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### In the shadow of the judge

*The involvement of judicial assistants in Dutch district courts*

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## NORMATIVE VIEWPOINTS ON THE INVOLVEMENT OF JUDICIAL ASSISTANTS: THE RULE OF LAW VERSUS THE MANAGERIAL PERSPECTIVE

This chapter aims to determine the normative stances that can be taken when evaluating the values and risks of employing judicial assistants. It also explores how the principles and values related to these normative ideas are incorporated into the law and policy in Dutch courts. In order to accomplish this, this chapter introduces two perspectives which can help to better illuminate the organisation of the judiciary: the (classical) rule of law perspective and the (novel) managerial perspective. The first offers a classical legal theoretical perspective on adjudication, based on principles and values that were established during a century-long history, particularly shaped through theories founded during the period of enlightenment. The second perspective provides newer – somewhat more controversial – insights, largely from economic theory regarding organisations, which arose particularly in the second half of the 20<sup>th</sup> century as a response to a widely held belief that court organisation needed to better reflect the needs of modern society.

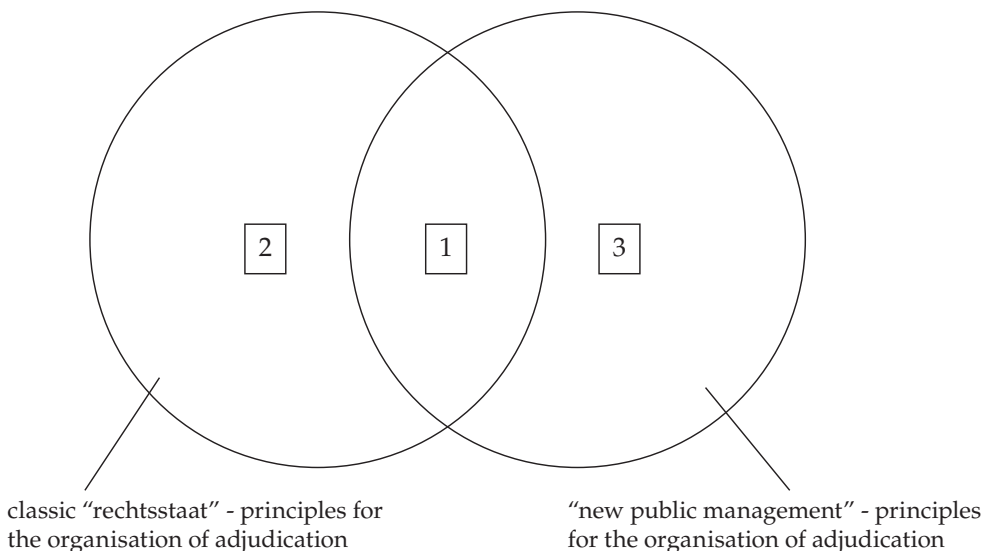
Both perspectives are present in the normative debate on how the judiciary should function. They also provide ideas regarding how the judiciary should be organised in order to best meet the connecting principles. The principles related to these perspectives have provided important guidance for the manner in which the Dutch judiciary is organised. Many provisions in Dutch law regarding the institutional establishment of the judicial process and the judiciary find their origins in the notion of the rule of law; managerial views on the judiciary can particularly be recognised in recent policy documents and projects of the Dutch Council for the Judiciary, as well as individual courts.

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

A development towards managerialism was also identified in jurisdictions outside the Netherlands prior to the research on the Dutch judiciary, for example, in the US by Resnik (1982) and Heydebrand and Seron (1990, p. 194-204) and in Australia by Freiberg (2005). It was also recognised in European jurisdictions such as England and Wales (Raine & Willson, 1995; Raine & Willson, 1997), France (Mak, 2008b) and Belgium (Vining, 1981).

The values and principles connected to the two perspectives are not incompatible but partly overlap and could mostly supplement or consolidate each other. Yet, regarding certain principles, tensions are palpable (see Mak, 2008b, chapter 3). This is clearly illustrated by Mak in the figure below.

**Figure 1**



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

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

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

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

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

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

While the scope of the debate regarding the desirability of managerialism of courts is much broader than the issue of the allocation of duties to subordinates, the two perspectives are presented in this chapter primarily for their relevance to the discussion on the collaboration between the judge and the judicial assistant.

The potential issues that can arise when managerialism is applied in a far-reaching manner are acknowledged. Yet, the motives for taking a more managerial approach to the judiciary are also acknowledged. This book embraces the idea that both perspectives can provide valuable parameters for shaping and evaluating the judiciary, thereby following other authors (Mak, 2008b, p. 95-101; Vining, 1981, p. 248) in their accountings that it is important to balance both perspectives and to incorporate safeguards to avoid the clashing of the values related to the perspectives.

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1. Published in *Trema*, February 2013.

2. 'The Netherlands' top judge warns of legal system overload'. February 4, 2013. See: [http://www.dutchnews.nl/news/archives/2013/02/the\\_netherlands\\_top\\_judge\\_warn.php#sthash.MdZugORQ.dpuf](http://www.dutchnews.nl/news/archives/2013/02/the_netherlands_top_judge_warn.php#sthash.MdZugORQ.dpuf)

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

#### 4.1 THE RULE OF LAW PERSPECTIVE ON THE JUDICIARY<sup>3</sup>

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

##### 4.1.1 *The notion of rule of law*

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

3. This section is partly based on the article “Considering the consequences of increased reliance on judicial assistants: A study on Dutch courts”. *International Journal of the Legal Profession*, 20(1), 39-59, 2014.

4. This view is particularly leading in civil law jurisdictions.

5. This results in the notion of the *rechtsstaat* – developed under the civil law doctrine with written constitutions – being slightly closer linked to constitutionalism, whereas rule of law focuses more on legal procedure (Chesterman, 2008, p. 336–338).

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

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

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

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6. Although the Dutch judiciary is one which is developed under the *rechtsstaat* principle, this book uses the term *rule of law*. Most literature regarding the conceptualisation is developed by reference to the rule of law, which is frequently used as the English term to translate the concept of the *rechtsstaat* in international treaties. Therefore, and for reasons of coherence, the term rule of law will be used.

7. In fact, according to Raz, 1979, chapter 11, any non-democratic legal system based on the denial of substantial human rights can fall under this definition.

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

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

#### 4.1.2 *Rule of law principles incorporated into the Dutch judicial organisation*

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

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

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

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

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

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

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

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8. Even though a questionable issue is whether this provision offers sufficient protection, given that the *Judiciary Organisation Act* also assigned the Minister and the Council for the Judiciary wide-ranging tasks in the management of courts. See Bovend'Eert, 2008, p. 26–27.

9. Which effectively means that they can administer justice until they are 70 years old (Article 46h of the *Judicial Officers Legal Status Act*).

10. Each court has its own protocol for this. An example of the most common protocol can be found in the recommended protocol: Aanbeveling wrakingsprotocol gerechtshoven en rechtbanken (2006). For removal, the judge must pass subjectivity and objectivity tests in accordance with the case law of the ECHR. See ECHR, *Daktarasvs. Lithuania*, 2000, paragraph 30.



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

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

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

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11. See also Aanbeveling wrakingsprotocol gerechtshoven en rechtbanken (2006), p. 2.

12. See Hof Arnhem, 6 July 2010, ECLI:NL:GHARN2010BN1679, Court of Alkmaar, 22 July 2010, ECLI:RBALK:2010:BN4880.

13. ECHR, 22 June 2011, *Bellizzi v. Malta*, 46575/09.

14. See also EHCR 13 October 2009, *Huhtanen v. Finland*, no. 44946/05.

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

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

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

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

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

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15. Such as the incorporation of several small black knots on the judicial robes and a difference in material of the sleeve cuffs.

16. To make it even more complicated, the prosecution officer (in criminal cases) will usually also sit behind this table (or sometimes a different table placed against it) which is located at the same level but usually rotated one-quarter.

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

*Enhancing rule of law principles via selection, training and setting professional standards*

The concept of the rule of law also requires judges (and other law officials) to be knowledgeable and competent in applying the law. Furthermore, when – as in the Dutch rechtsstaat – it is believed that the judiciary is not only bound by formal legality but also to an idea of the morality or justice of the legal system, this requires some additional virtues of the judge (see e.g. Solum, 1990). In addition to legal knowledge, judges, who are appointed with the special responsibility of making judicial decisions in concrete cases, should also possess certain character traits or virtues which make them suitable for adjudication. The virtues required can inter alia be found in legislation, judicial oaths and – most importantly – codes of conduct. Among these are virtues such as wisdom, uprightness, competence, integrity, courage and decisiveness.<sup>17</sup>

In the Netherlands, there are two separate codes of conduct for the judiciary (see Van Emmerik, Loof, & Schuurmans, 2014). Both were developed quite recently. One was developed in 2010 by the Dutch Council for the Judiciary; this code is applicable to all officers working within the judiciary. The other was established in 2011 by the Dutch Association for the Judiciary (the professional association for judges and prosecutors); this code applies only to judges and prosecutors. Apparently, it was deemed necessary to develop a code specifically for judges and prosecutors, even though the values stated in both codes are fairly similar. Both codes emphasise the earlier-mentioned independence and impartiality of the judicial officers. The code of conduct for judges also mentions autonomy of the judges/prosecutors as one of the core values. The fact that this value is only present in the code of conduct for judges is consistent with the idea of the judge as the personification of the judiciary.<sup>18</sup> Both codes also specify certain (personal) qualities that a judicial officer or judge should possess. The code of the Council for the Judiciary upholds the values of uprightness and diligence, while the code for judges and prosecutors speaks of the values of diligence, competence and integrity. These values are closely related to those included in other codes of conduct, such as the internationally recognised Bangalore Principles of Judicial Conduct (Mak & Ayirir, 2011).

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

18. This value is, in this capacity, not found in many codes of conduct of other judiciaries.

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

#### *Selection and training*

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

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

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

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

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

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20. The previous program for recent graduates included an obligatory two-year internship outside of the judiciary. This requirement is abandoned in the new program. Instead, it is shortened by a minimum of two years. See Roos & Van Amelsfort-Van der Kam, 2012.

21. The function profile of the judge and assistant are published on the website of the Judicial organization, [www.rechtspraak.nl](http://www.rechtspraak.nl).

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

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

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

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

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22. The function is scaled officially as one for students with higher education, though not necessarily meaning university (*Hoger Beroeps Onderwijs*).

23. The precise procedure for hiring judicial assistants varies across courts and sections of the courts.

24. At the Supreme Court and the specialised Courts of Appeal in administrative cases, this is a different story; see sections 3.1.2 and 3.1.3.

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

#### *Professional associations*

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

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

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

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

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

#### 4.2 THE MANAGERIAL PERSPECTIVE ON THE JUDICIARY

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

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

##### 4.2.1 *Managerial concepts regarding court organisation*

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



viewpoint (Hood, 1991, p. 5). These theories underscore the idea that it can be beneficial to use economic assumptions in improving public settings.

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

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

Among other aspects, Raine and Wilson recognise more judicial powers being delegated to Magistrates' clerks. An increased focus on accountability, effectiveness and productivity in court systems has also recently been distinguished in various European civil law judiciaries (Bell, 2006, p. 7; Kirat, 2010; Mak, 2008a; Vigour, 2009).

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

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

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

#### *Principal-agent theory*

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

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

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

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

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

#### 4.2.2 *Managerialism in court practice in the Netherlands*

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

From the seventies onwards, several committees and auditing bodies have evaluated and criticised the Dutch judiciary. Their reports displayed similar criticisms as were expressed in many other countries, describing the judiciary as fragmented, non-transparent and inefficient (Brommet, 2002). This resulted in a search for new, more economically oriented ways to organise the courts. This occurred particularly with the enactment of two new laws, the Dutch Judiciary Organisation and Management Act (*Wet Organisatie en Bestuur Gerechten*) and the Act on the Council for the Judiciary (*Wet Raad voor de Rechtspraak*), that modified the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*) in 2001.

These laws introduced an integrated management structure to the Dutch courts, which purpose is to improve the speed, accessibility, openness and legal uniformity (among other aspects).<sup>28</sup> Each court now has one executive board responsible for the administration and management of the court.<sup>29</sup> The Acts also formed the basis for the creation of an overarching Council for the Judiciary. This matches a

28. See Memorie van Toelichting Wet Organisatie en Bestuur Gerechten, TKII 27181, nr. 3, vergaderjaar 1999–2000, Kamerstukken 27181, nr. 3.

29. Since 2013, membership of this board became a full-time occupation.

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

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

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

#### *Efficiency, effectiveness and productivity*

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

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

case at the same court, a judge is expected to spend 387 minutes and the assistant 983.<sup>31</sup>

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

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

A different way in which the efficiency and effectiveness of courts could be improved is by specialisation (see also Abram et al., 2011, p. 20). Creating more specialised courts and court divisions was in fact one of the main reasons for consolidating some of the courts. In the past, the accessibility of the courts was an important reason to require generalist courts. Presently, because people are more mobile and communication techniques are improved, it seems that this could also be satisfied concurrently with having fewer, more specialised, courts.<sup>34</sup>

Although specialisation seems to be gaining some ground over generalisation recently, it is still largely court policy to have generalist judges. Judges are trained to be able to adjudicate in at least two fields of law, and they are required to circulate between different divisions of courts every four to six years. This safeguards their impartiality and assures that judges review cases with a fresh pair of eyes.

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31. In civil cases, the numbers differ substantially per type of case. Family law cases reveal a similar allocation as described above. Tax law is one of the few areas in which the judge is compensated for more time. See *lamicie*-model 2005, attachment to Van der Torre, et al., 2007.

32. Another part of the process in which the involvement of judicial assistants seems to have increased is the pre-hearing phase (see section 5.1).

33. Given that the cases are often trivial, and, therefore a summary might not add much value.

34. See *Memorie van Toelichting Wet Herziening Gerechtelijke Kaart*, TKII 32891, nr. 3 vergaderjaar 2010–2011.

However, it can also result in losing valuable knowledge. For that reason, some judges are excluded from obligatory circulation.<sup>35</sup>

It is interesting that, in contrast to judges, judicial assistants are not required to circulate. A possibility of changing divisions is increasingly offered by courts as a development opportunity for assistants. Still, the majority of assistants do not circulate and are regularly employed at one court division for long periods of time.

Achieving specialisation and preserving knowledge can, thus, not only be realised by creating specialised judges, but also by transforming judicial assistants into experts and having the assistants function as advisors. At district courts, this is particularly the case for staff lawyers who are commonly specifically employed to be highly qualified advisors in specific fields of law (section 3.1.2; see more in section 7.1.3). Another court in which this approach is executed in a far-reaching manner is the Administrative Law division of the Council of State, the highest general court of appeal in administrative law cases. As mentioned in section 3.1.1, at the Council, the judicial assistants are highly specialised, while the judges are truly generalists.

When judicial assistants are intentionally the persons with the most specialised knowledge, it is questionable from a managerial perspective whether this allows judges to properly control and monitor the work of the assistants (see the previous section on principal-agent theory).

#### *Transparency and focus on 'clients' and the public*

Yet another aspiration of the Dutch judicial organisation has been to be more accountable and accessible to the general public and to pay more attention to the needs of society. These aims are frequently mentioned in various policy documents (Raad voor de Rechtspraak, 2006; Raad voor de Rechtspraak, 2010a; Raad voor de Rechtspraak, 2010b). In achieving this aim, an increasingly important driver is the explanation and clarification of judicial decisions within written judgments, as well as in the media.

At the beginning of the 21st century, a pilot programme started called *Promis* at several criminal law divisions of district and appellate courts to improve the intelligibility of judgments. At the same time, an obligation to include further reasoning in judicial decisions (under certain circumstances) was added to the Code of Criminal Procedure (*Wetboek van Strafvordering*). In addition to achieving more credibility and understanding of judicial decisions, *Promis* judgments also function as an extra mechanism to monitor the deliberations (Sterk & Ficq, 2008). The programme was a success and has been extended to all other criminal courts (see De Groot-van Leeuwen, Laemers, & Sportel, 2015; De Rechtspraak, 2006; De Rechtspraak, 2008). Currently, courts are expected to write 50 percent of all panel judgments in *Promis*

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

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

Special attention of courts is also being given to the 'clients' of the judicial organisation: litigants and their representatives. For example, an extensive program, *Kwaliteit en Innovatie*, shortened to KEI, has been set up which concerns the entire judiciary. The program intends to make it easier for litigants to start judicial proceedings. This will primarily be achieved by digitalising the procedure to file a case, which currently still occurs on paper. This process of digitalisation is expected to be finished in 2020.<sup>37</sup> The first courts are already working with digital files. This especially affects the work of judicial (and administrative) assistants, who are the most involved in the procedural aspects of courts.

Another example of a project that focuses on the needs of litigants occurs in the administrative law divisions of the district courts: the *Nieuwe Zaaksbehandeling* project. The project is intended to bring about a considerable change in the way that administrative law cases are handled by providing a faster procedure that focuses on the core of the conflicts and offers tailor-made and final solutions (see Marseille, 2007; Verburg, 2013). This new approach of handling court cases is partly based on Tyler's (1988) idea of procedural justice (Verburg, 2013, p. 21).<sup>38</sup> At first sight, it appears that this new method requires several changes to be made in the approach of the judge in handling cases. In order to discover and resolve the core of the conflict (often not exclusively a legal matter), the judge has to employ a more active approach. Broadening the span of the procedure to underlying (perhaps non-legal) issues, however, brings along increased risks regarding the (perceived) impartiality of judges. In this context, the judicial assistant, who frequently has contact with litigants on behalf of the court, can function as a buffer between the judge and the parties (see more in section 5.2.6). This function can be of extra importance when dealing with a judge who is more active during the procedure.

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36. This percentage was met by the district courts, where 69 percent of cases were written in Promis style; the Courts of Appeal are slightly behind with 44 percent of Promis judgments. These numbers have been rising over the past three years. See Rechtspraak, 2015.

37. See on KEI, e.g.: <http://www.rijksoverheid.nl/onderwerpen/rechtspraak-en-geschiedenis/vernieuwing-in-de-rechtspraak/programma-kwaliteit-en-innovatie-rechtspraak-kei>, visited 11-05-2015.

38. Which assumes that the fairness of the procedure is more important for people's acceptance of a court decision than the actual outcome of the procedure.

#### 4.3 A THEORETICAL ASSESSMENT OF DIFFERENT TYPES OF INVOLVEMENT OF JUDICIAL ASSISTANTS

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

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

##### *Administrative and/or secretarial involvement*

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

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39. See also Mak, 2008, p. 44–49 on this issue.

40. Meaning that these are abstract or ‘pure’ constructions of extremes, used as methodological devices to analyse reality. These are not *ideals* in the normative sense of the word. Weber, 1988 [1922], p. 191.



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

*Advisory and/or discussion-related involvement*

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

4.3.1 *Rule of law evaluation*

The fact that judges are appointed with the special duty of administering justice has resulted in them enjoying several unique safeguards to assure their independence, impartiality, integrity and competence. The process of being appointed as a judge is extensive and thorough, and, when judges are appointed, legal provisions such as lifelong appointment ensure their independent position. These provisions justify why they are entrusted by society with the responsibility to adjudicate. Under the current circumstances, this means that the involvement in adjudicational duties of those other than judges, such as judicial assistants, who are not surrounded with the comparable safeguards, may be regarded as inappropriate or at least problematic. Consequently, at first glance, the rule of law perspective leaves relatively little room for the involvement of judicial assistants in adjudication.

However, it can be argued that the rule of law perspective does not reject *all* involvement of judicial assistants in adjudication. As long as the actual decisions are made by judges, employing assistants is actually not problematic. Accordingly, with respect to the rule of law, assistants that perform administrative and secretarial duties are permissible. This also clarifies why the duty of creating the court record has been part of the duties of Dutch judicial assistants since long before managerial values started to be an issue.<sup>41</sup>

Conversely, when assistants perform advisory and discussion-related duties, this is considered more problematic from a rule of law perspective. Judicial assistants are then performing duties in relation to the content of the judicial decision-making,

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

which potentially results in entities other than judges influencing the process and content of adjudication. When the public becomes aware of this situation, this can also harm the authority of the judge and the legitimacy of the judiciary.

This does not mean that – from a rule of law point of view – this advisory and discussion-related involvement should under all conditions be avoided. A flexible interpretation of the rule of law perspective implies that the acceptability of certain advisory or discussion-related duties depends on the circumstances in which the duties are performed. It depends on the degree to which the assistants are involved in performing the duties *and* the type of measures which are in place to safeguard the judicial assistants' independence, impartiality, integrity and competence. When judicial assistants are surrounded with stronger safeguards regarding the aforementioned values, this authorises them to have a greater involvement in the content of the decision-making.

This chapter demonstrates that currently, judicial assistants also enjoy various provisions that enhance rule of law values. However, the safeguards applicable to assistants are, in various respects, still more limited than those applicable to judges. This means, in theory, that when assistants are performing significant advisory and discussion-related duties, a potential conflict is present with the rule of law perspective. Whether a problem exists in reality depends on the degree to which the Dutch judicial assistants are actually involved in playing such a role.

This potential problem is furthermore not insoluble. If judicial assistants obtained more training, were selected in a different manner and were surrounded by more institutional safeguards, further involvement of judicial assistants would be conceivable. This does raise the question of what would actually differentiate the assistants from judges. Moreover, it brings up some issues from a managerial perspective (see next section).

#### 4.3.2 *Managerial evaluation*

The managerial perspective sets partly different standards for adjudication than the rule of law perspective, although these values also arise from certain public demands and are related to the legitimacy of the judiciary (Mak, 2008b, p. 44-45). Society demands that adjudication occurs in due time and in an effective manner without imposing any disproportionate pressure on government budgets. Especially in achieving more efficiency and cost-effectiveness, judicial assistants can play a key role.

From a managerial perspective, the added value of judicial assistants is most evident when it concerns administrative and secretarial duties. When lower-qualified – and consequently less compensated – assistants perform many of the more trivial duties, judges are able to spend their valuable time on the duties that are indispensable to their function. This reduces the costs of administering justice, which is particularly important since judiciaries have to increasingly cope with limited

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

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

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

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

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

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