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In the shadow of the judge

The involvement of judicial assistants in Dutch district courts

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REFLECTIONS ON THE DUTCH JUDICIAL ASSISTANCE MODEL FROM AN INTER-JURISDICTIONAL PERSPECTIVE¹

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 law-makers; 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 (Bever, 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 (Bever, 2004, p. 9). In 2005, the enactment of two new legal acts⁹ 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. *Staffurist*.

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 positions¹⁶ 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 Judiciary²² 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*, *RechtspraakQ* 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.

Law²⁶ – 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 courts³⁴ 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/codeconductjudicialempleyees.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.

judges⁴² 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 16 Judicial 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 Lords⁵⁷ 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 (pupilage) 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 pupillage 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 law 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.