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In the shadow of the judge

The involvement of judicial assistants in Dutch district courts

Holvast, N.L.

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

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

5.1 THE RUN UP TO THE HEARING

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

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

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

5.1.1 *Deciding if, when and how to adjudicate a case*

In criminal procedures, the prosecution office is the body that decides which cases are prosecuted.² When the prosecution office decides that a case should go to court, the office will schedule a hearing and estimate the time needed for hearing the case. In accordance with guidelines agreed upon with the courts, the office will appoint cases for hearing by a single-judge (referred to in first instance criminal cases as the ‘police-judge’) or a panel of three judges.

In more serious cases, an examining judge will be involved to lead the pre-hearing investigations and interrogate witnesses. These examining judges are also assisted by judicial assistants. The prosecution office employs assistants as well. Both types of assistants have many duties which are similar to those of the judicial assistants studied for this research (for more information about the involvement of judicial assistants at the prosecution office, see Lindeman, 2017). Several of the results of this research will therefore most likely also be relevant in relation to these assistants.³

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

2. The office also has a special power to settle certain cases without involvement of the court.

3. It goes beyond the scope of the research to include an in-depth analysis regarding these assistants.

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

5.1.2 *Judgments without a hearing*

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

It is interesting to note that judgments without a hearing progress almost entirely outside the scope of the judge. An administrative assistant commonly sends the case to the junior assistant without consulting a judge, and this assistant will normally also continue to write the judgment without discussing the merits of the case with a judge. Only when they doubt what the judgment should be will a judge be contacted. The judge still has the formal and final authority to decide these cases; all decisions must be signed off by the judge. Before signing, the judge decides whether he or she approves of the judgment or if it needs to be adjusted. Thus, regarding these 'simple' cases, the concerns of scholars such as Kronman (1993) and Posner (2008) and, in the Netherlands, Hol (2001) and Buruma⁵, about judges turning into 'editors' or officials who only assess the work prepared by others (see section 1.2) seem to be affirmed. A different question is whether this 'editing role'

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

5. HR 8 September 2009, NJ 2010, 391., m.nt. Buruma.

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

5.1.3 *Allotment of cases*

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

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

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

6. See also Langbroek & Fabri, 2007.

7. Not too complex cases but challenging enough to progress in learning.

8. See <https://www.rechtspraak.nl/SiteCollectionDocuments/20160220-professionele-standaarden.pdf>.

9. All quotations are translated from Dutch into English. A list of the original Dutch text of the quotations can be provided by the author on request.

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

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

In the past, the most senior (presiding) judge would act as the chair for all cases, but currently, the chairing-duty is commonly distributed among the judges of a panel (typically with the exception of deputy judges). The presiding judge¹⁰ divides the cases among the judges. This is an interesting development which seems to have been instigated to divide the workload more equally. Yet, it is also an indication of courts becoming less hierarchically orientated (see Holvast & Doornbos, 2015, p. 58-59).¹¹

5.1.4 Preparing the memo and structuring the files

When the cases and judicial officers are assigned to a hearing, the actual adjudication process begins. In the Dutch system, this phase of the process is especially important because – unlike in common law systems, where the hearing is the central place to present the arguments and evidence – the case files hold all the relevant legal information (Damaska, 1986; Shapiro, 1981; see also chapter 3). In administrative law, the focus on the information in the case files arises from the fact that the judicial proceedings are in fact a review of an earlier decision (including the documentation therefore) by a government agency. In criminal law, the proceedings also largely focus on the information in the case files, since a landmark ruling¹² by the Supreme Court in 1926 permitted hearsay statements to function as evidence in criminal proceedings.¹³ The files of both fields of law frequently

10. The presiding judge is normally a senior judge, who sometimes followed a special presiding course.

11. The execution of this habit appears to differ slightly between courts and court divisions. In some court divisions, the presiding judge still has a leading role, e.g. remains seated in the middle seat during the hearing and also takes the lead in deliberation. In other court divisions, the chairing judge performs all these duties.

12. The *de Auditu* ruling, HR 20 December 1926, NJ 1927.

13. The hearings currently consist of a formal repetition and discussion of the material collected during the preliminary investigations by the police and/or an examining judge; see Garé, 1994, p. 103.

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

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

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

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

Arranging the files

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

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

14. In criminal proceedings, these are, for instance, statements by the accused, witnesses and experts and reports of investigations by the police. In administrative law, the case files present the information on which the decision of the government agency was based, which can also be a large quantity of materials.

15. Except for cases which are not prepared by an assistant.

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

Format of the memo

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

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

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

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

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

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

Of the 65 analysed memos in the sample, 22 were written as draft judgments.¹⁷ Most of these memos were not completed drafts but had some blank segments which were supplemented with small memo-style sections. About two thirds of the draft judgments already included a suggested judgment.

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

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

17. Four of these draft judgments were written for special types of criminal cases. The rest were all drafted at the administrative law division.

18. See Verburg & Schueler, 2014.

ted in the files, the criminal record of the accused, personal circumstances (including possible psychological reports written on the accused) and a section to include the orientation points for sentencing. These memos are usually largely written in a neutral, descriptive style.

In one of the criminal court divisions, the memo is referred to as the 'evidence overview'. Here, the memo primarily focuses on the incriminating evidence. The form does not include a specific section to record possible exculpatory evidence. In both courts, the memo does include a section where the assistant can add an analysis of the case and/or report remarkable aspects of the case. The focus on incriminating evidence and the absence of room to report exculpatory evidence cause a risk of presenting the judge with a memo that is one-sided and primarily designed to reach a conviction (see also section 5.1.7).

Including extra material

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

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

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

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

In criminal law, it is a rare exception for assistants to include information apart from the applicable ‘orientation points for sentencing’. These orientation points are agreements established by judges all over the country¹⁹ that list suggested sentences for various offences which can be consulted when establishing a sentence.

The Dutch Criminal Code is more compact than the administrative regulations, and it is more widely assumed that criminal judges are familiar with the relevant case law. Some respondents even hint at it being considered inappropriate to include case law, as that would suggest that the judge’s legal knowledge is not up to standard. In three criminal cases that were followed, it was observed that the judicial assistants had found case law but did not include it in the memo. In two of these instances, the assistants did mention this case law during the deliberation sessions.

When judges are confronted with a novel legal question, they occasionally also ask a judicial assistant or a staff lawyer to write a specific memo regarding this issue. During one of the attended hearings, an exceptional procedural situation occurred that made it necessary to adjourn the hearing. The presiding judge then contacted a staff lawyer and asked the staff lawyer to write a memo listing relevant (case) law and, based on the case law, to provide advice for how to deal with the situation.

Revealing the vision of the judicial assistant

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

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

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

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

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

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

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

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

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

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

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

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

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

Usage of the memo by the judge

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

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

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

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

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

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

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

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

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

In accordance with this, none of the interviewed judges reported doing this themselves, although some said they were acquainted with other judges who do it.²¹ During the research, one situation was observed in which a judge in a panel admitted, during deliberations, that she had only read the memo. Colleagues of this judge later responded disapproving of this course of events. In another instance (hearing 19), a judge on a panel had become ill at the last moment. The replacement judge, who was only found the day before, also had only read the memos. This meant that this judge participated in deliberations without having read the files.

There are also several judges who experience difficulties in relying on memos due to the lack of trust they have in the quality of judicial assistants' work. Various judges report checking almost all the information written in the memo in the files, a practice also observed by Van Oorschot (2014, p. 440, 444). Others simply do not pay much attention to the memo.

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

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

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

The manner in which the memo is used also differs from judge to judge. Several judges (e.g. resp. 41) say they use the memo as a roadmap: *'I use it as a sort of roadmap. Like, hey, what did this person extract from it? And what do I add to this myself?'*

This is similar to how judges in other judiciaries describe using the memo (Cohen, 2003, p. 91–93). These judges commonly first read the memo to get an idea of what the case is about, and then they read the files. This enhances the likelihood of the judges being (unintentionally) influenced by the memo. Studies on heuristics and cognitive biases in (judicial) decision-making have revealed that the decisions that judges make are effected by the manner in which the information is presented to them (Englich, Mussweiler, & Strack, 2005; Guthrie et al., 2007; Ten Velden & Dreu, 2012). Thus, when the information from the files is presented by the judicial assistant in a certain layout, this can affect the way in which the judge evaluates this information. The so-called *anchoring effect* can occur. This occurs when people, in this case judges, adjust their judgments unconsciously to an initial value which is presented to them, which serves as a reference point or anchor for the judgment (Tversky & Kahneman, 1974). A few judges claim to be aware of the fact that they are presented with a selective, and perhaps coloured, summary of the information from the case files. They consciously choose to read the files first and use the memo as a device to check their own findings.

Some judges also employ the memo primarily as a vehicle for discussion (a function also noticed in other jurisdictions; see section 3.2). These judges believe the analysis of the merits of the case by judicial assistants to be the most important aspect of a memo:

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

This aspect appears to be especially important when judges are singly hearing cases.

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

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

5.1.5 Communication and deliberation prior to the hearing

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

At these consultations, the judge or judges meet with the assistant to discuss what type of memo they desire and what information should be included. In theory, this would result in both parties briefly exploring the case files a few weeks before the hearing and then meeting to discuss the desired content and the preferred type of memo (if a memo is needed at all). In practice, a majority of the judges do not read the files before the consultation. Every so often, no consultation takes place at all. This especially occurred at one of the courts, where, in the six observed administrative law hearings, only one official pre-hearing meeting took place. In the other court, meetings were held for all seven followed hearings.²³ Various judges appear to greatly value their professional autonomy and embrace the idea that they should be able to decide for themselves what their preferred working method is (see also Frissen et al., 2014). Even so, time constraints occasionally prevent the consultations from taking place.

The pre-hearing consultations that were held typically lasted 20 to 40 minutes (to prepare for an up-coming hearing at which three to four cases were scheduled). Usually, the content of the cases was already a point of discussion during these consultations, also because this affects the preferred type of memo. Case law and previously handled cases by the court were frequently discussed during these meetings as well.

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

22. This is a nationwide initiative introduced with the new policy of *Nieuwe Zaaksbehandeling*.

23. This high number could partly be the result of the presence of a researcher. In both divisions, respondents mention consultations not always taking place.

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

This asymmetry is probably strongest at this stage in the process, because judges usually start preparing for the hearing at a later stage than judicial assistants.

At the criminal law divisions, no pre-hearing consultations are held (with the exception of very large cases). That does not mean that no contact between judges and assistants is made. For example, bringing the files and memos to the judges' offices regularly offers the assistants and judges the opportunity to have brief conversations about the cases.²⁴ Judges, some more than others, also occasionally drop by the offices of assistants to converse about cases.

Still, on average, the contact between judges and assistants at this stage is rather minimal (see also Abram et al., 2011, p. 11). During the fieldwork, I shared a room with various assistants, a staff lawyer and a judge. The vast majority of days would go by without anyone coming in to discuss a legal matter. It appeared, and this was confirmed in several interviews, that the interaction in the criminal law divisions is less than in the administrative law divisions. In addition to the principle of immediacy, which may restrict elaborate discussions of cases before the hearings, this is – according to various respondents – also related to the workload at the criminal law divisions. The workload in the criminal law divisions is widely acknowledged to be particularly high (see Fruytier et al., 2013; Van Duijneveldt, Wijga, & Van Reisen, 2017). A judge explains: *'I always try to do it [have a consultation]. But, for instance, for my last two hearings, I didn't make it. Just because I lacked the time. So that is a pity.'* (resp. 60)

5.1.6 *Contact with the parties*

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

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

Acting as a buffer

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

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

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

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

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

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

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

Own initiative or not

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

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

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

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

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

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

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

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

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

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

5.2 THE HEARING

In criminal and administrative law, almost all cases are decided after a hearing has been held. This is quite different from civil law, in which a substantial portion of the cases are decided without hearings. To understand what occurs during a hearing, 27 hearings were observed. Thereby, not only were the official hearings in court studied, but also the preparation for the hearings and the breaks and adjournments. The hearings were also a topic in the interviews (see more on the research method in section 2.2).

In comparison to the other phases of the adjudicative process, the involvement of judicial assistants at the hearing is minimal. As one assistant (resp. 23) comments: *'It is sometimes a bit strange because you don't say a word, you just sit there.'* The main duty of assistants is to create a record of the hearing.

5.2.1 *Role of the memo during the hearing*

In section 5.1, the importance of the memo in preparation for the hearing was elucidated. However, this memo can also serve a purpose during the hearing. Several judges were observed using the memo as guidance for chairing the hearing and for questioning the accused or litigants. This function of the memo is also included in the professional standards (published in 2016) which criminal law judges recently set for themselves.²⁶ This was particularly noticed when observing from behind the bench (instead of in the audience) during seven criminal hearings in one of the courts (see section 2.2.2). The judges who use the memos for chairing the hearings explain that they prefer using the memos instead of browsing through the case files, as the latter may disrupt the interaction with the parties. One judge (resp. 16) mentions trying to chair a hearing by memory. This judge normally makes personal notes in order to do so, but when a case is too extensive, the judge uses the memo.

Although most judicial assistants create the memos predominantly as means to prepare for the hearings, some judicial assistants also consider their relevance during the hearings. One assistant even names this as the primary function of the memo: *'It is called 'evidence overview', but it was also called 'guidance for the hearing' by some. I think it is a rather vague thing. I mainly use it as guidance for the hearing.'* (resp. 39)

For this purpose, it is very important that the memo provides a correct summary of the information included in the case files.

Some judicial assistants in the administrative law division also include questions in their memos regarding components of the files which require further clarification

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

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

5.2.2 *Creating the record and other administrative duties*

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

The fact that the duty to create the record is specifically assigned to the judicial assistant generates a clear division of duties during the hearing: the judge(s) is/are chairing the hearing and interact(s) with the parties; the assistant at the same time sits hidden behind the computer²⁹ and creates the court record. This division of duties seems to fit well with the traditional rule of law ideal, in which emphasis is on the judge as the one who is entrusted with the responsibility to adjudicate (see section 4.1).

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

27. For criminal law: Art. 24 of the Dutch Code of Criminal Proceedings; for administrative law: Art. 8:61 of the Dutch Administrative Law Act.

28. See Supreme Court case HR 22 November 2005, LJN AU1993, NJ 2006/219 with note from Schalken.

29. Although a few assistants still make notes on paper.

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

5.2.3 *Involvement of assistants during the hearing*

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

However, in some instances, assistants did take part more actively in the hearings and the decisions that were made. An example of such participation was at hearing nr. 23, during which a judge asked an assistant for advice. The issue the judge was concerned about was that one of the parties had announced that she regretted being self-represented. The presiding judge wondered whether to adjourn to afford the party with the opportunity to contact a lawyer. Via a note, which the judge subtly passed to the judicial assistant, the judge asked the assistant's opinion on the matter. This was the only hearing during which such a practice was observed.

A different way in which a judge can consult the assistant is by adjourning the hearing for a brief period of time. This affords a judge time to reflect on certain matters, but an adjournment can also be used to discuss the issue at hand with the assistant (see more on adjournments in section 5.2.5).

Guarding the procedural requirements

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

30. They need this signature in order to receive compensation for the translation.

31. This also occurred several times during the hearings of this judge that I attended.

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

Most assistants confirm that they pay attention to these aspects and occasionally interrupt when they find it necessary. Most assistants consider this as part of their duties. Most judges perceive it as a positive contribution.

When a judge appears to overlook a procedural requirement, it is, however, regarded as inappropriate for an assistant to correct this by speaking out loud. This interferes with the notion that the judge chairs the hearing. A more suitable way to draw attention to these judicial omissions is to whisper or to discretely pass a note to the judge. At three of the studied hearings, such an interruption was observed. However, a hearing was also observed at which the judge overlooked procedural protocols several times, and the judicial assistant at this hearing did not correct the judge. Instead, the prosecution officer commented on it.

This last incident appears to be a manifestation of something which is pointed out in several interviews too: certain assistants are timid and reluctant to interrupt hearings. Various judges are under the impression that a large share of the assistants are not that keen to be (further) involved in the hearing.

Providing judicial assistants with the opportunity to ask questions

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

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

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

Another judge declares:

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

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

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

A criminal law assistant expresses a similar feeling:

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

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

However, administrative law judges also mention that when they provide judicial assistants with the opportunity to ask questions, most assistants do not actually ask questions. This seems to affirm the abovementioned reluctance of some assistants to speak during the hearings. Some assistants point to it fitting their timid personality to function mainly in the background. Another assistant's response was the following: *'Very occasionally a judge asks, 'Do you have anything to ask?' It would, of course, be a vote of no confidence if I then would go and ask all kinds of questions.'* (resp. 51)

This quote reveals the ambiguity which is frequently present in the relationship between assistants and judges. Several other assistants disclose similar views. Thus, the reason for not asking any questions is also related to a prevailing idea among assistants that most judges would not, in fact, appreciate their contribution.

Appearance of the assistant to the parties

Judicial assistants sit alongside the judge(s) behind the bench, and they wear similar looking robes (see section 4.1.2). This could potentially give the impression of equality in the authority of both officers. The research reveals that, in reality, judicial assistants actually make very diverse impressions during the hearing.

Some assistants sit completely hidden behind their computer screen and hardly look up. During hearing nr. 6, one of the hearings which was observed from behind the bench, the assistant was checking her email repeatedly. She was not paying attention to what was going on in court, and she came across as uninvolved.

Other assistants come across as much more interested in what happens during the hearings: they look at the parties when they are making an argument and nod their heads every now and again. On two occasions, different assistants who made notes on paper and not via the computer were invited by a single-judge to take a seat on one of the judge chairs. That way, the assistants did not have a computer screen blocking their views. This resulted in an image which, to a non-professional, would not evidently show who was the judge and who was not. In some courtrooms, possible confusion is taken away by having signs that indicate to the audience who sits where. Still, this image sends an entirely different message to the parties about the role and involvement of the assistant.

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

5.2.4 *Providing feedback on the judge's approach*

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

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

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

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

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

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

5.2.5 *Adjournments of cases and making interim-decisions*

Particularly in criminal cases, judges are frequently required to make preliminary decisions during the hearings. For instance, a representative can ask for permission to provide additional evidence at the last moment, or he or she can request for the adjournment of the hearing to a future date. Another possibility is that an accused currently in custody can request to be released in anticipation of the prospective sentence. When these issues are raised, the judge has to immediately reach a decision.

Judges of a judicial panel will, in that instance, adjourn the case to deliberate about the legal issue in private. This deliberation normally resembles the deliberation that takes place after the hearing (see more in section 5.4), although it commonly takes less time.

For this research, it is particularly relevant to note what occurs when such issues are raised at single-judge hearings. In those instances, it is also common for the judges to adjourn the hearings. This provides the judges some time to reflect on the requests. Additionally, it also provides an opportunity to discuss the issue with the judicial assistants. For similar reasons, single criminal law judges, who normally reach their verdicts immediately after the hearings, on occasion will also adjourn before rendering their judgments at the end of the hearings.

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

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

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

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

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

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

5.2.6 *Informal discussion on the day of the hearing*

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

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

jokes at the judges' expense.³³ This open atmosphere also presumably encourages judicial assistants to be frank when it involves content-related issues.

A lot of discussion and deliberation about cases also occurs during the day of the hearing. Judges regularly have already gotten familiar with the judicial assistants' ideas via the memos, and several judges appear to take pleasure in discussing cases with the assistants. Judges regularly discuss cases because they value the opinion of assistants, but they also do it because they are under the impression that the assistants enjoy it. One judge who is particularly chatty and keen on discussing legal and non-legal issues with assistants, remarks about this:

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

How much of a case a judge will actually discuss with an assistant depends on the qualities the judge attributes to certain assistants and, to a greater extent, on the judge's impression of whether the assistant is interested in having a discussion. Several judges emphasise that they recognise that it must be much more interesting for assistants to be involved in the adjudicative process. These judges have difficulties understanding the motives of assistants they perceive to be less interested.

Occasionally, these informal conversations between a judge and an assistant can also take a more formal tone and become some sort of pre-deliberation. In a few single-judge administrative law cases, the deliberations that normally take place at the end of the day had already been held during breaks in the court room.

Although the official deliberations only occur after the hearing, it is not uncommon for judges and assistants to informally reveal part of their views on cases beforehand. An event in which judges quite clearly revealed their thoughts on a case happened immediately after hearing a suspect during hearing nr. 5. One of the judges said, *'That last case will not take us long.'* The two other judges responded, saying that they did have some objections. The first judge responded with *'Yes, me too. I think we can't prove it'*, to which the others responded, *'Then we might be finished quickly indeed.'* This behaviour is at odds with the idea that all judges should enter the deliberation session openly and without being influenced by the views of their colleagues.

5.2.7 *Analysis of the involvement of judicial assistants during the hearing*

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

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

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

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

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

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

5.3 CONCLUSION

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

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