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In the shadow of the judge

The involvement of judicial assistants in Dutch district courts

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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.