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In the shadow of the judge

The involvement of judicial assistants in Dutch district courts

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

6.1 DELIBERATIONS

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

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

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

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

6.1.1 *Role of the memo during deliberations*

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

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

Two interviewed administrative law judges describe a similar approach. Nonetheless, this was not observed first hand.²

In criminal cases, respondents stated that the memo usually only serves as a reference for the information that is also included in the files. However, some respondents pointed out that this is different for large cases for which hearings last several days.³ In those instances, the memos can function as a means to direct the discussions.

6.1.2 *The involvement of assistants during panel deliberations*

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

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

3. These cases were not included in the sample of observed hearings.

Turns of expressing opinions in panels

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The role of assistants during disagreements in panel discussions

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

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

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

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

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

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

6.1.3 *Roles of participants in panel deliberations*

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

The mark of the presiding judge on the discussion in deliberations

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

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

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

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

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

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

On average, the presiding judge is approached with a large degree of respect by the panel members. Several respondents also mentioned that (although the opinions of all judges are important) the opinion of the presiding judge usually carries the most weight. This makes it difficult to reach a decision when the presiding judge does not agree with the other panel members.

The role of the panel members who are not the presiding judge

The power of the presiding judge and involvement of assistants during deliberations is also, to a large extent, dependent on the remaining panel members. When these two judges are experienced judges who possess substantial legal knowledge in the legal field, this often provides considerable counterweight to the presiding judge. Under such conditions, assistants could easily tend to be more reserved in revealing their thoughts and not mingle much in the discussion.

This can be different when one or both of the panel members command less authority, for instance, because these judges are new (to the field of law) or because they are deputy judges.⁵ This is in accordance with research on group decision-making, which reveals that low-status people will participate less in group decisions and also receive less room to deviate from the general norms of the group (see literature cited in Robbins & Judge, 2013, p. 319-320). An interesting occurrence is that in panels including new and/or deputy judges, an assistant can take up the role of discussion partner in deliberations, thereby, to a certain extent, replacing the position of the judicial panel member(s). One assistant comments on this:

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

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

A judge (resp. 7) similarly states:

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

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

Judicial assistants collect the material for writing the draft judgment

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

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

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

6.1.4 *'Deliberating' in single-judge cases*

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

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

slightly shorter than panel deliberations. Usually, two or three cases are discussed, and the deliberation time per case is commonly 15 to 30 minutes.

The foremost reason to hold these meetings is to provide the assistant with information for writing the judgments. Although these meetings are not 'real' deliberations, they are widely referred to as deliberations. This term also reflects the content of the meetings; at all the observed meetings, the merits of the cases were discussed, rather than judges simply giving instructions to the assistants. Usually, the discussion appeared to occur on equal grounds. During several deliberation sessions, the assistant and the judge would, for example, speak approximately equal amounts of time.

Major debates were not observed during these meetings, but the judge and assistant would occasionally disagree on small aspects. In those occurrences, either of the participants could be convinced by the other. It is not only remarkable that the assistants could persuade the judges, but it is just as remarkable that the judges believed it to be important that the assistants agreed with their decisions. Sometimes the deliberations would mainly consist of a discussion; in other events, the judges would also give instructions to the assistant for writing the judgment (see also section 6.1.6). In the interviews, administrative law judges frequently emphasised the value of having an assistant to discuss cases with in single-judge cases. One judge realised the importance of this function when she held a hearing with an assistant who was only present to create the record of the hearing and had not read the case files:

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

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

The reasons for having assistants take part in deliberations seem to be twofold. On the one hand, they are present to attain information in order to write the judgment; on the other hand, they can contribute to the quality of the deliberations. These two elements cannot be separated. Several respondents explain that it is important that assistants understand and/or agree with the judgment, as this makes it easier for them to write the draft judgment.

The fact that assistants are expected to participate in the discussion seems to be a relatively new development. Judges and assistants who have worked at the courts for decades mention that the norm of consulting the assistant has not always existed. A senior judicial assistant remembers:

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

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

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

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

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

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

6.1.6 *Providing instructions for writing the judgment*

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

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

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

Most judicial assistants really value this freedom. A staff lawyer explains:

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

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

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

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

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

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

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

6.1.7 *Consulting a third party*

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

Staff lawyers as sparring partners

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

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

Discussing cases in meetings and committees

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

7. Note that the amount of times that staff lawyers are consulted should not be exaggerated. In the criminal law division of one of the courts, I shared a room with a staff lawyer for a little over a month. Throughout that month, only twice did someone enter the room with a legal question for the staff lawyer.

8. These courts usually use several specialised committees consisting of judges and assistants who are consulted when cases concern particular issues (e.g. EU or international law related matters). Some of these courts also have digital discussion fora where cases can be discussed.

these fora can be used as an additional vehicle to attempt to convince the judges of what the judicial assistant considers the correct decision.

At the district courts, complex legal issues occur in a smaller percentage of cases, and legal uniformity is less of an issue, as litigants can still appeal. When judges at these courts are in doubt, they usually search for case law of the courts of appeal. Consequently, the district courts do not have as many discussion fora. However, recent case law is discussed at division or subdivision meetings. Most of the meetings held during the research period were observed (16 meetings in total).

The courts all held different types of meetings.⁹ In one division, meetings were also held with only judges. In the other divisions, this recently stopped. Some meetings were presided over either by the head of the division or other court managers; other meetings were prepared and presided over by staff lawyers. All court divisions paid attention to case law from higher courts during the meetings. Usually, a staff lawyer selected important cases which were discussed during the meeting. At the meetings of one criminal law division, mainly judges spoke, emphasising the hierarchical difference between judges and assistants. In the other divisions, certain assistants would also speak up. Interestingly, in most cases, only a minority of assistants were active. The active assistants were usually the same assistants that were actively involved in deliberations.

6.1.8 *Analyses of the involvement of judicial assistants in deliberations*

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

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

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

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

As deliberations essentially consist of an exchange of arguments, the authority of the person who makes the argument is of key importance.¹⁰ The experience and conceived legal knowledge of a person are important predictors of one's contribution to deliberation sessions. As judicial assistants are usually the persons with the least authority, this affects their potential involvement. For that reason, various assistants are hesitant to reveal their views and to participate in deliberations. In addition, some judges do not provide assistants with opportunities to get involved in the discussion. Consequently, judicial assistants do not participate in the discussions at all times. This undermines the current policy, largely based on managerial values, that underscores the importance of allocating certain responsibilities to assistants.

However, the authority issue can also work in favour of the involvement of judicial assistants. Especially in panels with less-experienced judges, the contribution of certain highly respected judicial assistants can be crucial. On such occasions, assistants sometimes function as substitute discussion partners to less-experienced judges, who may not possess the content-specific knowledge to function as full discussion partners. Assistants who function as such are mostly senior assistants who are acknowledged for their legal expertise. This can result in a shift in authority, which is difficult to align with traditional ideas behind the functions of a judge and a judicial assistant (see section 4.1).

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

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

6.2 WRITING OF THE JUDGMENT

Judgment writing is one of the features of the adjudicative process in which the increased allocation of duties to assistants is particularly strongly displayed. In addition to interviewing judges and judicial assistants about the process of judgment writing, 40 draft judgments, created by assistants concerning the observed cases, were analysed (see section 2.2.2). These judgments varied in number of pages from 3 to 15.

In the observed court divisions, the policy is that – in principle – all judgments are to be drafted by judicial assistants. Assistants remark that writing draft judgments takes up a considerable amount of their time, and they frequently mention this to be among their favourite duties. After the assistant has created the first draft, the judge(s) will adjust the judgment – to a minor or great extent – to create the final version, which is subsequently signed by the judge(s) as well as the assistant. The fact that judicial assistants make the first effort in drafting judgments has some important effects on the decision-making.

6.2.1 *The practice of drafting by the assistant*

At the criminal law divisions, it has been a long-standing practice for assistants to write substantive parts of the first drafts of judgments. Only in very large and legally complex cases was (and still is) this principle occasionally abandoned. The majority of criminal law judgments at the district courts used to be relatively compact and standardised. However, new, enhanced criteria for judgment motivations within the Promis scheme (see section 4.2.2) have made the writing of a substantial amount of judgments a more demanding exercise, as these judgments currently have to include more justification and reasoning (see also Abram et al., 2011).

At the studied administrative law divisions, having assistants draft all the judgments is a rather new phenomenon. Only a few years ago, it was common that judges would also write at least one or two judgments per hearing. Though it is policy that judicial assistants, in principle, write all drafts in the courts included in the research, respondents also informed me that this is not the case in some other district courts. This is also true for some of the criminal and administrative appellate courts (as additional interviews with judicial officers at those courts revealed). Several judges and assistants stated that they think that it will probably come across as somewhat odd that judges do not write the judgments themselves. Several administrative law judges who, in the past, wrote their own judgments, mention to regret this circumstance:

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

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

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

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

Another judge (resp. 65) says:

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

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

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

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

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

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

6.2.2 *Using the information from deliberations in the drafting*

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

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

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

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

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

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

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

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

Especially when memos are written in judgment form, they are beneficial for writing the draft judgment. Usually all practical information that should be included in a judgment, such as the legal framework and the procedural history, can just be copied from the memo. In the further expansion of the judgment, more information can be adopted from the memo. As mentioned previously (see section 6.1.1), various respondents claim that, every so often, a memo is taken as a point of departure and is only mildly adjusted. However, this was not observed in this research. Only two of the drafts quite strongly resembled the memos, but even these draft judgments also included new elements.

In order to construct the judgments, judicial assistants can also make use of various other resources. The word templates of the courts, for instance, include so-called 'building blocks', which are small blocks of text containing certain standard aspects that have often been included in judgments. In addition to this, judicial assistants have a database with previous case law at their disposal, which they can consult for inspiration. Making use of these resources can save judicial assistants' time and can potentially bring uniformity into the judgments.

6.2.4 *Judicial assistants' individual styles of judgment writing*

While the content of the judgment is usually largely determined by the judge(s), the writing style of the judgment is normally left to the assistant. As judgments are quite particular legal writings, new judicial assistants commonly have to become accustomed to using the legal jargon. Several courses are available that teach judicial assistants how to write in such a manner. In addition to this, judicial assistants are assigned a senior assistant¹² as a tutor, who provides them with advice and who reads and comments upon the judgments they write during the first period of their employment. A tutor (resp. 30) explains: *'We use a certain style here that has to*

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

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

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

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

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

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

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

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

6.2.5 *Rethinking and altering a judicial decision*

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

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

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

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

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

Refusing to write or sign a judgment

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

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

one else's decision. But what if the judicial assistant fundamentally disagrees with the judgment? In the nineties, Bruinsma (1995, p. 99) found in his research on civil cases regarding temporary arrangements (which are – unlike criminal and administrative judgments – not signed by the assistant but only include their initials) that there was one assistant who resolved the issue of disagreement by not placing his initials on cases with which he disagreed on the outcome.

When asked in the interviews whether it is acceptable for assistants to refuse to write or sign a judgment, the responses were diverse. Some judges regard this as truly inappropriate:

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

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

Another judge mainly approached it from a practical angle:

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

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

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

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

6.2.6 *Checking and adjusting draft judgments by judges*

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

Order of checking the judgment

Regarding panel judgments, the courts usually employ a strict order in which a judgment is checked and altered by the panel members. Most common is that the judgment is first distributed to the most junior judge, then to the senior judge and last to the presiding judge.¹³ The presiding judge can then note the suggested adjustments of his or her colleagues and has the final word on the content of the judgment. At the criminal law divisions, the most junior judge is also responsible for checking all the factual details of the judgment, such as dates and names.

Observing this process clarified that various suggested alterations strongly represent personal preferences of judges. Fairly regularly, it occurred that one judge, for instance, suggested changing a particular word or sentence structure, while a more senior judge preferred to continue with the original version.

Type and amount of adjustments made

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

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

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

Judicial assistants' responses to the adjustments

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

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

Some respondents mention that younger judges in particular do this. Several assistants remark that they tailor judgments to the judge they are writing for. When they expect a judge to turn the whole draft upside down, they put less effort in it, while for judges who they believe to rely on them more extensively, they really attempt to draft a perfect judgment.

Although the judicial assistants are not pleased when judges alter too much (in their perspectives), several assistants are also discontent with judges who appear to sign judgments too easily. A judicial assistant explains how, when receiving a judgment without any changes, the assistant gets slightly suspicious:

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

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

Views of judges on making adjustments

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

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

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

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

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

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

Providing the judicial assistant with feedback

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

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

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

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

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

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

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

6.3 CONCLUSION

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

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

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

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

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