sort of road-map. Like, hey, what did this person extract from it? And what do I add to this myself?'*
This is similar to how judges in other judiciaries describe using the memo (Cohen, 2003, p. 91–93). These judges commonly first read the memo to get an idea of what the case is about, and then they read the files. This enhances the likelihood of the judges being (unintentionally) influenced by the memo. Studies on heuristics and cognitive biases in (judicial) decision-making have revealed that the decisions that judges make are effected by the manner in which the information is presented to them (Englich, Mussweiler, & Strack, 2005; Guthrie et al., 2007; Ten Velden & Dreu, 2012). Thus, when the information from the files is presented by the judicial assistant in a certain layout, this can affect the way in which the judge evaluates this information. The so-called *anchoring effect* can occur. This occurs when people, in this case judges, adjust their judgments unconsciously to an initial value which is presented to them, which serves as a reference point or anchor for the judgment (Tversky & Kahneman, 1974). A few judges claim to be aware of the fact that they are presented with a selective, and perhaps coloured, summary of the information from the case files. They consciously choose to read the files first and use the memo as a device to check their own findings.
Some judges also employ the memo primarily as a vehicle for discussion (a function also noticed in other jurisdictions; see section 3.2). These judges believe the analysis of the merits of the case by judicial assistants to be the most important aspect of a memo:

> *'It prevents tunnel vision on my part. It can happen that you read something and think: 'Oh, that's about that', and then you continue to read the rest in that perspective, while the judicial assistant maybe has noticed things in advance that I didn't. Then I think: 'Oh, my, is that so? I have to check that'. I find it very important that you analyse the case as a couple. Nine out of ten times, you think the same, but sometimes there is someone who says, 'I think it should go that way'. And then I think, 'Well, I think it should be very different'. And then you can discuss those matters after the hearing, or before.'* (resp. 52)

This aspect appears to be especially important when judges are singly hearing cases.
The majority of the interviewed judges, however, claim to not have one fixed way of using the memo. Their method depends on the case at hand (especially in very large and complex cases, they regularly turn to the memo first), the available time (the larger the time constraints, the increased dependence on the memo) and also on the type of memo and their perception of the qualities of the person who has written the memo (see more in section 7.1.7). Furthermore, new judges frequently produce additional documents themselves. Preparing their own documents helps them to really master a case:

'If I make my own abstract, I know very quickly what it is about. It costs a lot of time, but that's why I always say to the judicial assistant, 'Don't elaborate too much on the facts, because I'm going to summarize them myself anyway'. I find it a waste if we then do double work. For me, it is a way to get the files in my head and to use as a reference.' (resp. 17)

5.1.5 Communication and deliberation prior to the hearing

In order to fully profit from the memos, the two administrative law divisions have introduced the concept of pre-hearing consultations between the judge(s) and the assistant.[22] This is a response to the problem that several judges mention of finding certain types of memos, under certain circumstances, not particularly useful.

At these consultations, the judge or judges meet with the assistant to discuss what type of memo they desire and what information should be included. In theory, this would result in both parties briefly exploring the case files a few weeks before the hearing and then meeting to discuss the desired content and the preferred type of memo (if a memo is needed at all). In practice, a majority of the judges do not read the files before the consultation. Every so often, no consultation takes place at all. This especially occurred at one of the courts, where, in the six observed administrative law hearings, only one official pre-hearing meeting took place. In the other court, meetings were held for all seven followed hearings.[23] Various judges appear to greatly value their professional autonomy and embrace the idea that they should be able to decide for themselves what their preferred working method is (see also Frissen et al., 2014). Even so, time constraints occasionally prevent the consultations from taking place.
The pre-hearing consultations that were held typically lasted 20 to 40 minutes (to prepare for an up-coming hearing at which three to four cases were scheduled). Usually, the content of the cases was already a point of discussion during these consultations, also because this affects the preferred type of memo. Case law and previously handled cases by the court were frequently discussed during these meetings as well.

These consultations also regularly function as additional platforms to discuss legal issues at stake. As mentioned before, at the pre-hearing consultations, the judicial assistant has already inspected the files, while the judge(s) have often done less preparation or none at all. This causes an asymmetry of information position. According to agency theory, such an asymmetry can give the subordinate a strong position from which to wield influence (see section 4.2.2). One of the judicial assistants confirms this idea:

22. This is a nationwide initiative introduced with the new policy of *Nieuwe Zaaksbehandeling*.
23. This high number could partly be the result of the presence of a researcher. In both divisions, respondents mention consultations not always taking place.

> *'Very often, I'm the most familiar with the case, content wise, because I have already looked though all the files. So, I'm better informed than the judges, who haven't seen all the files or just scanned the files. So, then it can be of importance that my factual knowledge of the case is better than that of the judges. (..) So I can then, on several occasions, provide additions or warn them about various things that they haven't focused on yet.'* (resp. 33)

This asymmetry is probably strongest at this stage in the process, because judges usually start preparing for the hearing at a later stage than judicial assistants.
At the criminal law divisions, no pre-hearing consultations are held (with the exception of very large cases). That does not mean that no contact between judges and assistants is made. For example, bringing the files and memos to the judges' offices regularly offers the assistants and judges the opportunity to have brief conversations about the cases.[24] Judges, some more than others, also occasionally drop by the offices of assistants to converse about cases.
Still, on average, the contact between judges and assistants at this stage is rather minimal (see also Abram et al., 2011, p. 11). During the fieldwork, I shared a room with various assistants, a staff lawyer and a judge. The vast majority of days would go by without anyone coming in to discuss a legal matter. It appeared, and this was confirmed in several interviews, that the interaction in the criminal law divisions is less than in the administrative law divisions. In addition to the principle of immediacy, which may restrict elaborate discussions of cases before the hearings, this is – according to various respondents – also related to the workload at the criminal law divisions. The workload in the criminal law divisions is widely acknowledged to be particularly high (see Fruytier et al., 2013; Van Duijneveldt, Wijga, & Van Reisen, 2017). A judge explains: *'I always try to do it [have a consultation]. But, for instance, for my last two hearings, I didn't make it. Just because I lacked the time. So that is a pity.'* (resp. 60)

5.1.6 Contact with the parties

Normally, the contact of judges and judicial assistants with litigants outside of the hearing is quite minimal. Most communication of litigants with the court occurs via administrative staff members and follows official procedures. However, especially in administrative law cases, it is sometimes necessary to contact the litigants. The same applies to large criminal law cases in which several (preliminary) hearings over multiple days need to be planned. In those events, the judicial assistant often plays an important role in the communication.

24. The interviews that I conducted with judges were interrupted by such an occurrence several times.

Acting as a buffer

Almost all of the judges and assistants that were interviewed about their contact with parties explained that it is a rule that the judge does not engage in direct contact with parties and their representatives outside of the courtroom. This is also recorded in Article 12 of the *Judiciary Organisation Act*. Instead of the judge, the judicial assistant or administrative staff officer calls parties when, for instance, extra documents are required to be sent to the court.

The main reason for this acting as a *buffer* is that if a judge has contact with one of the parties, this could cause him or her to appear to be partial to that side, which goes against the values of the rule of law (see section 4.1). It is also inconsistent with the principle of an adversarial process to have contact with only one of the parties involved. A judge cites:

> *'In the criminal law division, we would also do it [have contact with parties] ourselves, but to me, that doesn't feel right. I believe that here [in the administrative law division], the agreement is to have the judicial assistant do it. Otherwise, I have to explain to the parties during the hearing that I made a phone call to one party but not the other. Keeping in mind the principle of an adversarial process, I think, 'Don't do it'. It is also much safer when the judicial assistant does it. That way, there is a buffer in between. Let me please use that luxury.'* (resp. 21)

Seldom does one of the parties try to attain advice or information about the content of the case from the judicial officer. Assistants report it being easier for them than for a judge to keep the right distance. A judicial assistant states:

> *'I sporadically have very annoying conversations, but I learned to just be very patient and polite. And quite early, one can say, 'I have to discuss this with the judge; I will call you back'.'* (resp. 23)

Although most judges minimise the contact with litigants, some judges have assistants call litigants to provide them with additional information to prepare themselves for the hearing (for instance, if a case is likely to flounder on procedural matters) or to ask whether both parties are truly unwilling to agree upon a settlement. Especially in those instances, it can be challenging for assistants to use the right tone of voice and not reveal too much information.

Questions can be raised regarding whether this type of contact is permissible, even if it occurs via the assistant. At some of the highest courts of administrative appeal, respondents mention that their reluctance to have contact with parties is extended to the judicial assistants working on the case; instead of the judicial assistants, administrative staff members engage in contact with litigants. This reveals that these courts to also take the impartiality of judicial assistants into consideration when they are highly involved in adjudication.

Own initiative or not

A frequently asked follow-up question was whether assistants did, and were permitted to, contact parties on their own account. The answer to this question sheds light on the amount of control that judges desired to have and the room that judicial assistants are provided to make decisions individually. As it turned out, the answers differed considerably between the interviewed judges and assistants. Perhaps somewhat surprisingly, no clear policies for the different courts and court divisions could be recognised. The most common procedure is that the assistants first contact the judge, but assistants also solve simple issues, such as the absence of certain required documents, independently. It seems that mostly the more experienced assistants allow themselves the freedom to contact litigants without first consulting a judge: *'Sometimes documents are missing, or extra information about a document would be convenient. Then I just ask the litigant. But with other aspects, I first discuss with the judge.'* (Resp. 57, judicial assistant)

Various judges explain that they have to have a certain trust in the assistant in order to tolerate them taking initiative. For instance, a judge says:

> *'You have to know each other a bit. A certain confidence that somebody delivers good work exists more with some than with other people. I could easily think of a few faces of which I think, 'Fine if they do it [have contact with litigants on their own initiative]'. And with others, I would rather say, 'You have to discuss with me first'.'* (resp. 61)

Hence, perceptions about someone's competencies and skills are clearly important in this respect.

5.1.7 Analysis of the involvement of judicial assistants in the run up to the hearing

The research reveals that judicial assistants regularly play an important role in the run up to the hearing. However, their involvement is largely invisible and unknown to the larger public. The assistants hold a powerful position at the early beginnings of the legal procedure, in which they make initial decisions on procedural questions such as whether a case can be adjudicated without a hearing (in administrative cases). This results in the judge only performing a marginal role as a coordinator of the judicial assistants' work. Such a routine has been criticised by various authors (Hol, 2001; Kronman, 1993; R. A. Posner, 1985 see also section 1.2).
Judicial assistants, furthermore, prepare memos. It is widely agreed upon by judges that being provided a memo saves time. If creating the memos does not take too much effort from the assistants, this practice could thereby enhance the efficiency of the courts. Moreover, the additional information that is occasionally added to the memos can support judges to improve their decisions, as it can enhance the overall information on which the decisions are made (see on the bene-

fits of knowledge-sharing in adjudication Taal, 2016; see on information sharing in group decision-making Ten Velden & De Dreu, 2012a). Well-constructed memos can also prevent biases from occurring by providing the judges with opposing views and information to enrich their views on the (legal) contexts of the cases. When judges use memos as vehicles for discussion, it can prevent tunnel vision (see on debiasing techniques e.g. Anderson, 1982; Wagenaar & Crombag, 2005 chapter 7).

In some situations, assistants also spend more time reading and analysing the files. This can result in them having more knowledge about the content of the files, particularly in the early stages of the process. As assistants receive the case files before the judges, they sometimes present their views on cases to the judges in pre-hearing meetings or via the memo before the judges have read the files. The asymmetry of information that arises places judicial assistants in a powerful position in relation to the judge, as the judge cannot fully check the quality and accuracy of their work (on agency theory, see section 4.2.1). This is especially worrisome as, instead of preventing biases, memos also carry the risk of provoking biases. It is clear that memos could function as anchors (Tversky & Kahneman, 1974) to judges, especially when they use them as road maps for reading the case files. This is predominantly problematic when the memos do not present neutral information, but, for instance, focus predominantly on incriminating evidence, as is the situation in one of the courts.[25] Research also suggests that when judges are presented with evidence within well-constructed (coherent, structured, complete and unique) stories, they will be more likely to go along with the conclusion of these stories (see on the story model in juror decisions: Pennington & Hastie, 1991; Pennington & Hastie, 1992; and regarding judges Wagenaar, Koppen, & Crombag, 1993). By creating their own stories or amplifying the story of one of the litigants or the police, memos, could therefore steer judges in certain directions. The fact that people have the tendency to uphold their original judgments and tend to search for evidence that confirms their presumptions (confirmation bias) strengthens these effects (Nickerson, 1998). It depends on the content of the memos whether – when they are used – they have such biasing effects.

Some judges acknowledge these risks, and for that reason, they choose to read the files first before reading the memos. Furthermore, several judges are reluctant to trust the work of assistants in general. This results in some judges spending a significant amount of time checking all the information in the memos. Several other judges simply make little use of the memos. While this avoids judges being undesirably influenced, it also nullifies the positive contributions that the work of judicial assistants can have.

25. Also note the research by Schünemann and Bandilla, 1989, which revealed that in an experimental setting, judges in criminal cases who had knowledge of case files before a hearing more frequently convicted defendants than did judges with no prior knowledge.

5.2 The hearing

In criminal and administrative law, almost all cases are decided after a hearing has been held. This is quite different from civil law, in which a substantial portion of the cases are decided without hearings. To understand what occurs during a hearing, 27 hearings were observed. Thereby, not only were the official hearings in court studied, but also the preparation for the hearings and the breaks and adjournments. The hearings were also a topic in the interviews (see more on the research method in section 2.2).
In comparison to the other phases of the adjudicative process, the involvement of judicial assistants at the hearing is minimal. As one assistant (resp. 23) comments: *'It is sometimes a bit strange because you don't say a word, you just sit there.'* The main duty of assistants is to create a record of the hearing.

5.2.1 Role of the memo during the hearing

In section 5.1, the importance of the memo in preparation for the hearing was elucidated. However, this memo can also serve a purpose during the hearing. Several judges were observed using the memo as guidance for chairing the hearing and for questioning the accused or litigants. This function of the memo is also included in the professional standards (published in 2016) which criminal law judges recently set for themselves.[26] This was particularly noticed when observing from behind the bench (instead of in the audience) during seven criminal hearings in one of the courts (see section 2.2.2). The judges who use the memos for chairing the hearings explain that they prefer using the memos instead of browsing through the case files, as the latter may disrupt the interaction with the parties. One judge (resp. 16) mentions trying to chair a hearing by memory. This judge normally makes personal notes in order to do so, but when a case is too extensive, the judge uses the memo.
Although most judicial assistants create the memos predominantly as means to prepare for the hearings, some judicial assistants also consider their relevance during the hearings. One assistant even names this as the primary function of the memo: *'It is called 'evidence overview', but it was also called 'guidance for the hearing' by some. I think it is a rather vague thing. I mainly use it as guidance for the hearing.'* (resp. 39)
For this purpose, it is very important that the memo provides a correct summary of the information included in the case files.
Some judicial assistants in the administrative law division also include questions in their memos regarding components of the files which require further clarification

26. See https://www.rechtspraak.nl/SiteCollectionDocuments/20160220-professionele-standaarden.pdf.

and which could be raised by the judges during the hearings. During the fieldwork, it was difficult to determine whether judges take note of these questions in the memos. The questions were rarely asked directly to the parties during the observed hearings, but the hearings usually take the form of conversations, and most information is already discussed without the judge specifically asking for it. The questions do make fairly clear what information, according to the assistants, needs to be acquired during the hearings, and thereby, they can guide the judge(s).

5.2.2 Creating the record and other administrative duties

When judges and judicial assistants were asked about the involvement of the assistant during the hearing, they almost all pointed foremost to the fact that the judicial assistant in this stage functions as a court clerk and makes the record of all the relevant statements made during the hearing and all legally relevant activities which have taken place. As one of the judges (resp. 7) states: *'To put it crassly, at the hearing, it is nothing but typing.'* This longstanding duty of the assistants is codified in legal Acts.[27] The record is the only legally binding source of knowledge of what occurred during the hearing, and thereby, it serves an important purpose when the case is adjourned or the ruling is appealed.[28] It is also important that statements made during the hearing are properly recorded, as they can also serve as evidence. The record must be signed by the assistant as well as the presiding judge, and they share the responsibility for establishing the record. So if the judge(s) and the assistant were to disagree about what occurred during the hearing, the view of the judge should not prevail, but the views of both officers should be included in the court record (Corstens, 2005, p. 554).

The fact that the duty to create the record is specifically assigned to the judicial assistant generates a clear division of duties during the hearing: the judge(s) is/are chairing the hearing and interact(s) with the parties; the assistant at the same time sits hidden behind the computer[29] and creates the court record. This division of duties seems to fit well with the traditional rule of law ideal, in which emphasis is on the judge as the one who is entrusted with the responsibility to adjudicate (see section 4.1).

Apart from producing the record, the judicial assistant is assigned additional administrative duties for during the hearing. In criminal cases, for instance, the judicial assistant has to produce a court order to place someone in custody if the court has decided to capture the accused instantly; or conversely, he or she also has

27. For criminal law: Art. 24 of the Dutch Code of Criminal Proceedings; for administrative law: Art. 8:61 of the Dutch Administrative Law Act.
28. See Supreme Court case HR 22 November 2005, LJN AU1993, NJ 2006/219 with note from Schalken.
29. Although a few assistants still make notes on paper.

to produce court orders to discontinue the custody. Another example of such an administrative duty is the signing of the note of the court translators.[30]

5.2.3 Involvement of assistants during the hearing

Given that the involvement of assistants during hearings is primarily administrative, content-related involvement of assistants is rare, but not completely absent. There was minimal active participation of assistants in the hearings observed during the fieldwork. In about half of the hearings, there was no involvement at all (apart from occasionally signing the translators' notes). In most other cases, the involvement only consisted of signing or producing administrative documents and/or providing secretarial assistance, such as assisting in setting a date for a follow-up hearing. The interviews confirmed these observations: most assistants state that this is commonly where their contribution ends.

However, in some instances, assistants did take part more actively in the hearings and the decisions that were made. An example of such participation was at hearing nr. 23, during which a judge asked an assistant for advice. The issue the judge was concerned about was that one of the parties had announced that she regretted being self-represented. The presiding judge wondered whether to adjourn to afford the party with the opportunity to contact a lawyer. Via a note, which the judge subtly passed to the judicial assistant, the judge asked the assistant's opinion on the matter. This was the only hearing during which such a practice was observed.
A different way in which a judge can consult the assistant is by adjourning the hearing for a brief period of time. This affords a judge time to reflect on certain matters, but an adjournment can also be used to discuss the issue at hand with the assistant (see more on adjournments in section 5.2.5).

Guarding the procedural requirements
In various interviews, judges and assistants mentioned that assistants are also expected to ensure that all procedural requirements (such as notifying someone of his right to remain silent) are met during the hearing. One judge, who occasionally forgets to follow certain procedural requirements,[31] states to appreciate it when judicial assistants point these out. As an example, the judge mentions the swearing-in of people who are questioned under oath:

30. They need this signature in order to receive compensation for the translation.
31. This also occurred several times during the hearings of this judge that I attended.

> *'I sometimes forget that. Then I just start talking to someone. I really appreciate it if a judicial assistant then says, 'you still have to swear in'. Just things that do not occur during every hearing, those non-routine things. I realise that I sometimes tend to be sloppy in those events.'* (resp. 42)

Most assistants confirm that they pay attention to these aspects and occasionally interrupt when they find it necessary. Most assistants consider this as part of their duties. Most judges perceive it as a positive contribution.
When a judge appears to overlook a procedural requirement, it is, however, regarded as inappropriate for an assistant to correct this by speaking out loud. This interferes with the notion that the judge chairs the hearing. A more suitable way to draw attention to these judicial omissions is to whisper or to discretely pass a note to the judge. At three of the studied hearings, such an interruption was observed. However, a hearing was also observed at which the judge overlooked procedural protocols several times, and the judicial assistant at this hearing did not correct the judge. Instead, the prosecution officer commented on it.
This last incident appears to be a manifestation of something which is pointed out in several interviews too: certain assistants are timid and reluctant to interrupt hearings. Various judges are under the impression that a large share of the assistants are not that keen to be (further) involved in the hearing.

Providing judicial assistants with the opportunity to ask questions
Regarding the involvement of judicial assistants beyond administrative and procedural issues, judges seem to have quite diverse views. Most judges believe that any additional involvement of judicial assistants does not suit their role. These judges seem to adhere to a traditional view on the judicial assistant's role (on role perceptions, see 7.1.2). An administrative law judge who embraces this traditional view states:

> *'No, that cannot happen, because the judicial assistant is not there to ask questions during the hearing. If that happens at a hearing were parties are present, then it is wrong. Period. (…) The duties are clearly marked. The judge chairs the hearing.'* (resp. 50)

On the contrary, some judges take additional steps to include judicial assistants in the hearings. According to respondents, it is a relatively new development in administrative law divisions that some judges provide the judicial assistants with the opportunity to ask additional questions at the end of the hearings. This was witnessed at three hearings. One judge (resp. 17) explains why: *'I almost always ask whether the judicial assistant has any questions. (…) As a judge, you are so busy asking questions that it can very well be that you forget something.'*

Another judge declares:

> *'I'm a supporter of having assistants ask a question during the hearing when there is a reason to do so, but people think very differently about it. I would not find that strange. The assistant knows just as much as I know about the case. I find it very odd when an assistant says [to me], 'you have to ask this'. Why can't the assistant ask it himself?'* (resp. 24)

Several interviewed administrative law assistants also stated that they have asked questions in the past. These assistants rather enjoy getting the opportunity to do so. Some of these assistants reveal actually finding it rather difficult to stay quiet during the hearings. They would occasionally even wish to change seats with the judges. An administrative law assistant says:

> *'I have had hearings that I thought, not that the other person is doing a bad job, but that you think, 'I want to do it; I just want to ask the questions'. For example, last Tuesday I had a hearing with a panel of judges. At that time, I had worked on the case for such a long time that I thought, 'This really feels like my case'. Actually, I thought, 'I know the case so well that I want to do it'.'* (resp. 23)

A criminal law assistant expresses a similar feeling:

> *'So, you can be as influential as you are as an assistant, but during the hearing, you have to let it go. And I find that a pity (…). You have your ideas about a case, you want to go in a certain direction, and then here is the hearing, and then the judge runs off with your case and does it in a way which does or does not match with what you had in mind. Eventually, it always works out, but I also want to do it myself.'* (resp. 8)

These are frequently assistants who wish to further their judicial careers and become judges. The quotes disclose how an advanced role of judicial assistants could potentially also lead to role conflicts, as judicial assistants might feel highly involved in adjudication and may be unsatisfied with the limited role they play during the hearings.

However, administrative law judges also mention that when they provide judicial assistants with the opportunity to ask questions, most assistants do not actually ask questions. This seems to affirm the abovementioned reluctance of some assistants to speak during the hearings. Some assistants point to it fitting their timid personality to function mainly in the background. Another assistant's response was the following: *'Very occasionally a judge asks, 'Do you have anything to ask?' It would, of course, be a vote of no confidence if I then would go and ask all kinds of questions.'* (resp. 51)
This quote reveals the ambiguity which is frequently present in the relationship between assistants and judges. Several other assistants disclose similar views. Thus, the reason for not asking any questions is also related to a prevailing idea among assistants that most judges would not, in fact, appreciate their contribution.

Appearance of the assistant to the parties
Judicial assistants sit alongside the judge(s) behind the bench, and they wear similar looking robes (see section 4.1.2). This could potentially give the impression of equality in the authority of both officers. The research reveals that, in reality, judicial assistants actually make very diverse impressions during the hearing.
Some assistants sit completely hidden behind their computer screen and hardly look up. During hearing nr. 6, one of the hearings which was observed from behind the bench, the assistant was checking her email repeatedly. She was not paying attention to what was going on in court, and she came across as uninvolved.
Other assistants come across as much more interested in what happens during the hearings: they look at the parties when they are making an argument and nod their heads every now and again. On two occasions, different assistants who made notes on paper and not via the computer were invited by a single-judge to take a seat on one of the judge chairs. That way, the assistants did not have a computer screen blocking their views. This resulted in an image which, to a non-professional, would not evidently show who was the judge and who was not. In some courtrooms, possible confusion is taken away by having signs that indicate to the audience who sits where. Still, this image sends an entirely different message to the parties about the role and involvement of the assistant.

Judges can also play a role in shaping the image of the assistant's importance when they are opening the hearing. In five of the observed hearings, the judge specifically introduced the assistant to the parties. However, during the rest of the hearings, the assistant remained unmentioned.

5.2.4 *Providing feedback on the judge's approach*

In addition to judges giving feedback to assistants, assistants also give 'upward' feedback to judges. A way in which judicial assistants can contribute to the overall quality of the hearings is by providing the judges with feedback on their performances in court. A judge clarifies:

> *'I find it very important to hear from the assistant whether I was too strict or too soft. Or whether I made myself clear enough. Things like that. I, and everybody else too, has to constantly be confronted with that. Because you work in a social context. I am not some little king on his own island. What one does has to make sense.'* (resp. 21)

Several assistants confirm that they are occasionally asked for feedback by certain judges. Although it can be perceived as difficult to give feedback to a superior (see also Commissie visitatie gerechten, 2014, p. 52), most of these assistants state that they do not hold back when asked for feedback. A staff lawyer says:

'When you ask for something, you can get my answer. I wouldn't say, 'That went really badly.' But sometimes they ask what their attitude was like, whether they came across as a bit grumpy. I believe that you should say such things honestly.' (resp. 57)

During hearing nr. 2, a judge was observed asking the assistant for feedback during an adjournment. This judge asked whether the judicial assistant agreed with the judge's request that the lawyer use a different vocabulary, as the judge believed the lawyer had used some vulgar words. The assistant responded that he thought that the judge had acted appropriately, although the assistant was not too bothered by it. The assistant believed that the lawyer had a refreshing way of pleading.
Some assistants, mainly senior, also indicated that they occasionally give uninvited feedback when they consider it is necessary or just because they enjoy giving a compliment. Judges clarify that judicial assistants can really be of additional value in this respect, as they work with a wide range of judges and therefore have a broad collection of comparative material. Also, they are the only court officials that are present when judges hear cases alone. For instance, one judge states:

'You see them [judicial assistants] operating with many different judges. So, when I ask an assistant after the hearing what this person thought of it, I would be fine if the assistant said, 'I noticed that you did this that way to the accused. What is the reason for that? Because I also see it done this and that way.' I can learn from that. Because I don't frequently see my colleagues at work.' (resp. 12)

5.2.5 Adjournments of cases and making interim-decisions

Particularly in criminal cases, judges are frequently required to make preliminary decisions during the hearings. For instance, a representative can ask for permission to provide additional evidence at the last moment, or he or she can request for the adjournment of the hearing to a future date. Another possibility is that an accused currently in custody can request to be released in anticipation of the prospective sentence. When these issues are raised, the judge has to immediately reach a decision.
Judges of a judicial panel will, in that instance, adjourn the case to deliberate about the legal issue in private. This deliberation normally resembles the deliberation that takes place after the hearing (see more in section 5.4), although it commonly takes less time.
For this research, it is particularly relevant to note what occurs when such issues are raised at single-judge hearings. In those instances, it is also common for the judges to adjourn the hearings. This provides the judges some time to reflect on the requests. Additionally, it also provides an opportunity to discuss the issue with the judicial assistants. For similar reasons, single criminal law judges, who normally reach their verdicts immediately after the hearings, on occasion will also adjourn before rendering their judgments at the end of the hearings.

According to the respondents, judges differ a great deal in this respect. Some never adjourn before announcing a judgment, others – especially more junior judges – do it rather frequently. During the fieldwork, numerous adjournments occurred, some of which were not able to be observed (see section 2.2.2). During one hearing (nr. 14), the judge announced when he came back after the adjournment:

> *'After careful consideration [looks at the assistant], we have reached a judgment.'*

The majority of judges told me that they do not often adjourn to consult with the assistant. Nonetheless, most of the judges state that they are glad this opportunity to adjourn exists. A judge cites:

> *'And of course, we do adjourn occasionally. Mostly during single-judge hearings, because then you have to render your judgment straight away. And then you can talk about it with the assistant in deliberation. 'What do you think? Do you believe that witness? Is there anything else in the files?' So, as a sparring partner. They can sometimes say very clever things. I don't adjourn very often. (…) But every now and then, I do. And then the view of the assistant can be very useful.'* (resp. 10)

In administrative law, preliminary issues are raised less frequently, but this can also occur. An event that happens more frequently is that the judge will adjourn a hearing in order to afford the parties the opportunity to attempt to reach a settlement.[32] Similar to the adjournments in criminal cases, these adjournments also offer an opportunity to discuss the case. This was observed happening several times. One administrative law judge says about this possibility:

> *'What I also like about an assistant is that, in case needed, we can always discuss. So, it doesn't happen often, but if during a hearing, I think that I don't know, then I can adjourn and consult the person next to me. Because that person also knows the case. He knows what happened and has legal knowledge.'* (resp. 32)

5.2.6 Informal discussion on the day of the hearing

Most interaction between judges and assistants on the day of the hearing occurs in an informal setting: during the walk to the court room, while waiting for the parties to arrive in court or during a lunch or coffee break. Especially during long working days, the atmosphere can become very informal. Frequently, jokes are made. On various occasions, it was also observed that judicial assistants made

32. Unlike in criminal cases, in administrative law, the parties are the ones leaving the court room, and the judge(s) and assistant stay.

jokes at the judges' expense.[33] This open atmosphere also presumably encourages judicial assistants to be frank when it involves content-related issues.
A lot of discussion and deliberation about cases also occurs during the day of the hearing. Judges regularly have already gotten familiar with the judicial assistants' ideas via the memos, and several judges appear to take pleasure in discussing cases with the assistants. Judges regularly discuss cases because they value the opinion of assistants, but they also do it because they are under the impression that the assistants enjoy it. One judge who is particularly chatty and keen on discussing legal and non-legal issues with assistants, remarks about this:

> *'I don't need it, but I do welcome it. And for an assistant, it is sheer fun too. For that reason alone, one should do it. As a judge, you have to offer them that opportunity, always.'* (resp. 59)

How much of a case a judge will actually discuss with an assistant depends on the qualities the judge attributes to certain assistants and, to a greater extent, on the judge's impression of whether the assistant is interested in having a discussion. Several judges emphasise that they recognise that it must be much more interesting for assistants to be involved in the adjudicative process. These judges have difficulties understanding the motives of assistants they perceive to be less interested.
Occasionally, these informal conversations between a judge and an assistant can also take a more formal tone and become some sort of pre-deliberation. In a few single-judge administrative law cases, the deliberations that normally take place at the end of the day had already been held during breaks in the court room.
Although the official deliberations only occur after the hearing, it is not uncommon for judges and assistants to informally reveal part of their views on cases beforehand. An event in which judges quite clearly revealed their thoughts on a case happened immediately after hearing a suspect during hearing nr. 5. One of the judges said, *'That last case will not take us long.'* The two other judges responded, saying that they did have some objections. The first judge responded with *'Yes, me too. I think we can't prove it'*, to which the others responded, *'Then we might be finished quickly indeed.'* This behaviour is at odds with the idea that all judges should enter the deliberation session openly and without being influenced by the views of their colleagues.

5.2.7 Analysis of the involvement of judicial assistants during the hearing

The duties of judicial assistants during the hearings still primarily consist of the traditional tasks of creating the court record and providing administrative assistance. Thus, during the hearings, judicial assistants primarily perform the socially

33. During hearing nr. 5, for example, a judicial assistant joked about expecting the hearing to take a long time because one particular judge was going to chair it.

accepted role of support staff members. The fiction of the judge as the core decision-maker, who adjudicates without substantial support, is thereby upheld at the public hearing. Several of the interviewed judges seem to adhere to this depiction. Consequently, they are cautious about changing the involvement of assistants during the most visible part of adjudication: the hearing. Various assistants are similarly satisfied with an active role behind the scenes and a more limited role during the hearings. This image that is presented to the public suits the traditional establishment of the judiciary, in which the judge is charged with the adjudication responsibilities and his or her position is secured with various mechanisms to safeguard the rule of law values (see section 4.1).

However, there are some means by which judicial assistants are involved and may influence what occurs during the hearings. These are mainly informal practices which take place outside of the purview of the larger public. A minority of (primarily administrative) judges also welcome a more substantial involvement of judicial assistants during the visible part of the hearings. They have taken favourably to the recent development of providing judicial assistants the opportunity to ask questions during the hearings. A minority of judicial assistants (mainly senior), are also positive about being actively involved during the hearing and providing the judges with feedback regarding their performances in court. This presents a new image to the public, which seems to fit well within the managerial development which promotes an active role for judicial assistants.

Because of these diverse views on the expected involvement of judicial assistants, the norms about the appropriate contribution of the assistants to the hearings are ambiguous and frequently unclear to assistants and judges. This leaves room for various executions. It also results in judges and assistants often having complex relationships with each other. The extent to which judicial assistants perform a more active, involved, role during the hearings also appears to be related to their characters. Several assistants point out that a role at the background fits their personalities. This is also observed by various judges.

The fact that judicial assistants are currently often highly involved in the adjudicative process remains largely unexposed during the hearings. Yet, there are some cracks appearing in the surface, and it will be interesting to follow how this evolves in the near future.

5.3 Conclusion

It can be concluded that during the first phase of the adjudication (the run up to the hearing and during the hearings), judicial assistants regularly play a substantial role in preparing to make decisions (likely driven by various managerial modifications). Pre-hearing, judicial assistants are particularly involved in deciding on procedural issues. Additionally, the memos that assistants create are regularly important in the judges' preparations for the hearings. During the hearings, the

part that judicial assistants play is often rather limited and primarily administrative. Thereby, the fiction of the supremacy of the judge as the core adjudicator is confirmed to the public. Yet – just as prior to the hearings – in the shadow of the hearings, judicial assistants participate in discussions regarding the content of cases. However, due to differing views regarding the matter, it is not always clear to the participants what role assistants can and ought to play. This unclarity, which is related to the limited guidelines on this issue (see chapter 3), seems to be an important reason that the court practices are so diverse.

6 Deciding the judgment: deliberations and writing the judgment

This chapter discusses the findings of the fieldwork regarding the involvement of judicial assistants in the second part of the decision-making process, namely when deliberations take place and the judgments are written. Section 6.1 focuses on the deliberation sessions, and section 6.2 concentrates on the drafting and finalising of the judgments. The chapter ends with a conclusion in section 6.3.

6.1 Deliberations

The previous chapter revealed that the discussions regarding a case commonly already start prior to the hearing and frequently continue on through the day of the hearing. However, usually, the actual decision on the case outcome is made during deliberations. Unlike in most common law judiciaries, Dutch judicial assistants are present during the deliberation sessions. It is remarkable that according to the law, judicial assistants do not have an official vote in the deliberation room. Yet, the function profile for judicial assistants of one of the courts cites that the assistant has to contribute to the deliberations and participate as a full partner in the discussion. In practice, the amount of involvement in deliberations varies greatly.

While having deliberation sessions is the norm, in certain types of cases, no deliberations take place, and the judge immediately reaches his or her verdict after the hearing. Regarding police-judge cases, this is common practice, and simple administrative law cases are also occasionally decided without a deliberation session.[1] However, for more complex cases, the judge(s) will go into deliberation. In panel-adjudication, apart from the three judicial panel members, the assistant also participates in deliberations. Regarding single-judge adjudication, a discussion about the case also takes place between the judge and the assistant. Given that in single-judge cases, the judge officially reaches the decision alone, this session cannot officially be referred to as deliberations. Still, within the courts, the discussion meet-

1. In some clear-cut administrative cases, a judge can decide to reach an oral judgment immediately after the hearing. This happens occasionally, but in the vast majority of administrative cases, deliberations take place.

ings between the judge and judicial assistant are commonly referred to as deliberation sessions. In this book, these sessions will also be referred to as such. Sections 6.1.2 and 6.1.3 focus exclusively on the involvement of judicial assistants during panel deliberations. Judicial assistants' involvement in single-judge deliberations is described in section 6.1.4. For the remainder of the chapter, both types of deliberations are discussed.

6.1.1 Role of the memo during deliberations

Although the memo can also be useful in this stage of the adjudicative process, the conducted observations exposed that the memo merely played a minor role. Only in a small sample of deliberation sessions did participants briefly consult the memo to check information regarding a discussion point. In contradiction to this, several administrative law assistants mentioned during the interviews that memos (particularly those written in concept judgment format) can play a significant role during deliberations. According to these assistants, judges regularly go over the memos to identify which parts could stay and which parts should be altered. One assistant describes the single-judge deliberations as follows:

> *'Usually, it is a sort of dialogue. Equal. And the memo is leading. Usually, we just get it [the memo] out there. And then it goes like, 'Yes, I agree with that' or 'No, I want that differently', or 'You raised that question, but during the hearing, it became clear this and that…' Sometimes it can go very quickly. Then I look back at the notes I took of the deliberation session and these just state 'in accordance with memo.' Not much more. So, then it can go very quickly.'* (resp. 53)

Two interviewed administrative law judges describe a similar approach. Nonetheless, this was not observed first hand.[2]
In criminal cases, respondents stated that the memo usually only serves as a reference for the information that is also included in the files. However, some respondents pointed out that this is different for large cases for which hearings last several days.[3] In those instances, the memos can function as a means to direct the discussions.

6.1.2 The involvement of assistants during panel deliberations

The duration of panel deliberations was on average about one to two hours. During that time, usually one to three cases were discussed. The longest time that a panel deliberated on one case was almost two hours.

2. This could be due to judges altering their behaviour because of a prominent perception of it not being appropriate to use the memo in this manner. However, I did not get the impression that the researcher's presence altered the court practices on many other occasions. See section 2.1.4.
3. These cases were not included in the sample of observed hearings.

Turns of expressing opinions in panels

Article 7 of the *Judiciary Organisation Act* prescribes that the presiding judge asks all individual judges of the panel for their opinions and only then contributes to the discussion him or herself. This rule used to be executed such that the youngest judge of the bench would start the discussion in order to prevent automatic joining of the authority of the more senior judges (see on this issue e.g. Cialdini & Goldstein, 2004; Robbins & Judge, 2013, p. 319-321). A judge explains:

> *'I know that people have difficulties, or find it scary, or are not as strong, to persist with their opinion. In such a situation, it is important to run the deliberation as it is originally intended: first the most junior judge, then the senior judge and then the presiding judge. That structure is not codified in the law; it is just common practice. Because when one would, as a presiding judge, first state one's own opinion and then the more junior judge would go next, yeah, why would you then [as a junior judge], after a very experienced judge has spoken, proclaim your own stubborn opinion?'* (resp. 7)

Currently, as pointed out by many respondents, new ideas about the involvement of judicial assistants in deliberation sessions have instigated this rule being converted such that it is now common for judicial assistants to be permitted to express their opinions first. This new custom is a marker of the changing views regarding the position of judicial assistants. However, this custom is still somewhat controversial. Some authors have criticised the involvement of judicial assistants (Spong, 2016, p. 172-173) or the involvement of anybody who is not part of the judicial panel in general (d'Oliveira, 2016) in the deliberations.

Even though most judges state that they endorse the custom of allowing assistants to speak first, they do not always follow it. In just over half of the observed deliberations, the assistants were consistently offered the opportunity to speak first. Especially when the outcome of a case seemed evident, not all participants were afforded a separate opportunity to speak. For example, during deliberations after hearing 18, a presiding judge opened the discussion by saying:

> *'Can anyone think of a reason to substantiate the point of the lawyer?'*

According to judicial assistants, it varies among presiding judges how they structure the deliberations. One judicial assistant (resp. 39) sums it up:

> *'[Judge A] says straight away, '[Name of judicial assistant], you go and say what you think.' That judge really starts with that statement immediately. [Judge B] doesn't always ask it. [Judge C]: absolutely not.'*

Several judges mention that they alter their approaches when it concerns different assistants and under different circumstances. A judge explains his or her considerations:

> *'There are judicial assistants who do not appreciate participating in deliberations. There are also judicial assistants who do like to participate. One knows that in advance. I also know that it sometimes happens that judicial assistants are deployed at the very last minute, so then they don't really know what it [the case] is about. Then there is little use in asking their opinion, so I won't do that in that situation. But, in general, I first give the floor to the assistant.'* (resp. 45)

The underlying idea that everyone should present their opinions without being influenced by the opinions of other members is damaged by the exchange of views which often takes place prior to the deliberations (see section 5.2.6).

Subsequently, how judicial assistants take advantage of the opportunity to express their views differs a great deal. Some assistants are quite hesitant and attempt to look for cues for whether the judges (and in particular the presiding judges) agree with their opinions. This is not extraordinary, as people generally attempt to save face in interactions with others (Goffman, 1967). This was particularly noticed in a panel with a very experienced and opinionated presiding judge and an assistant who was new to the field of law (during the deliberations after hearing nr. 3). Having to express the first opinion can, especially to new assistants, be an intimidating task. It seems to be a situation one has to get accustomed to. An assistant explains:

> *'In the beginning, I did not like it. At that time, I thought something like, 'Just ask the most junior judge first.' But one has to get passed that. Deliberating is something one has to learn. You learn through experience. In the beginning, it is uncomfortable, but now I am usually quite confident. I'm not afraid anymore to give my opinion and express my thoughts.'* (resp. 9)

Some assistants note that they have already expressed their views in the memo, and, thus, they do not find it necessary to repeat them during deliberations. Some assistants also feel particularly uncomfortable expressing their views about the level of sentencing. This is typically an intuitive aspect of the decision-making. These assistants believe that, therefore, this is for judges to decide upon. For instance, a judicial assistant (resp. 48) says: *'I'm not going to propose a sentence. That is really…. No, I believe that is not our duty.'*

Conversely, there are also various assistants who present their views with great confidence, even on the sentencing levels. Particularly in the criminal law division, some assistants also prepare for the deliberations by writing down some thoughts or case law. Especially when an assistant has a strong opinion on a certain matter, this opportunity can be a great occasion to attempt to convince the judges of their views. The aforementioned anchoring effect (see section 5.1.4) can also occur in this situation.

The role of assistants during disagreements in panel discussions

Respondents frequently underline in the interviews that fundamental and lasting disagreements during deliberations are rare. Usually, participants will discuss the issues exhaustively, and in the end, everyone will agree on the outcome. As one judicial assistant (resp. 26) explains: *'Talk, talk, talk. And then usually, you will reach an agreement. Then the one is persuaded by the other.'* This was also the most observed course of events during the research. Several judges explained that it is the quality of the argument that counts and not the authority of the person who brings it across. For instance, a judge states the following:

> *'So, if you asked how important that voice [of the judicial assistant] is… When it comes to voting, it is not, because there are only three votes. But during the whole decision-making process, it can be decisive. Decision-making is not about what the opinion of a judicial assistant or judge is. It is the quality of the opinion, how it is substantiated. But also how it comes across; inviting, or is someone closing the door with his opinion by saying, 'That's just the way it is'? Then it doesn't matter if it comes from an assistant or a judge.'* (resp. 1)

This judge followed this comment by providing an example of a case in which all the judges in a panel first considered going one way, but the judicial assistant convinced them to go another direction. Other judges produced similar stories and mentioned that the judicial assistants' input can be crucial. Yet, this is certainly not the case for all assistants. As mentioned before, how much judicial assistants are involved in deliberation greatly differs.

Most often, participants in a deliberation are able to convince one another, but it also occurs that participants continue to disagree. In criminal law, a common area for disagreement is the sentence. In administrative law, disagreement is often related to different views on the balance of powers between the government and its citizens: some are more lenient towards the claimant than others. In the interviews, several judges pointed to the uneven number of panel members, which exists to vote when disagreements cannot be resolved otherwise. When it comes to voting, the vote of the assistant does not count. Even so, it is quite interesting that, especially in circumstances in which not all judges agreed with each other, the opinion of the judicial assistant, in practice, carried extra weight. A judge explains how, during deliberations, the opinion of an assistant resulted in a change of the views of the two judges in the majority:

> *'I know some examples of situations in which two judges believed that someone had to be acquitted. And the other way around too, I remember now. And in these situations, I held the opposite view. And the assistant agreed with me. And the other judges…, thanks to the assistant, changed their views. (…) Sometimes it can be valuable to loosen up the discussion. Well, occasionally the three judges just cannot agree. Ultimately, it is a discussion between the judges, but sometimes it can make a difference what the assistants' views are.'* (resp. 42)

During the research, two of the abovementioned situations were also observed. Both times, the matter under discussion was a decision regarding the sentence. During the one event (deliberation session regarding hearing nr. 5), the prosecutor had pleaded for a sentence of 30 months, of which 10 were conditional. Two judges were leaning towards lower sentences (30, of which 20 were conditional, and 24, of which 10 were conditional). The third judge agreed with the prosecutor. To be able to make a decision, the judges asked the opinion of the judicial assistant. The assistant agreed with the third judge. Subsequently, that punishment was imposed. It appears that the view of the judicial assistant was an important factor in reaching the final decision. A similar event (concerning a sentence of 12 or 15 months) occurred during another deliberation session (related to hearing nr. 17).

6.1.3 Roles of participants in panel deliberations

It was observed that during deliberations of a panel, the different participants took on different roles which were partly inherent to their official functions.

The mark of the presiding judge on the discussion in deliberations

The presiding judge (typically the most senior judge) usually chairs the discussion.[4] This judge often leaves his or her mark, as the presiding judge directs who speaks and on what matter. The personality of the judge in question appears to play an important role in how the deliberations are arranged. Sometimes the deliberation sessions occur in a very structured manner, while on other occasions, everyone talks at the same time.

The presiding judge usually is particularly directive in leading the discussion and leaves little room for the other participants to interrupt. One of the judicial assistants points to a situation in which a presiding judge had a hearing with a deputy judge and a newly appointed judge. The presiding judge did not listen to the deputy judge, who disagreed with the presiding judge, and with whom the assistant agreed. This really upset the assistant, who managed to join in the discussion:

> *'At that point, I said something about it, and then I believe they went into another discussion. And then [name of presiding judge] stayed rigid. And then, in the end, it just happened as [the presiding judge] said. She was the presiding judge, so, yes… Then I think, 'It is not up to me now; now I really have to shut up'.'* (resp. 39)

No participants have much opportunity to participate during such dominated deliberation sessions, but this often affects the assistants the most, as they possess the least authority to speak.

4. This was the case at the nine criminal and two administrative panel deliberations observed. In criminal law, this appears to be the common procedure. In administrative law cases, it also happens that the judge who chaires the case during the hearing chairs the deliberations.

There are also presiding judges who chair the deliberations using an entirely different approach. They are careful to provide all participants with room to speak. Some also pay particular attention to creating a pleasant atmosphere, for instance, by first getting a drink for everyone or starting the meeting with an informal conversation. This results in some of the deliberations taking place on a seemingly equal basis. It is especially important to create a situation in which participants feel comfortable sharing their knowledge when the participants do not all possess the same information (e.g. because they did not all read every part of the case files). Research has namely shown that in decision-making, people often tend to focus on the shared information and leave the rest unmentioned (Lu, Yuan, & McLeod, 2012; Strasser & Birchmeier, 2003).
On average, the presiding judge is approached with a large degree of respect by the panel members. Several respondents also mentioned that (although the opinions of all judges are important) the opinion of the presiding judge usually carries the most weight. This makes it difficult to reach a decision when the presiding judge does not agree with the other panel members.

The role of the panel members who are not the presiding judge
The power of the presiding judge and involvement of assistants during deliberations is also, to a large extent, dependent on the remaining panel members. When these two judges are experienced judges who possess substantial legal knowledge in the legal field, this often provides considerable counterweight to the presiding judge. Under such conditions, assistants could easily tend to be more reserved in revealing their thoughts and not mingle much in the discussion.
This can be different when one or both of the panel members command less authority, for instance, because these judges are new (to the field of law) or because they are deputy judges.[5] This is in accordance with research on group decision-making, which reveals that low-status people will participate less in group decisions and also receive less room to deviate from the general norms of the group (see literature cited in Robbins & Judge, 2013, p. 319-320). An interesting occurrence is that in panels including new and/or deputy judges, an assistant can take up the role of discussion partner in deliberations, thereby, to a certain extent, replacing the position of the judicial panel member(s). One assistant comments on this:

> *'I sometimes feel that… This is all anonymous, right? …That I have more influence than the junior judge or deputy judge. I often get the idea that that person is purely decorative, that my opinion is valued higher than his or hers.'* (resp. 2)

5. In the Netherlands, law graduates with a minimum of six years of legal experience can apply to become a deputy judge. These judges will sometimes sit in a panel with professional judges to hear cases.

A judge (resp. 7) similarly states:

> *'Some assistants are legally quite sharp; they are long accustomed to criminal law. And they can be of more value than such a deputy judge who doesn't know a thing, or a judge who is brand new to criminal law.'*

Research reveals that in panel decision-making, judges tend to conform to the ideas of their colleagues (Sunstein, 2003). This tendency is stronger when a group has a strong leader. The presiding judge and occasionally also the judicial assistant can, therefore, be of great influence on the judgment that is reached. This effect can be strengthened when decisions are made under time pressure, which is often the case, particularly in criminal cases (see section 7.1.7).

Judicial assistants collect the material for writing the draft judgment
Apart from taking part in the discussion, the assistant also has an additional duty during deliberations, namely to collect all the information for the writing of the draft judgment. This places the assistant in a somewhat different position than the judges. He or she usually pays extra attention to whether what is decided can be written into a judgment based on a sound legal reasoning. How this function of the judicial assistant plays out in practice is described in the following remarks of a judicial assistant:

> *'Sometimes three judges are speaking to one another, and it is quite clear which way it's heading, but then I have to alert them to 'How are we going to write this down, and how are we going to create a reasoning for it?' Because I have to write the judgment, and so I have to know in what order I should place everything. (…) I do believe that it is the duty of the judicial assistant to keep the judges' minds focused, that in the end, it has to convert into a judgment. I can not only write down the final decision. When I notice, 'You say this and that, but how do I account for that in the judgment?' Then they have to take a few steps back in their thinking about how they got there. That is teamwork between the four concerned.'* (resp. 33)

Asking the judges explicitly to clarify their reasoning during the hearing might prevent judges from making intuitive, and perhaps politically loaded, decisions without considering the legal arguments.[6]

6.1.4 'Deliberating' in single-judge cases

As mentioned, in administrative law, single-judges also hold meetings after the hearings to discuss the cases with the assistant. These meetings are, on average,

6. Posner (2008) has warned of the possibility of judges taking decisions based on their policy preferences, as law clerks would be skilled enough to write a convincing judgment for any decision.

slightly shorter than panel deliberations. Usually, two or three cases are discussed, and the deliberation time per case is commonly 15 to 30 minutes.
The foremost reason to hold these meetings is to provide the assistant with information for writing the judgments. Although these meetings are not 'real' deliberations, they are widely referred to as deliberations. This term also reflects the content of the meetings; at all the observed meetings, the merits of the cases were discussed, rather than judges simply giving instructions to the assistants. Usually, the discussion appeared to occur on equal grounds. During several deliberation sessions, the assistant and the judge would, for example, speak approximately equal amounts of time.
Major debates were not observed during these meetings, but the judge and assistant would occasionally disagree on small aspects. In those occurrences, either of the participants could be convinced by the other. It is not only remarkable that the assistants could persuade the judges, but it is just as remarkable that the judges believed it to be important that the assistants agreed with their decisions. Sometimes the deliberations would mainly consist of a discussion; in other events, the judges would also give instructions to the assistant for writing the judgment (see also section 6.1.6). In the interviews, administrative law judges frequently emphasised the value of having an assistant to discuss cases with in single-judge cases. One judge realised the importance of this function when she held a hearing with an assistant who was only present to create the record of the hearing and had not read the case files:

> *'There was a hearing, and, for some reason, I did not have any judicial assistance [except for someone to create the court record]. Everyone was fully booked, and the idea was that judges would get only half a hearing and do everything themselves. I realised that I really missed a discussion partner then. (…) I really missed someone to write the judgments. That, too. (…) But I mainly noticed that what I really miss is the exchange of thoughts. I didn't expect that to be such an issue.'* (resp. 42)

6.1.5 *The duty of assistants to participate and the perceived boundaries of their involvement*

The reasons for having assistants take part in deliberations seem to be twofold. On the one hand, they are present to attain information in order to write the judgment; on the other hand, they can contribute to the quality of the deliberations. These two elements cannot be separated. Several respondents explain that it is important that assistants understand and/or agree with the judgment, as this makes it easier for them to write the draft judgment.
The fact that assistants are expected to participate in the discussion seems to be a relatively new development. Judges and assistants who have worked at the courts for decades mention that the norm of consulting the assistant has not always existed. A senior judicial assistant remembers:

> *'It developed as such over the years. Ten to fifteen years ago, I first experienced it, being asked a question during deliberation.'* (resp. 37)

Perhaps for that reason, it continues to be unclear what is exactly expected from assistants. In the interviews, respondents were asked whether they considered it a duty of assistants to participate in deliberation. Judicial assistants in general believe that it is their duty to contribute to deliberation, although some also feel this to be less so in panel deliberations or when it concerns certain aspects, such as the level of sentencing. Most judges agree with this, but there are also some judges who consider it a privilege for the assistant to be able to present his or her views. Still, judges who call it a privilege do find it odd, or surprising, when assistants will not present their views. For instance, one judge says:

> *'[Name of assistant] essentially does not want to say anything. And then I think, 'Well, you are a senior. I actually think you should have your views, as well. You are familiar with the files.' (…) She has said something occasionally, but when it concerns the sentence, then she says: 'No, regarding the sentence, I don't want to speak.' She has a right to do that, of course. She doesn't have to.'* (resp. 41)

Although judges respond somewhat disapproving o the fact that some judicial assistants keep their views to themselves, they also seem to passively accept it. A judge, for instance, states:

> *'Well, I don't think it's fine. I believe they should do it [give their opinion]. But the situation, the reality and actuality, is that there are people who can't do certain things. And I know that. So, then I'm really not going to… It sounds a bit negative, but that is what I learned over the years. You can comment on it, but that only makes people unhappy.'* (resp. 45)

This resignation to the course of events is observed more often. Most judges seem reluctant to give negative feedback to judicial assistants or to make efforts that can help to improve the assistance they are receiving (see for similar findings Abram et al., 2011, p. 11-12).

6.1.6 Providing instructions for writing the judgment

The assistant is also present during deliberations to receive information for writing the judgment. One assistant describes the different ways in which judges give instructions:

> *'There are presiding judges who almost dictate during deliberation what you should write down, because they just can't help themselves. But there are also judges who say, 'We thus consider that to be proven.' Then that's all the information I get. And then it is mainly our own contribution that counts.'* (resp. 8)

In most observed deliberations, the essential features of the judgment were discussed, but it rarely occurred that a judge gave very specific instructions. Details habitually remained unspoken. A standard sentence pronounced by judges is: *'You'll figure it out, right?'* During the deliberations following hearing nr. 20, a judge said the following: *'I'm sure you can make something beautiful of that.'* Various judicial assistants mention that they frequently ask for additional instructions, especially during panel deliberations. The fact that a substantial portion of particulars remains open provides the judicial assistants with considerable room to use their own creativity in writing the judgments. This applies particularly to the grounds or motivations given for certain decisions.
Most judicial assistants really value this freedom. A staff lawyer explains:

> *'I am experienced, so I do not always need them to spell it all out for me. Sometimes I also say, 'Shall I try to write it down myself, shall I make something nice of it?' They then often agree with that.'* (resp. 57)

Various judges explain that they find it somewhat condescending toward the knowledge of the assistants to give too-detailed instructions. They only do this when they fear that the drafting will otherwise go wrong, which would result in them having to spend a lot of time correcting the draft (see section 6.2.6).

During some deliberations, the freedom that assistants are provided for writing a judgment is even taken a step further. In certain administrative law cases, judges instruct judicial assistants to conduct additional research before writing the judgment or to try and see if heading in a certain direction will be successful. For instance, during the deliberation after hearing nr. 11, the judge said:

> *'Try to do it [this way] at first, and then if, while writing, you notice that it doesn't work, then you can adjust it. I'll just see what you've made of it.'*

In another case, a judge asked the assistant to first conduct further research and then come back to the judge. Subsequently, the assistant did the research and then wrote the judgment as the assistant thought right. The assistant only presented the results of the research to the judge by means of this draft judgment. A judge explains why this occasionally happens:

> *'Of course, you always have to make a decision, and some decisions can really be a or b. And then it is like, 'We're going for a. Try and write it in that direction. If you really can't write it down, then apparently, it wasn't the right choice. Then it has to be b after all.'* (resp. 22)

This last practice changes the entity of the judge into that of a corrector instead of the core decision-maker, as is feared by various authors (see e.g. Hol, 2001; Kronman, 1993).

6.1.7 Consulting a third party

Respondents stipulate that the vast majority of cases are standard cases in which little research is needed. However, occasionally, a more complex case will pass that will perhaps create a new precedent. In these types of cases, judges or assistants can decide to consult outsiders who are not part of the panel to obtain their views.

Staff lawyers as sparring partners

Sometimes experienced or specialised judges are asked for their views. Two criminal law judges whose room is near the courtrooms, for instance, mention that they are occasionally consulted by their colleagues. However, judges or assistants can also decide to contact a staff lawyer. Staff lawyers are usually experienced judicial assistants. Their duties differ slightly from court to court (see section 3.1.2). In addition to performing regular assisting duties, the staff lawyers regularly function as experts in a certain field of law. One former staff lawyer (resp. 8) describes the function as *'in between the assistant and the judge'*. Staff lawyers spend considerable time keeping up to date with the most recent case law in their areas of expertise. For that reason, they are valuable sources of information and cherished sparring partners.

Several interviewed staff lawyers mentioned being consulted quite regularly by judicial assistants as well as judges. This was also noticed during the fieldwork. One of the interviewed judges (who was new in the administrative law division) mentioned consulting a staff lawyer to discuss some issues regarding a case of one of the observed hearings. On another occasion, a criminal panel hearing was observed in which an extraordinary procedural incident occurred, and the judges were unsure how to respond to it. When the hearing was postponed to a later date, the presiding judge asked a staff lawyer to search for case law and write a memo on the issue before the new hearing.[7]

Discussing cases in meetings and committees

Another way to debate current cases within a broader group is by discussing the cases during division or subdivisions meetings. Additional interviews conducted with members of criminal and administrative law courts of appeal (see section 2.3) revealed that, at those courts, various mechanisms are adopted to ensure that cases entailing novel and complex issues are discussed within a wider group of people.[8] When an assistant at these courts does not agree with an initial decision of a panel,

7. Note that the amount of times that staff lawyers are consulted should not be exaggerated. In the criminal law division of one of the courts, I shared a room with a staff lawyer for a little over a month. Throughout that month, only twice did someone enter the room with a legal question for the staff lawyer.
8. These courts usually use several specialised committees consisting of judges and assistants who are consulted when cases concern particular issues (e.g. EU or international law related matters). Some of these courts also have digital discussion fora where cases can be discussed.

these fora can be used as an additional vehicle to attempt to convince the judges of what the judicial assistant considers the correct decision.
At the district courts, complex legal issues occur in a smaller percentage of cases, and legal uniformity is less of an issue, as litigants can still appeal. When judges at these courts are in doubt, they usually search for case law of the courts of appeal. Consequently, the district courts do not have as many discussion fora. However, recent case law is discussed at division or subdivision meetings. Most of the meetings held during the research period were observed (16 meetings in total).
The courts all held different types of meetings.[9] In one division, meetings were also held with only judges. In the other divisions, this recently stopped. Some meetings were presided over either by the head of the division or other court managers; other meetings were prepared and presided over by staff lawyers. All court divisions paid attention to case law from higher courts during the meetings. Usually, a staff lawyer selected important cases which were discussed during the meeting. At the meetings of one criminal law division, mainly judges spoke, emphasising the hierarchical difference between judges and assistants. In the other divisions, certain assistants would also speak up. Interestingly, in most cases, only a minority of assistants were active. The active assistants were usually the same assistants that were actively involved in deliberations.

6.1.8 Analyses of the involvement of judicial assistants in deliberations

Although judicial assistants do not have an official vote during deliberations, they sometimes are highly involved, as well as influential. It is mostly regarded as normal that assistants participate in the deliberation process. Moreover, most judges and assistants regard it as a duty of assistants to contribute to the discussion.

Particularly when judges are unsure how to deal with a certain issue or disagree with each other, the views and arguments of assistants can and do steer the decisions that are made. Some aspects of how the process of deliberation is practically arranged offer assistants specific opportunities to wield influence. One aspect is that judicial assistants are often afforded the opportunity to express their views first during deliberation. Research shows that the way in which early information is presented will often have an anchoring effect on the decision-making (Tversky & Kahneman, 1974). A well-presented argument by the assistant can, therefore, influence the decision-making process. Another aspect is that the judicial instructions for writing judgments often leave much room for the assistants to complete and fill the gaps. Not all required elements of judgments are discussed during deliberations. In one instance, the assistant was even permitted to make a proposal, and the

9. Some courts separated case law meetings from other meetings; others did not. Some held large division meetings; others held meetings in smaller subdivisions.

judges only reviewed this proposal when it was presented in the draft judgment. This leaves the initial decision-making practically up to the assistant. Among other authors, Kronman (1995, p. 327) has revealed his disapproval of such a practice. According to Kronman, this makes the vantage point of the judge essentially monocular, because he or she is not directly confronted with the plurality of claims and points of view. This practice is also problematic from a rule of law perspective, as judicial assistants are not subject to the same institutional constraints as judges.

As deliberations essentially consist of an exchange of arguments, the authority of the person who makes the argument is of key importance.[10] The experience and conceived legal knowledge of a person are important predictors of one's contribution to deliberation sessions. As judicial assistants are usually the persons with the least authority, this affects their potential involvement. For that reason, various assistants are hesitant to reveal their views and to participate in deliberations. In addition, some judges do not provide assistants with opportunities to get involved in the discussion. Consequently, judicial assistants do not participate in the discussions at all times. This undermines the current policy, largely based on managerial values, that underscores the importance of allocating certain responsibilities to assistants.
However, the authority issue can also work in favour of the involvement of judicial assistants. Especially in panels with less-experienced judges, the contribution of certain highly respected judicial assistants can be crucial. On such occasions, assistants sometimes function as substitute discussion partners to less-experienced judges, who may not possess the content-specific knowledge to function as full discussion partners. Assistants who function as such are mostly senior assistants who are acknowledged for their legal expertise. This can result in a shift in authority, which is difficult to align with traditional ideas behind the functions of a judge and a judicial assistant (see section 4.1).

Moreover, it was found that, because judicial assistants do not have an official vote during deliberations, it remains unclear what is precisely expected of them in the process of discussing cases and reaching decisions. This lack of clarity also resonates in what respondents report regarding their views on the required level of participation of assistants in deliberation and the boundaries of their involvement (see more in section 7.1.2). This issue also came to the surface in an internal research report of criminal divisions (see Abram et al., 2011, p. 11). The existing ambiguity leaves room for many different practices. As mentioned, participation seems to be regarded as the norm, but occasionally, the judicial assistant's input is also minimal to non-existent.

10. The effect of authority in (group) decision-making is found in many social studies; for an overview, see e.g. Cialdini, 2009, chapter 5.

6.2 Writing of the judgment

Judgment writing is one of the features of the adjudicative process in which the increased allocation of duties to assistants is particularly strongly displayed. In addition to interviewing judges and judicial assistants about the process of judgment writing, 40 draft judgments, created by assistants concerning the observed cases, were analysed (see section 2.2.2). These judgments varied in number of pages from 3 to 15.
In the observed court divisions, the policy is that – in principle – all judgments are to be drafted by judicial assistants. Assistants remark that writing draft judgments takes up a considerable amount of their time, and they frequently mention this to be among their favourite duties. After the assistant has created the first draft, the judge(s) will adjust the judgment – to a minor or great extent – to create the final version, which is subsequently signed by the judge(s) as well as the assistant. The fact that judicial assistants make the first effort in drafting judgments has some important effects on the decision-making.

6.2.1 The practice of drafting by the assistant

At the criminal law divisions, it has been a long-standing practice for assistants to write substantive parts of the first drafts of judgments. Only in very large and legally complex cases was (and still is) this principle occasionally abandoned. The majority of criminal law judgments at the district courts used to be relatively compact and standardised. However, new, enhanced criteria for judgment motivations within the Promis scheme (see section 4.2.2) have made the writing of a substantial amount of judgments a more demanding exercise, as these judgments currently have to include more justification and reasoning (see also Abram et al., 2011).
At the studied administrative law divisions, having assistants draft all the judgments is a rather new phenomenon. Only a few years ago, it was common that judges would also write at least one or two judgments per hearing. Though it is policy that judicial assistants, in principle, write all drafts in the courts included in the research, respondents also informed me that this is not the case in some other district courts. This is also true for some of the criminal and administrative appellate courts (as additional interviews with judicial officers at those courts revealed).
Several judges and assistants stated that they think that it will probably come across as somewhat odd that judges do not write the judgments themselves. Several administrative law judges who, in the past, wrote their own judgments, mention to regret this circumstance:

> *'Actually, it's only since recently that I don't do that [writing judgments] anymore. Until recently, some judges really felt the desire to do it. Because when you do, you retain the feeling for it. (…) But appa-*

> *rently, it is a nationwide tendency that judges do not write anymore. I find it a great pity, but our schedule is such that there is no room for it anymore.'* (resp. 60)

A minority of judges remark that they still occasionally write judgments. There appear to be a variety of reasons for that. Some judges do it because they really enjoy writing a judgment, others because they believe it to be necessary to acquire a proper judgment in complex cases. A judge provides his reasons for it:

> *'There can be different arguments. Either because the judicial assistant is very busy and I have enough time to write one or two drafts, or that I think it [a case] is somewhat exciting and that I would like to write it myself. Like, for instance, a case in which the Court of Appeal boarded it up, and I believe that it should be different [in that particular case]. Then I also like to write it myself. It also happens that I think, 'This case is particularly difficult', and I believe that the assistant is not going to manage it. So, then I will have more work of correcting than when I just write it in one go myself.'* (resp. 62)

Another judge (resp. 65) says:

> *'If I have doubts on a case regarding which way it should go, then I also prefer to write it myself. Because then I see it in its entirety, and I put it on paper.'*

When a judge is new to a certain field of law, writing his or her own judgments can also function as a way to become familiar with the area of law. One judge mentions that when he was hearing immigration cases for the first time, he would first write the judgments himself:

> *'It was quite intense (…) So I was able to negotiate to take it easy, in the sense that I, say, did only half hearings. And that I also wrote all my own verdicts and judgments in order to get deeper into it. (…) If I followed the ordinary pattern, which was common, that the clerks would instruct the cases and also write the draft, then too much would pass me by.'* (resp. 47)

This idea that writing the judgment can function as a natural way to reconsider one's initial judgment links to the literature on using heuristics in decision-making. Writing a judgment seems to be a natural way to stimulate what Kahneman (2012) refers to as the 'system II thinking'. This is the second part of the thinking process in which a person determines whether an intuitively derived judgment (made in the first part of the thinking process) needs to be endorsed, corrected or overridden. That second part requires time, effort and the application of rules (Kahneman & Frederick, 2002; Tversky & Kahneman, 1974).

However, in the current practice, this reconsideration process is taken away from the judges and allocated to assistants (see also Holvast, 2014). Authors such as Posner (1985, p. 1094), Kronman (1993) and Hol (2001) warn of the risks that can be

involved when judges become editors of the work of assistants (see section 1.2). It is remarkable that indeed, judicial assistants appear to have partly taken over the reconsidering of decisions. Section 6.2.5 demonstrates that they sometimes cause judges to alter agreed-upon decisions.

6.2.2 Using the information from deliberations in the drafting

The actual impact that judicial assistants have on the content of the judgments they draft is, to a great extent, related to information they receive during deliberations. The extent to which judicial assistants acquire detailed instructions during deliberation differs widely, as is discussed in section 6.1.6. In many cases, judicial assistants receive a large amount of freedom to decide what aspects to include in the judgment and what writing style to adopt. Some judicial assistants happily accept that freedom. When drafting a judgment, if a judicial assistant arrives at an aspect of the case that was not discussed during deliberations, they often propose a way to deal with the issue. The proposed solution is often clarified in a comment, sometimes also by explaining the underlying reasons for the proposal. A judicial assistant explains:

> *'With us [referring to the hearing I attended], it wasn't so bad, but often, it is late after such a day of hearings, and then one is less sharp. If you then have a pleading which consists of 25 pages, one could overlook an argument of the defence. While writing, I often encounter that, and usually, I just continue writing. Then we do not have to deliberate, but I say, 'I saw that we forgot this argument of the defence, and this is my proposal.' And then I just see what happens.'* (resp. 4)

These kinds of comments were noticed in several of the analysed draft judgments. There are also judicial assistants who prefer to receive additional directions when they detect certain points that were not deliberated. When assistants need additional directions, it is common for them to pay a visit to (one of) the judge(s) to discuss the matter.[11] Several assistants note that it is not always easy to obtain further instructions from a judge. Typically, the hearing was a while ago, and the judges have already moved on to reading case files of new cases. When the judicial assistants then enter the judges' offices to discuss a case, the judges often have already forgotten the specifics, which results in difficulties in discussing the case. One assistant in particular mentioned this:

> *'Sometimes during the writing of a judgment, I face difficulties or get stuck. And then I sometimes go back to the judge. But then he often says, 'That is such a long time ago. I have seen so many cases since. What was that case about again? You know what, just make the draft judgment; put something on paper.*

11. The presiding judge is commonly the first person to approach. If he or she is unavailable, one of the other judges is consulted.

Then I'll look into it.' When, actually, I can't continue, and I feel the need to talk a bit more about it.' (resp. 66)

This assistant says to eventually always manage to write the judgment, though, actually, the assistant believes judges should make such decisions.
Even so, when it concerns fundamental issues, usually a discussion does take place between the judge and the assistant. When it concerns a particularly complex issue, the other judges of a panel might also be consulted, or an additional deliberations session may even be scheduled.

6.2.3 The memo and other materials that can be employed in judgment writing

Especially when memos are written in judgment form, they are beneficial for writing the draft judgment. Usually all practical information that should be included in a judgment, such as the legal framework and the procedural history, can just be copied from the memo. In the further expansion of the judgment, more information can be adopted from the memo. As mentioned previously (see section 6.1.1), various respondents claim that, every so often, a memo is taken as a point of departure and is only mildly adjusted. However, this was not observed in this research. Only two of the drafts quite strongly resembled the memos, but even these draft judgments also included new elements.
In order to construct the judgments, judicial assistants can also make use of various other resources. The word templates of the courts, for instance, include so-called 'building blocks', which are small blocks of text containing certain standard aspects that have often been included in judgments. In addition to this, judicial assistants have a database with previous case law at their disposal, which they can consult for inspiration. Making use of these resources can save judicial assistants' time and can potentially bring uniformity into the judgments.

6.2.4 Judicial assistants' individual styles of judgment writing

While the content of the judgment is usually largely determined by the judge(s), the writing style of the judgment is normally left to the assistant. As judgments are quite particular legal writings, new judicial assistants commonly have to become accustomed to using the legal jargon. Several courses are available that teach judicial assistants how to write in such a manner. In addition to this, judicial assistants are assigned a senior assistant[12] as a tutor, who provides them with advice and who reads and comments upon the judgments they write during the first period of their employment. A tutor (resp. 30) explains: '*We use a certain style here that has to*

12. In other district courts, this can also be a judge.

be learned; it doesn't come naturally. (…) So I pay a lot of attention to that. Especially at the beginning.'

While judicial assistants in the beginning quite strictly follow the style and format they were taught in the courses, various senior assistants mention that they later on developed individual styles; some assistants are quite elaborate, providing reasoning behind every minor aspect, while others write very compact judgments. The formality of the language used also differs substantially. Regarding developing an individual style, an assistant (resp. 9) notes the following: *'You try to develop your own style, but that is an ongoing process. You keep dealing with different cases, people and situations. I try to have my own style show through, but that is something which is continuously developing.'*

In the interviews, judicial assistants were asked if they adjust their styles to the judge(s) they are writing for. In other judiciaries, judicial assistants who are personal assistants to judges typically tune their judgment style to the desires of the judges (see section 3.2). The Dutch judicial assistants, however, almost all expressed generally not doing this. Only regarding minor details, such as a judge who is 'allergic' to a certain word or who requests a specific lay out, might assistants adjust their judgments. A main reason for this approach is that it otherwise takes too much time and effort. An assistant remarks:

> *'I can't adjust my style of writing for each individual judge. I notice it costs me way too much time. And then it is still not entirely how it should be [according to the judge]. Then I think, 'Well, did I make all that effort for nothing?''* (resp. 51)

In addition to these motivations, some assistants are also just rather confident about their own style:

> *'I believe in how I do certain things. Of course, there is occasionally a presiding judge who does not like it so much, but it is very difficult to adjust your own style entirely. (…) For example, with deciding the sentence, I do not only refer to the guidelines, but I also write down what is in there. Because I once learned that in a course (…) I know that a lot of judges say, 'Just in general, [write down] the guidelines.' But I keep doing it this way, because I find it nicer and clearer to the accused. And look, if it is taken out in a later stage, I don't mind that much.'* (resp. 15)

This characterises the confidence various judicial assistants have in their own writing abilities. The extent to which the judgment retains the assistants' style depends on how the judgment is modified by the judge(s) (see section 6.2.6).

6.2.5 Rethinking and altering a judicial decision

For the judge, the consideration process regarding a case pauses for a while after the hearing; he or she will be waiting for the assistant's draft and is working on

other cases in the meantime. For the assistant, however, the process continues, with writing the draft judgment. An interesting finding of the research is that sometimes during the writing process, the assistant realises that the decision made during deliberations does not 'write down'. A large share of the interviewed judges and judicial assistants can remember one or more instances in which it was decided to take one legal route, but during the process of writing and revising the judgment, the participants realised that the legal argument did not make sense and, thus, reconsideration of the original decision was needed. As the assistant writes the first draft, he or she often notices this. A judicial assistant gives an example of a case in which this occurred:

> *'A few months ago, that was also with [name of judge]. The judge said, 'This and that, dismissed.' I said, 'Well…' But okay, then I looked at it, okay, it is going to be dismissed. I searched for everything, case law. It was about the principle of trust, and I thought that the appellate court had said something about it. I put everything together, and then I concluded: a dismissal is not going to work. So, I went back to [name of judge], grumble, grumble… And then I wrote it as such that the appeal was upheld. And, yes, that made sense. That happens every now and then.'* (resp. 58)

This discloses the importance of the act of writing in reaching a decision. It is characteristic of the current practice that (with the judgment writing duty currently being appointed to the assistant) the assistant obtains a significant role in reconsidering the initial decision, which is key for preventing biases from occurring in the decision-making.

That is not to say, however, that assistants always detect an existing shortcoming in the legal argument of a judgment. Several judges also mention situations in which a judicial assistant has written a judgment as agreed upon in deliberation, but while reading it, the judge realises that it is not right. Subsequently, the judge would change the judgment or have the assistant alter it. In this context, it is interesting to remark that Posner (2008, p. 285-286) suggests that US law clerks are skilled enough to write a judgment defending whatever position is taken, thereby providing judges the freedom to decide cases established by their policy preferences instead of legal arguments (see also Stras, 2007, p. 962).

Refusing to write or sign a judgment

While assistants are not official adjudicators, in criminal and administrative cases, they are required to sign the judgments in the capacity of court clerk, together with the judge(s). An indication of what respondents consider the position of assistants to be in the decision-making can be found in their ideas about whether or not the option is available for them to refuse to write or sign a judgment.

All of the consulted respondents (judges and assistants) agree that under normal circumstances, a judicial assistant has the duty to write and sign a judgment. Judicial assistants just need to accept it as being part of their jobs to write down some-

one else's decision. But what if the judicial assistant fundamentally disagrees with the judgment? In the nineties, Bruinsma (1995, p. 99) found in his research on civil cases regarding temporary arrangements (which are – unlike criminal and administrative judgments – not signed by the assistant but only include their initials) that there was one assistant who resolved the issue of disagreement by not placing his initials on cases with which he disagreed on the outcome.
When asked in the interviews whether it is acceptable for assistants to refuse to write or sign a judgment, the responses were diverse. Some judges regard this as truly inappropriate:

> *'No, I've never witnessed that. I would find it outrageous. I don't think that a judicial assistant would say that. The assistant is not in such a position, and everybody knows that.'* (resp. 45)

Other judges mention that they would be concerned about the content of their own judgment if an assistant had fundamental objections against it.

Another judge mainly approached it from a practical angle:

> *'Look, if a judicial assistant really has a strong belief that prevents him from writing the judgment, then we have to assign a different assistant to the case. I think, in the end, it is the decision of the judge, and it can't be that the decision of the assistant goes first. But you should avoid bringing people into a difficult position where they have to write something that is really against their will.'* (resp. 62)

Several other judges suggested the same solution. During the research, one recent occasion in administrative law was recounted in which an assistant faced a dilemma of this kind. A judge had changed the legal considerations of an assistant's draft judgment in a way that the assistant disagreed with. This assistant considered not signing the judgment, but after consulting with the assistant's superior, who advised signing the judgment, the assistant decided to drop the objections. One of the criminal law assistants also recalled a previous case in which the assistant had ethical problems with writing a judgment. On that occasion, another assistant was asked to write the judgment. A third assistant also mentioned facing such a dilemma. At the time, this assistant asked the judge to write part of the judgment, and afterwards, the assistant signed it, but currently, the assistant would have acted differently:

> *'I remember how I didn't get it on paper, I really didn't. So, I wrote the case as far as I was able and said, 'You want me to write something which is completely the opposite of what the appellate court says. And I just can't get it on paper. So, if you really want it, I hope you can write that part yourself.' (…) That is the only judgment that was passed that I thought, 'Well… actually, I just shouldn't have signed.' I never feel that, but that judgment… If they would have gone in to appeal, we would have been destroyed. Then I would have been deeply ashamed.'* (resp. 30)

This reveals that judicial assistants are often comfortable with their non-decisive roles in the judicial decision-making, but it also demonstrates that they can occasionally face ethical dilemmas. There is no general agreement on how to deal with such circumstances. However, that various respondents regard not writing or signing a judgment as inappropriate reveals that the often-seemingly-equal relations are ultimately not that equal.

6.2.6 Checking and adjusting draft judgments by judges

When the draft judgment is complete, it is sent to the judge(s) in order to be checked and, if necessary, adjusted. Usually, judges clarify the adjustments that are required, and the assistant subsequently processes the alterations.

Order of checking the judgment
Regarding panel judgments, the courts usually employ a strict order in which a judgment is checked and altered by the panel members. Most common is that the judgment is first distributed to the most junior judge, then to the senior judge and last to the presiding judge.[13] The presiding judge can then note the suggested adjustments of his or her colleagues and has the final word on the content of the judgment. At the criminal law divisions, the most junior judge is also responsible for checking all the factual details of the judgment, such as dates and names.
Observing this process clarified that various suggested alterations strongly represent personal preferences of judges. Fairly regularly, it occurred that one judge, for instance, suggested changing a particular word or sentence structure, while a more senior judge preferred to continue with the original version.

Type and amount of adjustments made
It depends on the quality of the delivered draft, but also on the judge who is revising, how much of a draft judgment is changed. Of the judgments analysed for this study, the majority of the judgments were only mildly adjusted. However, two judgments written by the same assistant (related to hearing 6) were heavily edited. Not only was the judicial reasoning of this judgment altered, but the reproduction of the arguments made by the lawyer of one of the parties was also revised. One of the judgments even had to be altered twice, as some of the inaccuracies in the first draft were still present in the second version. The comments one of the judges made with regard to the draft were, *'Colleagues, I do not believe that what was discussed during deliberations and the statements made during the hearing are adequately expressed. On the contrary, (I objected to this reasoning).'*

13. In some administrative panels, it also occurred that the judge who was chairing the hearing of a particular case (not being the official presiding judge) received the judgment first.

This demonstrates how allocating duties to assistants can also turn out to be inefficient. However, the presiding judge of this panel later contacted me to explain that this was an exceptional case, as most assistants understand better what is said during the hearing and are more precise in their writings. This was confirmed by the sample of analysed judgments, as no other judgments were changed this extensively. In only one other judgment, a judge changed the content of the legal argument. This concerned a draft by an assistant who had recently changed divisions.
Most other revisions concerned the writing style or typos and spelling mistakes. A few more-substantial alterations concerned the tone of the reasoning behind certain judicial decisions. Several multi-page judgments also stayed almost completely intact; for instance, only a handful of words were replaced as well as the sentence structure of one or two sentences. In one instance, a judge had not made one single change in a 7-page judgment. This is rather remarkable, as this was a judgment for which the judge and assistant had not come to an agreement yet on what the decision would be. The judge had left it to the assistant to first conduct more research before deciding (see section 6.1.6). Subsequently, the judicial assistant had individually drafted a judgment and placed it on the desk of the judge with his signature already on it. The judge then signed this judgment without adjusting it. This demonstrates the leading role that judicial assistants in some cases can have.

Judicial assistants' responses to the adjustments
Receiving comments from judges on a draft judgment can be confrontational. Most assistants mention accepting alterations without difficulty when they believe they improve the judgment. Assistants also acknowledge that sometimes small inaccuracies slip in, and they are pleased when judges notice these. However, there is discontent among assistants about certain judges who, in their eyes, consistently rewrite entire judgments. A judicial assistant comments:

> *'I sometimes get irritated by a judge. There are a few judges who you really do not want to have a hearing with because they rebuild your entire judgment (…) I mean, of course you might write it very differently yourself, but then you should write it yourself.'* (resp. 39)

Some respondents mention that younger judges in particular do this. Several assistants remark that they tailor judgments to the judge they are writing for. When they expect a judge to turn the whole draft upside down, they put less effort in it, while for judges who they believe to rely on them more extensively, they really attempt to draft a perfect judgment.
Although the judicial assistants are not pleased when judges alter too much (in their perspectives), several assistants are also discontent with judges who appear to sign judgments too easily. A judicial assistant explains how, when receiving a judgment without any changes, the assistant gets slightly suspicious:

> *'Then you get it [a judgment] back. 'Yes, no comments. Fine. Signature.' Then you think, 'Well, did you actually read it?' (…) It is nice to hear 'Well done. Fine job. No mistakes made', but it is almost impossible to write five pages without any mistakes. There is always a word that is not right or you have forgotten something…'* (resp. 53)

A handful of assistants expressed their concerns about this routine of signing a judgment too easily. These assistants believe it shifts too much responsibility to them, which is not in accordance with their official position in the decision-making (see section 7.1.2).

Views of judges on making adjustments

The differences in the amounts and types of adjustments that judges make reflect their ideas about how judgments revisions should be made. Naturally, all judges find it important to check that the judgment resembles the decisions made in deliberation. However, judges differ in their approaches to altering the writing style of a judgment. The notion that 'if it is not wrong, it is right' was mentioned various times. This means that although the judges might have written it differently themselves, as long as it is linguistically correct, they leave it unchanged. Efficiency appears to be an important drive for this working method. As a criminal law judge notes:

> *'You really look at the basics, whether it somewhat makes sense. So, if I can live with it, I leave it. But that's out of practical considerations. The question is how to use your hours. We've got too little hours, and then it is questionable if you should be using them to polish the text. I don't think so. You should move to the next hearing.'* (resp. 10)

Several judges, especially ones who worked as assistants themselves in the past, also mention the importance of respecting the work of the assistant. Yet, there are also judges who find the previous notion too limited and point to the importance of delivering a clear and understandable judgment. If this requires them to make substantial changes, they will not hesitate to do so.

It also differs from judge to judge how meticulously they check the correctness of information, such as names, dates, etcetera. Some judges check these aspects at all times, resulting in occasionally minor details being changed. For instance, in one of the analysed drafts, a judge found a mistake in an amount of money of one cent (judgment of hearing nr. 13). Other judges consider it to be the duty of assistants to assure that these details are correct. One judge (resp. 18) notes: *'Nobody reads it anyway. I'm sure that's all right.'*

The majority of judges seem to modify their manners of checking based on the judicial assistant they are working with, as they trust certain assistants more than others. A judge explains:

> *'I do it [checking factual details] every now and then. In particular, with people who only just started working here. With them, I do it more than with others. And regarding the permanent assistants, you kind of know who you're dealing with, that one is sloppier than the other.'* (resp. 59)

Providing the judicial assistant with feedback

It is customary that the assistants process the alterations that judges request in the judgments. This releases some pressure from the judges. It potentially also provides the judicial assistant with the opportunity to learn. Though, most of the time, judges do not clarify why they made certain changes. Only in a few analysed drafts did judges comment on why they altered certain aspects. In a few instances, a judge also complimented the assistant on his or her work.

A minority of judges, on occasion, also process the changes themselves, for instance, when they believe substantial revision is required. In that situation, it is not always communicated to the judicial assistant which changes are made. Sometimes the judge will just send a revised version to the assistant with a request to print and sign it. This highlights how some judges view the difference between their own responsibilities and those of the assistant. Several assistants mention not appreciating a judge making substantial changes without informing them.

6.2.7 *Analyses of the involvement of judicial assistants in judgment writing*

The fact that judicial assistants are responsible for writing the first drafts of judgments is likely to increase the productivity of the courts. At the same time, it provides assistants with room to affect the content of the judgments. The findings regarding the judgment writing illustrate the powerful position that judicial assistants can have in this respect. Assistants are often allowed a large amount of autonomy in writing judgments, and it can even be difficult for them to receive additional instructions from judges.

As the decision is normally already made during deliberations, it would seem that the influence of assistants during the judgment writing, would predominantly consider the reasoning behind a decision. For litigants, this aspect will commonly be of lesser importance, but it can be significant for the development of general legal rules via case law. However, the involvement of judicial assistants can also go beyond the legal reasoning, as the practice of judgment writing appears to function as an important way to reconsider initial decisions taken during deliberations (see Kahneman, 2012). This reconsideration responsibility is today firstly placed in the hands of assistants. That the writing process indeed functions this way is affirmed by the fact that, on various occasions, the writing of the draft judgment resulted in reassessing certain facets of a judgment or sometimes in altering the judicial decision. In this respect, assistants perform an extra check on the accuracy and righteousness of judgments, particularly by examining whether cases can stand in relation to current case law.

However, it can also be questioned whether this responsibility should actually lie with the assistant. Keeping in mind the reality that judges are appointed with the responsibility to adjudicate, and not the assistants (see Bieri, 2016; Darbyshire, 1999; McCree, 1981), the current practice of judgment writing could also be criticised for potentially shifting too much power to assistants. This seems to be acknowledged by some judges who – in certain cases – prefer to write the first drafts themselves.

While the data display situations in which judicial assistants are powerful, they also include cases in which judges left little room for assistants' contributions. This is particularly the situation when judges heavily alter draft judgments to precisely resemble their own views. While the altering occasionally involves the key elements of the judgment, it mostly is in regard to less important elements, such as the choice of words. Substantial alterations of draft judgments predominantly occur when judges feel that the performance of assistants falls short. Yet, the occurrence of this also seems to be related to the character of the judges; some judges are known for almost always making considerable changes to draft judgments. As a consequence, the drafting of judgments by assistants, which appears to have been introduced to save time, can also turn out to be a time-consuming and inefficient practice.

6.3 Conclusion

Regarding the involvement of judicial assistants in the deliberations and judgment writing, the findings are largely in line with the findings concerning the first two phases of the decision-making process. During the last two phases, judicial assistants – in various ways – also play an important role. Their involvement is for the most part invisible to the public, as deliberations take place behind closed doors. Consequently, it is not known by the general public whether, and if so which, contributions are made by assistants. That is problematic in evaluating the part that assistants play in conceiving judgments.

During deliberations, assistants are commonly expected to be involved in the discussion. Examples are cited of judicial assistants' input being of great significance for the judicial decisions that were reached. The likelihood of this input being significant seems to be related to, among other things, the experience and expertise of the officers involved. There are, however, also circumstances in which the involvement of judicial assistants during deliberation is minimal. For instance, assistants are occasionally not provided the opportunity to present their views.

As judicial assistants commonly write the first drafts of judgments, this regularly results in them influencing the reasoning behind a judgment. Writing down a decision can also function as a way to reconsider the initial decision, which provides assistants with room to also affect the judicial decision itself. Several instances

were mentioned by respondents in which decisions where altered after the judicial assistant suggested doing so. However, the potential power of assistants is not always established, as several judges leave little room for assistants to have an effect (for example, by providing the assistant with detailed instructions or by severely altering the draft judgments or, occasionally, even writing the judgments themselves).

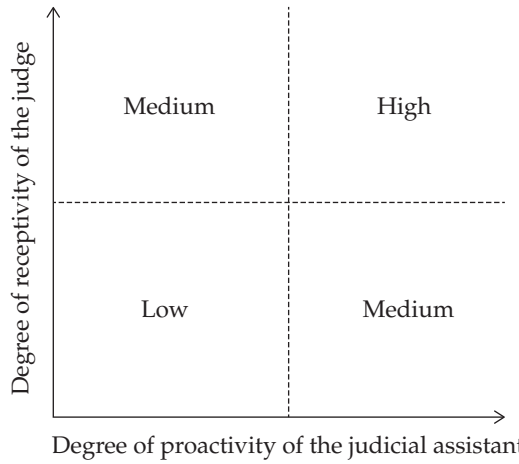
Hence, just as in the first two phases of the process, great variation is also observed in the involvement and effect of judicial assistants on adjudication in the last phases. The key factors that cause this variation are presented in the following chapter.

7 Factors that determine the involvement and impact of judicial assistants

In order to understand the variation in judicial assistants' involvement found in chapters 5 and 6, the first section of this chapter delineates seven key factors – stemming from the fieldwork – that affect the involvement of judicial assistants and, thereby, their potential to influence judicial decisions. Section 2 covers the questions that arise regarding the observed similarities and differences between the courts and court divisions.

Variation in the involvement of judicial assistants was first observed in the type of assistance performed. In section 4.3, an analytical distinction was introduced between administrative and/or secretarial and advisory and/or discussion-related assistance. The fieldwork shows that it differs greatly per situation whether judicial assistants perform either one or both of the types of assistance. In addition, there is also variation found in the degree to which assistants are involved in performing these types of assistance; in some cases, judicial assistants only perform minor tasks to support the judge(s), while other times, judges heavily rely on the assistants' work. The degree of involvement appears to be determined by the combination of: a) the degree of receptivity of the judge towards the judicial assistants' involvement (are judges allowing judicial assistants to participate, do they take the assistants' suggestions into account, etc.), and b) the degree of proactivity of the judicial assistant in performing either of the abovementioned types of assistance.

Figure 1 Degree of involvement of judicial assistants in judicial decision-making



Whether the judicial officers will be receptive or proactive seems to mainly depend on the seven key factors, which are discussed in the next section.

7.1 Determining factors

The factors mentioned in this section are not the only factors of influence, but they are the factors that appeared most prominently in the fieldwork.

Table 1 Factors that determine the involvement and influence of judicial assistants

Determining factors
Trust
Role perceptions
Experience and expertise
Career perspectives and ambitions
Type and complexity of cases
Single-judge or panel decision-making
Time pressure and workloads

The first four factors indicate aspects at an individual level. These are characteristics related to individual judges and judicial assistants. These individual characteristics are not static features; rather, they are subject to change over time, for instance, when one gains more experience. The last three factors are situational fac-

tors. These factors contain conditions under which individual judicial officers will be more or less receptive or proactive.
All the factors are presented as separate factors. However, in reality, various factors can simultaneously affect the involvement of judicial assistants. In fact, several factors are highly correlated and are expected to occur at the same time (e.g. the complexity of the cases, single or panel decision-making; and experience and expertise are often related), whereas others rarely co-exist. This is important to keep in mind, as the factors can also enhance or weaken each other's effects.

7.1.1 Trust

Working together involves interdependence and collaboration (Gambetta, 1988). It is therefore not surprising that in the interactions between the judge and the assistant, the notion of trust is a recurrent component that defines how the interactions play out (see also Abram et al., 2011, p. 12). Trust in the judicial assistants or judges one is working with was mentioned, in direct and indirect ways, in many of the conducted interviews.
Mayer, Davis and Schoorman (1995) distinguish between three types of inter-relational trust in organisational settings. First is ability- or competence-based trust. This is trust based on the belief that the trustee has the skills, competencies or characteristics to perform well in a certain domain (p. 717). The second type of trust recognised by Mayer et al. (1995) entails trust based on benevolence. This links to the question of where the loyalty of the trustee lies. It relies on the extent to which the trustee is perceived to want to do good to the trustor. The last type of trust is integrity-based trust. This involves the trustor's perception that the trustee adheres to a set of principles that the trustor finds acceptable (p. 719). These types of trust are also related to many of the concerns mentioned in section 1.2 regarding the involvement of judicial assistants in judicial decision-making. The notion that judges possess special – typical judicial – knowledge-based but also integrity-related qualities is at the core of many of the concerns regarding the involvement of judicial assistants. This idea also assumes that judges should be cautious in trusting individuals who are not judges to perform judicial duties and should consider whether judicial assistants are sufficiently competent and possess integrity. Benevolence, or the lack thereof, is an important issue in agency theory and other theories that emphasise the possible differences in goals that judges and judicial assistants may aim for (see also section 1.2 and 4.2.1).

Judges' trust in judicial assistants
Given that judges are ultimately accountable for the results of the decision-making, it is imperative for them to play a leading role in the process. The judges' trust of the judicial assistants plays a key role in how receptive they are to their input. Several judges mention relying more on certain judicial assistants than others because

they will generally 'do a better job' or are 'better assistants'. This trust seems to be predominantly based on the competence of the judicial assistants, with judges mentioning the educational background of judicial assistants and their experience and knowledge (for a similar finding see Abram et al., 2011, p. 12). Although, in some occasions, it was not completely clear what the trust was based on. A particular competence that is at least regularly mentioned as an important factor in trusting judicial assistants' work is their accuracy. Issues relating to a lack of benevolence-based trust were not explicitly mentioned in the research, but this factor possibly does play a modest, perhaps subconscious, role in the degree of trust in assistants. Some judges, for instance, questioned the work ethics of certain assistants, which seems to indicate that the judges do not trust that the assistant will put in all the needed effort to produce the finest work. Although integrity is an important virtue for judicial officers, trust based on integrity also does not appear to play a major role at the courts. Nonetheless, in a few instances, judges mentioned their fear of judicial assistants abusing their power in order to reach their desired case outcome (see section 7.1.3).

The receptivity of judges to the contribution of judicial assistants does not only relate to trust; it also differs per type of involvement. Almost all judges are, to a large degree, receptive of administrative assistance, but some judges are more sceptical of assistants' involvement as an advisor or discussion partner. In addition, for the vast majority of judges, it also depends on particular situational circumstances whether they will act more or less receptive to further secretarial assistance and/or involvement in the actual decision-making. For example, under time pressure, some judges will rely more heavily on assistants' memos to prepare for the hearing (see section 7.1.7).

Judicial assistants' trust in judges

Because of the nature of the relationship between judges and judicial assistants (the judge is superior to the assistant in decision-making and is also solely accountable for the outcome of the case), the assistants' trust in the judges seems to be a somewhat less pressing issue. However, during the research, it was observed that the trust that judicial assistants had in judges did guide their behaviour and proactivity in certain instances. Competence-based trust is sometimes an issue in relation to new or deputy judges (see section 6.1.5) and, in rare occasions, judicial assistants also question the integrity or rightness of judges, for example, when they refuse to write or sign a judgment (see section 6.2.5). This lack of trust can cause judicial assistants to attempt to influence the decision-making, for instance, by having contact with other judges from the panel. On the contrary, it can also cause them to withdraw from the decision-making if they believe judges are not taking their advice into account.

7.1.2 Role perceptions

In the interviews, all of the respondents – judges and judicial assistants – were asked what they believed the core role of judicial assistants in the judicial decision-making process to be. They were also asked whether they considered it the judicial assistants' duty to be involved in the decision-making. The interviews revealed that most judges and judicial assistants have strong, but diverse, views on this matter. Their ideas on what image of adjudication should be presented to the general public (e.g. in order to uphold the status and legitimacy of the judicial office, see section 1.2) is also related to their role perceptions.
What judicial assistants and judges felt the role of assistants should be was often related to how they behaved in court practice. However, it is difficult to determine whether the observed behaviour was actually a result of the role perception of the respondents or if it was the other way around – that respondents were, in fact, giving an ex-post rationalisation for their behaviour.

Judges' perceptions of the role of the judicial assistant
In comparing the role of assistants to their own role, the judges' most mentioned difference is that the judge is required to take the decision. Subsequently, he or she holds the official and final responsibility for the judgment, whereas the assistant cannot be held accountable for the judgment. One judge explains:

> *'I take the decision. It is my responsibility, and I have to carry it. And if we can't decide, I am the one who lies awake at night, not the judicial assistant. He will hear the next day what we're going to do.'* (resp. 18)

Although several authors (Fiss, 1983; Hol, 2001) have raised the issue that high involvement of judicial assistants can cause problems with the sense of responsibility that judges feel for a judgment (see section 1.2), this was not observed in the way that judges spoke about their responsibilities. The judges actually mention that the accountability for a judgment weighs heavily on their shoulders. This is reflected in the above quote.
The sense of responsibility that certain judges feel results in their wanting to be in control and finding it difficult to dispense certain duties to assistants and to rely on the materials that the assistants produce. This control issue is also related to judges' perceptions of what the role of judicial assistant entails or should entail. A minority of judges, for instance, regard it as inappropriate for judicial assistants to take on an advisory or discussion-partner role. Among these judges is a criminal law judge who states to disregard the judicial assistant's memo for this reason (see more in section 5.1.4). This judge (resp. 38) says:

> *'A suspect has the right to get the judge offered to him by law. So, he has the right to see me. Not a judicial assistant, but me!'*

Other judges, however, strongly believe in a role for the assistant in judicial discussions. They see the functions of judge and judicial assistant as largely similar. One judge, (resp. 77) for instance, compares the functions by saying:

> *'A judge is actually a sort of assistant plus: he should be able to do everything that an assistant can and chair the hearing.'*

These role perceptions are reflected in the way that judges speak about judgments too. Some judges refer to judgments as 'our' (judge *and* assistant's) judgment or, in regard to panel cases, they say it is a decision by 'the four of us'. As mentioned in section 5.2.5, one judge even spoke in this manner during the hearing. Other judges refer to 'my' judgment when speaking about the judgment of the case. Furthermore, the role perceptions are relevant in regard to how the assistant position is presented to persons outside the judiciary. Various judges appear to be particularly against further involvement of judicial assistants during the hearing, as they believe it may present an incorrect image of the involvement of assistants to the public.

Judicial assistants' perceptions of their own role

While the accountability of a judge for the judgment reached is inherent in his or her appointment, this is not so for judicial assistants. This fact inevitably shapes their involvement and sense of responsibility. Most assistants indeed explained that it is inherent to their position at the court that they are not responsible for the judgment, and, therefore, they cannot decide what the judgment should be. Many judicial assistants primarily consider themselves to be administrative and secretarial assistants of judges. Secretarial duties, such as creating the court record, are mentioned as their main duties. While the notion seems widespread that the primary role of the assistant is to provide administrative and secretarial assistance, a substantial portion of them states that they also play a key role in the actual reaching of judicial decisions. These assistants also mention being discussion partners to the judges as part of their role.

Different roles also require assistants with different personalities. A secretarial role presupposes an obedient and somewhat submissive attitude; one should perform the administrative and secretarial tasks set by the judicial organisation or the judge without questioning them. Although no psychological study on the personalities of judicial assistants was performed, certain observations of and assertions by judicial assistants in interviews indicate that such an attitude indeed appears to exist among various judicial assistants. This was noticeable during the division or subdivision meetings that take place at the different court divisions (see section 6.1.7).

Unlike judges – who all speak frankly and regularly during these meetings – many assistants remain silent. During the interviews, various assistants pointed to their own more introverted nature, too. They mention that it is part of their character to prefer being involved in the background. Some assistants also specifically mention being pleased with the fact that they cannot be held responsible for the judgments in which they are involved:

> *'Secretly, I find it quite comfortable being a judicial assistant. Content-wise, you can go as deep as you like, you really can. (…) Only, you don't have the final responsibility for it. That is… I don't mind.'* (resp. 48)

A more active involvement in the judicial decision-making process as an advisor or discussion partner requires judicial assistants to be more outspoken. For many judicial assistants, this appears to conflict with how they describe their personalities, but a few assistants are in fact more outspoken (in particular ones with extensive experience and expertise; see section 7.1.3). They are, for instance, actively involved in the division meetings, and they also behave more proactively in other settings. This mind-set is also reflected in the responsibility that certain judicial assistants say they feel for judgments in which they are involved. Various judicial assistants mention that, despite the fact that they are not officially accountable for a judgment, they do feel responsible for the outcome of the judicial decision-making. Section 6.2.5 revealed that a minority of assistants, in exceptional circumstances, even refuse to write or sign a judgment when they disagree with its content.
Hence, it was observed that the existing perceptions of what the role of a judicial assistant ought to be and the actual involvement of judicial assistants regularly go hand in hand. Judicial assistants' personalities also appear to match the roles they perform. With changing ideas about the how the employment of judicial assistants can enhance managerial values (see section 4.2), the perceptions of what the role of a judicial assistant entails and should entail might also be slowly changing. Several respondents indeed mention this development. This could, in the long run, also have an effect on the personalities of individuals that apply for judicial assistantships.[1]

7.1.3 Experience and expertise

The fieldwork reveals that mutual trust and perceptions of the quality of each other's work are important for how much and in what way judicial assistants are involved in the judicial decision-making process (see also Spellman, 2010).

1. Since I have not conducted a longitudinal survey on court officials' perceptions of the involvement of judicial assistants, I cannot validate this.

Given that the function of judicial assistant has also gone through various changes over the years, the previous education of judicial assistants and their legal knowledge and experience varies widely. As mentioned, judicial assisting positions in the Dutch judiciary can be life-long careers. For the research, five assistants were interviewed who have worked in the court for more than 20 years. Two of them have even worked in the court for about 40 years, longer than any of the judges that were appointed to the division. Other assistants had only just started working in the courts.

Qualifications of judicial assistants

Directly related to the legal knowledge and expertise of judicial assistants are the qualifications that assistants obtain via academic education and internal training. The educational requirements for being employed as a judicial assistant have changed significantly during the last decades (see section 3.1.1), resulting in assistants with a broad range of qualifications. Most of the senior judicial assistants were trained via an internal education programme; they have never finished any tertiary legal education. For newly hired judicial assistants, the opposite holds, almost all being law school graduates.

The internally trained assistants were hired and trained in a time when judicial assistance was primarily designed as a secretarial and administrative function, and the educational requirements met this function. These assistants currently have to perform the same duties as the newly hired assistants, the vast majority of whom went to law school.

Although it was not observed to be true regarding all assistants, several respondents mention that the lack of high-level legal education makes older judicial assistants, on average, less capable than new assistants to perform the more complex tasks that are part of their function:

> *'There are a lot of people who gradually found it more difficult to keep up. (…) In the past, it was simpler work; there were not so many legal entanglements. Now there are [many legal entanglements], and then at some point, you're going to miss a legal education.'* (resp. 55)

Importance of court experience of the assistant

While some of the experienced but internally trained assistants may be somewhat less equipped to fulfil complex, content-related duties, overall, having assisting experience and being familiar with the common practices of the courts empowers judicial assistants to behave more proactively in the judicial decision-making process. During the interviews, a large number of assistants drew attention to their own development over the years. They mentioned having become bolder and less obedient over time. While experience is relevant to the behaviour of judicial assistants and of judges, it is a stronger factor for assistants. Unlike judges, assistants start

their position without first undergoing years of training, learning how to perform their duties.
Experienced assistants will, for instance, more easily contact a litigant without first discussing it with the judge (see section 5.1.6). These assistants also take more freedom in drafting judgments (see section 6.2.4). A more proactive position of experienced assistants is particularly observed in performing advisory or discussion-related duties, as those duties especially require judicial assistants to be knowledgeable and comfortable expressing personal views. Experienced assistants typically also command greater trust and respect from judges (see section 7.1.1). Judges, for instance, value the arguments presented by experienced assistants during meetings or in memos more highly (see section 5.1.4 and 6.1.3).
In this context, it is remarkable that, to complement the modest experience of judges who are new to a certain field of law, court managers match them with experienced assistants when these judges chair their first hearings (see section 5.1.3). When a judge has little experience and the assistant a great deal of experience, the judicial assistant can particularly be highly involved in adjudication. The judicial assistants' experience has extra significance because judges circulate between court divisions every four to six years, requiring them to get accustomed to a new field of law every time (see section 4.2.2).
The significant position of experienced judicial assistants is especially eminent during panel deliberations. Senior assistants occasionally partly take over the role of discussion partner from less-experienced judge(s) (see section 6.1.3). Experienced judicial assistants also regularly attain a noteworthy position in single-judge cases. Several of the more senior assistants mention that new judges can be quite dependent on senior assistants. One assistant says:

> *'I've had new judges who came from another field of law, for instance, civil or criminal law, and who had their first hearing with me. They would really lean on me, because they just didn't have a clue how to handle it. (…) During the deliberations, I notice that I'm mostly speaking and I'm leading the judge through the issues that have to be discussed. In those cases, I feel that the balance shifts somewhat more towards my side.'* (resp. 30)

A judge (resp. 1), further points out that assistants occasionally also attempt to misuse their knowledgeable position. He explains how this can be difficult for new judges:

> *'You have to make clear to a much more experienced person how you want it to be done. And then there are judicial assistants who overrule you and use their experience against you.'* (resp. 1)

This risk also results in the opposite effect, which was also observed in the research: some new judges are actually rather hesitant to rely heavily on assistants' work and knowledge. As a result of their own limited knowledge, they wish to

perform most of the work themselves, as otherwise, they feel unable to check properly whether the products of the assistants are up to standard.

Hence, experience on the part of the assistant causes the assistants to be more proactively involved in adjudication. Concurrently, the absence of experience and expertise – under certain circumstances – causes inexperienced judges to be more receptive to the work of assistants. However, this is not true for all inexperienced judges.

Specialisation and the special position of the staff lawyers
Assistants can also become valuable sources of knowledge through specialisation, which is an important managerial aim. In district courts, judges and assistants are primarily supposed to be generalists who handle a wide range of cases (see section 4.2.2).[2] There will always be judicial officers with specific expertise, but generally, extensive specialisation is not encouraged.
An exception to this rule is present in the position of the staff lawyer. As described in section 3.1.2, staff lawyers are the highest-ranked judicial assistants at Dutch courts. Apart from having several management and policy responsibilities, staff lawyers regularly function as specialised sparring partners for judges and judicial assistants (see section 6.1.7). Depending on how many staff lawyers are employed by the court division (the administrative law divisions in this research employed more staff lawyers than the criminal law divisions),[3] they function to a greater or lesser extend as specialised experts. At several divisions, the staff lawyers are specialised in detailed areas of law, and they inform the court members of new developments via meetings and newsletters. These staff lawyers frequently possess more knowledge about a particular legal field than the average judge, which provides them with a powerful position. Consequently, staff lawyers are often actively involved in the content of judicial decision-making by giving advice to judges.

Hence, the experience and expertise of both judicial assistants and judges are important in determining the types and amounts of involvement of the judicial assistants. Especially when a very experienced and knowledgeable assistant is working with a judge who is new to a specific field of law, this can result in judicial assistants dominating the decision-making.

2. In the criminal law divisions, there is truly little specialisation. The administrative law divisions are slightly more specialised; they are divided into a few subdivisions of judges and assistants who handle certain types of cases.
3. One criminal law division only possesses one staff lawyer; at the other criminal law division, there are several staff lawyers who are employed as part-time staff lawyers. The studied administrative law divisions employed five and six staff lawyers.

7.1.4 Career perspectives and ambitions

The last individual factors that affect the judicial assistants' involvement are the existing career opportunities and relating ambitions, as well as their job satisfaction. In section 3.2, it was observed that in judiciaries outside the Netherlands (particularly in the US), a judicial assistantship is regarded as an important stepping-stone towards a fruitful legal career outside the judiciary.[4] In the Dutch judiciary, the judicial assistant position can, rather, be a career in itself. Yet, most judicial assistants acknowledge that the career opportunities within the judiciary are rather limited (this is also shown in employee satisfaction surveys, see Commissie visitatie gerechten, 2014, p. 71). This is partly inherent to the current staffing policy and career tracks within the Dutch judiciary (see section 3.1). One can develop from being a junior to senior assistant, but subsequent possibilities to develop are limited. Only a small percentage of all judicial assistants can become staff lawyers (if they possess a university law degree), and the only other internal career opportunity is to be promoted to one of the rare managing positions (see for similar conclusions Commissie visitatie gerechten, 2014). The recent changes in the training to become a judge have further made the prospects of judicial assistants being admitted for training to become a judge even smaller (see section 3.1.2).
Due to the limited internal career perspectives, judicial assistants can also consider continuing their careers outside the judiciary. Several of the interviewed assistants mentioned this as a possibility.
How judicial assistants view their overall career perspectives and what their ambitions are in that regard are strongly related to how they were educated and trained before becoming an assistant. A clear difference is noticeable between older judicial assistants, who are internally trained, and new judicial assistants, who are primarily educated outside the judiciary. Given that assistants who followed the internal route generally do not possess law degrees, there are few career perspectives for these assistants outside the judiciary. This results in most of these assistants remaining employed by the courts until their retirement. A judicial assistant explains his career perspectives:

> *'I feel like I'm at the top of what I can achieve without a diploma. (…) Without a diploma, I won't be able to get a better or higher position in a different organisation. So, I see myself being here for a long time. I will probably become an old dusty assistant.'* (resp. 2)

Within the judiciary, the career perspectives for these assistants also have become more limited with the introduction in 2007 of the requirement that staff lawyers have to possess a university law degree.

4. Some assistants do return to the courts at a later point in time as a magistrate or judge.

A substantial share of the new – highly educated – judicial assistants considers the assistantship to be a starting point from which they wish to continue to develop. A relatively young assistant (under 30), resp. 15) for instance, says:

> *'I never intended to be in a job at this age of which you know: this is it. I want to develop myself. The moment that it is not challenging anymore, it is time for something else.'*

Several of these assistants speak about their desire to become judges in the future; others consider a career in advocacy or in the local government.
The dissimilar career perspectives also result in different levels of motivation and ambition among judicial assistants. Some judges mention that several of the internally educated assistants do not possess the same motivation to develop their skills and to be involved in the judicial decision-making as the newly hired assistants. During the research, three of the interviewed internally trained assistants appeared to have rather limited ambitions and job satisfaction. One of them (resp. 43) stated, *'I can hold out.'* It is not entirely clear where this mindset originates. Two of these assistants were also close to retirement age, which could be a reason for their limited motivation. Nonetheless, it remains true that even though the internally trained assistants are highly experienced, part of this group of assistants performs their duties less proactively and habitually attempts to limit their responsibilities. One of these assistants (resp. 37) explains:

> *'I'm not an adventurer. There are people that have an enormous drive to do all sorts of things. [I don't]. I don't know why… I think it's my personality.'*

Predominantly among the younger and more-educated assistants, there are very ambitious assistants who are motivated to be highly involved in the process of decision-making. Some of these assistants also do not feel limited by office hours. One assistant, for instance, mentions occasionally finishing judgment drafts on the weekend (resp. 13). Another assistant uses commuting time on the train to read literature and case law on all types of procedural issues of interest. This assistant believes that this results in judges putting trust in what is brought up by the assistant during discussions:

> *'I really enjoy researching stuff, so I always make sure that I am completely up to date with things. And I notice, steadily, people will begin to think, 'If [own name] says so, then it is probably okay.' At least, with procedural stuff concerning criminal law.'* (resp. 15)

This impression is confirmed in various interviews with judges. They state that they include judicial assistants in the judicial decision-making not only for their own benefits but also because they believe it supports assistants in developing valuable skills, and it makes their work more interesting. A judge for instance says:

> *'It is ultimately just more fun to work with an involved clerk, and – if someone is really involved – to give him a chance to say something about the content of the case. Because they are lawyers, of course. If they had the chance to prepare a case well, they are also anxious to say something. And they can learn from it. It stimulates people to develop themselves. Eventually, the product will benefit from that.'* (resp. 7)

Hence, the judges are usually more likely to involve strongly motivated judicial assistants in the decision-making. The level of judicial assistants' motivation is related to their ambitions to further their legal careers. This aspect is often challenging for judicial assistants who received limited legal education.

7.1.5 Type of case: complexity-level and degree of routine

First instance courts typically are required to adjudicate a wide range of cases. This is, in fact, one of the reasons for studying these courts (see section 2.2.1). The involvement of judicial assistants is, for a substantial portion, defined by the type of cases that the assistants assist in. How this differs for routine versus complex cases is described in this section.

The involvement of assistants in routine cases

The vast majority of the cases handled in the studied courts are simple cases which do not present the judicial officers with new, complex legal issues. The case files of these cases are regularly thin, the hearing is often brief and the judgment is a one or two-page record of the oral judgment. In administrative law, these are typically the cases in which the judge can reach an oral judgment immediately after the hearing (which is an exception in administrative law but is the rule in criminal single-judge cases). In most instances, these cases are decided by following previous case law. Hence, there is little room for influencing the judgment. Therefore, neither efforts of the judge nor the judicial assistants really make a difference with regard to the outcome of the judgment. At the same time, the assistants' efforts to summarise the key elements of the cases can be of great value for the efficiency of the process of judicial decision-making. For example, judicial assistants may list standard information from the case files in order for the judge to match this with pre-existing guidelines.

Good examples of routine cases are driving under the influence cases, which are handled in criminal proceedings.[5] For hearing those cases, usually only ten minutes is scheduled. In these cases, the police have commonly performed a breathalyser test of the driver to verify the blood alcohol concentration (BAC), and according to that concentration, a certain penalty is imposed. To find a suitable punishment for the tested BAC, a judge can consult the nationwide judicial orien-

5. Art. 8 of the Dutch Road Traffic Act.

tation points,[6] which simply list the penalties to impose for specific ranges of BACs. Hence, to handle these cases, little legal knowledge is required. A few of the judges mentioned that, in these cases, they themselves (resp. 12) or their colleagues (resp. 11) rely completely on the information in the assistants' memo.[7] According to respondent 12:

> *'There are, for instance, very simple hearings, like driver license hearings, driving under the influence hearings, that really are so simple. The judicial assistant then checks if the breathalyser was approved and whether the 20-minute limit between stopping the accused and breathalysing was met, those sorts of formalities. I really am not going to check that. That is just really simple.'*

Judicial assistants can easily list the information that judges require to decide these standard cases. For drafting a judgment in these cases, one also does not need to be highly qualified, as the judgments are usually short and consist mostly of 'standard' text (see section 6.2.3). These simple, predominantly secretarial or administrative duties are often fulfilled by assistants with limited qualifications. Drunk-driving hearings are, for instance, regularly handled by part-time assistants, who are still attending law school (so-called *buiten-griffiers*).
Due to the strong reliance of judges on the efforts of judicial assistants in the pre-hearing stage, assistants have a particularly important responsibility to scan for cases which turn out to be out of the ordinary and to make this condition clear to the judges. With respect to these cases, a judge might want to dive deeper into the case files. However, this is challenging, as the most junior assistants are allotted to these hearings. This points precisely to the situation (discussed in section 1.2) which Buruma believes to be problematic in his annotation of a case that appeared to be a 'standard assault case'. He believes that in that case, an assisting staff member at the prosecution office failed to recognise the case as an unusual case in which a simple application of the guidelines did not suffice.[8] This discloses that, although it may not be the intention of judicial assistants to influence the judicial decision-making, indirectly, their secretarial involvement in the judicial process might affect the decisions that are reached in these cases (see also section 5.1.4). This is probably part of the reason why many judges are reluctant to rely completely on assistants' memos, even in simple cases.

The involvement of assistants in large and legally complex cases
A minority of the cases are large and legally more challenging. These cases are typically handled by judicial panels. The involved judicial assistants are usually expe-

6. The orientation points are composed by the chairmen of the criminal law divisions of the district courts and Courts of Appeal.
7. Due to the simplicity of these cases, some courts have also decided not to have these cases prepared by assistants.
8. HR 8 September 2009, NJ 2010, 391.

rienced. In these cases, the involvement of judicial assistants can be quite different from standard cases. Due to the chosen research design (see chapter 2), no participant observations were conducted of the small selection of very large cases in which the hearings last several days. The current section is based on information from observations of cases with hearings that lasted one day at the most and on various interviews held with judges and judicial assistants who handled larger cases during their employment in the court.[9]

While routine cases are mostly handled in routine manners, larger and more complex cases require customised approaches. To start with, these procedures often entail more action prior to the hearing in order to gather and arrange all the information. Where needed, the parties should be contacted. It is common for judicial assistants to take the lead in this process, because judges are prohibited from having contact with the parties apart from the hearing (see also section 5.1.6). In large cases, it is also more likely that interim decisions have to be made in anticipation of the main procedure.

For handling large, complex or media-sensitive cases, it is common to compose a special team (see section 5.1.3), as these cases frequently require a lot of collaboration. A judicial assistant reminisces about one large case he was involved in:

> *'It is very different, because you work together very intensively. That was very special. Completely different from a normal hearing. You have about 18 days of hearing but also the time before and after. Those days you eat together every day. So, you acquire a special relationship.'* (resp. 2)

The files of such cases are extensive, sometimes filling an entire room. A good preparation for the hearing is, therefore, utterly important. Because of the magnitude of the files, it is often not conceivable for the assistant to prepare a 'standard' memo. The preparation for hearings differs from case to case. In addition to judicial assistants, judges are occasionally also involved in making memos. In these complex cases, judicial assistants can play an important role in arranging the files and making them manageable. In order to do so, the assistant has to possess the analytical skills to present the case materials in the easiest, most understandable way. An assistant who is regularly involved in large, complex cases showed me an example; this assistant had produced several tables and diagrams to arrange the information in a complex criminal case that involved various suspects and alleged victims. This was a very comprehensive document, but at the same time, it was clearly directing judges towards certain parts of the court files that were important according to the judicial assistant.

During the hearing, the involvement of judicial assistants is quite similar to simple cases,[10] but in the deliberation phase, the involvement may differ. Depending on

9. This issue was discussed in nine interviews with judges, assistants and court managers.
10. Although the length and the complexity of the hearings makes them somewhat more demanding than regular hearings.

how structured the presiding judge is in leading the deliberations, the judicial assistant may be the one who keeps an overview so that all necessary elements that should be part of the judgment are discussed (see more in section 6.1.3). After the deliberations, sometimes the assistant will solely write the first draft of a judgment; at other times, the judicial officers will divide the drafting duty. Particularly under the former circumstances, the effect of the assistant on the content of the judgment can be substantial. These judgments are normally lengthy, comprising dozens of pages. It is often left to the assistant to fill in the details of a decision (see section 6.1.6), which – consequently – can have a considerable impact on the structure and appearance of the judgment.
In large and complex cases, the role of assistants is, on one hand, a secretarial and managerial one. On the other hand, because of the legal complexity of most cases, judicial assistants are frequently involved in the decision-making and are frequently considered to be members of the (judicial) team.
Given that the outcome of adjudication is largely undetermined in complex cases, there is potential room for all participants to influence the decision-making. This is also true for assistants when they occupy a proactive position. Conversely, these decisions are normally made by panels of experienced judges, who will primarily discuss the case among each other (see the next section). Judicial assistants' views are always considered along with many other possible views that are argued among the panel members. The prospect of far-reaching and/or undesired influence on the judicial content is therefore less likely.

Hence, the potential for judicial assistants to have influence on the content of judicial decisions is most present in legally complex cases, especially when the assistant has a lot of expertise and the judges value his or her opinion. However, complex cases – which are handled in panels – will usually also receive much attention from the judges involved. That diminishes the assistants' influence. In routine case decisions, the assistant can, at times, be of great value to the efficiency of the decision-making process. As these cases will mainly involve standard situations, assistants will usually not have influence on the outcome of the cases. However, in the special category of cases which at first glance appear to be standard but on closer examination are not, their contribution can (unintentionally) affect the judicial decision-making.

7.1.6 Single-judge or panel decision-making

As already highlighted in several passages in chapters 5 and 6, the process of decision-making also significantly differs in single-judge and panel adjudication.[11] In

11. See more on single-judge versus panel decision-making at (criminal) Dutch courts in (Baas, De Groot-van Leeuwen, & Laemers, 2010; Ten Velden & De Dreu, 2012).

single-judge cases, apart from the judge, the only judicial officer who is acquainted with the content of the case files is the judicial assistant. Formally, the judge is solely responsible for reaching a decision. However, in practice, the judge often discusses the merits of the case with the judicial assistant.[12]

Single-judge adjudication

The majority of cases at Dutch district courts are handled by single-judges. In 2014, 85 percent of criminal cases were handled by a single-judge, as were 89 percent of all general administrative law cases.[13]

A substantial subset of these cases is composed of run-of-the-mill cases. In these cases, usually little interaction is needed about the merits of the case, and the assistant mainly adds value by assisting in routine aspects of the decision-making (see the previous section). However, during the fieldwork, it was also observed that the outcome of various cases adjudicated by single-judges is not that evident. These cases receive most of the judicial officers' attention. In these more complex single-judge cases, the judicial assistant regularly functions as an important discussion partner to the judge.

The exchange of views between the judge and the assistant commonly starts on paper. In the memo, judicial assistants will – more or less obviously – present their views on the case. Given that there are no contending voices from other judges in single-judge adjudication, there is a greater risk of anchoring effect (adjusting one's judgment to a reference point in the memo) when the judges make extensive use of the memos (see Tversky & Kahneman, 1974). The involvement of judicial assistants as sparring partners to judges is most prominent during deliberation meetings between the judge and the assistant that occur in administrative cases. During all of these observed meetings, rather than a judge primarily giving instructions to the assistant, an actual exchange of views regarding the merits of a case occurred (see section 6.1.3). In criminal cases, the police-judge will normally reach a decision and declare an oral judgment immediately after the hearing, leaving no room for deliberation with the judicial assistant. However, in rare instances, the judge can decide to adjourn the case to obtain some time to contemplate the case and – potentially – discuss it with the assistant (see section 5.2.5). Although this does not occur frequently, various judges mention that they are pleased to be afforded this opportunity to speak with the assistant. In general, the judicial assistant drafts the judgment in single-judge cases. In that situation, there is only one judge to revise the draft judgment. In the followed cases, this resulted in, on average, the draft being less severely adjusted (see section 6.2.6).

The fact that a single-judge is single-handedly responsible for the reached judgment results in some judges wanting to be fully in control and leaving little room

12. Of course, a judge can also approach another colleague to discuss the legal issues of a case, but this person will not be familiar with the specific content of the case at hand.
13. See De Rechtspraak, 2015, p. 53.

for the involvement of judicial assistants. Most single-judges, however, are quite receptive towards judicial assistants' involvement, as judicial assistants are their only well-informed sparring partners. In single-judge cases, there is also less collegial interaction, which results in there not being a situation which activates judges to display their judicial abilities to their judicial colleagues (see also Baum, 2006, p. 76-81). The majority of judicial assistants who reflect upon the difference between assisting single-judges or panels say that their involvement is usually greater during single-judge decision-making.[14]

Adjudication in judicial panels

In panel decision-making, the interaction between the judges of a panel occupies a central place in the adjudication. In several instances, this diminishes the role as discussion partner of the assistant. An assistant says:

> *'I do notice that, when you assist in a panel case, you see macho behaviour occurring (…) Then the judges are so engaged with each other that the assistant does not really matter anymore. (…) While one-on-one, you are a full partner in deliberations, during three-on-one situations, you are all of a sudden not anymore. I'm not really bothered by that; I still try to be a full discussion partner. But I believe that one is less visible then, as an assistant.'* (resp. 51)

It was indeed observed that during deliberations in most judicial panels, assistants acted less proactively. Judicial assistants have to be quite self-assured to engage fully in the discussion in the deliberation room and, hence, primarily it is experienced assistants who get involved. However, the memo commonly functions as an important document (and probably also as an anchor) for the judges to become familiar with the case, particularly given that panel cases are, on average, larger and legally more complex. Likewise, judicial assistants also attain a powerful secretarial position as judgment drafters. Still, the possibility of assistants having substantial influence on the content of judicial decisions is less in panel adjudication, given that not one but three judges are monitoring the assistants' work.

While the part that assistants play in the discussion is, on average, minimal in panel deliberations, this occasionally changes when there is disagreement among the judges. Section 6.1.2 reveals that when judges continue to disagree about the outcome of a case during deliberations, they sometimes turn to the judicial assistant to obtain an extra view on the matter. When this occurs, the opinion of the assistant suddenly becomes important, especially when the assistant substantiates his or her opinion with compelling arguments.

Hence, in general, the *involvement* of judicial assistants in deliberations will be larger in single-judge cases than in panel cases. In single-judge cases, judicial assistants are the only legal officers with case file knowledge that judges can discuss the

14. This is particularly true for administrative cases.

case with, whereas in panel cases, judges also have the opportunity to turn to their judicial colleagues. As most single-judge cases are simple, this involvement mostly does not result in substantial influence of the assistants. This is, however, different for the minority of single-judge cases which are more complex.
As panel cases are generally legally more complex (resulting in more possible outcomes of the cases) than single-judge cases, there is more room for all judicial officers to affect the outcome of the decisions. The relative *influence* of judicial assistants on the decision-making may therefore actually be larger than in most single-judge cases. Especially when it concerns cases in which the panel members disagree with each other.

7.1.7 Time pressure and workload

Lastly, the workload and time pressure that judicial officers experience determine the types and degrees of involvement of assistants.

Workload
Via different means, a number of Dutch judges have raised their concerns about their belief that the judiciary is increasingly focused on output.[15] The judicial workload is generally also considered to be high. A study in 2013 revealed that 73 percent of all its 648 respondents (judges and prosecutors) believed the workload to be too high.[16]
Although it differs substantially among judges how they consider their workload (see also Van Duijneveldt et al., 2017, p. 33-38),[17] concerns regarding the workload were widely exposed during the interviews. For most of the judges, working in the evenings and on weekends is quite common (see also Van Duijneveldt et al., 2017, p. 33-35). It appears to happen regularly that a judge only has time to read some of the cases of a hearing the night before. While most judges say they will not compromise on the quality of judicial decisions, some also acknowledge that they have to make choices which can affect the overall quality. One judge, for instance, says:

> *'Sometimes you've got little time, and then you indeed think, 'Well, it is written down… and it's not my ideal judgment, but it is good enough. It's a six out of ten. So, it's going through.' And the busier it gets, the more it happens. And that does happen quite a number of times.'* (resp. 83)

15. This was, e.g., specifically stated in the Leeuwarden Manifesto by a substantial group of judges; see *Trema*, February 2013. It was also mentioned in various publications in journals and newspapers by judges. A recent survey among 852 judges also confirms this. Eighty-eight percent of all respondents agree with the statement that there is too much focus on output, which challenges the quality. See survey related to (Berendsen et al., 2015) see also https://www.rechtspraak.nl/SiteCollectionDocuments/Resultaten%20enquete%20Tegenlicht.pdf.
16. According to these respondents, the quality of adjudication is 'sometimes' or 'often' compromised due to the high workloads; see similarly Lensink & Husken, 10-12-2013.
17. Several respondents also mentioned to me that they consider the workload to be reasonable.

Several studies revealed that time pressure can negatively influence (judicial) decision-making, as it results in less sharing of information and more reliance on heuristics (see Bowman & Wittenbaum, 2012; Ten Velden & De Dreu, 2012, p. 85). This results in not only less discussion among judges but also less discussion with the judicial assistant. High workloads, resulting in more time pressure, can also result in judges relying heavily on the documents produced by judicial assistants, such as the memo or draft judgment. On average, the interviewed judges firmly rejected the idea of relying entirely on the memo whilst preparing for a hearing. However, this was observed happening in two instances. Additionally, some respondents also mentioned some of their colleagues doing this (see section 5.1.4). Respondents qualified this as a consequence of acting under time pressure. Several judges mention that time pressure also affects the time they spend on revising assistants' judgment drafts. One judge says:

> *'A high workload can come at the expense of quality. That is something I can agree with. At a certain moment, you get tired of all the reading. Then at a certain moment, you think, 'Enough', and you sign the judgment.'* (resp. 11)

Similar to judges, judicial assistants occasionally also have to deal with substantial workloads (see Van Duijneveldt et al., 2017, chapter 3). During the fieldwork at one of the administrative courts, an assistant raised the issue of assistants' high workloads during a division meeting. When judicial assistants do not receive enough time to adequately perform their duties, this can also affect the quality of their work and, as a result, the degree to which judges are inclined to rely on it.

Temporary decision-making under time pressure

Sometimes, courts have to make preliminary decisions, for instance, regarding the extension of pre-trial custody in criminal cases or to provide temporary arrangements in administrative cases. These cases typically have to be decided upon at short notice, which means there is little time to read the files and contemplate the legal issue at hand. The reached decisions have temporary validity and can be adjusted in the procedure on the merits. This justifies the quick and modest procedure which is often employed in these cases. In one of the criminal law divisions of the courts, it is customary in custody decisions to distribute the cases of a hearing among the panel of judges and one or two judicial assistants.[18] These persons (either judges or assistants) will then read the case carefully and produce a memo. The other panel members usually only read that memo. This has the effect that, in the cases in which a judicial assistant prepared the memo, usually no judge has read the case files in order to reach a judgment. In complex custody cases, it is, of

18. In these cases, these assistants are normally not involved during the hearing, as the judges are then accompanied by a junior judicial assistant who has received only limited judicial training.

course, possible that judicial assistants point out the complexity and suggest that the judges *do* read the files. Conversely, a judge can – at any time – decide to read the files if he or she believes it to be necessary. However, in a seemingly ordinary custody case, this gives the judicial assistant a key role in determining the relevant factors to build the decision on.
Unlike the previous depiction, in the administrative law division, cases in which temporary arrangements need to be made are usually handled though single-judge adjudication by senior judges. They are assisted by senior assistants who are often specialised in handling these types of cases. The underlying cases are usually complex, and it demands experience to understand the essence of these cases rapidly. Given that these cases frequently should be heard only days after they are filed at the court, they have to be scheduled quickly, often leaving the judge with little time to prepare for the hearing. When an assistant has time to create a memo, the odds are that the judge will heavily rely on that memo. In such circumstances, the contribution of assistants is substantial.
Hence, when the judges are under increased pressure to produce judicial output, they are occasionally more receptive to the input of judicial assistants and less critical regarding the products assistants create. This increases judicial assistants' potential to influence the judicial decision-making. This effect is strengthened when judges are dealing with substantial workloads and are operating under severe time pressure. Though, in such situations, judges will also possess less time to discuss cases, which can result in them deciding cases alone instead of discussing them with their judicial colleagues or assistants.

7.2 Differences and similarities in the studied courts and court divisions

The empirical fieldwork focused on two divisions (criminal law and administrative law) of two Dutch first instance district courts. These courts and court divisions were studied in order to get a broad, varied set of data for analysis; they were not primarily selected in order to compare court divisions (see section 2.2.1). Nevertheless, it is interesting to discover whether there are differences and if these differences can explain some of the variation between court practices.

7.2.1 Court location characterictics

It was expected that the characteristics of particular courthouses would have an effect on the involvement of judicial assistants in adjudication. The study, however, did not reveal major dissimilarities between the two studied courts. Merely smaller differences were observed, the most important of which are discussed in this section.

An important reason for the fact that minimal differences were observed between the studied courts seems to be that the Netherlands is a relatively small country in which there are no major differences in the social, cultural and economic conditions of the areas in which the courts are located. Smaller differences that some respondents suggested to be of relevance were the location of the courts in either the north or the south of the country, and in more desolate areas or larger cities. Furthermore, respondents mentioned that the size of a court or courthouse also matters: smaller courthouses would be less hierarchical. The research was not designed in a manner that allowed verifying these claims, so it cannot be determined whether they are accurate or how this may affect the involvement of judicial assistants.

Even so, it became clear from the interviews that some courts are acknowledged for their slightly more formal atmosphere, which, according to some, also results in more hierarchical relationships between judges and judicial assistants. Respondents in this research mark both of the studied courts as among the less formal courts.

As identified in previous chapters, there is some dissimilarity in how the studied courts are organised and managed. An important difference is that no memos were prepared for police-judge cases in one of the courts (see section 5.1.4). Another difference is that in administrative cases in one court, hardly any pre-hearing meetings occurred, whereas in the other court, meetings were held regarding all of the followed hearings (see section 5.1.5). These aspects clearly affect the involvement of assistants.[19]

Apart from these organisational differences, there is one significant difference which stands out in relation to the theme of this research. This concerns the perceived career perspectives of judicial assistants in and outside of the studied courts. While judicial assistants recognise that the career opportunities within the judiciary are, on average, rather limited, the assistants of the studied courts perceive their career opportunities fairly differently. This appears to be related to the fact that one of the courts is located in the *Randstad*, the western part of the Netherlands, in which most large cities are located. The other court is located outside the Randstad and is relatively far away from other larger cities. For the judicial assistants in the court in the Randstad, it seems to be relatively easy to switch jobs; there are regularly vacancies in nearby courts or other legal establishments (e.g. law firms or government agencies) in the area. The latter was less observed in the more isolated court. Respondents in this court stated that several assistants were unhappy with the internally offered career prospects. When the assistants were asked about the alternative option to switch to a position outside of the court,

19. Without a memo, the involvement of the assistant is likely to be smaller. The impact of the occurrence of pre-hearing consultations is somewhat more complex. These meetings can function as a way for judicial assistants to wield influence. On the contrary, they can also function as a way for judges to monitor and direct the assistant, which could diminish their influence.

respondents often mentioned the limited possibilities for the legally trained in the area. This results in some assistants feeling 'stuck' in a position with which they are not entirely content. Responding to the question of whether this could cause friction, a court manager responds:

> *'Yes. Regularly. I can easily name five to six people in our department who would like to become judges but didn't get the opportunity from the organisation and are disappointed about it. And they also feel kind of stuck. (…) So, then you've been working here for nine years and your social life is settled and maybe your partner is located here. Then you won't say that easily, 'Let's try and find a nice position in The Hague'.'* (resp. 55)

Thus, although the limited internal career opportunities are partly inherent to the way that the assisting scheme is organised, the effects of this are most strongly visible at the court that is located in a more isolated place. How career opportunities are associated with the involvement of judicial assistants in judicial decision-making is defined in section 7.1.4.

7.2.2 Criminal versus administrative law divisions

Various respondents pointed to the fact that the divisions have different characteristics. The data of this research also reveal some differences between the criminal and administrative law divisions, resulting in somewhat different types and degrees of involvement of the judicial assistants. Nonetheless, these differences only determine a small part of the observed variation in court practices. Much more variation was observed between different judicial officers within court divisions.

Similarities of the two public law divisions

To start this section, it is worth noting that the criminal and administrative law divisions bear several resemblances to each other, particularly in comparison to the civil law divisions. Both fields identify as public law, meaning that the dispute does not involve a conflict between two private parties but, rather, the government is involved. This also entails that an official government body – either the police/prosecution office (in criminal cases) or the accused government agency (in administrative cases) – has already prepared files and presented its views on the merits of the case in the case files. It is important to recognise that not only the judicial assistants' memos can function as anchors to judges. The case files usually also contain information that can affect the understandings of the judges or the judicial assistants who read them. For instance, the charge of the prosecution officer generally functions as a starting point for the discussion in the deliberation room.

In addition, the hearing has a central position in public law procedures. In the private law divisions, a more substantial number of cases are handled without a hear-

ing.[20] Several respondents also mention that the work of judges and judicial assistants in the civil divisions is more individualistic and, to a larger extent, based on the exchange of arguments in written documents. An interviewed judicial assistant who previously worked in the civil division describes:

> *'There were weeks that I would just get a pile of cases on my desk, and then I was just writing and writing. You don't see anyone. You do speak about it with the judge; it should head in that direction. But there was no hearing or anything.'* (resp. 49)

This can result in civil judgments being more a product of either the efforts of a judge or a judicial assistant, whereas in the criminal and administrative law divisions, the preparation for the hearing and the hearing itself require that both the judge and the assistant are involved in the process.

Different historical background

Criminal and administrative law divisions have dissimilar historical backgrounds. Criminal law has been part of the judiciary from the early beginnings.[21] Legal protection against acts of the administration emerged much later; administrative law only really flourished in the second half of the 20th century.[22] At first, administrative law was a fragmented field with strong connections to the involved government agencies. With the codification of the General Administrative Law Act (*Algemene wet bestuursrecht*) in 1994, various procedures were unified. Separately operating first instance administrative courts were also merged and incorporated into one single division of administrative law in the district courts (which already handled all criminal and civil first instance cases). Only since January 2002 have these administrative law divisions been officially recognised as 'courts part of the judiciary', as defined in Article 2 of *the Constitution*.[23] From then on, all institutional safeguards of the judiciary have also been applicable to the administrative law division to the same extent.

The historically strong association with the government and the previous special position within the court system appear to result in a somewhat different culture in the administrative law divisions. Various respondents mention that these divisions are less formal and less hierarchically organised than the other divisions. Some also argue that administrative law assistants would (consequently) be more influential than assistants in the criminal law division, as judges would assign them with further-reaching duties. This could be a reflection of the practice of far-reaching dele-

20. See for the figures: De Heer-de Lange et al., 2013.
21. Since the establishment of the judiciary by Napoleon in 1811, criminal cases have been heard by professional judges at Dutch courts; see Bosch, 2011.
22. For an overview of the development of administrative law in Europe, see Mannori & Sordi, 2009.
23. Prior to this date, the administrative law divisions were acknowledged as courts that function outside of the judiciary. Some of the administrative appellate courts are still part of the latter category Mak, 2008b, p. 129.

gation of duties in government agencies (see e.g. Bovens, 2000). The research design does not enable drawing any conclusions regarding whether differences between the divisions are actually related to the historical background. It is expected that cultural differences will become less dominant over time, with administrative law divisions being integrated into the courts and especially given that it is policy for judges to rotate between court divisions.

Type of cases

The content of cases that are handled by the criminal law and administrative law divisions also differs. On average, criminal cases are recognised for being more focused around assessing the facts, while administrative cases will typically concentrate more on legal rules and policy. A criminal law judge explains:

> *'At the administrative law division, it is more legal than here [criminal law]. Because here, it is like, 'Yes, he slapped someone, at least that is the accusation. What evidence do we have for that? The declaration of the victim, maybe we will have a witness. We have a declaration of the doctor who says that someone has been injured.' That is a list of a number of factual documents, and if you have enough of those, and they do not allow for much noise, then the crime is said to be proven.'* (resp. 3)

Not only are criminal cases more factual, the criminal legislation is also more limited in quantity. The vast majority of issues are strictly codified in the Dutch *Criminal Code*, whereas the field of administrative law consists of numerous different acts and regulations. Many of these regulations consist of open clauses. Additionally, there is a larger variation in the types of persons/organisations involved in administrative cases. In criminal law cases, the encounter is always between the prosecution office and the accused. In administrative cases, parties can be individuals but also various types of government agencies, interest groups, semi-public organisations and so forth.

These differences are reflected in the contributions of assistants to the judicial decision-making. Criminal law assistants primarily focus on the incriminating evidence in their memos, while administrative law memos often concentrate on what legislation is applicable and how the legislation should be applied to the case at hand. In administrative law cases, it is also more common for assistants to add additional information regarding legislation and case law to the memo. In criminal memos, this is mostly regarded unnecessary or even inappropriate (see section 5.1.4). The administrative law divisions also have organised more specialisation among judicial assistants, particularly in the capacity of staff lawyers (see sections 6.1.7 and 7.1.3) who specialise in a specific segment of administrative law. These characteristics result in administrative law assistants often being more involved in the capacity of transferring legal knowledge to the judges, whereas criminal law assistants are involved as summarisers of the (sometimes extensive amount of) information in the case files.

Procedural differences

Previous chapters already pointed to some procedural differences in the handling of criminal and administrative law cases. With regard to the involvement of judicial assistants, it is relevant that during the run up to criminal law hearings, the prosecution office plays a key role in deciding what cases are scheduled at the hearing and in what capacity the hearing will occur. In administrative cases, judicial assistants take the lead in arranging most of these issues (see section 5.1.1). Additionally, in a small percentage of administrative cases (8 percent in 2012),[24] no hearing is part of the procedure. In those relatively simple cases, judicial assistants play an important role, as they write the draft judgments, usually without first contacting a judge (see section 5.1.2). Another aspect in which the procedures differ is the need for pre-hearing consultation of the parties. In administrative cases, contact with parties occurs more frequently than in criminal cases. As judges are prohibited from having contact with the parties prior to the hearing, it is an important duty of the assistants to act as a buffer (see section 5.1.6).

Furthermore, the percentage of adjudication by judicial panels is slightly higher in the criminal law divisions than in the administrative law divisions (15 percent of all criminal cases in 2014 compared to 11 percent of all general administrative cases).[25] Panel cases are handled in a quite similar manner in the two court divisions, but there is a remarkable difference in the way that single-judge cases are handled. In so-called police-judge cases in criminal courts, it is common procedure for the judge to reach a decision immediately after the hearing. This means that, normally,[26] there will be no deliberation by the judge and assistant between the end of the hearing and reaching the verdict. This limits the contribution of judicial assistants, especially when they also did not prepare a memo (which is the standard procedure in one of the studied courts). In the administrative law divisions, judges can also reach decisions immediately, but this is an exception. In the majority of cases, judges decide the case within six weeks.[27] This entails that judges first plan a meeting to discuss the case with the assistant (see section 6.1.4). At that meeting, the judicial assistant often functions as a sparring partner for the judge, particularly because the assistant is the only person, apart from the judge, who is familiar with the specifics of the case.

Exchange of views prior to the hearing

The most noticeable difference between the two divisions is the manner in which judges and assistants perceive the idea of exchanging views prior to the hearings.

24. De Heer-de Lange et al. 2013, p. 234.
25. In criminal law, a norm of 15 percent is set for cases to be handled in a panel. In regular administrative cases, the norm is set at 10 percent. These numbers exclude immigration cases, in which the norm is set at 5 percent, and the actual percentage of panel judgments in 2014 was 3 percent. See De Rechtspraak, 2015, p 53.
26. There are exceptions in which the judge can delay the decision for up to two weeks.
27. Art 8:66 Awb. Which also can be extended with an extra 6 weeks if needed 8:66 sub 2 Awb.

In the administrative law divisions, it appears to be rather common to discuss the merits of a case before the hearing. This is also reflected by the fact that it is common for assistants' memos to include their views on the cases. On several occasions, the assistants even wrote the memos in judgment format (see section 5.1.4). In addition to this, pre-hearing consultations have become common settings for administrative law judges and assistants to discuss cases prior to the hearings (see section 5.1.5). These practices are very different from what occurs in the criminal law divisions. In those divisions, the hearing is traditionally regarded as *the* central place to exchange views. As a result, it is considered crucial to enter the hearing open-minded and unprejudiced. For that reason, the memos are usually prepared in the most neutral manner by the assistants. Planning meetings to discuss cases prior to the hearings is perceived as inappropriate.[28]
This variance in exchanging views in the early stages of the process results in assistants in the administrative law divisions operating more as sparring partners than in the criminal law divisions. Consequently, in criminal law divisions, under normal circumstances, the influence of assistants in the stage prior to the hearing is more limited. However, there is nonetheless a likelihood of a more indirect, and perhaps unintentional, influence by criminal law assistants on judges. As it is impossible to write a memo that is truly neutral, the way in which information is ordered, the choice of words and the selection of information all inevitably add colour to the memo. The criminal law memos are, moreover, often one-sided, as they predominantly focus on the incriminating evidence (see section 5.1.4). Thus, a judge who uses the memo to prepare for the hearing is unavoidably influenced by it. When judges treat the memos as if they are neutral summaries of the files, they may be unaware of the anchoring effect that may occur (see section 5.1.1).

Workload
Judicial officers in the two divisions also deal with different workloads, at least, according to various respondents. They say that, due to the strict deadlines for publishing the judgments in the criminal law division,[29] criminal law judges experience, on average, more time pressure. A judge who was previously positioned in the criminal law division declares about his transfer to the administrative law division:

> *'Yes, in the beginning, it was a lot of catching up. But the hearings are much more relaxed. You have time to write the judgment, six weeks. And if you can't make that, you can extend it. The bustle of criminal law is not present.'* (resp. 47)

28. This difference between the divisions is probably related to the more immediacy-based origin of the criminal proceedings, whereas in administrative law, the process is to a larger extent based on the documentation, see section 5.1.4.
29. Two weeks for criminal cases, while it is six weeks – which can be extended for another six weeks – in administrative procedures.

To summarise, several characteristics of the field of administrative law seem to generally result in administrative law judicial assistants having a somewhat greater role, especially in the early stages of the decision-making process. The existence of a more open attitude to assistants' participation in the administrative law divisions also shows in the opportunities offered to judicial officers in that division to participate during the hearings. Providing assistants with the ability to be involved in questioning the parties during the hearing was only observed in the administrative law divisions (see section 5.1.3). This potentially makes the significant position of judicial assistants somewhat more exposed to the public. Though in practice, this opportunity does not result in a major difference between the divisions. Although various administrative law judges provide judicial assistants the opportunity to be involved during the hearing, only in a small minority of cases do judicial assistants actually act on it.

7.3 Conclusion

This chapter reveals that the types (administrative and/or secretarial or advisory and/or discussion related) and degrees of involvement of assistants in adjudication particularly depends on seven factors: four factors related to individual officers and three situational factors. First of all, trust – which can be of various types – plays a key role in the openness of judges towards the involvement of assistants. Second, the ideas of the judicial officers regarding what the appropriate role of a judicial assistant should be effects the involvement of judicial assistants in court practice. Third, experience and expertise of both the judge and the judicial assistant are key factors that define the involvement and influence of judicial assistants. There is wide variation among assistants regarding their experience and expertise. Particularly when judges with limited experience are working with highly experienced and specialised assistants, judicial assistants' involvement is often far reaching. The career perspectives and ambitions of judicial assistants also influence the ways in which assistants are involved in the decision-making. The educational backgrounds of judicial assistants are diverse, and this affects the career perspectives as well as the ambitions of the assistants. Assistants who possess law degrees are often especially interested in furthering their careers and, consequently, fulfil their duties more ambitiously.

Apart from these individual factors, various situational factors also play a role. To start with, the types of cases that have to be adjudicated affect the interaction between the judge and judicial assistant. Complex cases often require more consideration, which results in more opportunities for judicial assistants to have influence on the content of the judicial decision-making. Routine cases, on the other hand, are often quite clear cut, leaving little or no room for influence. Yet, in some cases that appear to be standard but in fact may require a closer read, the influence of judicial assistants can be – sometimes unintentionally – substantial. Partly related

to the previous factor is the factor of whether adjudication takes place by a single-judge or a judicial panel. In general, judicial assistants will be more actively involved in single-judge adjudication than in panels. Particularly, in administrative single-judge cases (in which the judge and the assistant plan a meeting to discuss the cases after the hearing), judicial assistants can function as important discussion partners. The fact that cases adjudicated in panels are more legally complex as well as organisationally more challenging, however, may also cause judicial assistants to play an important role. Yet, in the discussions, their views will be competing with those of the three judicial panel members. Lastly, the pressures caused by time and workloads also affect the involvement and influence of judicial assistants in the decision-making. Severe time pressure and high workloads are related to judges relying more heavily on judicial assistants' work. Hence, various factors determine whether a judicial assistant's involvement is small or far-reaching.
Although the factors are discussed separately, in practice, these factors co-exist. It is important to realise that, particularly when several factors are enhancing each other's effects, this can, and sometimes will, lead to quite far-reaching involvement and potential influence of judicial assistants. On the contrary, it can also lead to assistants being hardly involved in the judicial decision-making at all.

The last section of the chapter was devoted to the question of whether differences were found in the involvement of judicial assistants between the two studied courts and the two court divisions. The external validity of these results is somewhat limited (see section 2.1.3), as only two courts and, within each court, two court divisions, were studied, but the account of the data on this subject still reveals some interesting results. First, no major differences were observed between the two court locations. One smaller aspect that appeared to differ between the courts was the career perspectives. In the more isolated court, assistants experienced less possibilities to further their careers, which frustrated them and could harm their working relationship with the judges. A few more differences were observed between the court divisions. On average, the differences caused judicial assistants to perform a somewhat greater role in the administrative law divisions. However, no great difference was observed there, either; more variation was observed in the practices within one court division than between divisions.

8 Conclusions and reflections on the involvement of judicial assistants

This book started by stating that although judicial assistants occupy a central position in all types of court systems, we know very little about what their involvement entails and what consequences their employment has on judicial decision-making. In an era in which the managerialisation of courts has become a major issue, and judicial assistants are expected to play a key role in increasing efficiency as well as the quality of judicial decisions, it is of key importance to gain a greater insight into the involvement of judicial assistants and to reflect on this involvement. This is the driver for the following research question for this book:

In what ways are judicial assistants involved in the judicial decision-making process, and what consequences does their involvement have for the manner in which adjudication takes place?

Judicial assistants prove to be indispensable in the process of judicial decision-making. At the same time, the involvement of judicial assistants is a particularly sensitive issue. The law appoints judges with the responsibility to adjudicate, and, hence, people expect that judicial decisions are taken under their sole authority. When it turns out that judicial assistants are, in fact, regularly highly involved in the decision-making, this raises questions about the legitimacy of this involvement. From a normative and theoretical angle, taking a rule of law and a managerial perspective, various potential difficulties related to the employment of judicial assistants are addressed. A tension between certain values (e.g. efficiency and transparency versus autonomy and independence) related to the different perspectives is also recognised. This research reveals that this tension affects the collaboration of judges and assistants in court practice. Concrete dilemmas that judges face, which came to the surface in the research, are, for instance: how to most effectively use memos written by assistants; in what manner to include assistants in running the hearing so that they are (and feel) valued but that also presents a suitable image of their position to the public; how (and to what extent) to have judicial assistants participate during deliberations; and how to retain the correct amount of control of the content of judgments while dealing with the fact that judgments are currently drafted by assistants.

In order to gain insight into the involvement of assistants in the judicial decision-making process and its consequences for adjudication, eight months of fieldwork was conducted at two Dutch district courts. Within each of those courts, two different divisions were studied (the administrative law and the criminal law division). Cases were followed from the start of preparing for the hearing to the writing of the judgment. In addition, numerous judges and judicial assistants were interviewed during the fieldwork.
District courts were studied because they handle a wide range of cases, namely both run-of-the-mill cases and large and legally complex cases. The cases in these courts, furthermore, are handled in different setups: by panels as well as by single-judges (with the majority of cases being handled by single-judges). This way, the involvement of judicial assistants in different situations could be observed. Broadening the selection of cases was also the reason for including two different court divisions. The criminal law division and administrative law division were selected because they were expected to differ in the types and degrees of involvement of judicial assistants (see more on the research method and selection criteria in chapter 2).

The results of the fieldwork, in the strictest sense, shed light on the practices as they occurred in the studied court divisions, but several patterns were recognised that are likely to be generalizable to other Dutch courts and also to different jurisdictions.[1] The specific conditions in which judges perform their adjudicative duties (as professionals assisted by subordinate staff) are, in fact, in many ways similar to other professions. Friction between enhancing managerial values and protecting the professional status is also visible in professions, such as the medical profession (see section 1.1). To be able to reflect on the results regarding the Dutch district courts and to place them in a broader, inter-jurisdictional perspective, the research also paid attention to the organisation of higher Dutch courts and of courts in different jurisdictions (namely the US and England and Wales; see chapter 3 for the selection of the studied assistance systems within these jurisdictions). For that reason, interviews were also conducted at Dutch courts other than the ones observed and at English courts.
The first section of this chapter outlines the three main empirical findings of the research. The following section provides an assessment of the desirability of administrative and/or secretarial and advisory and/or discussion-related involvement of judicial assistants in judicial decision-making. The two normative perspectives which guide the organisation of the Dutch judiciary (described in chapter 4) are employed to perform this evaluation. The last section examines the implications of the findings of the research for the judicial decision-making practice. The situation in Dutch district courts is thereby taken as a starting point, but elements

1. See more on the external validity of the results in section 2.1.3.

of judicial assistance models of other courts and jurisdictions are also taken into account.

8.1 Empirical findings of the research

This book contains many empirical findings regarding the involvement of judicial assistants, which are discussed elaborately in chapters 5, 6 and 7. In this concluding section, three central empirical findings are highlighted.

8.1.1 Discrepancy between the formal position of judicial assistants and the wide variation in their actual involvement

It has been a presupposition from the start of the research that the official and publicly recognised contribution of judicial assistants to the adjudicative process could well be different from their involvement in practice. The research reveals that there is, indeed, a discrepancy between the formally recognised position of assistants, as codified in Legal Acts and policy documents, and their actual involvement in judicial decision-making.
Chapters 3 and 4 reveal that Dutch Legal Acts, statutes and policy documents are quite specific about the recording duties of judicial assistants and their administrative responsibilities, but duties which entail active involvement in the content of judicial decision-making are barely mentioned. In the course of the introduction of various managerial principles to the courts, documents were produced that plainly mark the time that judicial assistants and judges are supposed to spend handling cases.[2] This did not instigate the development of general policy regarding the division of work or the collaboration between judges and judicial assistants, which is virtually non-existent in judicial policy documents. While collaboration with judicial assistants comprises a major part of the judges' daily work, this is, for instance, not reflected in the judges' function profiles.[3] The nationwide function profiles introduced in 2007 for judicial assistants do list the various duties which judicial assistants can have in the decision-making process. However, these descriptions remain very general; the profiles do not provide detailed information of what, for instance, 'assisting judges in conceiving judgment' entails (see section 3.2.2). Remarkably, the function profiles also do not mention the role of judicial assistants during deliberation sessions. At a court or court division level, the intensified employment of judicial assistants has generated some regulations: often, quite detailed guidelines and templets exist regarding the work of judicial assistants.

2. The nationwide Lamicie-model provides indications for how to allocate the time, and the individual courts have adjusted these models as desired; see also section 4.2.2.
3. The only reference to the collaboration of judges with assistants that is mentioned in their 6-page-long profiles is that the judges 'work together with assistants and have contact with them'; see section 3.2.2.

These regulations clearly delineate what practical information should minimally be included in the documents produced by assistants. The regulations are, however, vague about whether and how judicial assistants should include their own views on cases in these documents (see sections 5.2.4 and 6.2.1).

Hence, the image which is presented in regulations and policy documents is that of a judicial assistant who is mainly an administrative figure and who has only limited involvement in the judicial decision-making. This image is reinforced by the fact that at the hearing – the main public element of the adjudicative process – the involvement of judicial assistants is usually minimal (see section 5.3.7).

This depiction is, at least partly, in contrast with the results of the fieldwork at the two district courts. A wide variation was observed in the involvement and influence of judicial assistants in the judicial decision-making practices, probably chiefly driven by the lack of regulation (see section 8.1.2). Judicial assistants in Dutch district courts are allocated duties in all stages of the decision-making process. Although their precise duties differ somewhat per court, court division and type of assistant (see section 3.2.1), on average, these duties include preparing memos, producing the court records, attending (and participating in) the deliberations and conceiving draft judgments. Thus, apart from several largely administrative duties, such as the creation of the court record, judicial assistants are also allocated various duties which contain more advisory or discussion-related features. Nonetheless, the actual contribution of judicial assistants to the judicial process by performing these duties varies greatly.

On one hand, the fieldwork exposed situations in which the judicial assistants' involvement in the judicial decision-making process was substantial. Various judges make extensive use of memos prepared by assistants as road maps for understanding the cases (see section 5.1.4). During the hearings, some assistants were involved in pointing out procedural aspects that the chairing judge was about to overlook. Judicial assistants are occasionally also involved by asking questions during the hearing.[4] In some deliberation sessions, assistants were also observed to be highly involved in the discussions. Lastly, the drafting of judgments is also a duty in which assistants frequently play an important role by writing the first drafts, often after having received only general directions (see section 6.1.6).

On the other hand, the research revealed occasions in which the involvement of judicial assistants in the judicial decision-making process was limited to almost non-existent. In the run up to the hearing, this was the case in situations in which (by protocol) no memos were prepared[5] or in which the judge (for various reasons) was not making much use of the prepared memo (see section 5.1.4). The involvement during the hearings was usually largely restricted to making the court records, which is an important but also largely administrative duty (see section

4. Although I personally did not observe judicial assistants asking an important question during the hearing, a respondent mentioned that this does happen, see section 5.2.3.
5. Which is standard procedure for single-judge cases in one of the criminal court divisions.

5.2). In some deliberation sessions, judicial assistants were not invited to present their views, or sometimes, assistants themselves chose to hardly participate in the discussion (see sections 6.1.2, 6.1.3 and 6.1.4).[6] Lastly, in conceiving the judgments, the role of assistants is sometimes minimal when judges provide them with detailed instructions (sections 6.1.6 and 6.2.2) or when judges heavily alter the draft judgments afterwards (section 6.2.5).

In summary, the types and degrees of observed involvement of the judicial assistants was diverse. This is due to personal characteristics of the judges and assistants but also to various circumstantial factors (see also chapter 7). First and foremost, the judge has to be receptive towards the involvement of judicial assistants. Trust in the judicial assistant is a key factor for this. There must be a general willingness among judges to trust judicial assistants, but the *particular* judicial assistant who is involved also has to be regarded as trustworthy to the judge (Mayer et al., 1995). The research reveals that competence-based trust is especially important in this context.[7] Whether a judge considers a judicial assistant to be competent is, for a large part, dependent on their previous associations with the assistant. The perceived experience and expertise of an assistant are also important factors. Particularly, some senior assistants in the courts are highly respected, and they are therefore often highly involved in the decision-making.

While the receptiveness of the judge towards the judicial assistants' involvement is a precondition, the type and degree of involvement is also dependent on the proactivity of the judicial assistants in performing their duties. Some assistants (who have certain role perspectives) possess a more proactive attitude than others. However, this attitude is also something that develops over time; most assistants say that they became more confident and proactive as they worked for a longer period in the courts. The ambitions of assistants to further their careers also play a part in their proactivity. The newly hired assistants especially often regard a judicial assistant position as a learning experience to further their careers.

The circumstances in which the decision-making takes place also determine whether an assistant will play a substantial role. When the workloads are high and when decisions are made under time pressure, judges rely more heavily on the work of judicial assistants than they normally might. For instance, some judges mention that time pressure affects the time they spend on revising judgments (see section 7.2.6). Certain types of cases also require more involvement of judicial assistants. In simple routine cases, judicial assistants regularly play an important administrative and secretarial role, but in those cases, there is often less need for assistants to provide judges with advice or act as sparring partners. In complex

6. Note that in certain cases, no deliberations take place (e.g. most single-judge criminal law cases).
7. When there is a lack of trust in the judicial assistants' abilities to produce adequate materials, this results in situations in which judges are simply not making much use of the memos. Other judges spend endless time checking whether every detail of a draft judgment is a correct reproduction of the information in the case files, because they do not trust the assistants' meticulousness.

cases, however, the knowledge and views of assistants are regularly regarded as welcome contributions to the discussion. Lastly, the setup of the legal procedure also defines the involvement of judicial assistants. Judicial assistants will more frequently act as discussion partners to single-judges than to judicial panels. Nonetheless, judicial assistants also play an important role in some panel deliberations, for instance, when a panel consists partly of new or deputy judges. Especially when several factors that enhance the role of judicial assistants co-occur, their involvement can be considerable.

8.1.2 Ambiguity in the judge–judicial assistant relationship: a cautious search for the right balance

The second finding of the research is the ambiguity observed regarding the position of judicial assistants and their relationship with judges. The judge is officially appointed as the adjudicator and, hence, is responsible for administering justice, but he or she is increasingly assisted by subordinates who may directly or indirectly influence the decision-making. This circumstance brings along several complex questions regarding the responsibility of judges, the suitable and permissible allocation of duties, the reliance on judicial assistants' work and the monitoring of judicial assistants (see e.g. Fiss, 1983; Hol, 2001; Kronman, 1993; McCree, 1981, also section 1.2). Many of these issues are similarly pressing in other professions. However (as emphasised in section 8.1.1), the Dutch judicial organisation is rather exceptional in providing very limited policy or regulations regarding the division of labour between judges and assistants. Particularly, the more advisory and discussion-related duties of assistants are scarcely codified or regulated. As a result, many decisions regarding how to give substance to the involvement of judicial assistants are transferred to the judicial officers in the workplace, resulting in a wide variation in this involvement in court practice.

One specific aspect that raises concerns among court officers is the fact that the increased involvement of judicial assistants in judicial decision-making could be considered a threat to the authority or legitimacy of the judicial office. This is a particularly complicated issue from a rule of law perspective on adjudication. When many of the duties that used to be exclusively entrusted to judges (appointed for adjudicative reasons) are, in fact, being performed by their assistants (mainly appointed for administrative reasons), this can potentially damage the status and legitimacy of the judicial office. In addition, the degree to which this information becomes public could also harm the general public's trust in the judiciary (see Bieri, 2016, p. 33; R. A. Posner, 1985, p. 110, see more on this topic in section 1.2). Van de Bunt (1985, p. 107) raised a similar concern when additional duties were mandated to assistants at the Dutch prosecution office in the 1980s (which he refers to as 'disenchantment' of the function of prosecution officers). Maintaining a façade of what the professional work stands for – despite the reality of the internal

stratification – is, in fact, recognised as one of the key collective aims of (legal) professionalism (Francis, 2001, p. 22-24). Freidson (2001, chapter 2) identifies, as one of the features of professionalism, that professionals will be sceptical towards allocating more duties to other personnel in the organisation. In the 1980s, Abbott argued that *'internal stratification provides the basis mechanism that keeps the public picture of professional life separate from the workplace one'* (Abbott, 1988, p. 134).

This research demonstrates that several Dutch judges are indeed concerned about the increased involvement of judicial assistants in judicial decision-making and especially about the appearance thereof to the public. This concern can, for instance, be observed when looking at the importance that several judges attach to the fact that, during the public hearing, the involvement of the assistant should be limited to administrative duties. Most judges do not provide judicial assistants with the opportunity to ask questions during the hearing, and some judges actually regard such a contribution as inappropriate (see section 5.3.3). Acting in such a manner allows the judges to maintain the public image of judicial assistants as merely administrative officers. Judicial assistants, too, seem to be aware of the existence of this concern regarding the authority of the judicial office. During interviews, on various occasions, judicial assistants began by downplaying their potential influence on the decision-making by pointing to their official duties as codified in legal codes, only to elaborate on situations in which they certainly had influence on the decision-making process later on in the interview. Another example of judicial assistants' reluctance to interfere too strongly in the public part of the adjudicative process is found in the response of a judicial assistant to the occasionally provided opportunity to ask questions during the hearing. This assistant says that she does not feel truly free to raise questions, as she feels it would come across as trespassing on the terrain of the judge to raise questions that the judge did not raise him- or herself (see section 5.3.3).

Conversely, social relations in the courts do appear to have changed over time (see also Commissie visitatie gerechten, 2014, p. 53-54), and the involvement of judicial assistants in various phases of the judicial decision-making process has become inevitable. In addition to criticism that court officials express towards managerialism,[8] the significance of efficiency that comes along with employing judicial assistants is also acknowledged and, to some extent, embraced by judges (see also Frissen et al., 2014, p. 61-64). In accordance with these trends, current social norms in the courts stress that it is also inappropriate for judges to disregard the involvement of judicial assistants. Various judges remark in interviews that it is important to take judicial assistants seriously and that they greatly benefit from the contributions of judicial assistants. This is partly because the occupation of judicial assistant has become professionalised: assistants currently are mostly law school graduates, and they are often allotted considerable time to prepare memos and other materi-

8. E.g. in the manifesto of Leeuwarden, published in *Trema*, February 2013.

als for the judges (see e.g. section 5.2.4). Not providing judicial assistants with the opportunity to contribute to the discussion during deliberations is widely considered inappropriate (sections 6.1.2). It appears as if certain judges, perhaps unintentionally, want to display an even more open attitude towards the involvement of judicial assistants than they do in reality (see section 2.1.4). In this context, several judges also mention that they consider it important to 'respect' the work produced by judicial assistants. Consequently, carelessly altering an entire draft judgment without informing the judicial assistant is regarded inappropriate (section 6.2.6). Judicial assistants also regularly expect to be taken seriously and to – at least to some extent – be included in the decision-making. These norms regarding judicial assistants' involvement also presuppose that competence-based trust (Mayer et al., 1995) in the assistants' work exists in the collaboration between judges and assistants. When this trust is indeed present and the social norms are really endorsed, which appears to be the case for a large group of judges,[9] this intensifies the involvement of judicial assistants. However, when judges do not entirely trust the work of judicial assistants – a circumstance that was also occasionally observed in the research – the norms can also result in judges providing judicial assistants with room to participate merely for sake of appearances (see on trust, section 7.1.2).

Hence, different standards exist regarding the appropriate involvement of judicial assistants. Some respondents display a firm attachment to various rule of law-related values, while others demonstrate a stronger appreciation for managerial values. This is related to the diverse opinions that circulate regarding what role judicial assistants play and ought to play in the judicial decision-making process (see section 7.2.1). Some judges and judicial assistants believe that the involvement of assistants should mainly be limited to administrative and secretarial duties, while others embrace a further-reaching advisory or discussion-partner role.

Apart from some clear boundaries that appear to be widespread norms in the courts, such as the fact that a judge should not completely rely on the memo and that he or she should not refrain from reading the case files as preparation for the hearing (see section 5.1.4), ambiguity is exposed regarding what behaviour is and is not accepted: Are judges required to check all information included in a draft judgment? Is it acceptable to not read all the information in the case files? To what extent are assistants required to give advice, and are judges supposed to take this advice into account? These questions are answered differently by individual judges, but they also seem to be approached somewhat differently in the different court divisions (see section 7.3.2). The relationships between judges and assistants are noticeably tested when a judge or a panel of judges is planning to reach a decision with which the judicial assistant fundamentally disagrees. This raises the question of whether there are any prospects for judicial assistants – who are not officially accountable for the decision – to object to such a decision. Can assistants,

9. These judges refer to their endorsement of the norms in their answers to interview questions.

for instance, refuse to draft or sign such a judgment? Some respondents firmly believe that refusing to write or sign a judgment is absolutely inconceivable. Others considered this to be a difficult issue that could best be handled pragmatically. A pragmatic approach was indeed chosen for the limited occasions in which this situation actually occurred; on one occasion, for instance, a different assistant was assigned to write a case (see section 6.1.5). Instead of instigating a fundamental discussion regarding these issues, such a pragmatic approach appears to be a more common way to cope with complex issues regarding the role of judicial assistants (e.g. the allowance of assistants to ask questions during the hearing or permitting assistants to write judgment drafts as memos). A pragmatic, or somewhat evasive, attitude is also observed in judges when providing judicial assistants with feedback regarding their performances. Judges mostly do not provide assistants with wide-ranging feedback (see section 6.1.5, p. 168 and 6.2.5, p. 192; see also Commissie visitatie gerechten, 2014, p. 51-55).

Hence, the complex power relationship between the judge and assistant appears to be something that many court officers are struggling with and which they handle in different ways. Officers seem to be balancing between adhering to a more formalistic ideal of the judicial assistants' position and finding a practical and social way to cooperate and benefit from each other. For judicial assistants, the ambiguity which is inherent to this balancing act can result in uncertainty regarding the type and degree of involvement that is expected of them (see also section 6.1.8).

Ambiguity regarding the involvement and potential influence of judicial assistants is also a prevailing issue in the literature on the analysed common law judiciaries in section 3.2. However, section 3.2 also reveals that in different judiciaries, different aspects of the involvement of judicial assistant are considered problematic. For instance, in the US, it is inconceivable that law clerks would participate in deliberation sessions, but their involvement in drafting judgments is currently considered rather common. This is related to the fact that the law clerks are appointed as personal assistants to the judges. In England and Wales, on the contrary, the possibility of judicial assistants participating in drafting judgments is considered inappropriate. Similar to the Netherlands, judges and assistants in these countries also appear to be searching for the right balance in their collaboration with one another.

The observed ambiguity also appears to hinder the instigation of a discussion regarding the proper parameters for the involvement and influence of judicial assistants. This contributes to the perpetuation of the gap between the formal function of judicial assistants and their actual involvement in court practice, which was discussed in the previous section.

8.1.3 *Judicial assistants' involvement affects the judicial decision-making practice in various ways*

It is valuable to gain insight into the involvement of judicial assistants in decision-making, but an important follow-up question is what the consequences of this involvement are. In this last subsection, three different ways in which judicial assistants' involvement affects the judicial decision-making process are outlined.

1 Judicial assistants control the progression of a case within the court

When entering the work place in the courts, it becomes immediately obvious that judicial assistants are, to a large extent, in control of the course of the entire judicial procedure. Judicial assistants are the first judicial officers to receive the case files, and in the first stages of the process, they play an important role. In administrative law divisions, for instance, a special pool of assistants is appointed with the duty of screening cases to determine how much time should be scheduled for hearing them and to decide whether the cases should be handled by a single-judge or a panel (see section 5.2.1). The discretionary room they possess in deciding these matters provides them with power to determine how much attention a certain case receives from the judge(s) and how much time litigants receive to defend their positions in the courtroom. Although – unlike law clerks at the US Supreme Court – the Dutch assistants have no influence on which cases are selected to be handled (as there is no discretionary review in the Dutch district courts), they do affect the amount of consideration a case receives from the court.

In the run up to the hearing, judicial assistants are also in charge of structuring the court files: they assure that the files are complete and decide when the files (including the memo) are sent to the judges in order for them to prepare for the hearing. As it is the norm in Dutch courts that judges do not partake in direct contact with litigants or defendants outside of the setting of the hearing, assistants are often appointed to contact the parties when this is considered necessary (see section 5.2.6). Although the contact mostly relates to procedural matters, such as asking for missing documentation, on rare occasions, judicial assistants are also requested to obtain information from litigants concerning content-related matters, such as whether the parties might be interested in settling a case instead of going to court. It then partly depends on the approach taken by the assistant whether parties will indeed make an effort to settle the case.

During the hearing, assistants have to relinquish their controlling position, because the judge is indisputably responsible for chairing the hearing. Still, in the courtroom, assistants are usually carefully checking whether all the mandatory procedural steps are taken. A number of hearings were observed in which assistants indeed pointed out procedural aspects to the judge that he or she was about to forget (see section 5.3.3). When deliberations take place, the assistant also has to settle for a more submissive position. Nonetheless, because assistants are also present at

deliberations to collect the information needed for drafting the judgment, they must pay special attention to whether all aspects that have to be included in the judgment are discussed and decided upon. By compelling the judge(s) to focus on particular elements of the case, they can prevent them from taking decisions without carefully considering the legal and, particularly, procedural consequences.[10]
After the deliberations, the assistants commonly take the case files with them in order to draft the judgment. In drafting a judgment, most assistants usually do not take into account the specific style-related desires of the judge(s) they are drafting for (see section 6.2.4). Strict time limits are established by law for completing and publishing cases, particularly in criminal law divisions, where the judgment has to be completed within two weeks. Due to these deadlines, the timeliness with which assistants present the judges with the draft judgments also affects how much time judges have to read, reconsider and revise the judgment before it is finalised.
Hence, judicial assistants perform an important role as guards of the procedural aspects of the judicial process. Assistants also acknowledge this role themselves; they really feel responsible for ensuring that all procedural and administrative aspects of the decision-making process run smoothly. This is also the aspect of judicial assistants' work that most judges do trust and rely on. This setup releases judges from the burden of performing all these duties that do not directly relate to the core of their adjudicative responsibility. In this role, judicial assistants are not directly influencing the content of the judicial decisions, but they are affecting the working methods of judges. Their contribution, for instance, determines the time that judges are afforded to spend on their duties. Additionally, when assistants navigate the discussion in the deliberation room or when they emphasise certain aspects in their memos, they are also, to some extent, directing the content of cases that are discussed. In this way, they may indirectly affect the outcome of cases.

2 Judicial assistants are steering the judges in a certain direction

With regard to American courts, Kronman (1993) and Posner (1985) have pointed to the changing entity of the judicial work; instead of draftsmen of judgments, judges have become reviewers of the work of law clerks. This development can also be recognised in the Dutch district courts. Currently, the judges seldom completely write judgments themselves; most of the time, the assistants produce the first draft of judgments. In addition to this, judges are often presented with memos to help them get acquainted with the case files.
Although it has been argued that regardless of this changed entity, judges are perfectly able to make their own individual decisions (Edwards, 1981), literature regarding heuristics and cognitive biases in decision-making suggest otherwise (see e.g. Guthrie et al., 2007; Tversky & Kahneman, 1974). Hol (2001), moreover, argues that this changed entity can undermine the judge's ability to take into

10. Which has been a concern of, e.g., Posner (2008); see also the next section.

account all complexities of the context in deciding cases. People, including judges, are inevitably influenced by the manner in which information is presented to them. For that reason, it can also be concluded that when memos produced by assistants are used by judges, these memos will steer the judges' attentions in certain directions, regardless of whether the assistants intended to do so. The impact of the memos is especially wide-ranging when judges rely heavily on them in preparing for the hearing. It is difficult in this qualitative research to reveal in detail how much judges relied upon memos, but several judges mentioned that memos do play an important role in their preparations. It was observed on two occasions that judges had exclusively read the memo in order to prepare for the hearing and following deliberation session (see section 5.2.4). The extent to which judges are steered into a specific direction additionally depends on the content and format of the memos. In the administrative law divisions, several assistants prepare memos in the form of a draft judgment in order to save time. This results in memos that often largely emphasise one side of the case. In the criminal law divisions, the formats of the memos are sometimes such that the memos mainly focus on incriminating evidence and do not pay attention to possible exculpatory circumstances (see section 5.2.4). When such memos are employed, the risk of judges becoming biased by the information in the memos increases.

It is not only memos that steer judges in a particular direction when adjudicating cases. Judicial assistants composing the first drafts of judgments also narrows the judges' room for thought and consideration, particularly when it comes to complex cases. Kronman (1993, p. 330) and Posner (2008, p. 286) have argued that the process of writing judgments serves as a natural avenue from which to reconsider one's initial judgment. When judicial assistants are creating the first draft judgments, this function is removed from the judge. This circumstance was, for some of the judges in this research, a reason to occasionally write a judgment themselves. However, they only did so on rare occasions (see section 6.2.1). All of the followed cases in this research were drafted by assistants. Thus, it appears that this reconsidering aspect of the judgment writing is largely adopted by the assistant. A remarkable finding is that, several times, judicial assistants realised while writing draft judgments that an initially taken decision turned out to be impossible to write down and required reconsideration. Subsequently, the assistants reopened the discussion about the case with the judges, which occasionally resulted in a different outcome. Although it is impossible to know whether the same action would have been taken if the judge had done the drafting him or herself, this does confer to the assistant an important responsibility. Furthermore, this unofficial responsibility requires assistants who are confident enough to speak up when they believe a judgment should be altered. Considering the introverted nature of some assistants, all assistants might not feel comfortable doing this.

Altering the key outcome of a case in such an occasion is still a rare event, but the judgment drafting also provides judicial assistants with the possibility of influenc-

ing smaller details of a judicial decision, such as the grounds or motivations given for certain (sub)decisions. The fieldwork revealed that judges often do not provide assistants with detailed instructions for writing drafts, leaving it up to the assistants to make proposals (see section 6.1.6). These proposals most likely function as important starting points for judges when revising the judgments. Particularly when judges are revising the draft judgments under time pressure, they may easily be tempted to adhere to the proposals of the judicial assistant (see section 7.2.6).

By performing assisting duties, judicial assistants clearly – intentionally or unintentionally – steer the judges in certain directions. It cannot be said whether this inevitably improves or deteriorates the quality of the judicial decisions. However, it does indicate the (frequently regarded as problematic) situation in which a person appointed as an assistant is in fact influencing the decisions of the appointed adjudicator. The fact that this influence occurs subtly makes it particularly difficult to grasp. In the American literature, the prospect of judicial assistants intentionally attempting to influence judges' decisions is often mentioned as a hazard (see e.g. Peppers, 2006, chapter 1; see also section 1.2). This prospect is also cited as the reason for including various measures to prevent law clerks from having too much influence. In the fieldwork at the Dutch district courts, the prospect of judicial assistants *intentionally* attempting to influence the outcome of the judicial decision-making did not arise as a prominent concern.[11] This section, however, reveals that subtle and even unconscious influence of judicial assistants is plausible. With regard to the memo, a few judges claim to be aware of such influence. Still, this potential influence does not appear to be on the minds of many of the judges and assistants, and it does not receive much attention from court management.[12]

3 Judicial assistants are providing judges with additional views to consider

In addition to the previously mentioned (largely) indirect manners in which judicial assistants affect the decision-making, judicial assistants also affect the decision-making with more direct and open approaches. This particularly occurs when assistants provide judges with advice or act as their discussion partners. When judges are responsive to such types of involvement and include judicial assistants in the decision-making, this results in situations in which the assistants are directly afforded room to affect the judicial decision-making.

11. Even though a few judges did mention the threat of experienced judicial assistants attempting to overrule new judges with their knowledge, see section 7.2.2.
12. With regard to the managers, this limited attention is also derived from the lack of policy or training regarding this issue.

Introducing new information or extra arguments is regarded as advantageous for reaching good decisions,[13] so by introducing these, judicial assistants can enhance the quality of judicial decision-making. When assistants act as contrarians and actively provide judges with new viewpoints or contradictory information, they can improve the quality of the decision-making by preventing tunnel vision from occurring (see e.g. Rassin, Eerland, & Kuijpers, 2010). This research reveals, however, that advisory involvement is also the most controversial. Not all judges believe that judicial assistants should play a part in the judicial discussions and deliberations, and, moreover, not all assistants regard this as one of their duties (see section 7.2.1). At the same time, several judges and assistants also state that they greatly value such participation. For instance, one judge mentions how she missed discussing the case when she once had to handle a hearing without being assisted by an assistant who was familiar with the case specifics (see section 6.1.4). The fieldwork also revealed that judicial assistants regularly provide judges with additional information and/or deviating understandings of cases (see section 5.2.4). Particularly in the administrative law divisions, it is regarded as obligatory to a large extent for assistants to include their views on a case in their memos. Several judges use the memos as vehicles to challenge their own views on a case. One judge, for instance, says that considering the views of an assistant can prevent tunnel vision from occurring in this judges' decision-making (see section 6.1.4). In addition to getting acquainted with the views of the assistant via the memo, some judges also seek out informal oral discussions about cases with assistants.

The involvement of assistants as discussion partners is most evident during deliberation sessions. Respondents highlight that deliberations are about exchanging arguments; it is the strength of an argument that counts, not the person who brings it across. However, the research also demonstrates that the assistants' more-limited authority does affect their input (see section 6.1.8).

In the administrative law divisions, single-judges commonly hold deliberation sessions with the assistant who is appointed to the hearing. In all the observed single-judge deliberation sessions, the merits of the cases were discussed on very equal grounds (see section 6.1.4).[14] Given that the assistant is the only other court officer who is familiar with the specifics of a single-judges case, assistants regularly function as a significant discussion partners to judges.

During panel deliberations, judges can discuss the cases with the other judicial panel members, and judicial assistants do not always play an important role. However, especially when some of the judicial panel members are less knowledgeable

13. This is the presupposition of research on knowledge sharing and hidden information in group decision-making. For the original study on hidden information, see Strasser & Titus, 1985. For a study on sharing information in deliberation sessions by Dutch judges, see Ten Velde & De Dreu, 2012. On knowledge sharing in courts, see Taal, 2016.
14. The judge and assistant were both speaking an equal amount of time and, on occasions, convincing each other of a certain approach.

or experienced, judicial assistants sometimes partly take over their position as discussion partners. Moreover, when the judges disagree, the opinions of judicial assistants can also function as levers to reach a decision (see section 6.1.2). In panel deliberations, it is also regarded as the norm that judicial assistants are provided the opportunity to present their views before the judges present their views. This provides the judicial assistant with the potential to influence the direction in which the deliberation heads. Bearing in mind the literature on *anchoring* (see Appendix 12; see also Tversky & Kahneman, 1974),[15] it is likely that these views will function as reference points in the decision-making that follows. Depending on how likely an assistant is to adjust his or her views to those of judicial panel members (e.g. because the judges possess a lot of authority), the assistant can also contribute to the occurrence of *groupthink* (see e.g. Janis & Mann, 1977). In some instances, judicial assistants indeed appeared to modify their analyses to what they believed the judges wanted to hear. More often, however, they did not. Since judicial assistants regularly have already written a memo in which they present their views to the judges, they may be compelled to defend their original presented opinions instead of going into the discussion with an open mind.

Hence, in situations in which judges are receptive to the advisory or discussion-related involvement of judicial assistants, and, concurrently, judicial assistants are proactively performing such duties, this results in the assistants influencing the decision-making. This type of influence occurs in a more open and direct manner than the influence presented in the previous subsections. This reveals a novel role that judicial assistants increasingly appear to play in judicial decision-making. This type of involvement is, according to some, very valuable for the decision-making process, whereas others regard it as problematic. The next section normatively evaluates the involvement and effect of judicial assistants on the decision-making process.

8.2 Normative evaluation of the involvement of judicial assistants in judicial decision-making

Chapter 4 of this book offered a normative framework for evaluating the involvement of judicial assistants in court practices. The framework builds on two perspectives: the classical rule of law perspective and the novel managerial perspective. These two perspectives are selected because they currently are important in guiding the organisation of the Dutch judiciary (and likewise many other judiciaries).

The rule of law perspective revolves predominantly around the idea that the judiciary should play a crucial role in restricting government powers; it is very much

15. *Anchoring* is the phenomenon that one adjusts one's judgment to an initially presented value that then serves as a reference point for the judgment.

concerned about protecting the individual. Measures to ensure the independence and neutrality of the judiciary are key in this perspective. The rule of law perspective emphasises that adjudicative duties should be appointed to officers who are surrounded with proper institutional safeguards regarding their independence, impartiality and judicial and ethical competence, currently most strongly present for judges. Creating the right institutional surroundings for adjudicators would result in them providing justice to the public.

The managerial perspective derives its legitimacy primarily from its responsiveness to the needs of modern society. It is mainly aimed at the public purpose of judicial decisions; the efficiency and effectiveness of adjudication occupy a central position, and judicial assistants can play an important role therein. Adjudication receives its authority, within this perspective, by having objective quality standards to measure the functioning of courts and their officials. Transparency and a focus on the desires of litigants also play an important role. For a more elaborate description of these perspectives, refer to chapter 4.

A drive towards managerialism has recently been observed in the Dutch judiciary. This drive appears to mainly be a countermovement against what could be regarded as certain undesirable features of a too-rigid interpretation of the rule of law. However, the movement has subsequently been criticised for moving too far away from several highly desired rule of law values. In this book, it is acknowledged that both the rule of law and managerial perspectives provide valuable parameters (which are partly overlapping but can potentially also be conflicting; see Mak, 2008b) for shaping and evaluating the judiciary. Thereby other authors (Mak, 2008b, p. 95-101; Vining, 1981, p. 248) are followed in their accountings that it is important to balance the values related to both perspectives.

8.2.1 Theoretical evaluation of different types of duties of judicial assistants

In order to reflect on the involvement of judicial assistants, in chapter 4, an analytical distinction was introduced between 1) administrative and secretarial duties of assistants (which are duties for which judicial assistants are not directly involved in the content of the judicial decision-making), and 2) advisory and discussion-related duties (for which judicial assistants are directly involved in the judicial content of decision-making). The conclusion of the chapter regarding the first type of involvement was that strictly administrative and secretarial involvement of assistants is desirable from a managerial perspective, as it hypothetically will enhance the efficiency of adjudication. Given that this type of involvement, in theory, does not result in judicial assistants affecting the content of the decision making, the rule of law perspective raises few objections to this type of involvement and regards this involvement as permissible.

With regard to the advisory and discussion-related duties, the two perspectives raise more objections. Although both perspectives acknowledge the potential bene-

fits of judicial assistants' contributions to the quality of the decision-making, the perspectives also point at certain – partly perspective-specific – problems related to advisory or discussion-related involvement. These problems are related to the fact that, in order to perform advisory and discussion-related duties, judicial assistants, in many ways, have to possess competencies similar to those that judges are required to possess. This also means that – in line with the values related to the two perspectives – assistants should be selected after a thorough selection process and after following extensive training and education. However, from a managerial perspective, this has the substantial disadvantage that providing this training is costly, and, consequently, the (cost) efficiency of employing assistants is largely diminished. Principle-agent theory further points to the fact that allocating duties to subordinates can result in an asymmetric information position, which makes monitoring of the work of assistants challenging (see section 4.2.1). The rule of law perspective is, in relation to these duties, concerned about employing assistants who followed the right training to achieve the required virtues for being involved in adjudication. This perspective further adds that assistants can only be permitted to perform these duties when they are surrounded with various institutional safeguards regarding their impartiality and independence. Here, a tension between the two perspectives can be recognised, as providing these safeguards will bring about even more costs, making this type of involvement even less attractive from the managerial perspective.

8.2.2 Evaluation of the involvement of judicial assistants in practice

This research shows that, first of all, courts have high expectations for the benefits of employing assistants: judicial assistance is expected to increase the efficiency of courts, and, at the same time, judicial assistants are also expected to help improve the quality of the decision-making. The Dutch judicial organisation promotes an administrative and secretarial type of involvement of judicial assistants *and* – to some extent – advisory and/or discussion-related involvement. In practice, in the Dutch district courts, judicial assistants are indeed observed to perform both types of duties.

Administrative and secretarial involvement

Administrative and, to a lesser extent, secretarial duties have been part of the responsibilities of assistants for decades, and they still comprise a large portion of the judicial assistants' work. The extent to which administrative and secretarial assistance actually turns out to be beneficial depends on how much the efficiency and effectiveness are actually increased by it. During the fieldwork, some minor complications were observed which hinder the efficiency enhancement of assigning judicial assistants with administrative/secretarial duties. First of all, some assistants consider their secretarial role to be rather limited (see sections 7.1.2 and

7.2.1). These assistants, for instance, prepare much shorter summaries of cases than other assistants. Additionally, various respondents mention that they believe that some assistants lack the required skills to provide accurate summaries and to draft proper draft judgments. As a result, certain judges experience difficulties trusting the work of assistants and, consequently, spend a lot of time revising their work or simply do not make much use of it. When this occurs, the efforts which the judicial assistants are performing as part of their function may not really be beneficial to the judges.[16] Nevertheless, because the administrative and secretarial duties normally do not require a great deal of skills and knowledge, this trust aspect is usually not a major issue. Therefore, on average, the allocation of strictly administrative and secretarial duties to judicial assistants appears to function quite well. Judges and judicial assistants largely recognise that judicial assistants are required to perform these duties, and, commonly, assistants perform them without much supervision or monitoring by judges. Hence, from a managerial perspective, the administrative and secretarial involvement of judicial assistants generally appears to make the courts run more efficiently.

An important finding is, however, that while it may be possible to make a theoretical distinction between strictly administrative/secretarial duties (for which judicial assistants are not involved in the content of the judicial decision-making) and advisory/discussion-related duties (which may result in the involvement of assistants in the content of the decision-making), in reality, making such a distinction is not feasible. Section 8.1.3 shows how various primarily administrative and secretarial duties, in fact, potentially affect the content of adjudication and, furthermore, that many duties that seem secretarial (such as writing a memo) also contain advisory and discussion-enhancing elements (see e.g. section 5.2.4). This makes administrative and secretarial involvement of assistants more problematic from a rule of law perspective, as it to some extent expands the concerns regarding content-related involvement (see the section below for details on the concerns that arise). This results in the necessity to also incorporate measures to prevent biases in the decision-making and to safeguard the institutional position of assistants, with respect to the administrative and secretarial duties.

Advisory and discussion-related involvement

Prominent advisory and discussion-related involvement was also observed during the fieldwork. This type of assistance does not always occur, and it depends on various circumstances whether assistants are involved in this manner. In most of the observed situations in the courts, the judicial assistants' involvement in advisory and discussion-related duties was not excessive. Even though few regulatory boundaries are set, most judges only limitedly rely on the work of assistants. They

16. Such a situation was, for instance, described in section 6.2.5, when – in an exceptional situation – a judgment had to be severely changed and was adjusted twice, as the first corrected version still contained inaccuracies.

are largely personally in control of the decision-making. On some occasions, judges were even so significantly in control that they did not allow judicial assistants to be involved at all. This appears to be largely related to the aforementioned lack of trust some judges have in the judicial assistants' capabilities, which becomes a more prominent concern when it relates to involvement in performing content-related duties. The views of judges and assistants concerning the appropriate involvement of judicial assistants also appear to play a role in this (see section 7.2.1). From a rule of law perspective, this reluctance to allocate too much responsibility to assistants seems comforting. However, given the fact that judicial assistants are compelled by the organisation to perform various advisory and discussion-related duties, this course of events is not in accordance with managerial values, as it is inefficient when judges hardly utilize the work produced by assistants.

In contrast to the previous observations, in a few instances, judicial assistants' involvement in performing advisory and discussion-related duties was so significant that the judicial assistants were influencing and, to a degree, even controlling the decision-making. For instance, this is the case when judges completely rely on memos to prepare for a hearing (as was observed in two instances; see section 5.2.4) or when large parts of the judgment drafting are completely allocated to assistants without providing instructions, which also occurred (see section 6.1.6). This can be regarded as problematic, as the involvement of judicial assistants can cause biases in the decision-making (see e.g. section 8.1.3, part 2). Moreover, this creates a concern from a rule of law point of view because, although the qualifications of judicial assistants have been enhanced and more safeguards are applicable to them, assistants are still not as highly qualified and are not surrounded by comparable institutional safeguards as judges (see section 4.2.1). Hence, for these situations, more measures and regulations to limit the involvement of assistants appear to be required, *and/or* stronger measures to safeguard the competencies and institutional position of judicial assistants are needed (which, however, is difficult with regard to the cost-efficiency of the process).

This research reveals that employing assistants helps to meet certain managerial and rule of law values. At the same time, it is observed that their involvement can also conflict with values related to both perspectives. The current limited policy and guidance in the courts leaves considerable ambiguity and does not make optimal use of judicial assistants under either a rule of law or managerial perspective. This research indicates where the opportunities and problems lie in regard to the two perspectives; it is up to the judiciary to decide how to weigh the different values and cope with these opportunities and problems. The next section will discuss possible directions that the judiciary can take to find a proper balance in the employment of judicial assistants.

8.3 Implications for the judicial decision-making practice

This section explores the facets related to judicial assistance which, following the findings of the research, should receive attention in reforming the conditions for the employment of judicial assistants. In doing so, this section by no means claims to be exhaustive.
The Dutch model as observed in the studied district courts is taken as a starting point in the analysis. As the organisation of the Dutch district courts is rather similar, most of the observations will also be applicable to the Dutch district courts that were not studied in this research. Note that a few aspects of the research might be court-specific, which could make certain reflections less relevant or applicable to the judiciary as a whole. In searching for ways to possibly improve the current conditions in the district courts, the analysis of judicial assistance in other jurisdictions (see chapter 3) and information from interviews with judges and judicial assistants in other courts in the Netherlands and England and Wales is also considered (see section 2.3).

8.3.1 Embracing the benefits of judicial assistance

This study reveals various ways in which adjudication can and does benefit from the involvement of judicial assistants. Some of these benefits are envisioned by the courts; others are unintentional side-effects of the manner in which assistance is organised.
One of the most apparent and anticipated benefits of employing assistants is that, by performing various trivial duties, assistants can support courts running efficiently. This means that judicial assistants are also contributing to reducing the time taken to process court cases in the courts. Another essential benefit that is clearly visible is the judicial assistants' role in ensuring that procedural requirements of the judicial procedure are met. Additionally, it is anticipated that judicial assistants contribute to the quality of decision-making by performing the role of expert in a certain field of law. This role is particularly played by staff lawyers[17] and ensures that judicial decision-making is based on the complete set of relevant (legal) data regarding a court case.
Not as apparent but also important are the contributions of judicial assistants to various other facets of the decision-making. First of all, by actively providing the judges with additional or even contradictory information and viewpoints, judicial assistants can play a role in preventing biases in the decision-making. Second, judicial assistants occasionally play a part in guaranteeing the principle of equality of law. When staff lawyers give advice in accordance with their specific knowledge of

17. They regularly are specialised in a particular legal field, of which they possess more knowledge than the average judge, see section 7.2.2, as Dutch judges are typically generalists.

the prevailing case law, they can enhance this principle. Furthermore, the setup in which judicial assistants collaborate with a wide range of judges within a court division also stimulates the principle of equality before the law. Finally, it was also observed that assistants, at times, support maintaining the image of impartiality of the judge by functioning as a buffer between judges and litigants when contact between these parties is needed.
Only under certain conditions can the judiciary benefit from judicial assistants in the aforementioned ways. Judicial assistants are required to be competent and motivated to perform these duties. Additionally, especially for a substantial expert or contrarian role, judicial assistants are required to possess a certain authority within the courts.

Training and education
The education and training that judicial assistants follow logically affects their competencies. For the judiciary, it is therefore important to select adequately educated assistants. This is especially relevant, as some complications were observed in the district courts regarding the perceived competencies of certain judicial assistants in performing advisory and discussion-related duties (see section 8.1.2). From the 1960s to the 1990s, Dutch courts mainly hired lower-educated personnel and provided them with extensive training during their employment (which is similar to what occurred with Magistrates' clerks in England and Wales). Currently, the courts mainly attract assistants who attended law school, just like US law clerks and UK Judicial Assistants (see also section 7.2.2). Thereby, the condition of possessing an adequate level of legal knowledge appears to be mostly satisfied. With regard to staff lawyers, for whom their legal knowledge on a specific subject of law is of particular importance, it is sensible to be extra cautious in the hiring process and perhaps recruit persons with work experience in a certain field of law.
With regards to additional training offered to anticipate the duties in court, it is observed that – in contrast to judges – no mandatory training is required before starting to work as an assistant. However, both judges and assistants are required to follow a set number of hours of training every year (see section 3.2.1), and the Training and Education Centre of the Judiciary (*SSR*) provide various special training for recently employed assistants. These courses are adjusted to the needs in the workplace.[18] To further enhance the competencies of assistants, it is recommended to consider adding courses to the existing pallet which provide assistants with skills to perform advisory and discussion-related duties. In addition to this, the judiciary could also consider offering special courses to assistants who have worked in the courts for a long time and have not completed the same level of legal education as new assistants. This can support them in getting accustomed to the duties recently added to the judicial assistants' function.

18. Some are also specifically designed for assistants working in diverse sub-sections of the law.

Generating motivated assistants

It is important to create conditions that generate motivated assistants, as motivation affects the extent to which assistants will actively perform their duties (particularly advisory and discussion related) (see section 7.2.3). For this reason, it is first of all important to offer judicial assistants an interesting assortment of occupational tasks. With the responsibilities of judicial assistants having increased over the years, the versatility and challenging nature of the occupation has strengthened. Accordingly, the court managers of the studied courts mention that large numbers of candidates are currently applying for new judicial assistantships when they become available.[19]

The availability of career opportunities also generates motivated assistants. However, the follow-up career perspectives for judicial assistants in the Dutch judiciary are usually perceived as limited. Especially for the assistants who do not possess a law degree and for assistants who work in courts in more isolated areas, this is perceived as a genuine problem (see section 7.2.3).[20] Limited career opportunities could result in ambitious judicial assistants leaving the judicial organisations. The judicial assistants who are not in a position to leave can become frustrated (see section 7.2.3).

In order to improve the assistants' career perspectives, courts can, first of all, improve the career opportunities *within* the judiciary. In the past, being afforded the possibility to train to become a judge was one of the possible career paths for judicial assistants. Several different setups existed that provided assistants a special route to train to become a judge (see section 3.1.1). Since 2013, such a special route no longer exists.[21] Given that various (newly hired) assistants have the ambition to become judges, this is perceived as a loss by many of them. Without the possibility to internally opt for a training to become a judge, only rather limited career perspectives for assistants remain; they can develop from a junior assistant position to a senior one, and, for a limited group, further promotion to a staff lawyer position or a managerial position is conceivable. Since decent career perspectives attract ambitious candidates and this also provides existing assistants with an incentive to perform well, it is recommended to reconsider the current career prospects within the judiciary. Particularly, recreating a special path for assistants to train to become a judge should be considered.

19. One manager (resp. 20) speaks of around 250 applicants for an open position; another manager (resp. 54) says he had around 200 persons applying for a position.
20. Interestingly, a similar problem is observed with regard to Magistrate clerks in England and Wales (see section 3.3.2).
21. All candidate judges are required to have at least two years of working experience outside of the judiciary, which makes internal promotion to becoming a judge impossible. When an assistant does take the effort to gain experience outside of the judiciary and is then selected to follow the judicial training, the circumstance that they previously were employed as an assistant may be a reason to shorten the total training one has to follow to become a judge.

Apart from, or in addition to, improving the internal career prospects for judicial assistants, courts can also learn from the US law clerk model and explore the possibilities of providing judicial assistants with career opportunities *outside* the judiciary. Former US law clerks are in high demand by various legal employers (see section 3.3.1). These career perspectives (combined with the fact that they are only committing themselves for one year) are probably an important reason why so many recent law school graduates apply for the position. This results in judges receiving applications from the best students of the highest-ranked law schools, who are highly qualified and motivated. Having such a type of assistants corresponds to the high-demanding duties which they have to perform.
Part of the appeal of law clerk positions is that they are situated in the highest courts of the US, where the most influential legal decisions are taken. In that sense, Dutch district courts are never able to offer a similar experience. Still, the idea of offering short-term positions to recent graduates for them to gain legal experience and garner a unique insight into how judicial decision-making occurs is an appealing option to create a career path outside of the judiciary.
Currently, district courts already offer part-time judicial assistant positions (*buitengriffierschappen*) and occasionally also internships to students who are in the final years of their studies. This is an attractive way to become visible to law school students as a prospective employer. It could also be taken further to create a stripped down and better-fitted version of the short-term law clerk-model in Dutch district courts. This also has additional benefits (see 8.2.1) but has disadvantages as well (such as high training costs of assistants and a loss in continuity in the assistance).

Consolidating the authority of judicial assistants
Finally, a precondition which should not be underestimated is that judicial assistants need to enjoy a level of authority within the courts in order to effectively function as an expert or contrarian. Ensuring that the quality of assistants is up to standard (by providing them training and career prospects) appears to be key in increasing their authority. However, a hierarchical difference between judges and judicial assistants still remains, which prevents assistants from gaining significant positions of authority. This, to some extent, prohibits their functioning as effective contrarians or equal discussion partners, but at the same time, this difference is also desirable, as it prevents assistants from overpowering judges. The latter is a reason to question the appropriateness of having assistants act as contrarians or discussion partners in the decision-making. At the same time, it underscores not too much is to be expected from the assistants' sparring partner duties.
If courts do wish to employ assistants to function as valuable discussion partners and to introduce contrarian views, it is important to establish conditions in which the assistant possesses enough authority to be taken seriously by the judges and, simultaneously, not possess so much authority that it causes a power shift from the judge to the assistant. With regard to staff lawyers (in most of the courts), such a

balance appears to be established; regarding other judicial assistants, establishing such a balance should receive more attention.

8.3.2 Minimising the hazards of judicial assistance

When embracing the benefits of judicial assistance, it is also important to pay attention to minimising the hazards. Potential hazards were elaborately discussed in section 1.2 of this book. In essence, they concentrate on the possible negative effect that the involvement of judicial assistants could have on decision-making; the quality of judgments could deteriorate, and employing judicial assistants could (besides preventing biases) also instigate certain biases to occur. Additionally, assistant involvement is regarded as problematic due to the limited safeguards regarding various rule of law values that are applicable to them.
Various measures that can be taken to minimise the hazards are explored in this section. Some measures concentrate on restricting the influence of judicial assistants; others mainly attempt to minimise the negative influence of assistants.

Monitoring the work
First, a common way to control the influence of judicial assistants is to closely monitor their work. This method is in line with the ideas regarding superior–subordinate relationships as defined in principal-agent theory (see e.g. Moe, 1984; Ross, 1973, see also section 4.2.1). Peppers (2006, p. 207–212) identified that US Supreme Court justices indeed use this approach; among other ways, Supreme Court justices organise this by having their law clerks check each other's work and by creating intra-chamber rules. This manner of controlling the work of judicial assistants is successful partly due to the specific setting in which the assistants are performing their duties. Supreme Court justices each receive assistance from multiple clerks who are assigned as their personal assistants.
Having personal assistants makes instructing, mentoring and monitoring them easier than in situations in which assistants perform their duties for multiple judges. Respondents in this research mentioned that in the past in certain Dutch district courts, judges were also matched with personal assistants.[22] However, there appear to have been various reasons to abandon this arrangement. First of all, this arrangement is organisationally challenging.[23] More importantly, the personal associations can also create situations in which extreme forms of collaboration (very large or little involvement of assistants) exist, while there is little oversight or external control over what occurs between the two officers. This is espe-

22. In certain sub-divisions of Dutch courts, this is still the case. E.g. at the first instance level with regard to investigating judges (*rechter-commissaris*) in criminal cases and in some civil law cases. Judges at the Supreme Court are also assisted by personal assistants.
23. It is difficult to match the time schedules of the various, regularly part-time working judges and assistants, and it is also challenging to arrange the assistance in panel hearings.

cially true when assistants are assigned to judges for numerous years.[24] Furthermore, during the fieldwork, various judges mentioned that working with different assistants is very valuable for the uniformity of judicial decisions (see section 5.3.4). Not being assisted by personal assistants does not entail that no monitoring occurs. Several Dutch district judges also mention monitoring the work of assistants (see e.g. sections 5.2.4 and 6.2.5). In the criminal law divisions, it is even a rule that the most junior judge of a panel checks whether the assistant has incorporated the factual details of a case correctly in the judgment. In other situations, the monitoring is unregulated, and the level of monitoring depends on the involved judges and their trust in a particular assistant.

Monitoring can, to some extent, be an effective way to prevent undesired influence, but in order to monitor properly and give helpful feedback, one also has to spend considerable time doing this. Section 8.2.2 mentioned that this comes at the expense of the overall efficiency of the decision-making. When extensive monitoring is required, this can even result in the involvement of judicial assistants being more ineffective than effective overall. Monitoring also only limitedly prevents undue influence and biases. Monitoring the work of assistants is especially a suitable way to guarantee that the memo provides a proper summary of the court files and that the judgment follows the line of reasoning proposed during deliberations. Components of assistants' involvement related to giving advice and acting as discussion partners are less easy to monitor due to what principle-agent theory calls the information asymmetry.[25] Hence, additional manners of controlling the influence of assistants are required.

Temporary position

An arrangement that is especially mentioned in American literature to limit the power of judicial assistants is having short-term (often one-year) assistantships (see section 3.4). The idea is that short-term assistants will never fully master the job and therefore will not be able to garner considerable power (Peppers, 2006, p. 207). This arrangement also prevents assistants from attaining too personal relationships with judges (which is particularly relevant when judicial assistants are assigned to individual judges). As mentioned, the one-year law clerk setup works well to attract highly qualified and motivated assistants. For these reasons, Dutch courts could consider offering a similar track. The fact that the temporary assistants will not fully master the job is obviously also a considerable disadvantage when courts seek to employ assistants to create expertise. This type of setup also requires substantial time spent each period selecting new assistants and facilitating getting them accustomed to the job. Selecting new assistants each year also diminishes the

24. On this matter, also see Bruinsma, 1995, p. 98–99.
25. The agent possesses more information regarding the conditions under which he or she is performing certain duties.

continuity in the assistant model. For these reasons, it does not seem desirable to completely rely on short-term assistants.

Procedural constraints

Courts can decide to incorporate certain procedures to minimalise the occurrence of biases (such as anchoring or framing) due to the involvement of judicial assistants. Currently, this aspect is not explicitly considered in procedures of Dutch district courts.

In the US, a clear constraint on the role of law clerks is that assistants are not invited to attend the deliberation sessions. This prevents them from being involved in the discussions that occur among judges during deliberations. Law clerks also have no duties during the public hearings, which precludes them from asking questions or being otherwise involved during the hearings. However, these provisions do not prevent less-visible, and thereby perhaps more perilous, forms of influence. Chapters 5 and 6 revealed that assisting duties performed behind the scenes (such as the writing of the memo and the drafting of judgments) are especially potential sources of biases. Likewise, at the UK Supreme Court and Court of Appeal, a restriction is generated by not having assistants draft opinions (see section 3.2.3), although that rule is not officially recorded. Dutch district courts used to also be reluctant to allow judicial assistants to draft judgments, but more recently, it has become common for judicial assistants in the studied courts to prepare the first drafts of judgments (see section 6.1.2).

Given that the writing of the judgment can function as a way to reconsider an initially taken judgment (Bruinsma, 1995, p. 105-107; Kronman, 1993, p. 330; R. A. Posner, 2008, p. 286) and can help judges to truly familiarise themselves with a legal issue, it is regrettable that this duty is passed onto judicial assistants.

As mentioned before, memos can also be a source of decision-making biases. Although it is difficult to control the manner in which judges use memos, it seems recommendable to raise their awareness of how the information in the memo can subconsciously affect their decision-making. It is furthermore important to pay attention to how the information in the memo is presented to judges. Clearly marking the difference between factual information adapted from the court files and the personal analysis of the assistant is sensible. Additionally, especially when judges use the memos as road maps to understand cases, it is important for the memos to present neutral descriptions of the facts and balanced depictions of the relevant legal arguments in the cases.

Constructing institutional safeguards

The current safeguards concerning judicial assistants in the Netherlands are, in various respects, more limited than those applicable to judges (see section 4.1.2). Therefore, a last aspect that requires consideration is the institutional arrangements that, according to the rule of law perspective, should be made to safeguard the

independence, impartiality, professionalism and integrity of judicial assistants. Depending on the type and degree of involvement of judicial assistants, various arrangements can be considered. Some provisions that apply to judges seem by definition too far-reaching to extend to judicial assistants. For instance, the provision of life-tenure offered to Dutch judges seems farfetched for judicial assistants. Other provisions could more easily be extended to judicial assistants. The rules regarding the recusal of judicial officers and regarding the publishing of extra-judicial functions are examples of the former provisions. However, extending both of these provisions to judicial assistants also has drawbacks which should be taken into consideration.[26] Which safeguards are most important to reinforce depends on the role that courts reserve for assistants. However, when an influential role is reserved for assistants, serious reconsideration of the current institutional safeguards is also required.

8.3.3 Creating professional standards and guidelines

Key observations in this research are that few regulations exist, especially regarding the advisory and discussion-related involvement of judicial assistants, and that wide variation is found in the type and degree of involvement of judicial assistants in practice (see section 8.1). This indicates that clearer guidelines should be generated to give direction to the employment of judicial assistants.
This section stresses that in creating guidelines, it is important to leave considerable room for judicial officers to determine their own methods of work. The manner in which the judicial professionals determine how they collaborate, however, should be more transparent, and more accountability is needed than currently exists.

Necessity of discretion
Judges and, to a lesser extent, judicial assistants are bound to various professional codes and are selected and trained to perform their duties in a righteous manner and with integrity (see section 4.1.2). As a result, they are well equipped to ensure that in many cases, the cooperation and use of the judicial assistant goes smoothly. Additionally, providing judges with room to determine their working methods is also in accordance with the rule of law values of independence and autonomy, as well as with the notion of the judge as a professional (Paterson, 1983).[27]
Moreover, it is desirable to have judges and judicial assistants in charge of organising their mutual collaboration because, in the course of their work, they are the

26. E.g. extending the possibilities to ask for recusal of judicial assistants would provide litigants an extra opportunity to make improper use of this procedure (see on the reasons for making use of the recusal procedure Van Rossum, Tigchelaar, & Ippel, 2012).
27. On the conditions of professionalism, see also e.g. Freidson, 2001; and on the legal profession, Abel, 2003.

ones who are directly confronted with the perks and dilemmas regarding the assistance in individual cases. Every court case is different, and as so-called 'street-level workers' (Lipsky, 2010; see also Maynard-Moody & Musheno, 2003), judges and assistants are the only persons to oversee the full complexity of cases and are able to assess the efforts that have to be taken to reach a judicial decision.[28] In order for them to determine the best working method per case, they require a certain degree of discretion. When judges have significant control over their tasks during a work day, they are also likely to perceive less mental strain in performing their work (Karasek, 1979; Schaubroeck & Merritt, 1997).

The fieldwork at the district courts correspondingly supports the idea of promoting discretion, as it demonstrates that employing uniform, organisationally imposed procedures of assistance is not satisfactory. Although new judicial assistants particularly benefit from the uniform formats which are available for making memos, assistants often believe that these formats are too limiting. For that reason, various assistants adjust the formats and add additional information in ways they consider to best support the judicial decision-making (see section 5.2.4). Similarly, several judges state that they do not believe every type of memo to be equally useful for preparing different types of cases (see section 5.2.5). Hence, this is not only an argument in favour of discretion but also for customising the assistance to fit the particular circumstances.

Demand for more transparency and accountability

However, too much discretion can also result in arbitrariness and in ineffective collaboration between judges and assistants. When there is little transparency about how officials give substance to the employment of assistants, there are also few possibilities offered to control the process and prevent excesses in the employment from occurring. That is why managerialism introduces the values of transparency and accountability as important quality measures.[29]

Courts and court officers could be more transparent and explicit about the manner in which assistants are involved in the decision-making and, especially, about the underlying choices that are made regarding the duties assistants perform under specific circumstances. It would be sensible to promote discussion on this topic.[30] First, this could support reaching a level of agreement about what type of involvement is and is not desirable and, subsequently, achieve more uniformity in the current practices. This does require breaking the silence surrounding this issue which has prevailed thus far.

28. For a nuanced account of whether judges can be considered street-level bureaucrats, see Biland & Steinmetz, 2017.
29. See e.g. Ng, 2007, p. 12.
30. For a similar conclusion regarding freedom to express personal opinions by Dutch judges, see Dijkstra, 2016, p. 297–300.

Given that judges and judicial assistants are the most capable of recognising the preferred assistance and related hazards, it is sensible that these officers should play a key role in this discussion and in the creation of guidelines or standards regarding the involvement of judicial assistants in adjudication. Currently, the different divisions of Dutch courts are actually already working on the creation of general documents consisting of professional standards for adjudication, in which some minimum norms are explicated (on this development see the report by Noordegraaf, Schiffelers, Van de Camp, & Bos, 2014). This development seems to offer great possibilities to also create specific standards regarding the involvement of judicial assistants. It is a shame that the present process of creating professional standards has not instigated a discussion regarding the involvement of judicial assistants. Unfortunately, the current standards hardly settle any of the prevailing issues regarding judicial assistance.[31]

Besides the bottom-up creation of professional standards, top-down involvement of the judiciary and courts management is also significant. Only at the top level can measures be taken to create the proper organisational, procedural and institutional conditions regarding the involvement of judicial assistants. Involvement at this level is especially required for creating the required conditions to embrace the benefits of judicial assistants while minimalizing the hazards.

31. The published professional standards of criminal judges specifically mention that the standards are not applicable to judicial assistants, and little of the standards concern the collaboration of judges with assistants. Draft versions of the (as this book went to print) not-yet published standards of the administrative and civil law divisions of the courts display a similar image.

Acknowledgements

Conducting this research has been a wonderful experience and not in the least due to all the people who supported me during the process. First of all, conducting this research would not have been possible without the cooperation of the Council of the Judiciary, the courts, and the judges and judicial assistants that participated in the research. I am particularly grateful to the courts for providing me with the possibility to conduct observations and interviews. My greatest gratitude goes to all the respondents that contributed to my research. Thank you for being so open, and for taking the time in your busy schedules to speak to me and have me observe your activities. Without your cooperation, writing this book would not have been possible.

My supervisors Henk van de Bunt and Nienke Doornbos, I thank you for the inspiring meetings we had to discuss my progress, which I always left full of energy and new ideas. Due to the broader views you provided on the research, as well as the detailed comments I received, I managed to maintain momentum in writing this book. However, I owe both of you more gratitude than for just supervising my dissertation. Henk, before I started this research you have been a mentor in my academic career. Thank you for stimulating my interest in becoming an academic and for the trust you had in me early on in my career. Nienke, as soon as I started at the University of Amsterdam I felt supported and at home thanks to your support. Your personal concern for my research as well as my personal life has been very special and is much appreciated.

Many more colleagues contributed to me finishing this research. For reading and discussing my dissertation, and for the insightful comments I received, I would like to thank Jeanine Evers, Elaine Mak, Peter Mascini, Roel Pieterman, Peter Rijpkema, Wibo van Rossum, Rob Schwitters, Jonathan Soeharno, Derk Venema, Marc de Wilde and all others who participated in the research sessions at which I presented my research or who otherwise commented on my work. Outside of the Netherlands, I would like to thank Penny Darbyshire, Kate Malleson, Alan Paterson, Todd Peppers and Cheryl Thomas.

I am very grateful to the members of the steering committee Leny de Groot, Jacomien Bins-Scheffer, Karsten Gilhuis, André Verburg and Rinus Otte, for their

advice and guidance provided throughout the process. Thank you for all the hours you spent reading draft-versions of the dissertation that were far from finished.
During my research I have been very fortunate to have been surrounded with such kind and inspiring colleagues at the University of Amsterdam. Kees Cappon, Marc de Wilde and Roland Pierik, thank you for all the opportunities the department General Jurisprudence and the research centre Paul Scholten Centre offered me to develop academically. Spending time with co-PhD students Yedan Li, Hadassa Noorda, Michelle Parlevliet and Tamar de Waal made life at the Oudemanhuispoort much more enjoyable and has resulted in special friendships. I thank all the colleagues from the department for the enjoyable collaboration and for great times we had teaching together. I also want to acknowledge student-assistants Anne Merel Brink, Annelies Jonkers and Door Hendriksen for their assistance in transcribing the interviews.
My appreciation also extends to my new colleagues at the Erasmus University Rotterdam. Wibren van der Burg and Sanne Taekema, thank you for offering me new professional challenges and for providing me with room to finish this book while starting with my new job. I would specifically like to express my appreciation to my enthusiastic sociology of law colleagues Roel Pieterman and Wibo van Rossum for the warm welcome I received.
Apart from all these colleagues, I owe gratitude to my Dutch and South African family and my friends. For understanding when I was working hard and for the interest they showed in the content and the progress of my book. Particularly, I want to thank Marianne, who not only shares the ambition to write a dissertation, but who also always has been a great support to me on a professional and personal level. My parents and Leon I thank for always being proud of what I achieve, no matter how insignificant. Mum and Dad, from the early beginnings you have always supported me to develop myself whether it was helping me with Maths homework or endlessly reading all the papers I wrote for school and university.
Last but not least a special thank you to my husband, Tristan. You have always supported and encouraged me to achieve my aspirations whether it was going away for a research visit to UCL in London, a period of conducting fieldwork at the courts or working hard on finishing the manuscript during the months after our son Thomas was born. In addition to this, you have been of great help in reviewing the English in my dissertation. Thomas and you do not only inspire me to continue the career that I enjoy so much; you also continuously help me keep the importance of my research in perspective.

Summary

While judicial assistants occupy a central position in all types of court systems, the contribution of these staff members to the process of adjudication remains largely unknown, even though their involvement can have significant effects on the perceived quality and credibility of adjudication. This research aims at unravelling the involvement of this group of judicial officers in judicial decision-making.

Although it did not occur as noticeably as in other jurisdictions such as the US, it seems that in the last two decades the essentials of the function of judicial assistant in the Netherlands have changed, and the allocation of duties to assistants has increased. At the same time, Dutch judicial assistants have progressively become more qualified. This is a development that – under the influence of the *New Public Management* movement – is observed more widely in public service organisations.

In the context of the judiciary the involvement of assistants is a particularly sensitive issue. The law appoints judges with the responsibility to adjudicate, and hence, people expect that judicial decisions are taken under their sole authority. When it turns out that judicial assistants are regularly highly involved in the decision-making, this raises questions about the legitimacy of this involvement. Particularly in reference to the American law clerk model, several authors have raised their concerns about the possibility of judicial assistants influencing the judicial decision-making and the potential effects thereof. These authors are for example concerned about the loss of the sense of responsibility of judges when they mainly function as editors of judicial assistants' work. The possibility that adjudication will become more legalistic and based on procedural guidelines and less concerned with general moral principles and societal consequences is also mentioned as a concern. Furthermore, the difference in institutional safeguards with respect to judges and judicial assistants is mentioned as a latent problem. Lastly, the actual efficiency of employment of judicial assistants is also questioned.

In order to assess whether the aforementioned concerns are fair, it is first of all important to gain more insight in the role of judicial assistants in adjudication. This book aims to provide this insight by studying Dutch district courts, thereby answering the following research question:

In what ways are judicial assistants involved in the judicial decision-making process, and what consequences does their involvement have for the manner in which adjudication takes place?

Methodology

The core of this research consists of an empirical field study in two Dutch district courts. In order to conduct this study a qualitative multi-method approach was used which is elaborated on in chapter 2. Eight months of fieldwork was conducted in two different divisions of each of the studied courts. This fieldwork entailed document analyses, participant observations and in-depth interviews. In essence a method of following the decision-making in 137 court cases (heard at 27 hearings) was engaged. The produced documents related to the cases (usually memos and draft judgments) were analysed and all gatherings and (informal) contacts between judges and judicial assistants related to the cases (commonly the hearing, the deliberations sessions and sometimes pre-trial meetings) were observed. In addition, 66 judges and judicial assistants were interviewed during the fieldwork, 51 of which were involved in the observed hearings.
In addition to this field study, seven Dutch judges and judicial assistants were interviewed prior to the fieldwork. Additionally, a set of 10 interviews with Dutch judicial officers after the fieldwork was conducted. Finally, 10 interviews were conducted with judges and judicial assistants during a research stay in England.

Inter-jurisdictional reflections

In order for one to understand the specific setting in which this research took place, the judicial assistance models in Dutch courts, with particular attention to the model in the district courts, are outlined in chapter 3. Subsequently, in this chapter, these models are contrasted to three entirely different judicial assistance models: 1) The law clerk model in the US, which is the most studied type of assistant, 2) Magistrates' clerks, who play a remarkable role in the system of lay adjudication in England and Wales, and 3) The new function of Judicial Assistants, who are currently employed at the English and Welsh Court of Appeal and the UK Supreme Court. The chapter introduces six features by which judicial assistance models can be distinguished:

1. The reasons for employing judicial assistants
2. The ratio of judicial assistants to judges
3. The qualifications of judicial assistants and the terms of their employment
4. The duties of assistants and their participation in various stages of the judicial process
5. Judicial assistants' assignment to individual judges or the entire court
6. Judicial assistants working with professional or lay judges

The study of judicial assistance models furthermore reveals a great difference in the organisational structures of the assistance. The duties of the studied judicial assistants were also found to vary, although many duties are actually remarkably similar. Another remarkable observation is that in all jurisdictions the involvement and responsibilities of judicial assistants are rather scarcely mentioned in legislation and official policy documents. The majority of the assistants' duties are informally established.
The exploration of the different assistance models furthermore shows that all judiciaries struggle with the issue of how to make the best use of judicial assistant, but also attempt to diminish the risk of assistants being too influential. Each model includes its own individual mix of features that, on one hand, enable judicial assistants to make a contribution to the efficiency and quality of the judicial process, and on the other hand, contain safeguards to prevent assistants from gaining too much power. It is important to understand that the models consist of bundles of features which have been shaped within specific judicial and societal contexts. Judicial systems should therefore be cautious of cherry picking features from other judicial systems.

Two normative perspectives

In chapter 4 two perspectives are introduced which can be taken in evaluating the benefits and hazards of employing judicial assistants. These perspectives are: the rule of law perspective and the managerial perspective. The first offers a classical legal theoretical perspective on adjudication, based on principles and values that were established during a century-long history, particularly shaped during the period of enlightenment. The second perspective provides newer insights, largely from economic theory regarding organisations, which arose particularly in the second half of the 20th century as a response to a widely held belief that court organisation needed to better reflect the needs of modern society. The chapter defines what these perspectives stand for and how the principles and values related to these normative ideas are incorporated into the law and policy in Dutch courts. The chapter ends with an assessment of different types of involvement of judicial assistants in adjudication from a theoretical perspective making an analytical distinction between 1) administrative and secretarial duties of assistants (which are duties that are not directly involved in the content of the judicial decision-making), and 2) advisory and discussion-related duties (which are directly involved in the judicial content of decision-making).
It concludes that a strictly administrative and secretarial involvement of assistants is desirable from a managerial perspective, as it will enhance the efficiency of adjudication. The rule of law perspective raises few objections to this type of involvement and regards this involvement as permissible. With regard to the advisory and discussion-related duties, the two perspectives raise more objections. Although

both perspectives acknowledge the potential benefits of judicial assistants' contributions to the quality of the decision-making, the perspectives also point at certain – partly perspective-specific – problems related to advisory or discussion-related involvement.

The involvement of judicial assistants in different phases of the decision-making process

Chapters 5, 6 and 7 present the results of the fieldwork at the criminal and administrative law divisions of two Dutch district courts. Chapters 5 and 6 describe and analyse the judicial decision-making process in chronological order to illuminate what part judicial assistants play in different phases (pre-hearing, hearing, deliberations and judgment writing) and how this affects the way in which adjudication takes place.

The run-up to the hearing

The research reveals that judicial assistants regularly play an important role in the phase prior to the hearing. This role is largely invisible and unknown to the larger public. The assistants can hold a powerful position at the early beginnings of the legal procedure, in which they make initial decisions on procedural questions such as whether a case can be adjudicated without a hearing (in administrative law cases).
Judicial assistants, furthermore, prepare memos which are sometimes documents that reveal the views of the judicial assistants. At other times, these documents are primarily neutral summaries of the case files. The manner in which, and extent to which these memos are employed by judges in preparing for the hearing also varies greatly. Still, it is widely agreed upon by judges that being provided a memo saves time. Additionally, memos can also provide new insights on a case and function as vehicles for discussion. Depending on their content and the manner in which they are used they can either prevent or generate biases in the judicial decision-making to occur.

The hearing

The duties of judicial assistants during the hearings still consist primarily of the traditional tasks of creating the court record and providing administrative assistance. The notion of the judge as the core decision-maker, who adjudicates without substantial support, is thereby upheld at the public hearing. Several of the interviewed judges seem to adhere to this depiction. Consequently, they are cautious about changing the involvement of assistants during the hearing. Various assistants are similarly satisfied with a more limited role during the hearings.

Nonetheless, there are some means by which judicial assistants are involved and may influence what occurs during the hearings. These are mainly informal practices which take place outside of the purview of the larger public. A minority of (primarily administrative law) judges additionally welcome a more substantial involvement of judicial assistants during the visible part of the hearings. They have taken favourably to the recent development of providing judicial assistants the opportunity to ask questions during the hearings. A minority of judicial assistants, are also positive about being actively involved during the hearing. However, because of the diverse views on the expected involvement of judicial assistants, the norms about the appropriate contribution of the assistants to the hearings are ambiguous and frequently unclear to assistants and judges. This leaves room for various executions. It also results in judges and assistants often having complex relationships.

Deliberations

Although judicial assistants do not have an official vote during deliberations, it is nowadays mostly regarded as normal that assistants participate in the deliberation process. Moreover, most judges and assistants regard it as a duty of assistants to contribute to the discussion. As deliberations essentially consist of an exchange of arguments, a well-presented argument by the assistant can influence the decision-making. Particularly when judges are unsure how to deal with a certain issue or disagree with each other, the views and arguments of assistants can and do steer the decisions that are made. Especially in panels with less-experienced judges, the contribution of certain highly respected judicial assistants can be crucial. On such occasions, assistants sometimes function as substitute discussion partners for less-experienced judges. Another aspect that provides assistants a powerful position is the fact that the judicial instructions for writing judgments given during deliberation sessions often leave much room for the assistants to complete and fill the gaps.

However, that judicial assistants are usually the persons with the least authority of all people involved in deliberations sessions affects their potential contribution. Various assistants are in fact hesitant to reveal their views and to participate in deliberations. In addition, some judges do not provide assistants with opportunities to become involved in the discussion. Consequently, judicial assistants do not participate in the discussions at all times.

Because judicial assistants do not have an official vote during deliberations, it remains unclear what is precisely expected of them in the process of discussing cases and reaching decisions. This lack of clarity also resonates in what respondents report regarding their views on their required level of participation in deliberation and the boundaries of their involvement.

Drafting the judgment

Judicial assistants are responsible for writing the first drafts of judgments. This is likely to increase the productivity of the courts. At the same time, it provides assistants with room to affect the content of the judgments. Assistants are often allowed a large amount of autonomy in writing judgments. As the decision is normally already made during deliberations, this creates the expectation that assistants will mostly wield influence on the reasoning behind a decision. However, the involvement of judicial assistants can also go beyond the legal reasoning, as the practice of judgment writing appears to function as an important way to reconsider initial decisions taken during deliberations. That the writing process indeed functions this way is affirmed by the fact that, on various occasions, the writing of the draft judgment resulted in reassessing certain facets of a judgment or sometimes in altering the judicial decision.
While the data display situations in which judicial assistants are powerful, they also include cases in which judges left little room for assistants' contributions. This is particularly the situation when judges heavily alter draft judgments to precisely resemble their own views. While the altering occasionally involves the key elements of the judgment, it mostly is in regard to less important elements, such as the choice of words. Substantial alterations of draft judgments predominantly occur when judges feel that the performance of assistants falls short. Yet, the occurrence of this also seems to be related to the character of the judges.

Determining factors

Chapter 7 delineates seven key factors – stemming from the fieldwork – that affect the involvement of judicial assistants and, thereby, their potential to influence judicial decisions. First of all, trust – which can be of various types – plays a key role in the openness of judges towards the involvement of assistants. Especially, trust based on the competencies of the judicial assistants determines how much room judges provide assistants with to be involved in adjudication. Second, the ideas of the judicial officers regarding what the appropriate role of a judicial assistant should be (a more substantial or a more limited role) effect the involvement of judicial assistants in court practice. When judicial officers, for instance, believe a more limited role to be preferable, this will generally also be how the involvement of judicial assistants is exercised. Third, experience and expertise of both the judge and the judicial assistant are key factors that define the involvement and influence of judicial assistants. Particularly when judges with limited experience are working with highly experienced and specialised assistants, judicial assistants' involvement is regularly far-reaching. The career perspectives and ambitions of judicial assistants also influence the ways in which assistants are involved in the decision-making. The educational backgrounds of judicial assistants are diverse, and this affects

the career perspectives as well as the ambitions of the assistants. Assistants who possess law degrees are often especially interested in furthering their careers and, consequently, fulfil their duties more ambitiously.

Apart from these individual factors, various situational factors also play a role. To start with, the types of cases that have to be adjudicated affect the interaction between the judge and judicial assistant. Complex cases often require more consideration, which results in more opportunities for judicial assistants to have influence on the content of the judicial decision-making. Routine cases, on the other hand, are often quite clear cut, leaving little or no room for influence. Yet, in some cases that appear to be standard but in fact may require a closer read, the influence of judicial assistants can be – sometimes unintentionally – substantial. Partly related to the previous factor is the factor of whether adjudication takes place by a single-judge or a judicial panel. In general, judicial assistants will be more actively involved in single-judge adjudication than in panels. Particularly, in administrative single-judge cases judicial assistants can function as important discussion partners. The fact that cases adjudicated in panels are more legally complex as well as organisationally more challenging, however, may also cause judicial assistants to play an important role. Yet, in the discussions, their views will be competing with those of the three judicial panel members. Lastly, the pressures caused by time and workloads also affect the involvement and influence of judicial assistants in the decision-making. Severe time pressure and high workloads are related to judges relying more heavily on judicial assistants' work. Hence, various factors determine whether a judicial assistant's involvement is small or far-reaching.

Court and court division similarities and differences

In addition to determining these factors, chapter 7 also pays attention to the question of whether differences were found in the involvement of judicial assistants between the two studied courts and the two court divisions. No major differences were observed between the two court locations. One smaller aspect that appeared to differ between the courts was the career perspectives. In the court that is more isolated, assistants experienced fewer possibilities to further their careers.
Between the court divisions, no great difference was observed there, either. Only a few smaller differences were observed. On average, these differences caused judicial assistants to perform a somewhat greater role in the administrative law divisions.

Conclusion

Empirical findings

The concluding chapter, chapter 8, starts with highlighting three central empirical findings of the research. First of all, a discrepancy is observed between the formal position of judicial assistants and the wide variation in their actual involvement. In regulations and policy documents the administrative and secretarial role is emphasised, while little is regulated regarding the potential advisory and discussion-related duties of assistants. This presents the image of the judicial assistant as a mainly administrative figure and who has only limited involvement in the judicial decision-making. This is, at least partly, in contrast with the actual involvement of judicial assistants, because great variation in their involvement is observed in practice. In some situations judicial assistants are indeed only limitedly involved in a mainly administrative manner, but in other situations they play an important role in making decisions regarding the content of cases.

A second finding of the research is that ambiguity is observed in the relationship of the judge and the judicial assistant. Two different sets of norms are present at the courts. On the one hand a more formalistic ideal of the judicial assistants' position is adhered which emphasised the fact that judges should not rely too much on the work of judicial assistants. More specifically, court officers are concerned about the fact that the appearance of increased involvement of judicial assistants in judicial decision-making could be considered a threat to the authority or legitimacy of the judicial office. On the other hand, current social norms in the courts stress that it is also inappropriate for judges to disregard the involvement of judicial assistants. This is related to the circumstance that the involvement of judicial assistants has become inevitable. It is widely acknowledged that the involvement of judicial assistants can have various positive effects, for example on the efficiency of adjudication. Officers seem to be balancing between the two sets of norms. When this ambiguity leads to potential conflicts between judges and judicial assistants (e.g. when an assistants disagrees with a decision of the judge) often pragmatic solutions are chosen to resolve the conflicts. Particularly for judicial assistants, the ambiguity can result in uncertainty regarding the type and degree of involvement that is expected of them.

Thirdly, the research finds that judicial assistants' involvement affects the judicial decision-making practice in various ways. Three manners in which this occurred are mentioned: 1) Judicial assistants control the progression of a case within the court; judicial assistants play a key role in assuring that the judicial procedure runs smoothly and by performing their administrative duties they can indirectly affect the working methods of judges. 2) Judicial assistants are steering the judges in a certain direction. This is particularly done though memos in which judicial assistants might emphasise certain information which concurrently can affect the

judges' decision-making. The drafting of judgments can additionally also steer judges' decision-making especially when little instructions are given for writing a judgment. 3) Judicial assistants are providing judges with additional views to consider. This last practice particularly occurs when judicial assistants provide judges with advice, for instance in memos, or when they function as discussion partners.

Normative evaluation

The conclusion continues the evaluation of the involvement of judicial assistants started in chapter 4 by including the findings of the fieldwork. The current manner in which some clearly administrative and secretarial duties are conducted appears to be organised in a manner that can raise the efficiency of adjudication (although some minor complications were observed which may hinder the efficiency enhancement). An important finding is, however, that while it may be possible to make a theoretical distinction between administrative/secretarial duties and advisory/discussion-related duties, in reality, making such a distinction is not feasible. Various primarily administrative and secretarial duties, in fact, potentially affect the content of adjudication and, furthermore, many duties that seem secretarial (such as writing a memo) also contain advisory and discussion-enhancing elements. This makes administrative and secretarial involvement of assistants problematic from a rule of law perspective, as it to some extent expands the concerns regarding content-related involvement.
In most of the observed situations in the courts, most judges only limitedly rely on the advice of assistants. They are largely personally in control of the decision-making. On some occasions, judges were even so significantly in control that they did not allow judicial assistants to be involved at all. From a rule of law perspective, the reluctance to allocate too much responsibility to assistants seems comforting. However, given the fact that judicial assistants are compelled by the organisation to perform various advisory and discussion-related duties, this course of events is not in accordance with managerial values.
In contrast to the previous, in a few instances, judicial assistants' involvement in performing advisory and discussion-related duties was so significant that the judicial assistants were significantly influencing the decision-making. This can be regarded as problematic, as the involvement of judicial assistants can cause biases in the decision-making. Moreover, this creates a concern from a rule of law point of view because judicial assistants are currently not as highly qualified and are not surrounded by comparable institutional safeguards as judges.

Implications for the judicial decision-making practice

The book ends with discussing possible directions that the judiciary can take to find a proper balance in the employment of judicial assistants. It first of all empha-

sises the importance of embracing the aids of the contribution of judicial assistants to adjudication and discusses some possible conditions to best accomplish this, such as providing the required education and training to assistants, generating adequate career opportunities and consider enhancing the authority that assistants have at the courts. It is also mentions the importance to pay attention to minimising the potential hazards. In order to minimise these hazards, courts should consider: incorporating structures to monitor the work of judicial assistants, offering assistants temporary contract, incorporating procedural constraints to bind the involvement of judicial assistants and reconsider the institutional arrangements to safeguard the independence, impartiality, professionalism and integrity of judicial assistants.

Lastly, the significance to improve transparency and accountability by generating clearer guidelines which give direction to the employment of judicial assistants is mentioned. Ideally, judge and judicial assistants in the workplace should play a key role in this process. This current development of professional standards seems an appropriate vehicle to arrange these guidelines.

Samenvatting

Hoewel juridisch ondersteuners een centrale positie innemen in allerlei soorten rechtssystemen, is de bijdrage die deze medewerkers leveren grotendeels onbekend, ook al kan hun betrokkenheid een significant effect hebben op de kwaliteit en de legitimiteit van de rechtspraak. Dit onderzoek beoogt de betrokkenheid van deze groep werknemers in het rechterlijk besluitvormingsproces te duiden.
De laatste twee decennia is de positie van juridisch ondersteuners in Nederland veranderd en juridisch medewerkers lijken meer taken toebedeeld te hebben gekregen. Tegelijkertijd zijn juridisch medewerkers hoger opgeleid geraakt. Dit is een ontwikkeling die – onder invloed van de *New Public Management* beweging – breder wordt gezien binnen de publieke sector.
Binnen de rechterlijke macht is de betrokkenheid van juridisch ondersteuners een gevoelig onderwerp. De wet stelt rechters aan met de verantwoordelijkheid om recht te spreken en er wordt dus verwacht dat rechterlijke uitspraken worden genomen op hun gezag. Als blijkt dat juridisch ondersteuners regelmatig zeer betrokken zijn in de besluitvorming, roept dit vragen op over de legitimiteit van deze betrokkenheid. In het bijzonder met betrekking tot het Amerikaanse *law clerk*-model hebben verscheidene auteurs hun zorgen geuit over de mogelijkheid dat juridisch ondersteuners de besluitvorming beïnvloeden. Zij maken zich ook zorgen over de mogelijke gevolgen daarvan. Deze auteurs noemen bijvoorbeeld het teniet-gaan van het verantwoordelijkheidsgevoel van rechters als ze voornamelijk bezig zijn met het redigeren van het werk van juridisch medewerkers. Ook verwachten de auteurs dat rechtspraak legistischer wordt, meer gebaseerd op vooraf bepaalde richtlijnen en dat daarbij algemene rechtsbeginselen en maatschappelijke gevolgen van rechtspraak minder worden meegenomen in de beslissingen. Daarnaast wordt het verschil in institutionele waarborgen met betrekking tot rechters en juridisch medewerkers als een potentieel probleem genoemd. Tot slot wordt de effectiviteit van het aanstellen van juridisch medewerkers in twijfel getrokken.
In het licht van bovenstaande punten is het allereerst van belang om meer inzicht te krijgen in de rol van juridisch ondersteuners in de rechterlijke besluitvorming. Dit boek beoogt dit inzicht te verschaffen door onderzoek te doen naar twee rechtbanken waarbij de volgende onderzoeksvraag wordt gesteld:

Op welke manieren zijn juridisch medewerkers betrokken in het rechterlijk besluitvormingsproces en welke gevolgen heeft hun betrokkenheid voor de wijze waarop de rechtspraak plaatsvindt?

Methode

De kern van dit onderzoek betreft een empirisch veldonderzoek bij twee Nederlandse rechtbanken. Een kwalitatieve *multi-method* benadering is gebruikt, welke nader wordt toegelicht in hoofdstuk 2. Tijdens een periode van acht maanden veldwerk binnen twee sectoren (strafrecht en bestuursrecht) van de onderzochte rechtbanken zijn document analyses, participerende observaties en diepte-interviews gehouden. Meer specifiek is de besluitvorming van 137 zaken (behandeld tijdens 27 zittingen) gevolgd. Alle documenten die gerelateerd zijn aan de zaken (voorbereidingsformulieren/instructies en concept-uitspraken) zijn geanalyseerd en alle contacten tussen de rechters en juridisch medewerkers (gedurende de zitting, het raadkameren en soms tijdens voorbesprekingen) zijn geobserveerd. Bovendien zijn 66 rechters en juridisch medewerkers geïnterviewd tijdens de veldwerkperiode waarvan er 51 betrokken waren bij de zittingen die zijn gevolgd.
Ter aanvulling zijn zeven rechters en juridisch medewerkers geïnterviewd voorafgaand aan het veldwerk. Daarnaast is een set van 10 interviews gehouden met betrokkenen nadat het veldwerk was afgerond. Ten slotte zijn ook 10 interviews gehouden met rechters en ondersteuners tijdens een bezoek aan Engeland voor het onderzoek.

Inter-jurisdictionele reflecties

Om de specifieke omstandigheden waaronder dit onderzoek plaatsvond te begrijpen, worden in hoofdstuk 3 de samenstelling en werkwijzen van Nederlandse gerechten, in het bijzonder de rechtbanken, uiteengezet. Daarbij is bijzondere aandacht voor de positie van juridisch medewerkers. Vervolgens worden de Nederlandse ondersteuningsmodellen afgezet tegen drie andere modellen namelijk die van 1) de Amerikaanse *law clerks*, 2) *Magistrates' clerks* in Engeland en Wales, en 3) *Judicial Assistants* in Engeland en Wales. Aan het einde van het hoofdstuk worden zes kenmerken besproken waarop modellen van juridische ondersteuning kunnen worden onderscheiden. Dit zijn:

1. de redenen om juridisch medewerkers aan te nemen
2. de verdeling van rechters ten opzichte van juridisch medewerkers
3. de kwalificaties en arbeidsvoorwaarden van juridisch medewerkers
4. de taken van juridisch medewerkers en hun deelname in verschillende onderdelen van het proces
5. de toewijzing van juridisch medewerkers aan individuele rechters of het gehele gerecht

6. de situatie of juridisch medewerkers met professionele- of lekenrechters samenwerken

De bestudering van de verschillende modellen legt een grote verscheidenheid aan organisatorische structuren van juridische ondersteuning bloot. De taken van de onderzochte juridisch medewerkers blijken ook te variëren, hoewel veel taken eigenlijk opmerkelijk gelijksoortig zijn. Een andere opmerkelijke observatie is dat in alle jurisdicties de betrokkenheid en verantwoordelijkheden van juridisch medewerkers vrij beperkt wordt benoemd in wetgeving en beleidsdocumenten. De meerderheid van de taken zijn informeel vormgegeven.
De verkenning van verschillende modellen van juridische ondersteuning laat zien dat in alle jurisdicties wordt geworsteld met het vinden van een manier om juridisch medewerkers zo goed mogelijk te benutten en tegelijkertijd de eventuele risico's van te grote invloed van juridisch ondersteuners te beperken. Elk model heeft zijn eigen mengeling van onderdelen ingericht om hiermee om te gaan. Omdat de modellen bestaan uit verschillende onderdelen die zijn ontstaan in een specifieke juridische en maatschappelijke context moet men behoedzaam zijn om bepaalde aspecten vanuit andere systemen over te nemen.

Twee normatieve perspectieven

In hoofdstuk 4 worden twee perspectieven geïntroduceerd die kunnen worden ingenomen bij het evalueren van de kosten en baten van de betrokkenheid van juridisch medewerkers. Deze perspectieven zijn: het rechtsstatelijk perspectief en het *managerial* perspectief. Het eerste is een klassiek theoretisch perspectief, gebaseerd op principes en waarden die zijn gevestigd gedurende een eeuwenlange geschiedenis, in het bijzonder gedurende de periode van de Verlichting. Het tweede perspectief is een nieuwer perspectief, gebaseerd op economische theorieën over organisaties, dat in het bijzonder opkwam in de tweede helft van de 20e eeuw als een reactie op de breed gedeelde overtuiging dat de rechtspraak beter zou moeten aansluiten bij de behoeften van de moderne maatschappij. Het hoofdstuk geeft aan waar deze perspectieven voor staan en laat zien hoe de principes gerelateerd aan de perspectieven geïncorporeerd zijn in de regelgeving en beleid met betrekking tot de rechterlijke macht. Het hoofdstuk eindigt met een theoretische beoordeling van het inzetten van juridisch ondersteuners op basis van de twee perspectieven. Daarbij wordt een analytisch onderscheid gemaakt tussen enerzijds administratieve en secretariële verantwoordelijkheden van juridisch medewerkers en anderzijds adviserende en discussie-gerelateerde verantwoordelijkheden. Hoewel beide perspectieven de potentiële baten van de bijdrage van juridisch medewerkers erkennen, wijzen ze ook op bepaalde (deels perspectief-specifieke) problemen met betrekking tot met name een adviserende en discussie-gerelateerde betrokkenheid.

De betrokkenheid van juridisch medewerkers in de verschillende fasen van het rechterlijke besluitvormingsproces

Hoofdstuk 5, 6 en 7 presenteren de resultaten van het veldwerk in de bestuurs- en strafsectoren van twee Nederlandse rechtbanken. Hoofdstuk 5 en 6 beschrijven en analyseren het besluitvormingsproces in chronologische volgorde. Deze hoofdstukken belichten de rol die juridisch medewerkers spelen in de voorbereidende fase, tijdens de zitting, gedurende het raadkameren en tijdens het schrijven van de uitspraken.

De voorbereidende fase

Het onderzoek onthult dat juridisch medewerkers regelmatig een belangrijke positie innemen tijdens de fase voorafgaand aan de zitting. Deze positie is grotendeels onbekend bij het grote publiek. Medewerkers kunnen een sterke positie hebben in de beginfase van een juridische procedure aangezien zij initiële beslissingen nemen bijvoorbeeld of een zaak zonder zitting afgehandeld kan worden (in het bestuursrecht).
Juridisch medewerkers bereiden bovendien documenten voor (ook wel instructies genoemd) die de rechter kan gebruiken bij de voorbereiding op de zitting. Soms geven deze documenten aan hoe de medewerkers over een bepaalde zaak denken. In andere gevallen zijn het primair neutraal geformuleerde samenvattingen van de zaaksdossiers. De manier waarop rechters gebruikmaken van deze documenten verschilt aanzienlijk. Wel wordt algemeen onderkend dat het hebben van een dergelijk voorbereidend document tijd bespaart. De documenten kunnen ook nieuwe inzichten op een zaak bieden of discussie op gang brengen. Afhankelijk van de inhoud en de manier waarop ze worden gebruikt, kunnen de documenten denkfouten in de besluitvorming voorkomen of juist bevorderen.

De zitting

Tijdens de zitting functioneert de juridische medewerker voornamelijk als griffier die het proces-verbaal opmaakt en andere administratieve assistentie biedt. De notie van de rechter als dé besluitvormer, die veelal zonder substantiële inhoudelijke hulp rechtspreekt, wordt daarmee overeind gehouden tijdens de zitting. Meerdere geïnterviewde rechters staan daar ook achter. Zij zijn dan ook terughoudend in het aanbrengen van veranderingen in de betrokkenheid van juridisch medewerkers tijdens de zitting.
Desalniettemin zijn er bepaalde, vooral informele manieren, waarop sommige juridisch medewerkers actiever participeren in de gang van zaken tijdens de zitting en daarbij deze ook mogelijk beïnvloeden. Een minderheid van (vooral bestuurs)-rechters verwelkomt een meer substantiële bijdrage van juridisch medewerkers

aan de zitting. Zij kijken positief aan tegen een nieuwe ontwikkeling om juridisch medewerkers in de gelegenheid te stellen om vragen te stellen tijdens de zitting. Een minderheid van juridisch medewerkers is hier ook positief over. Omdat er zoveel uiteenlopende visies zijn ten aanzien van de juiste betrokkenheid van juridisch medewerkers tijdens de zitting, blijkt er onduidelijkheid te bestaan over de gepaste wijze van betrokkenheid. Dit zorgt er ook voor dat de taken van juridisch medewerkers uiteenlopend worden uitgevoerd. Rechters en juridisch medewerkers hebben daarbij regelmatig een complexe, ambigue relatie.

Het raadkameren

Hoewel juridisch medewerkers geen officiële stem hebben in de raadkamer wordt het tegenwoordig wel grotendeels van ze verwacht dat ze participeren in het besluitvormingsproces. Daarbij zien de meeste rechters en juridisch medewerkers het ook als een plicht dat juridisch medewerkers een bijdrage leveren aan de discussie. Omdat het raadkameren in essentie bestaat uit een uitwisseling van argumenten kan een goed ingebracht argument door de medewerker invloed hebben op de besluitvorming. In het bijzonder als rechters in het ongewisse zijn over hoe ze een bepaalde situatie zouden moeten beoordelen, kunnen de visies en argumenten van een juridisch medewerker de discussie sturen. Vooral in meervoudige kamers met minder ervaren rechters kan de bijdrage van bepaalde hoog gerespecteerde juridisch medewerkers cruciaal zijn. Onder dat soort omstandigheden kunnen medewerkers soms de functie van discussiepartner gedeeltelijk overnemen van minder ervaren rechters. Een ander aspect wat juridisch medewerkers een belangrijke positie geeft, is het feit dat de instructies voor het schrijven van de uitspraak die worden gegeven tijdens het raadkameren vaak substantiële ruimte laten voor nadere invulling door de medewerker.
Echter, juridisch medewerkers zijn ook degenen met het minste gezag van alle personen die betrokken zijn bij het raadkameren en dat heeft effect op hun bijdrage. Meerdere juridisch medewerkers aarzelen om mee te doen in het raadkamerproces. Daarnaast geven sommige rechters juridisch medewerkers ook niet de ruimte om deel te nemen aan de discussie. Als gevolg daarvan nemen juridisch medewerkers niet altijd deel aan de discussie.
Omdat juridisch medewerkers geen officiële stem hebben tijdens het raadkameren blijft het onduidelijk wat precies van hen wordt verwacht in deze fase. Het gebrek aan duidelijkheid hierover weerklinkt in de visies die respondenten hebben over het gepaste niveau van betrokkenheid en de gepaste grenzen.

Het concipiëren van de uitspraak

In de onderzochte rechtbanken zijn juridisch medewerkers verantwoordelijk voor het schrijven van het eerste concept van een uitspraak. Naar verwachting vergroot

dit de productiviteit van de gerechten. Tegelijkertijd geeft het juridisch medewerkers ruimte om de inhoud van de uitspraken te beïnvloeden. Medewerkers genieten vaak aanzienlijke autonomie in het schrijven van concept-uitspraken. Aangezien alle procedurele beslissingen normaal gesproken al zijn gemaakt tijdens het raadkameren zou men verwachten dat juridisch medewerkers vooral invloed kunnen uitoefenen op de motivering van uitspraken. Echter, de bijdrage van juridisch medewerkers kan verder strekken, aangezien het onderzoek aantoont dat het schrijven van de uitspraak een belangrijke manier blijkt te zijn om initieel genomen beslissingen te heroverwegen. Dit blijkt onder andere uit het feit dat verscheidene gebeurtenissen werden genoemd waarin de uitkomsten uit het schrijfproces resulteerden in het herbeoordelen van bepaalde onderdelen van een rechterlijk besluit en, in sommige gevallen, het wijzigen van de beslissing.
De data tonen dus situaties waarin juridisch medewerkers een machtige positie hebben. Gelijktijdig tonen de data ook situaties waarin rechters juridisch medewerkers weinig ruimte bieden om een rol te spelen. Dit is vooral het geval als rechters concept-uitspraken, geschreven door juridisch medewerkers, verregaand aanpassen zodat ze precies voldoen aan de ideeën die de rechters hebben over een goede uitspraak. Hoewel deze aanpassingen een enkele keer kernelementen van de uitspraak betroffen, betreffen de aanpassingen die rechters maken in concept-uitspraken meestal minder belangrijke onderdelen zoals de woordkeuze. Het maken van grote aanpassingen gebeurt vooral in uitzonderlijke gevallen, waar de rechter vindt dat de juridisch medewerker tekort heeft geschoten. Hoeveel wordt aangepast in een conceptversie is echter ook gerelateerd aan het karakter van de betrokken rechter.

Bepalende factoren

Hoofdstuk 7 schetst zeven factoren – voortvloeiend uit het veldwerk – die de betrokkenheid (en daarbij potentiële invloed) van juridisch medewerkers bepalen. Allereerst speelt de factor vertrouwen een rol in de openheid van rechters om juridisch medewerkers in de besluitvorming te betrekken. Vooral vertrouwen gebaseerd op de competenties van juridisch medewerkers bepaalt de ruimte die rechters juridisch medewerkers geven om betrokken te zijn in de besluitvorming. Ten tweede zijn de ideeën die rechters en juridisch medewerkers hebben over de passende rol van juridisch medewerkers van invloed op de betrokkenheid van juridisch medewerkers op de rechtbanken. Als respondenten een meer terughoudende rol voor juridisch medewerkers onderschrijven, is dit over het algemeen ook hoe die rol in de praktijk uitvoering krijgt. Als derde zijn de expertise en ervaring van zowel de rechter als de juridische medewerker belangrijke factoren die de bijdrage van juridisch medewerkers bepalen. In het bijzonder in situaties waarin rechters met relatief weinig ervaring samenwerken met zeer ervaren medewerkers kan het aandeel van juridisch medewerkers aanzienlijk zijn. Carrièreperspectieven en (ge-

relateerde) ambities van juridisch medewerkers beïnvloeden ook de wijze en mate waarin zij betrokken zijn in de rechterlijke besluitvorming. De opleiding die juridisch medewerkers hebben genoten is divers en dit heeft gevolgen voor de carrièremogelijkheden en ambities. Vooral juridisch medewerkers die rechten hebben gestudeerd aan de universiteit en dus over een mr.-titel beschikken, hebben vaak interesse om verdere carrière te maken. Als gevolg daarvan zijn zij over het algemeen ambitieuzer in het vervullen van hun werkzaamheden.
Naast voorgenoemde individuele factoren spelen ook verscheidene situationele factoren een rol. Allereerst blijkt het type zaken van invloed op de interactie tussen de rechter en zijn ondersteuner. In complexe zaken dient om tot een uitspraak te komen vaak meer te worden afgewogen en dat resulteert erin dat er meer mogelijkheden zijn om bij te dragen aan de inhoud van de besluitvorming in die zaken. Routine zaken, aan de andere kant, zijn vaak scherp omlijnd en laten weinig tot geen ruimte voor discussie. Er zijn echter ook zaken welke scherp omlijnd lijken te zijn, maar die bij nader inzien meer aandacht behoeven. In dergelijke zaken kan de invloed van juridisch medewerkers, soms onbedoeld, substantieel zijn. Deels gerelateerd aan de vorige factor is ook de omstandigheid of een zaak wordt behandeld door een unus-rechter welke een zaak zelfstandig behandeld, of een meervoudige kamer bestaande uit drie rechters. Over het algemeen zullen juridisch medewerkers actiever betrokken zijn bij zaken die rechters individueel beslissen. Zeker in bestuursrechtzaken functioneren juridisch medewerkers in dergelijke gevallen vaak als belangrijke discussiepartners. Het feit dat meervoudige kamers meestal complexere en organisatorisch uitdagender zaken beslechten, kan echter als gevolg hebben dat juridisch medewerkers ook een belangrijke rol spelen. Daarbij is het wel zo dat de visies van juridisch medewerkers moeten concurreren met die van de drie rechterlijke leden van de kamer. Tot slot blijken tijds- en werkdruk ook van belang te zijn voor de betrokkenheid en invloed van juridisch medewerkers. Regelmatig lijken deze factoren er toe te leiden dat rechters sterker leunen op het werk van juridisch medewerkers. Er zijn dus verscheidene, deels elkaar versterkende, factoren die bepalen of de betrokkenheid van juridisch medewerkers minimaal of verstrekkend is.

Overeenkomsten en verschillen tussen de rechtbanken en sectoren

Naast deze factoren besteedt hoofdstuk 7 ook aandacht aan de vraag of er verschillen zijn gevonden in de betrokkenheid van juridisch medewerkers in de verschillende rechtbanken en sectoren. Geen grote verschillen zijn geconstateerd tussen de twee rechtbanken. Een klein aspect waarin de gerechten lijken te verschillen is de carrièremogelijkheden. In de rechtbank met een meer geïsoleerde ligging, gaven juridisch medewerkers aan dat de carrièremogelijkheden beperkter zijn.
Tussen de sectoren zijn eveneens geen grote verschillen geconstateerd. Slechts een paar kleinere verschillen worden geobserveerd. Deze betreffen onder andere het

type zaken dat wordt behandeld, de wijze waarop de juridische procedure is ingericht (vooral in unus-zaken), de ideeën over het bediscussiëren van zaken voorafgaand aan een zitting en de werkdruk. Deze verschillen leiden er over het algemeen toe dat juridisch medewerkers een iets grotere rol hebben binnen de bestuurssectoren.

Conclusie

Empirische bevindingen

In het eerste gedeelte van het concluderende hoofdstuk 8 worden drie centrale empirische bevindingen gepresenteerd. Allereerst wordt een discrepantie waargenomen tussen de formele positie van juridisch medewerkers en de grote variatie in hun de werkelijke betrokkenheid. In regels en beleidsdocumenten wordt de secretariële en administratieve rol van juridisch medewerkers benadrukt, terwijl weinig is gereguleerd met betrekking tot potentiele adviserende en discussie-gerelateerde taken van juridisch medewerkers. Dit spreidt een beeld tentoon van de juridisch medewerker als een voornamelijk administratieve figuur, die slechts in beperkte mate betrokken is in de besluitvorming. Dit is in ieder geval deels in tegenspraak met de werkelijke betrokkenheid van juridisch medewerkers. In werkelijkheid wordt een grote variatie gezien: in sommige situaties zijn juridisch medewerkers inderdaad slechts beperkt betrokken en daarbij vooral op het administratieve vlak, maar in andere situaties spelen zij een belangrijke rol in de rechterlijke besluitvorming.
Een tweede bevinding is dat ambiguïteit wordt geconstateerd in de relatie van rechters en juridisch medewerkers. Twee verschillende normensystemen lijken met elkaar te concurreren binnen de rechtbanken. Aan de ene kant de meer formalistische notie waarin wordt benadrukt dat rechters niet te veel op juridisch medewerkers moeten leunen. Betrokkenen zijn in het verlengde hiervan bezorgd over het gezag en de legitimiteit van de positie van rechters. Aan de andere kant bestaat de sociale norm binnen de rechtbanken dat het niet gepast is om juridisch medewerkers niet te betrekken in de besluitvorming. Het is een wijd gedeelde visie dat juridisch medewerkers positief kunnen bijdragen aan de rechterlijke besluitvorming, bijvoorbeeld door deze efficiënter te laten verlopen. Betrokkenen lijken te balanceren tussen beide normen. Wanneer deze ambiguïteit leidt tot potentiele conflicten tussen rechters en juridisch medewerkers (bijvoorbeeld omdat zij het oneens zijn over de uitkomst van een zaak), wordt vaak een pragmatische weg gekozen om het conflict op te lossen. Vooral voor juridisch medewerkers zorgt de ambiguïteit voor onzekerheid over welke type en welke mate van betrokkenheid van hen wordt verwacht.
Een derde resultaat is dat de betrokkenheid van juridisch medewerkers het rechterlijk besluitvormingsproces op verschillende manieren beïnvloedt. Drie ma-

nieren waarop dit gebeurt zijn: 1) Juridisch medewerkers hebben de controle over de wijze waarop een zaak verloopt binnen de rechtbank. Juridisch medewerkers hebben een essentiële rol in het verzekeren dat de procedure goed verloopt en door het uitvoeren van administratieve taken kunnen zij de werkwijze van rechters indirect beïnvloeden. 2) Juridisch medewerkers sturen de rechters in een bepaalde richting. Dit gebeurt in het bijzonder via de documenten die zij maken ter voorbereiding van de zitting, welke bepaalde informatie zullen benadrukken, wat vervolgens de besluitvorming beïnvloedt. Het concipiëren van uitspraken kan de besluitvorming van rechters ook beïnvloeden, vooral als er weinig instructies zijn gegeven voor het schrijven van de uitspraak. 3) Juridisch medewerkers voorzien rechters van extra standpunten om in overweging te nemen. Dit laatste gebeurt vooral als juridisch medewerkers rechters van advies voorzien, bijvoorbeeld in voorbereidingsdocumenten of als ze fungeren als discussie partners.

Normatieve evaluatie

De conclusie evalueert vervolgens de betrokkenheid van juridisch medewerkers op basis van de in hoofdstuk 4 geïntroduceerde perspectieven. De huidige wijze waarop sommige, duidelijk administratieve en secretariële taken worden verricht, lijkt georganiseerd te zijn op een manier die de efficiency van de rechtspraak verhoogt (hoewel er enkele kleinere complicaties worden gezien die de efficiency kunnen verminderen). Een belangrijke bevinding is echter dat hoewel het mogelijk is om een theoretisch onderscheid te maken tussen administratieve/secretariële taken en adviserende/discussie-gerelateerde taken, dat in werkelijkheid zo'n onderscheid niet te maken valt. Verscheidene, voornamelijk administratieve en secretariële, taken blijken in de praktijk potentie te hebben om de inhoud van het rechtspreken te beïnvloeden. Bovendien zijn er verscheidene taken die secretarieel lijken (zoals het maken van voorbereidingsdocumenten) maar die ook adviserende en discussie-gerelateerde elementen bevatten. Dit zorgt ervoor dat secretariële betrokkenheid potentieel problematisch is vanuit een rechtsstatelijk perspectief aangezien bepaalde zorgen met betrekking tot inhoud-gerelateerde betrokkenheid ook van toepassing blijken op de administratieve betrokkenheid.
In de meeste situaties op de rechtbanken vertrouwen rechters maar in beperkte mate op het advies van juridisch medewerkers waardoor ze grotendeels de controle hebben over de besluitvorming. In sommige gevallen zijn rechters in zo'n verregaande mate in controle dat ze juridisch medewerkers helemaal niet toestaan om betrokken te zijn. Vanuit een rechtsstatelijk perspectief is de terughoudendheid om te veel verantwoordelijkheden bij ondersteunend personeel te leggen geruststellend. Echter, gezien het feit dat de organisatie beoogt dat juridisch medewerkers verscheidene adviserende en discussie-gerelateerde taken verrichten, is dit niet in overeenstemming met *managerial* waarden.

In tegenstelling tot het voorgaande zijn er ook situaties waargenomen waarin de betrokkenheid in het uitvoeren van adviserende en discussie-gerelateerde taken zo significant was, dat de medewerkers de besluitvorming in belangrijke mate beïnvloeden. Dit kan als problematisch worden gezien, aangezien de betrokkenheid van juridisch medewerkers denkfouten in de besluitvorming kan genereren. Daarbij creëert het een probleem vanuit het rechtsstatelijk perspectief aangezien juridisch medewerkers niet vergelijkbaar zijn opgeleid en niet omgeven zijn met vergelijkbare waarborgen als rechters.

Implicaties voor de praktijk

Het boek eindigt met het bespreken van mogelijke richtingen die de rechterlijke organisatie kan uitgaan om een goede balans tussen verschillende waarden te vinden in de aanstelling van juridisch medewerkers. Allereerst wordt het belang benadrukt om de baten van het hebben van juridisch medewerkers te benutten. Enkele mogelijke condities waaraan moet worden voldaan om dit te realiseren worden besproken, zoals het voorzien van de juiste opleiding voor juridisch medewerkers, het genereren van adequate carrièremogelijkheden en het overwegen om het gezag van juridisch medewerkers binnen rechtbanken te vergroten. Daarnaast wordt het belang genoemd om aandacht te hebben voor het minimaliseren van potentiële kosten van de betrokkenheid van juridisch medewerkers. Om deze kosten te minimaliseren kunnen gerechten overwegen om structuren te creëren om het werk van juridisch medewerkers te monitoren, tijdelijke contracten aan te bieden aan juridisch medewerkers en te overwegen bepaalde stappen te zetten om de waarborgen met betrekking tot de onafhankelijkheid, onpartijdigheid, professionaliteit en integriteit van juridisch medewerkers te versterken.
Ten slotte wordt genoemd dat het belangrijk is de transparantie en verantwoording te verbeteren door duidelijkere richtlijnen op te stellen met betrekking tot de positie van juridisch medewerkers. Idealiter spelen rechters en juridisch medewerkers een essentiële rol in het opstellen van dergelijke richtlijnen. De huidige ontwikkeling van professionele standaarden lijkt een uitermate geschikt medium om dit te bewerkstelligen.

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Appendix 1 – Key information regarding the observed hearings

Hearing date	Court	Division	Type of hearing (Single/Panel)	No. of cases	Interviewed respondents no. (Judge/Judicial Assistant (JA))
14-3-2013	Court 1	Criminal law	Panel	4	7(Judge),8(JA)
19-3-2013	Court 1	Criminal law	Single-judge	4	7(Judge),14(JA)
25-3-2013	Court 1	Criminal law	Panel (pre-trial custody hearing)	16	3(Judge), 84(Judge), 10(Judge), 5(JA)
26-3-2013	Court 1	Criminal law	Single-judge	4	12(Judge), 9(JA)
3-4-2013	Court 1	Criminal law	Panel	3	84(Judge), 10(Judge), 15(JA)
5-4-2013	Court 1	Criminal law	Panel (special cases)	10	1(Judge), 6(JA)
11-4-2013	Court 1	Criminal law	Panel	4	16(Judge), 4(JA)
16-5-2013	Court 1	Admin law	Single-judge	4	32(Judge)
22-5-2013	Court 1	Admin law	Single-judge	3	17(Judge), 27(JA)
27-5-2013	Court 1	Admin law	Single-judge	3	21(Judge), 30(JA)
31-5-2013	Court 1	Admin law	Single-judge (temporary arrangements)	4	18(Judge), 26(JA)
4-6-2013	Court 1	Admin law	Single-judge	3	22(Judge), 25(JA)
7-6-2013	Court 1	Admin law	Single-judge	4	24(Judge), 23(JA)
12-6-2013	Court 1	Admin law	Panel	1	28(Judge), 33(JA)
23-9-2013	Court 2	Admin law	Single-judge	4	62(Judge), 63(JA)
25-9-2013	Court 2	Admin law	Panel	3	65(Judge), 53(JA)
3-10-2013	Court 2	Admin law	Single-judge	3	64(Judge), 49(JA)
8-10-2013	Court 2	Admin law	Single-judge	4	59(Judge), 51(JA)
11-10-2013	Court 2	Admin law	Single-judge	3	52(Judge), 56(JA)
14-10-2013	Court 2	Admin law	Single-judge (temporary arrangements)	1	60(Judge), 57(JA)
20-11-2013	Court 2	Criminal law	Single-judge	15	47(Judge), 43(JA)

Hearing date	Court	Division	Type of hearing (Single/Panel)	No. of cases	Interviewed respondents no. (Judge/Judicial Assistant (JA))
27-11-2013	Court 2	Criminal law	Panel (special cases)	4	41(Judge), 45(Judge), 46(JA)
28-11-2013	Court 2	Criminal law	Panel	5	40(Judge), 39(JA), 48(JA)
29-11-2013	Court 2	Criminal law	Single-judge	21	42(Judge), 44(JA)
5-12-2013	Court 2	Criminal law	Panel	3	42(Judge), 45(Judge), 39(JA), 48(JA)
13-12-2013	Court 2	Criminal law	Panel	3	47(Judge), 41(Judge), 36(JA), 37(JA)
7-1-2013	Court 2	Criminal law	Panel (adjourned case of hearing 13-12-2013)	1	47(Judge), 41(Judge), 37(JA)
Total					
N=27	**Court 1: N=14** **Court 2: N=13**	**Criminal law: N=14** **Admin law: N=13**	**Panel hearings: N=15** **Single-judge hearings: N=12**	**N=137**	**Judges: N=40** **Judicial Assistants: N=28**

Appendix 2 – Conducted research activities per hearing

Hearing date	Analysed memos	Checked court files	Observed deliberations	Observed adjournment deliberations	Observed pre-hearing consultations	Analysed (draft-) judgments
14-3-2013	Yes	Yes	Yes	No	not applicable	Yes
19-3-2013	not applicable*	No	not applicable**	not applicable	not applicable	not applicable**
25-3-2013	Half of the cases	Yes	Yes	not applicable	not applicable	not applicable****
26-3-2013	not applicable*	No	not applicable**	No	not applicable	not applicable**
3-4-2013	Yes	Yes	Yes	Partly	not applicable	Yes
5-4-2013	Yes	Yes	Yes	No	not applicable	Yes
11-4-2013	Yes	Yes	Yes	No	not applicable	Yes
16-5-2013	Yes	Yes (except for 1)	Yes	not applicable	No	Half of the cases
22-5-2013	Yes	Yes (except for 1)	Yes	not applicable	Yes	Yes
27-5-2013	Yes	Yes	Yes	not applicable	Yes	Yes
31-5-2013	Yes	Half of the cases	Yes	not applicable	Yes	Yes
4-6-2013	Yes	Yes	Yes	not applicable	Yes	Yes
7-6-2013	Yes	Yes (except for 1)	Yes	not applicable	Yes	No
12-6-2013	Yes	Yes	Yes	not applicable	Yes	Yes
23-9-2013	Yes (except for 1)	Yes	not applicable***	not applicable	not applicable	not applicable***
25-9-2013	Yes	Yes	Yes	not applicable	not applicable	Yes
3-10-2013	Yes	Yes	Yes	not applicable	not applicable	1 of 3
8-10-2013	Yes	Yes	Yes	not applicable	not applicable	Yes
11-10-2013	Yes	Yes	Yes	not applicable	not applicable	Yes
14-10-2013	Yes	No	Yes	not applicable	not applicable	No

Hearing date	Analysed memos	Checked court files	Observed deliberations	Observed adjournment deliberations	Observed pre-hearing consultations	Analysed (draft-) judgments
20-11-2013	Yes	No	not applicable**	not applicable	not applicable	not applicable**
27-11-2013	not applicable*	Yes	Yes	Yes	not applicable	Yes
28-11-2013	Yes	Yes	Yes	Yes	not applicable	Half of the cases
29-11-2013	Yes	No	not applicable**	not applicable	not applicable	not applicable**
5-12-2013	Yes	Yes	Yes	Yes	not applicable	Half of the cases
13-12-2013	Yes	Half of the cases	2 out of three cases	Yes	not applicable	Yes
7-1-2013	is memo of hearing 13-12-2013	Are files of hearing 13-12-2013	Yes	Yes	not applicable	Yes
N=27						

* For these single-judge criminal hearings (police judge hearings) in court 1 and criminal special case hearing (27-11-2013) in court 2 it is customary that no memos are prepared.

** For these single-judge criminal hearings (police judge hearings) no deliberations are held. The judgments are merely reports of the oral judgment pronounced in court and were therefore not analysed.

*** At this hearing all cases were settled or an oral judgment was pronounced. Therefore no deliberations took place and no judgments were available to be analysed.

**** This being a pre-trial custody hearing results in no proper judgments being written and, hence, these were not analysed.

Appendix 3 – Interviewed respondents during the fieldwork (anonymised)

Respondent no.	Position	Interview date	Interview time	Type of interview	Attended hearing of interviewee
Court 1 Criminal law division					
14	Head judicial support	19-3-2013	10.00-11.15	special	not applicable
11	Team manager	31-3-2013	14.10-15.20	special	not applicable
7	Judge	19-4-2013	10.00-11.10	involved in a hearing	14-3-2013
3	Judge	12-4-2013	12.30-14.00	involved in two hearings	19-03-2013/25-03-2013
84	Judge	26-4-2013	15.00-16.15	involved in two hearings	25-03-2013/03-04-2013
12	Judge	15-4-2013	13.00-14.00	involved in a hearing	26-3-2013
16	Judge	22-4-2013	13.30-15.00	involved in a hearing	11-4-2013
1	Judge	16-4-2013		involved in a hearing	5-4-2013
10	Judge	3-5-2013	12.10-13.20	involved in two hearings	25-03-2013/03-04-2013
8	Judicial assistant	28-4-2013	15.00-16.20	involved in a hearing	14-3-2013
2	Judicial assistant	15-3-2013	10.00-11.10	involved in a hearing	19-3-2013
9	Judicial assistant	23-4-2013	09.30-10.35	involved in a hearing	26-3-2013
15	Judicial assistant	17-4-2013	10.30-11.40	involved in a hearing	3-4-2013
4	Judicial assistant	24-4-2013	09.30-10.35	involved in a hearing	11-4-2013

Respondent no.	Position	Interview date	Interview time	Type of interview	Attended hearing of interviewee
6	Judicial assistant	19-3-2013	15.00-16.00	involved in a hearing	5-4-2013
13	Staff lawyer	22-4-2013	15.30-16.45	special	not applicable
5	Junior judicial assistant	25-3-2013	10.00-10.45	involved in a hearing	25-3-2013
Court 1 Admin law division					
20	Head judicial support	23-5-2013	09.00-11.00	special	not applicable
32	Judge	20-6-2013	16.30-17.40	involved in a hearing	16-5-2013
17	Judge	19-6-2013	10.00-11.00	involved in a hearing	22-5-2013
21	Judge	10-6-2013	13.45-15.00, 16.00-16.20	involved in a hearing	27-5-2013
18	Judge	26-6-2013	15.30-16.55	involved in a hearing	31-5-2013
22	Judge	4-7-2013	10.10-11.15	involved in a hearing	4-6-2013
24	Judge	3-7-2013	10.00-11.10	involved in a hearing	7-6-2013
28	Judge	12-6-2013	13.00-14.20	involved in a hearing	12-6-2013
27	Judicial assistant	19-6-2013	15.00-16.00	involved in a hearing	22-5-2013
30	Judicial assistant	17-6-2013	15.00-16.35	involved in a hearing	27-5-2013
26	Judicial assistant	25-6-2013	16.00-17.00	involved in a hearing	31-5-2013
25	Judicial assistant	14-6-2013	10.00-11.15	involved in a hearing	4-6-2013
23	Judicial assistant	4-7-2013	15.00-16.10	involved in a hearing	7-6-2013
33	Judicial assistant	24-6-2013	15.00-16.15	involved in a hearing	12-6-2013
31	Staff lawyer	25-6-2013	10.00-11.05	special	not applicable
29	Junior judicial assistant	26-6-2013	10.00-10.35	special	not applicable
19	Senior administrative assistant	26-6-2013	13.50-14.15	special	not applicable

Respondent no.	Position	Interview date	Interview time	Type of interview	Attended hearing of interviewee
Court 2 Admin law division					
54	Team manager location 1	30-9-2013	13.00-14.10	special	not applicable
55	Team manager location 2	15-10-2013	09.30-11.30	special	not applicable
62	Judge	23-10-2013	09.30-10.40	involved in a hearing	23-9-2013
65	Judge	5-11-2013	09.30-10.30	involved in a hearing	25-9-2013
64	Judge	17-10-2013	10.00-11.25	involved in a hearing	3-10-2013
59	Judge	22-10-2013	15.00-16.25	involved in a hearing	8-10-2013
52	Judge	30-10-2013	15.00-16.l10	involved in a hearing	11-10-2013
60	Judge	29-10-2013	09.10-10.10	involved in a hearing	14-10-2013
61	Judge	4-11-2013	13.10-14.20	special	not applicable
05	Judge	13-10-2013	11.00-11.50	special	not applicable
63	Judicial assistant	2-10-2013	09.30-11.25	involved in a hearing	23-9-2013
53	Staff lawyer	6-11-2013	09.30-10.40	involved in a hearing	25-9-2013
49	Judicial assistant	30-10-2013	10.00-11.20	involved in a hearing	3-10-2013
51	Judicial assistant	12-11-2013	10.30-11.40	involved in a hearing	8-10-2013
56	Judicial assistant	31-10-2013	14.00-15.05	involved in a hearing	11-10-2013
57	Judicial assistant	7-11-2013	09.30-10.30	involved in a hearing	14-1-2013
58	Staff lawyer	13-11-2013	15.30-16.50	special	not applicable
66	Judicial assistant	13-11-2013	10.20-11.05	special	not applicable
Court 2 Criminal law division					
35	Team manager	30-12-2013	10.00-11.10	special	not applicable
38	Judge	4-12-2013	16.00-17.15	special	not applicable
47	Judge	7-1-2013	10.30-11.50	involved in three hearings	20-11-2013/13-12-2013/ 07-01-2014

Respondent no.	Position	Interview date	Interview time	Type of interview	Attended hearing of interviewee
41	Judge	19-12-2013	10.40-11.55	involved in three hearings	27-11-2013/13-12-2013/ 07-01-2014
40	Judge	30-12-2013	13.30-14.40	involved in a hearing	28-11-2013
42	Judge	14-1-2014	09.20-10.40	involved in two hearings	29-11-2013/05-12-2013
45	Judge	9-1-2014	10.00-11.15	involved in two hearings	27-11-2013/05-12-2013
43	Judicial assistant	13-1-2014	09.25-10.30	involved in a hearing	20-11-2013
46	Judicial assistant	13-1-2014	13.30-14.50	involved in a hearing	27-11-2013
39	Judicial assistant	19-12-2013	13.00-14.15	involved in two hearings	28-11-2013/05-12-2013
48	Judicial assistant	9-1-2014	13.00-14.15	involved in two hearings	28-11-2013/05-12-2013
44	Judicial assistant	9-1-2104	15.45-16.40	involved in a hearing	29-11-2013
37	Judicial assistant	8-1-2014	14.00-15.20	involved in two hearings	13-12-2013/07-01-2014
36	Judicial assistant	7-1-2014	15.30-16.55	involved in a hearing	13-12-2013
N=66					

Appendix 4 – Interviewed respondents additional interviews (anonymised)

Resp. no.	Court	Division	Function	Date	Time
Prior to fieldwork					
78	Appellate court Amsterdam	Criminal law	Judicial Assistant	29-5-2012	10.15-11.30
74	District court Zeeland-West-Brabant	Admin. law	Judicial Assistant	20-6-2012	10.15-12.00
75	District court Zeeland-West-Brabant	Civil law	Staff lawyer	20-6-2012	14.00-15.00
83	District court Noord-Holland	Criminal law	Judge	8-8-2012	15.00-16.30
82	District court Amsterdam	Admin. law	Former judge	20-8-2012	11.00-13.00
77	District court Oost-Brabant	Admin. law	Judge	13-12-2012	15.45-17.15
68	District court Amsterdam	Civil law	Former judge	18-12-2012	11.00-12.00
After fieldwork					
76	Administrative Court for Trade and Industry	Admin. law	Judicial Assistant	25-9-2014	09.00-10.15
81	Administrative Jurisdiction Division of the Council of the State	Admin. law	Judicial Assistant	2-10-2014	12.00-13.00
80	Higher Social Security Court	Admin. law	Judicial Assistant	6-10-2014	15.15-16.25
69	Higher Social Security Court	Admin. law	Judicial Assistant	13-10-2014	15.00-16.00
67	Supreme Court	Criminal law	Judge	9-7-2014	14.30-16.00
70	Administrative Jurisdiction Division of the Council of the State	Admin. law	Judge	22-8-2014	16.00-17.45
72	Administrative Court for Trade and Industry	Admin. law	Judge	25-9-2014	10.30-11.45
79	Administrative Court for Trade and Industry	Admin. law	Judge	25-9-2014	13.15-14.05
73	Higher Social Security Court	Admin. law	Judge	6-10-2014	14.00-15.10
71	Higher Social Security Court	Admin. law	Judge	13-10-2014	16.10-17.20
N=17					

Appendix 5 – Members of the Steering committee

1. Leny de Groot- Van Leeuwen (chair) (Em.) Prof. Rechtspleging Radboud University Nijmegen
2. Jacomien Bins-Scheffer, (former) judicial assistant in Administrative law, District court Zeeland-West-Brabant
3. Karsten Gilhuis (from beginning 2016), Criminal law judge, District court Gelderland
4. Rinus Otte (until end 2015), Criminal law judge, Court of Appeal Arnhem
5. André Verburg, Administrative law judge, District court Midden-Nederland

Appendix 6 – Checklist for assessing the memo

This is a translation from the original Dutch version. The Dutch version is available on request.

Hearing/case no.:
Involved judicial assistant:
Involved judge(s):
Type of case (admin/cri, single/panel):
Brief facts of the case:
Additional info:

General

- *How many pages is the memo and what is the thickness (in cm) of the case files?*
- *Format of the instruction (concept-judgment, checklist or different format)?*
- *Is the format strictly followed or adjusted, and if so; how?*
- *Is it written using own words or literally copied from the files?*
- *Is it easy to understand what the case is about when reading the memo, without reading the files?*

Sources of information included in the memo

- *Legal Acts? Yes/No*
- *Case law? Yes/No*
- *Literature? Yes/No*
- *Own experience in similar cases? Yes/No*
- *Other sources? Yes/No*

Revealing vision of judicial assistant

- *Are any subjective terms used? Which, how many and concerning what aspects?*
- *Does the judicial assistant reveal his/her own view with regard to what the judgment should be? How is this substantiated?*

– *Are different alternatives for handling the case mentioned?*

Communication with judge(s)

– *Does the memo contain points of attention on what to ask/discuss during the hearing? If so, what points?*
– *Does the memo contain information regarding what points require extra attention or need further research before reaching a judgment?*

Additional comments

Appendix 7 – Checklist for assessing the hearing and deliberation sessions

This list is a translation from the original Dutch version. The Dutch version is available on request.

Date and time:
Type of hearing (admin. law/crim. law, panel/single-judge, additional specifications):
No. of cases:
Involved judicial assistant:
Involved judge(s):
Other attendees:
Duration of hearing:
Setup during hearing:
Duration deliberations:
Setup during deliberations:
Additional info:

Before the hearing report
…

Lunch report
…

Hearing

1. *Does the judge introduce the judicial officers including the judicial assistant to the public?*
2. *Do the judge(s) and judicial assistant engage in any contact (verbal or nonverbal)? What does the contact entail?*
3. *Does the judge provide the judicial assistant with room to speak or ask questions? At which moment(s)?*
4. *Does the judicial assistant make use of the possibility to speak? When and how?*
5. *Does the judge make use of the memo during the hearing?*
6. *How does the judicial assistant make notes (computer or paper)?*

7. *Is the hearing adjourned? For what reason? How often and for what duration?*
8. *Additional comments*

Deliberation session

General observations

1. *What is the duration of the deliberation session?*
2. *Where are the deliberations held?*
3. *Is there any structure (order of speaking) in the deliberations? What is the structure?*
4. *Is the memo used during deliberations? In what way?*
5. *How long do the different deliberations of cases last?*
6. *Is the judicial assistant afforded room to speak and/or does he or she speak?*
7. *Is the judicial assistant involved in the discussion regarding the content? In what way?*
8. *In what aspect of the deliberation is the assistant involved (evidence, punishment, legal aspects of the judgment)?*
9. *Is the involvement related to legal and/or emotional aspects?*
10. *How do(es) the judge(s) respond to the involvement of the assistant?*
11. *Do(es) the judge(s) and judicial assistant agree on the judgment or is there discussion? On which points and how is the potential disagreement solved?*
12. *Does the judicial assistant get instructions for writing the judgment? What instructions are provided and to which aspects of the judgment do they apply?*
13. *Does the judge check with the assistant if he or she possesses enough information to write the judgment?*
14. *Additional comments*

Appendix 8 – Checklist for assessing the draft- and final judgments of the hearing

This list is a translation from the original Dutch version. The Dutch version is available on request.

[when necessary specified per judgment]

Involved judicial assistant:
Involved judge(s):
Type of hearing (admin. law/crim. law, panel/single-judge, additional specifications):
No. of cases and types of cases:
No. of pages of each judgment:

General

- *Were any 'building blocks' used?*
- *Who wrote the drafts?*

Memo

- *Were any parts of the judgment adapted from the memo? Which ones?*
- *Are any aspects very different from what was written in the memo?*

Deliberation session

- *Which discussions from the deliberations are adapted in the draft?*
- *Are there any parts of the deliberation that are not included in the judgment? Which ones?*
- *Are any parts added which were not discussed during deliberations? Which ones?*

Adjustments made by the judge(s)

- *Who made adjustments and in what order did this occur?*
- *Are any adjustments made regarding the style?*
- *Are any adjustments made in the content of the judgment?*

- *What elements were changed and how much were they changed?*
- *Are the adjustments alterations, changes and/or deletions?*
- *In which part of the judgments are the adjustments made?*
- *Is any general feedback to the assistant included in the revised version?*

Appendix 9 – Example of an item list used for the interviews with respondents involved in the hearing

This is a translation from the original Dutch version. The Dutch version is available on request. The slightly modified item lists used for judicial assistants and for court 1 are available on request too.

Item list Judge, admin. Law court 2

Introduction

Description and explanation of research and interview

- Anonymity
- Permission from respondent to record interview

General

Position

- Duration of position at the court and previous positions (at which divisions, courts)
- Reasons for choosing to work at the judiciary

Education

- RAIO/RIO (entrance within 6 years after graduation or later entrance) and attention in education to relationship with assistant
- Additional training

Career

- Thoughts on future of career (within or outside the judiciary) and ambitions

Duties

– Additional duties besides regular case work and what these entail

Decision-making process (partly related to observed hearing(s))

Preparation for hearing

Preliminary consultations
– Whether preliminary consultations are held and if so when
– What the preliminary consultations entail
– Goal of these consultations

General
– Preparations for a hearing; how these are conducted
– Manner and extent of reading the court files
– Making additional, individual, notes
– Differences in preparations when chair or not

Usage of the memo
– Manner of usage and order of reading memo and files
– The manner in which judicial assistant are followed (blindly following on any aspects)
– Adding own information
– Ask respondent clarifying questions about possible observations made by researcher regarding memo usage
– Ideas regarding preferred type of memo from the assistant

Relations with judicial assistant
– Views of judge on judicial assistant presenting their own views
– Whether and the manner in which the respondent makes use of these views

Contacting the parties
– The aspects that result in contact with the parties to be necessary
– The officer that has contact with the parties: judge/assistant/both
– The degree of supervision by the judge when assistants contact the parties

Hearing

– The main duties of the assistant during the hearing
– Degree that assistants are provided room to participate in the hearing and manner in which this is done

- Usage of the memo during the hearing
- How the observed hearing may have differed in relation to other hearings; if anything out of the ordinary occurred
- Ask respondent clarifying questions about possible remarkable observations made by researcher during the hearing

Deliberation sessions

- When chair, specific way(s) of structuring deliberations
- The speaking order of the deliberation participants (incl. assistant)
- Effect of judicial assistant on outcome of deliberations in general (and examples of possible influence)
- Manner of handling disagreements
- Views on importance of including assistants in the discussions
- The judges perception of the judicial assistant if the judicial assistant would not wish to share his or her views
- Usage of the memo during deliberations
- Ask respondent clarifying questions about possible remarkable observations made by researcher during the deliberations

(Draft)-judgments

- Manner of adjusting drafts
- Ideas on extent to which drafts are (and should be) adjusted
- The degree of blindly trusting assistants regarding certain aspects of the (draft)-judgment (e.g. administrative aspects)
- Importance of making adjustments in the writing style employed by the assistant
- Occurrences and examples of alterations to an original judgment during the drafting process
- Examples of things that have gone wrong in the drafting
- Ideas regarding the sense of responsibility over the final judgment (and the part that the assistant plays therein)

General issues

- Views on importance of following case law
- Importance of consistency in handling cases within own court
- Comparison of own method of work to that of other judges

Factors that affect the manner of work and views on the role of the judicial assistant

Role perceptions

- Views on own role as a judge and difference to role of assistant
- Views on magnitude of current duties of assistant
- Ideas about what possible boundaries to the role should be

Appreciation of work judicial assistant

- Qualities of an ideal judicial assistant
- Preference of working with certain assistants and reasons for it

Workload

- Views on workload at the court and court division
- The extent to which time constraints affect certain tasks, and the tasks that receive less attention due to time pressure

Professional and social relationships

Hierarchy and atmosphere

- Description of atmosphere at the court(division)
- Description of relationships with assistants; the degree of hierarchy that is employed

Performance reviews of judicial assistants

- Involvement of respondent in providing feedback for performance reviews of assistants

Miscellaneous

- Ideas on modifications in work at the judiciary and role of judicial assistant over time
- [If worked at different locations] ideas about differences between divisions and/or courts
- Aspects not discussed which respondent believes to be of relevance to the research topic

Conclusion

- Thank you
- Explanation of usage of data and quotes in dissertation
- Whether the respondent wishes to receive transcript to check accuracy

Appendix 10 – List of codes used for the analysis in Atlas.ti

This list is a translation from the original Dutch version. The Dutch version is available on request.

Position and extra duties

- 1.1. Position
- 1.2. Extra duties

Career and education

- 2.1. Choice to work at judicial organisation
- 2.2. Education and background
- 2.3. Training and coaching
- 2.4. Future career
- 2.5. Switch from judicial assistant to judge

Preliminary phase

- 3.1 Procedure preliminary phase
- 3.2 Division of cases

Preparations for the hearing

- 4.1. Memo
- 4.2. Views judicial assistant on case
- 4.3. Contact with parties
- 4.4. Contact judicial assistant and judge/pre-trial consultations
- 4.5. Including additional information in preparations
- 4.6. General about preparations and individual ways of preparing
- 4.7.1. Preparations – trust
- 4.7.2. Preparations – difference between judge and judicial assistant
- 4.7.3. Preparations – impact and influence

- 4.7.4. Preparations – remaining

Hearing

- 5.1. Duties judicial assistant at the hearing
- 5.2. Usage memo during hearing
- 5.3. Providing the judge(s) with feedback
- 5.4. Adjournments
- 5.5.1. Hearing – trust
- 5.5.2. Hearing – difference between judge and judicial assistant
- 5.5.3. Hearing – impact and influence
- 5.5.4. Hearing – remaining

Deliberations

- 6.1. Order of speaking and structure of meetings
- 6.2. Usage memo during deliberations
- 6.3. Discussion and disagreement
- 6.4. Place within case law
- 6.5. Providing directions for writing judgment
- 6.6. Asking advice from colleagues
- 6.7.1. Deliberations – trust
- 6.7.2. Deliberations – difference between judge and judicial assistant
- 6.7.3. Deliberations – impact and influence
- 6.7.4. Deliberations – remaining

Writing the judgment

- 7.1. Who is writing the judgment
- 7.2. Usage memo during writing
- 7.3. Order of revising judgment-draft
- 7.4. Adjusting the judgment to the judge
- 7.5. Revisions by judges
- 7.6. Changing the judgment during drafting-process
- 7.7. Refusing to write or sign case
- 7.8.1. Judgment – trust
- 7.8.2. Judgment – difference between judge and judicial assistant
- 7.8.3. Judgment – impact and influence
- 7.8.4. Judgment – remaining

Organisation and structure of court division

- 8.1. Organisation of division – practical matters
- 8.2. Performance reviews
- 8.3. Contact with manager and/or board
- 8.4. Role and usage of staff lawyers

Judicial organisation characteristics

- 9.1. Changes in role judicial assistant over time
- 9.2. Differences between courts
- 9.3. Differences in involvement judicial assistant in panel or single-judge decision-making
- 9.4. Differences between divisions
- 9.5. Remaining judicial organizational issues
- 9.6. Workload and time pressure
- 9.7. Professional relationships and hierarchy
- 9.8. Differences in involvement judicial assistants in different types of cases

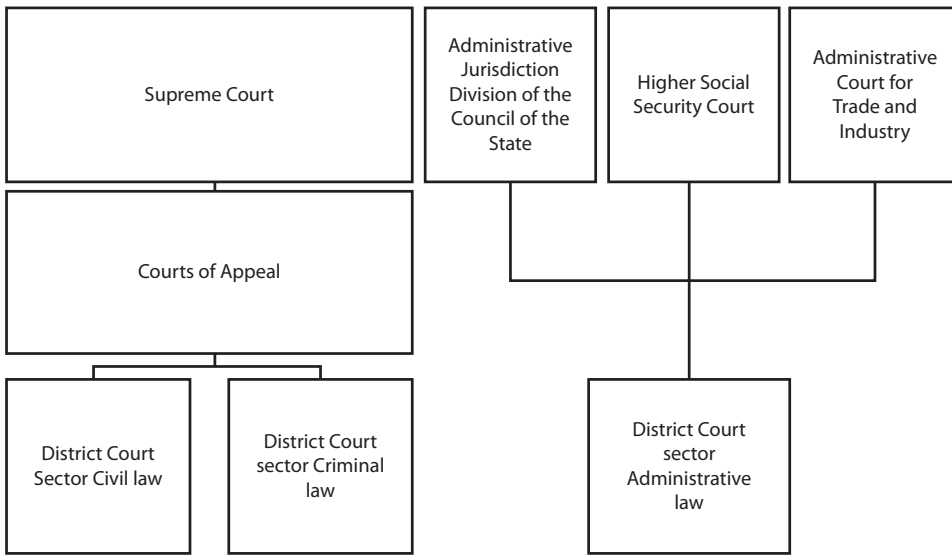
Role of judge and judicial assistant

- 10.1. Views on role judge and judicial assistant
- 10.2. Boundaries to involvement of judicial assistants
- 10.3. Role conflicts and possibilities to develop careers
- 10.4. Expertise
- 10.5. Experience
- 10.6. Sense of responsibility
- 10.7. Personality and character
- 10.8. Qualities of ideal judicial assistant
- 10.9. Appreciation and rewarding of judicial assistants
- 10.10. Different types of judicial assistants (personality etc.)

Remaining issues

- 11.1. Issues regarding the methodology of the research
- 11.2.1. Remaining – trust
- 11.2.2. Remaining – difference between judge and judicial assistant
- 11.2.3. Remaining – impact and influence
- 11.2.4. Remaining factors that might affect the involvement and impact of judicial assistants on judicial decision-making

Appendix 11 – Hierarchy of the Dutch courts



Appendix 12 – Overview of literature regarding heuristics, and cognitive and social biases in judicial decision-making[1]

Adjudication involves decision-making and when decisions are made people tend to rely on heuristics to a certain extent. Therein biases can also occur. As judicial assistants are regularly highly involved in the process of decision-making their participation can enhance or decrease the reliance on heuristics and occurrence of biases, and as such their involvement can affect the decision-making.

Although judges are specially selected and trained to make just judicial decisions, research demonstrates that in making judgments, judges in many respects perform similar to 'ordinary people' (see e.g. Guthrie et al., 2007; Ten Velden & De Dreu, 2012a). They tend to first evaluate ideas on the basis of intuition, which is an automatic, effortless and rapid process (also named system I) (Tversky & Kahneman, 1974). The great advantage of this system lies in the fact that this generates results quickly and, in general, the outcomes are decent. Therefore in ordinary life, this type of decision-making often suffices. However, the usage of heuristics (mental shortcuts to ease the decision-making) in this process can also result in errors. For decisions in which it is crucial to avoid errors – such as judicial decisions – a second, deliberative, process should take place in which judges monitor the intuitively derived judgment to determine whether it needs to be endorsed, corrected or overridden (system II). This process involves time, effort and the application of rules (Kahneman & Frederick, 2002; Tversky & Kahneman, 1974).

It turns out to be difficult to overcome an initial decision made via system I and to properly overrule them using system II thinking, also in judicial decision-making. Several biases may occur during the decision-making process. These cognitive biases have been associated with miscarriages of justice in various studies (see for some Dutch court cases: Derksen, 2006; Koppen, 2003; see also: Rassin, 2010, p. 154).

A common phenomenon that causes biases is 'anchoring' (Kahneman, 1992). This phenomenon suggests that people adjust their judgment to an initial value that serves as a reference point or anchor for the judgment (Tversky & Kahneman,

1. This section is partly based on the article "Considering the consequences of increased reliance on judicial assistants: A study on Dutch courts". *International Journal of the Legal Profession*, 20(1), 39-59, 2014.

1974). This initial value can be manifested in the manner by which a problem is stated or information is presented. As another strand of research is focused on the phenomenon of 'framing'. It reveals that the way in which a problem is framed influences the associated decision-making considerably (Tversky & Kahneman, 1981).[2] In judicial decisions, these values can, for example, be identified in the case briefs presented by an attorney or the prosecutor's office. In 1989 Schünemann and Bandilla (1989) revealed that, in an experimental setting, judges in criminal cases who had knowledge of case files before a hearing more frequently convicted defendants than judges with no prior knowledge. More recently, Guthrie, Rachlinski and Wistrich (2007) demonstrated that anchoring also occurs when judges are deciding on awarding compensatory damages (see Guthrie, Rachlinski, & Wistrich, 2001 p. 1286-1294; Wistrich, Guthrie, & Rachlinski, 2005 p. 778-793). Ten Velde and de Dreu (2012) studied anchoring in the Dutch context and found that the anchoring effect also occurred when Dutch criminal law judges were faced with different levels of charges of the prosecution officer (see for another study conducted in Germany: Englich et al., 2005).

Closely related to anchoring and framing is the phenomenon of 'confirmation bias', or tunnel vision (see Nickerson, 1998). This refers to the predisposition to look for evidence that confirms our presumptions, thereby causing one to overlook or underestimate evidence that contradicts these presumptions. These phenomena can occur in motivated or unmotivated forms. That is, biases can be motivated by a conscious or unconscious desire to defend one's beliefs, but they can also occur without such motivation (see Nickerson, 1998, p. 176; on motivated reasoning, see e.g. Kunda, 1990).

The aforementioned biases are primarily related to the individual decision-making process. Additional social biases can occur in relation to the fact that judicial decision-making is often a group activity (Cohen, 2002, p. 25; Martinek, 2010). These group-related biases are expected to be particularly manifested in court cases that are heard by a panel of judges. Nonetheless, similar mechanisms can also occur in a normal work environment. 'Groupthink', defined as 'a collective pattern of defensive avoidance' (I. L. Janis & Mann, 1977, 129), may occur. In this context the strong desire to meet consensus and avoid conflict might inhibit the quality of the actual decision-making. The quality of group decision-making can also be obstructed by conformity effects (Sunstein, 2003). Decision-makers are often concerned about their personal relations with other group members whilst making decisions which can inhibit optimal decision-making (De Dreu, Nijstad, & Van Knippenberg, 2008; Janis, 1982). The extent to which one conforms to the expectations of other group members is significantly related to the status or authority held by the group

2. See on this topic also a study by Monahan and Silver (2003) in which they present 26 judges with information in percentages or in a number out of a 100. The way in which it was presented affected the choices that the judges made. See for how the use of different words can even make a difference the work on framing in linguistics by Charles Fillmore and George Lakoff.

members (see e.g. Cialdini & Goldstein, 2004; Robbins & Judge, 2013, p. 319-321). People with a higher status also tend to have more influence on the decision-making than people with a lower status (Levine & Moreland, 1990, p. 600). A final problem that can occur is when group members do not all possess the same information. The group will then mainly discuss the shared information with the group, leaving the unshared information frequently unmentioned and thus unknown to the rest of the group (Lu et al., 2012; Strasser & Birchmeier, 2003). The likelihood of certain biases occurring in practice is related to various personality traits: such as a persons need for cognition and ones pro-self or prosocial motivation. Additionally there are various situation based drivers, such as time pressure and accountability to the process, that affect the likelihood of biases occurring (De Dreu et al., 2008; Ten Velden & De Dreu, 2012a).