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### In the shadow of the judge

*The involvement of judicial assistants in Dutch district courts*

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#### Publication date

2017

#### Document Version

Other version

#### License

Other

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#### Citation for published version (APA):

Holvast, N. L. (2017). *In the shadow of the judge: The involvement of judicial assistants in Dutch district courts*. [Thesis, fully internal, Universiteit van Amsterdam]. Eleven International Publishing.

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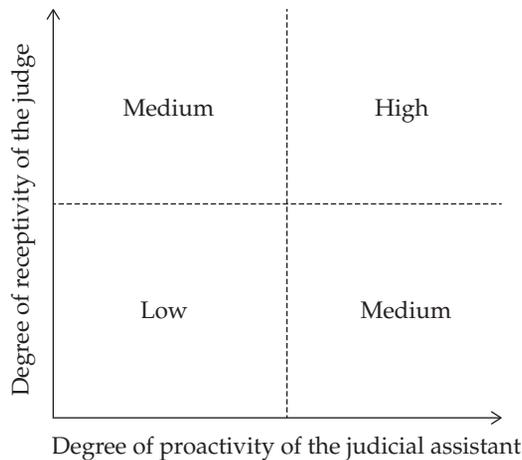
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In order to understand the variation in judicial assistants' involvement found in chapters 5 and 6, the first section of this chapter delineates seven key factors – stemming from the fieldwork – that affect the involvement of judicial assistants and, thereby, their potential to influence judicial decisions. Section 2 covers the questions that arise regarding the observed similarities and differences between the courts and court divisions.

Variation in the involvement of judicial assistants was first observed in the type of assistance performed. In section 4.3, an analytical distinction was introduced between administrative and/or secretarial and advisory and/or discussion-related assistance. The fieldwork shows that it differs greatly per situation whether judicial assistants perform either one or both of the types of assistance. In addition, there is also variation found in the degree to which assistants are involved in performing these types of assistance; in some cases, judicial assistants only perform minor tasks to support the judge(s), while other times, judges heavily rely on the assistants' work. The degree of involvement appears to be determined by the combination of: a) the degree of receptivity of the judge towards the judicial assistants' involvement (are judges allowing judicial assistants to participate, do they take the assistants' suggestions into account, etc.), and b) the degree of proactivity of the judicial assistant in performing either of the abovementioned types of assistance.

**Figure 1** Degree of involvement of judicial assistants in judicial decision-making

Whether the judicial officers will be receptive or proactive seems to mainly depend on the seven key factors, which are discussed in the next section.

### 7.1 DETERMINING FACTORS

The factors mentioned in this section are not the only factors of influence, but they are the factors that appeared most prominently in the fieldwork.

**Table 1** Factors that determine the involvement and influence of judicial assistants

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**Determining factors**

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Trust  
 Role perceptions  
 Experience and expertise  
 Career perspectives and ambitions  
 Type and complexity of cases  
 Single-judge or panel decision-making  
 Time pressure and workloads

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The first four factors indicate aspects at an individual level. These are characteristics related to individual judges and judicial assistants. These individual characteristics are not static features; rather, they are subject to change over time, for instance, when one gains more experience. The last three factors are situational fac-

tors. These factors contain conditions under which individual judicial officers will be more or less receptive or proactive.

All the factors are presented as separate factors. However, in reality, various factors can simultaneously affect the involvement of judicial assistants. In fact, several factors are highly correlated and are expected to occur at the same time (e.g. the complexity of the cases, single or panel decision-making; and experience and expertise are often related), whereas others rarely co-exist. This is important to keep in mind, as the factors can also enhance or weaken each other's effects.

### 7.1.1 *Trust*

Working together involves interdependence and collaboration (Gambetta, 1988). It is therefore not surprising that in the interactions between the judge and the assistant, the notion of trust is a recurrent component that defines how the interactions play out (see also Abram et al., 2011, p. 12). Trust in the judicial assistants or judges one is working with was mentioned, in direct and indirect ways, in many of the conducted interviews.

Mayer, Davis and Schoorman (1995) distinguish between three types of inter-relational trust in organisational settings. First is ability- or competence-based trust. This is trust based on the belief that the trustee has the skills, competencies or characteristics to perform well in a certain domain (p. 717). The second type of trust recognised by Mayer et al. (1995) entails trust based on benevolence. This links to the question of where the loyalty of the trustee lies. It relies on the extent to which the trustee is perceived to want to do good to the trustor. The last type of trust is integrity-based trust. This involves the trustor's perception that the trustee adheres to a set of principles that the trustor finds acceptable (p. 719). These types of trust are also related to many of the concerns mentioned in section 1.2 regarding the involvement of judicial assistants in judicial decision-making. The notion that judges possess special – typical judicial – knowledge-based but also integrity-related qualities is at the core of many of the concerns regarding the involvement of judicial assistants. This idea also assumes that judges should be cautious in trusting individuals who are not judges to perform judicial duties and should consider whether judicial assistants are sufficiently competent and possess integrity. Benevolence, or the lack thereof, is an important issue in agency theory and other theories that emphasise the possible differences in goals that judges and judicial assistants may aim for (see also section 1.2 and 4.2.1).

#### *Judges' trust in judicial assistants*

Given that judges are ultimately accountable for the results of the decision-making, it is imperative for them to play a leading role in the process. The judges' trust of the judicial assistants plays a key role in how receptive they are to their input. Several judges mention relying more on certain judicial assistants than others because

they will generally 'do a better job' or are 'better assistants'. This trust seems to be predominantly based on the competence of the judicial assistants, with judges mentioning the educational background of judicial assistants and their experience and knowledge (for a similar finding see Abram et al., 2011, p. 12). Although, in some occasions, it was not completely clear what the trust was based on. A particular competence that is at least regularly mentioned as an important factor in trusting judicial assistants' work is their accuracy. Issues relating to a lack of benevolence-based trust were not explicitly mentioned in the research, but this factor possibly does play a modest, perhaps subconscious, role in the degree of trust in assistants. Some judges, for instance, questioned the work ethics of certain assistants, which seems to indicate that the judges do not trust that the assistant will put in all the needed effort to produce the finest work. Although integrity is an important virtue for judicial officers, trust based on integrity also does not appear to play a major role at the courts. Nonetheless, in a few instances, judges mentioned their fear of judicial assistants abusing their power in order to reach their desired case outcome (see section 7.1.3).

The receptivity of judges to the contribution of judicial assistants does not only relate to trust; it also differs per type of involvement. Almost all judges are, to a large degree, receptive of administrative assistance, but some judges are more sceptical of assistants' involvement as an advisor or discussion partner. In addition, for the vast majority of judges, it also depends on particular situational circumstances whether they will act more or less receptive to further secretarial assistance and/or involvement in the actual decision-making. For example, under time pressure, some judges will rely more heavily on assistants' memos to prepare for the hearing (see section 7.1.7).

#### *Judicial assistants' trust in judges*

Because of the nature of the relationship between judges and judicial assistants (the judge is superior to the assistant in decision-making and is also solely accountable for the outcome of the case), the assistants' trust in the judges seems to be a somewhat less pressing issue. However, during the research, it was observed that the trust that judicial assistants had in judges did guide their behaviour and proactivity in certain instances. Competence-based trust is sometimes an issue in relation to new or deputy judges (see section 6.1.5) and, in rare occasions, judicial assistants also question the integrity or rightness of judges, for example, when they refuse to write or sign a judgment (see section 6.2.5). This lack of trust can cause judicial assistants to attempt to influence the decision-making, for instance, by having contact with other judges from the panel. On the contrary, it can also cause them to withdraw from the decision-making if they believe judges are not taking their advice into account.

### 7.1.2 *Role perceptions*

In the interviews, all of the respondents – judges and judicial assistants – were asked what they believed the core role of judicial assistants in the judicial decision-making process to be. They were also asked whether they considered it the judicial assistants' duty to be involved in the decision-making. The interviews revealed that most judges and judicial assistants have strong, but diverse, views on this matter. Their ideas on what image of adjudication should be presented to the general public (e.g. in order to uphold the status and legitimacy of the judicial office, see section 1.2) is also related to their role perceptions.

What judicial assistants and judges felt the role of assistants should be was often related to how they behaved in court practice. However, it is difficult to determine whether the observed behaviour was actually a result of the role perception of the respondents or if it was the other way around – that respondents were, in fact, giving an ex-post rationalisation for their behaviour.

#### *Judges' perceptions of the role of the judicial assistant*

In comparing the role of assistants to their own role, the judges' most mentioned difference is that the judge is required to take the decision. Subsequently, he or she holds the official and final responsibility for the judgment, whereas the assistant cannot be held accountable for the judgment. One judge explains:

*'I take the decision. It is my responsibility, and I have to carry it. And if we can't decide, I am the one who lies awake at night, not the judicial assistant. He will hear the next day what we're going to do.'* (resp. 18)

Although several authors (Fiss, 1983; Hol, 2001) have raised the issue that high involvement of judicial assistants can cause problems with the sense of responsibility that judges feel for a judgment (see section 1.2), this was not observed in the way that judges spoke about their responsibilities. The judges actually mention that the accountability for a judgment weighs heavily on their shoulders. This is reflected in the above quote.

The sense of responsibility that certain judges feel results in their wanting to be in control and finding it difficult to dispense certain duties to assistants and to rely on the materials that the assistants produce. This control issue is also related to judges' perceptions of what the role of judicial assistant entails or should entail. A minority of judges, for instance, regard it as inappropriate for judicial assistants to take on an advisory or discussion-partner role. Among these judges is a criminal law judge who states to disregard the judicial assistant's memo for this reason (see more in section 5.1.4). This judge (resp. 38) says:

*'A suspect has the right to get the judge offered to him by law. So, he has the right to see me. Not a judicial assistant, but me!'*

Other judges, however, strongly believe in a role for the assistant in judicial discussions. They see the functions of judge and judicial assistant as largely similar. One judge, (resp. 77) for instance, compares the functions by saying:

*'A judge is actually a sort of assistant plus: he should be able to do everything that an assistant can and chair the hearing.'*

These role perceptions are reflected in the way that judges speak about judgments too. Some judges refer to judgments as 'our' (judge *and* assistant's) judgment or, in regard to panel cases, they say it is a decision by 'the four of us'. As mentioned in section 5.2.5, one judge even spoke in this manner during the hearing. Other judges refer to 'my' judgment when speaking about the judgment of the case. Furthermore, the role perceptions are relevant in regard to how the assistant position is presented to persons outside the judiciary. Various judges appear to be particularly against further involvement of judicial assistants during the hearing, as they believe it may present an incorrect image of the involvement of assistants to the public.

#### *Judicial assistants' perceptions of their own role*

While the accountability of a judge for the judgment reached is inherent in his or her appointment, this is not so for judicial assistants. This fact inevitably shapes their involvement and sense of responsibility. Most assistants indeed explained that it is inherent to their position at the court that they are not responsible for the judgment, and, therefore, they cannot decide what the judgment should be. Many judicial assistants primarily consider themselves to be administrative and secretarial assistants of judges. Secretarial duties, such as creating the court record, are mentioned as their main duties. While the notion seems widespread that the primary role of the assistant is to provide administrative and secretarial assistance, a substantial portion of them states that they also play a key role in the actual reaching of judicial decisions. These assistants also mention being discussion partners to the judges as part of their role.

Different roles also require assistants with different personalities. A secretarial role presupposes an obedient and somewhat submissive attitude; one should perform the administrative and secretarial tasks set by the judicial organisation or the judge without questioning them. Although no psychological study on the personalities of judicial assistants was performed, certain observations of and assertions by judicial assistants in interviews indicate that such an attitude indeed appears to exist among various judicial assistants. This was noticeable during the division or subdivision meetings that take place at the different court divisions (see section 6.1.7).

Unlike judges – who all speak frankly and regularly during these meetings – many assistants remain silent. During the interviews, various assistants pointed to their own more introverted nature, too. They mention that it is part of their character to prefer being involved in the background. Some assistants also specifically mention being pleased with the fact that they cannot be held responsible for the judgments in which they are involved:

*'Secretly, I find it quite comfortable being a judicial assistant. Content-wise, you can go as deep as you like, you really can. (...) Only, you don't have the final responsibility for it. That is... I don't mind.'*  
(resp. 48)

A more active involvement in the judicial decision-making process as an advisor or discussion partner requires judicial assistants to be more outspoken. For many judicial assistants, this appears to conflict with how they describe their personalities, but a few assistants are in fact more outspoken (in particular ones with extensive experience and expertise; see section 7.1.3). They are, for instance, actively involved in the division meetings, and they also behave more proactively in other settings. This mind-set is also reflected in the responsibility that certain judicial assistants say they feel for judgments in which they are involved. Various judicial assistants mention that, despite the fact that they are not officially accountable for a judgment, they do feel responsible for the outcome of the judicial decision-making. Section 6.2.5 revealed that a minority of assistants, in exceptional circumstances, even refuse to write or sign a judgment when they disagree with its content. Hence, it was observed that the existing perceptions of what the role of a judicial assistant ought to be and the actual involvement of judicial assistants regularly go hand in hand. Judicial assistants' personalities also appear to match the roles they perform. With changing ideas about the how the employment of judicial assistants can enhance managerial values (see section 4.2), the perceptions of what the role of a judicial assistant entails and should entail might also be slowly changing. Several respondents indeed mention this development. This could, in the long run, also have an effect on the personalities of individuals that apply for judicial assistantships.<sup>1</sup>

### 7.1.3 *Experience and expertise*

The fieldwork reveals that mutual trust and perceptions of the quality of each other's work are important for how much and in what way judicial assistants are involved in the judicial decision-making process (see also Spellman, 2010).

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1. Since I have not conducted a longitudinal survey on court officials' perceptions of the involvement of judicial assistants, I cannot validate this.

Given that the function of judicial assistant has also gone through various changes over the years, the previous education of judicial assistants and their legal knowledge and experience varies widely. As mentioned, judicial assisting positions in the Dutch judiciary can be life-long careers. For the research, five assistants were interviewed who have worked in the court for more than 20 years. Two of them have even worked in the court for about 40 years, longer than any of the judges that were appointed to the division. Other assistants had only just started working in the courts.

#### *Qualifications of judicial assistants*

Directly related to the legal knowledge and expertise of judicial assistants are the qualifications that assistants obtain via academic education and internal training. The educational requirements for being employed as a judicial assistant have changed significantly during the last decades (see section 3.1.1), resulting in assistants with a broad range of qualifications. Most of the senior judicial assistants were trained via an internal education programme; they have never finished any tertiary legal education. For newly hired judicial assistants, the opposite holds, almost all being law school graduates.

The internally trained assistants were hired and trained in a time when judicial assistance was primarily designed as a secretarial and administrative function, and the educational requirements met this function. These assistants currently have to perform the same duties as the newly hired assistants, the vast majority of whom went to law school.

Although it was not observed to be true regarding all assistants, several respondents mention that the lack of high-level legal education makes older judicial assistants, on average, less capable than new assistants to perform the more complex tasks that are part of their function:

*'There are a lot of people who gradually found it more difficult to keep up. (...) In the past, it was simpler work; there were not so many legal entanglements. Now there are [many legal entanglements], and then at some point, you're going to miss a legal education.'* (resp. 55)

#### *Importance of court experience of the assistant*

While some of the experienced but internally trained assistants may be somewhat less equipped to fulfil complex, content-related duties, overall, having assisting experience and being familiar with the common practices of the courts empowers judicial assistants to behave more proactively in the judicial decision-making process. During the interviews, a large number of assistants drew attention to their own development over the years. They mentioned having become bolder and less obedient over time. While experience is relevant to the behaviour of judicial assistants and of judges, it is a stronger factor for assistants. Unlike judges, assistants start

their position without first undergoing years of training, learning how to perform their duties.

Experienced assistants will, for instance, more easily contact a litigant without first discussing it with the judge (see section 5.1.6). These assistants also take more freedom in drafting judgments (see section 6.2.4). A more proactive position of experienced assistants is particularly observed in performing advisory or discussion-related duties, as those duties especially require judicial assistants to be knowledgeable and comfortable expressing personal views. Experienced assistants typically also command greater trust and respect from judges (see section 7.1.1). Judges, for instance, value the arguments presented by experienced assistants during meetings or in memos more highly (see section 5.1.4 and 6.1.3).

In this context, it is remarkable that, to complement the modest experience of judges who are new to a certain field of law, court managers match them with experienced assistants when these judges chair their first hearings (see section 5.1.3). When a judge has little experience and the assistant a great deal of experience, the judicial assistant can particularly be highly involved in adjudication. The judicial assistants' experience has extra significance because judges circulate between court divisions every four to six years, requiring them to get accustomed to a new field of law every time (see section 4.2.2).

The significant position of experienced judicial assistants is especially eminent during panel deliberations. Senior assistants occasionally partly take over the role of discussion partner from less-experienced judge(s) (see section 6.1.3). Experienced judicial assistants also regularly attain a noteworthy position in single-judge cases. Several of the more senior assistants mention that new judges can be quite dependent on senior assistants. One assistant says:

*'I've had new judges who came from another field of law, for instance, civil or criminal law, and who had their first hearing with me. They would really lean on me, because they just didn't have a clue how to handle it. (...) During the deliberations, I notice that I'm mostly speaking and I'm leading the judge through the issues that have to be discussed. In those cases, I feel that the balance shifts somewhat more towards my side.'* (resp. 30)

A judge (resp. 1), further points out that assistants occasionally also attempt to misuse their knowledgeable position. He explains how this can be difficult for new judges:

*'You have to make clear to a much more experienced person how you want it to be done. And then there are judicial assistants who overrule you and use their experience against you.'* (resp. 1)

This risk also results in the opposite effect, which was also observed in the research: some new judges are actually rather hesitant to rely heavily on assistants' work and knowledge. As a result of their own limited knowledge, they wish to

perform most of the work themselves, as otherwise, they feel unable to check properly whether the products of the assistants are up to standard.

Hence, experience on the part of the assistant causes the assistants to be more proactively involved in adjudication. Concurrently, the absence of experience and expertise – under certain circumstances – causes inexperienced judges to be more receptive to the work of assistants. However, this is not true for all inexperienced judges.

*Specialisation and the special position of the staff lawyers*

Assistants can also become valuable sources of knowledge through specialisation, which is an important managerial aim. In district courts, judges and assistants are primarily supposed to be generalists who handle a wide range of cases (see section 4.2.2).<sup>2</sup> There will always be judicial officers with specific expertise, but generally, extensive specialisation is not encouraged.

An exception to this rule is present in the position of the staff lawyer. As described in section 3.1.2, staff lawyers are the highest-ranked judicial assistants at Dutch courts. Apart from having several management and policy responsibilities, staff lawyers regularly function as specialised sparring partners for judges and judicial assistants (see section 6.1.7). Depending on how many staff lawyers are employed by the court division (the administrative law divisions in this research employed more staff lawyers than the criminal law divisions),<sup>3</sup> they function to a greater or lesser extent as specialised experts. At several divisions, the staff lawyers are specialised in detailed areas of law, and they inform the court members of new developments via meetings and newsletters. These staff lawyers frequently possess more knowledge about a particular legal field than the average judge, which provides them with a powerful position. Consequently, staff lawyers are often actively involved in the content of judicial decision-making by giving advice to judges.

Hence, the experience and expertise of both judicial assistants and judges are important in determining the types and amounts of involvement of the judicial assistants. Especially when a very experienced and knowledgeable assistant is working with a judge who is new to a specific field of law, this can result in judicial assistants dominating the decision-making.

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2. In the criminal law divisions, there is truly little specialisation. The administrative law divisions are slightly more specialised; they are divided into a few subdivisions of judges and assistants who handle certain types of cases.

3. One criminal law division only possesses one staff lawyer; at the other criminal law division, there are several staff lawyers who are employed as part-time staff lawyers. The studied administrative law divisions employed five and six staff lawyers.

#### 7.1.4 *Career perspectives and ambitions*

The last individual factors that affect the judicial assistants' involvement are the existing career opportunities and relating ambitions, as well as their job satisfaction. In section 3.2, it was observed that in judiciaries outside the Netherlands (particularly in the US), a judicial assistantship is regarded as an important stepping-stone towards a fruitful legal career outside the judiciary.<sup>4</sup> In the Dutch judiciary, the judicial assistant position can, rather, be a career in itself. Yet, most judicial assistants acknowledge that the career opportunities within the judiciary are rather limited (this is also shown in employee satisfaction surveys, see Commissie visitatie gerechten, 2014, p. 71). This is partly inherent to the current staffing policy and career tracks within the Dutch judiciary (see section 3.1). One can develop from being a junior to senior assistant, but subsequent possibilities to develop are limited. Only a small percentage of all judicial assistants can become staff lawyers (if they possess a university law degree), and the only other internal career opportunity is to be promoted to one of the rare managing positions (see for similar conclusions Commissie visitatie gerechten, 2014). The recent changes in the training to become a judge have further made the prospects of judicial assistants being admitted for training to become a judge even smaller (see section 3.1.2).

Due to the limited internal career perspectives, judicial assistants can also consider continuing their careers outside the judiciary. Several of the interviewed assistants mentioned this as a possibility.

How judicial assistants view their overall career perspectives and what their ambitions are in that regard are strongly related to how they were educated and trained before becoming an assistant. A clear difference is noticeable between older judicial assistants, who are internally trained, and new judicial assistants, who are primarily educated outside the judiciary. Given that assistants who followed the internal route generally do not possess law degrees, there are few career perspectives for these assistants outside the judiciary. This results in most of these assistants remaining employed by the courts until their retirement. A judicial assistant explains his career perspectives:

*'I feel like I'm at the top of what I can achieve without a diploma. (...) Without a diploma, I won't be able to get a better or higher position in a different organisation. So, I see myself being here for a long time. I will probably become an old dusty assistant.'* (resp. 2)

Within the judiciary, the career perspectives for these assistants also have become more limited with the introduction in 2007 of the requirement that staff lawyers have to possess a university law degree.

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4. Some assistants do return to the courts at a later point in time as a magistrate or judge.

A substantial share of the new – highly educated – judicial assistants considers the assistantship to be a starting point from which they wish to continue to develop. A relatively young assistant (under 30), resp. 15) for instance, says:

*'I never intended to be in a job at this age of which you know: this is it. I want to develop myself. The moment that it is not challenging anymore, it is time for something else.'*

Several of these assistants speak about their desire to become judges in the future; others consider a career in advocacy or in the local government.

The dissimilar career perspectives also result in different levels of motivation and ambition among judicial assistants. Some judges mention that several of the internally educated assistants do not possess the same motivation to develop their skills and to be involved in the judicial decision-making as the newly hired assistants. During the research, three of the interviewed internally trained assistants appeared to have rather limited ambitions and job satisfaction. One of them (resp. 43) stated, *'I can hold out.'* It is not entirely clear where this mindset originates. Two of these assistants were also close to retirement age, which could be a reason for their limited motivation. Nonetheless, it remains true that even though the internally trained assistants are highly experienced, part of this group of assistants performs their duties less proactively and habitually attempts to limit their responsibilities. One of these assistants (resp. 37) explains:

*'I'm not an adventurer. There are people that have an enormous drive to do all sorts of things. [I don't]. I don't know why... I think it's my personality.'*

Predominantly among the younger and more-educated assistants, there are very ambitious assistants who are motivated to be highly involved in the process of decision-making. Some of these assistants also do not feel limited by office hours. One assistant, for instance, mentions occasionally finishing judgment drafts on the weekend (resp. 13). Another assistant uses commuting time on the train to read literature and case law on all types of procedural issues of interest. This assistant believes that this results in judges putting trust in what is brought up by the assistant during discussions:

*'I really enjoy researching stuff, so I always make sure that I am completely up to date with things. And I notice, steadily, people will begin to think, 'If [own name] says so, then it is probably okay.' At least, with procedural stuff concerning criminal law.'* (resp. 15)

This impression is confirmed in various interviews with judges. They state that they include judicial assistants in the judicial decision-making not only for their own benefits but also because they believe it supports assistants in developing valuable skills, and it makes their work more interesting. A judge for instance says:

*'It is ultimately just more fun to work with an involved clerk, and – if someone is really involved – to give him a chance to say something about the content of the case. Because they are lawyers, of course. If they had the chance to prepare a case well, they are also anxious to say something. And they can learn from it. It stimulates people to develop themselves. Eventually, the product will benefit from that.'* (resp. 7)

Hence, the judges are usually more likely to involve strongly motivated judicial assistants in the decision-making. The level of judicial assistants' motivation is related to their ambitions to further their legal careers. This aspect is often challenging for judicial assistants who received limited legal education.

#### 7.1.5 *Type of case: complexity-level and degree of routine*

First instance courts typically are required to adjudicate a wide range of cases. This is, in fact, one of the reasons for studying these courts (see section 2.2.1). The involvement of judicial assistants is, for a substantial portion, defined by the type of cases that the assistants assist in. How this differs for routine versus complex cases is described in this section.

##### *The involvement of assistants in routine cases*

The vast majority of the cases handled in the studied courts are simple cases which do not present the judicial officers with new, complex legal issues. The case files of these cases are regularly thin, the hearing is often brief and the judgment is a one or two-page record of the oral judgment. In administrative law, these are typically the cases in which the judge can reach an oral judgment immediately after the hearing (which is an exception in administrative law but is the rule in criminal single-judge cases). In most instances, these cases are decided by following previous case law. Hence, there is little room for influencing the judgment. Therefore, neither efforts of the judge nor the judicial assistants really make a difference with regard to the outcome of the judgment. At the same time, the assistants' efforts to summarise the key elements of the cases can be of great value for the efficiency of the process of judicial decision-making. For example, judicial assistants may list standard information from the case files in order for the judge to match this with pre-existing guidelines.

Good examples of routine cases are driving under the influence cases, which are handled in criminal proceedings.<sup>5</sup> For hearing those cases, usually only ten minutes is scheduled. In these cases, the police have commonly performed a breathalyser test of the driver to verify the blood alcohol concentration (BAC), and according to that concentration, a certain penalty is imposed. To find a suitable punishment for the tested BAC, a judge can consult the nationwide judicial orien-

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5. Art. 8 of the Dutch Road Traffic Act.

tation points,<sup>6</sup> which simply list the penalties to impose for specific ranges of BACs. Hence, to handle these cases, little legal knowledge is required. A few of the judges mentioned that, in these cases, they themselves (resp. 12) or their colleagues (resp. 11) rely completely on the information in the assistants' memo.<sup>7</sup> According to respondent 12:

*'There are, for instance, very simple hearings, like driver license hearings, driving under the influence hearings, that really are so simple. The judicial assistant then checks if the breathalyser was approved and whether the 20-minute limit between stopping the accused and breathalysing was met, those sorts of formalities. I really am not going to check that. That is just really simple.'*

Judicial assistants can easily list the information that judges require to decide these standard cases. For drafting a judgment in these cases, one also does not need to be highly qualified, as the judgments are usually short and consist mostly of 'standard' text (see section 6.2.3). These simple, predominantly secretarial or administrative duties are often fulfilled by assistants with limited qualifications. Drunk-driving hearings are, for instance, regularly handled by part-time assistants, who are still attending law school (so-called *buiten-griffiers*).

Due to the strong reliance of judges on the efforts of judicial assistants in the pre-hearing stage, assistants have a particularly important responsibility to scan for cases which turn out to be out of the ordinary and to make this condition clear to the judges. With respect to these cases, a judge might want to dive deeper into the case files. However, this is challenging, as the most junior assistants are allotted to these hearings. This points precisely to the situation (discussed in section 1.2) which Buruma believes to be problematic in his annotation of a case that appeared to be a 'standard assault case'. He believes that in that case, an assisting staff member at the prosecution office failed to recognise the case as an unusual case in which a simple application of the guidelines did not suffice.<sup>8</sup> This discloses that, although it may not be the intention of judicial assistants to influence the judicial decision-making, indirectly, their secretarial involvement in the judicial process might affect the decisions that are reached in these cases (see also section 5.1.4). This is probably part of the reason why many judges are reluctant to rely completely on assistants' memos, even in simple cases.

#### *The involvement of assistants in large and legally complex cases*

A minority of the cases are large and legally more challenging. These cases are typically handled by judicial panels. The involved judicial assistants are usually expe-

6. The orientation points are composed by the chairmen of the criminal law divisions of the district courts and Courts of Appeal.

7. Due to the simplicity of these cases, some courts have also decided not to have these cases prepared by assistants.

8. HR 8 September 2009, NJ 2010, 391.

rienced. In these cases, the involvement of judicial assistants can be quite different from standard cases. Due to the chosen research design (see chapter 2), no participant observations were conducted of the small selection of very large cases in which the hearings last several days. The current section is based on information from observations of cases with hearings that lasted one day at the most and on various interviews held with judges and judicial assistants who handled larger cases during their employment in the court.<sup>9</sup>

While routine cases are mostly handled in routine manners, larger and more complex cases require customised approaches. To start with, these procedures often entail more action prior to the hearing in order to gather and arrange all the information. Where needed, the parties should be contacted. It is common for judicial assistants to take the lead in this process, because judges are prohibited from having contact with the parties apart from the hearing (see also section 5.1.6). In large cases, it is also more likely that interim decisions have to be made in anticipation of the main procedure.

For handling large, complex or media-sensitive cases, it is common to compose a special team (see section 5.1.3), as these cases frequently require a lot of collaboration. A judicial assistant reminisces about one large case he was involved in:

*'It is very different, because you work together very intensively. That was very special. Completely different from a normal hearing. You have about 18 days of hearing but also the time before and after. Those days you eat together every day. So, you acquire a special relationship.'* (resp. 2)

The files of such cases are extensive, sometimes filling an entire room. A good preparation for the hearing is, therefore, utterly important. Because of the magnitude of the files, it is often not conceivable for the assistant to prepare a 'standard' memo. The preparation for hearings differs from case to case. In addition to judicial assistants, judges are occasionally also involved in making memos. In these complex cases, judicial assistants can play an important role in arranging the files and making them manageable. In order to do so, the assistant has to possess the analytical skills to present the case materials in the easiest, most understandable way. An assistant who is regularly involved in large, complex cases showed me an example; this assistant had produced several tables and diagrams to arrange the information in a complex criminal case that involved various suspects and alleged victims. This was a very comprehensive document, but at the same time, it was clearly directing judges towards certain parts of the court files that were important according to the judicial assistant.

During the hearing, the involvement of judicial assistants is quite similar to simple cases,<sup>10</sup> but in the deliberation phase, the involvement may differ. Depending on

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9. This issue was discussed in nine interviews with judges, assistants and court managers.

10. Although the length and the complexity of the hearings makes them somewhat more demanding than regular hearings.

how structured the presiding judge is in leading the deliberations, the judicial assistant may be the one who keeps an overview so that all necessary elements that should be part of the judgment are discussed (see more in section 6.1.3). After the deliberations, sometimes the assistant will solely write the first draft of a judgment; at other times, the judicial officers will divide the drafting duty. Particularly under the former circumstances, the effect of the assistant on the content of the judgment can be substantial. These judgments are normally lengthy, comprising dozens of pages. It is often left to the assistant to fill in the details of a decision (see section 6.1.6), which – consequently – can have a considerable impact on the structure and appearance of the judgment.

In large and complex cases, the role of assistants is, on one hand, a secretarial and managerial one. On the other hand, because of the legal complexity of most cases, judicial assistants are frequently involved in the decision-making and are frequently considered to be members of the (judicial) team.

Given that the outcome of adjudication is largely undetermined in complex cases, there is potential room for all participants to influence the decision-making. This is also true for assistants when they occupy a proactive position. Conversely, these decisions are normally made by panels of experienced judges, who will primarily discuss the case among each other (see the next section). Judicial assistants' views are always considered along with many other possible views that are argued among the panel members. The prospect of far-reaching and/or undesired influence on the judicial content is therefore less likely.

Hence, the potential for judicial assistants to have influence on the content of judicial decisions is most present in legally complex cases, especially when the assistant has a lot of expertise and the judges value his or her opinion. However, complex cases – which are handled in panels – will usually also receive much attention from the judges involved. That diminishes the assistants' influence. In routine case decisions, the assistant can, at times, be of great value to the efficiency of the decision-making process. As these cases will mainly involve standard situations, assistants will usually not have influence on the outcome of the cases. However, in the special category of cases which at first glance appear to be standard but on closer examination are not, their contribution can (unintentionally) affect the judicial decision-making.

### 7.1.6 *Single-judge or panel decision-making*

As already highlighted in several passages in chapters 5 and 6, the process of decision-making also significantly differs in single-judge and panel adjudication.<sup>11</sup> In

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11. See more on single-judge versus panel decision-making at (criminal) Dutch courts in (Baas, De Groot-van Leeuwen, & Laemers, 2010; Ten Velden & De Dreu, 2012).

single-judge cases, apart from the judge, the only judicial officer who is acquainted with the content of the case files is the judicial assistant. Formally, the judge is solely responsible for reaching a decision. However, in practice, the judge often discusses the merits of the case with the judicial assistant.<sup>12</sup>

### *Single-judge adjudication*

The majority of cases at Dutch district courts are handled by single-judges. In 2014, 85 percent of criminal cases were handled by a single-judge, as were 89 percent of all general administrative law cases.<sup>13</sup>

A substantial subset of these cases is composed of run-of-the-mill cases. In these cases, usually little interaction is needed about the merits of the case, and the assistant mainly adds value by assisting in routine aspects of the decision-making (see the previous section). However, during the fieldwork, it was also observed that the outcome of various cases adjudicated by single-judges is not that evident. These cases receive most of the judicial officers' attention. In these more complex single-judge cases, the judicial assistant regularly functions as an important discussion partner to the judge.

The exchange of views between the judge and the assistant commonly starts on paper. In the memo, judicial assistants will – more or less obviously – present their views on the case. Given that there are no contending voices from other judges in single-judge adjudication, there is a greater risk of anchoring effect (adjusting one's judgment to a reference point in the memo) when the judges make extensive use of the memos (see Tversky & Kahneman, 1974). The involvement of judicial assistants as sparring partners to judges is most prominent during deliberation meetings between the judge and the assistant that occur in administrative cases. During all of these observed meetings, rather than a judge primarily giving instructions to the assistant, an actual exchange of views regarding the merits of a case occurred (see section 6.1.3). In criminal cases, the police-judge will normally reach a decision and declare an oral judgment immediately after the hearing, leaving no room for deliberation with the judicial assistant. However, in rare instances, the judge can decide to adjourn the case to obtain some time to contemplate the case and – potentially – discuss it with the assistant (see section 5.2.5). Although this does not occur frequently, various judges mention that they are pleased to be afforded this opportunity to speak with the assistant. In general, the judicial assistant drafts the judgment in single-judge cases. In that situation, there is only one judge to revise the draft judgment. In the followed cases, this resulted in, on average, the draft being less severely adjusted (see section 6.2.6).

The fact that a single-judge is single-handedly responsible for the reached judgment results in some judges wanting to be fully in control and leaving little room

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12. Of course, a judge can also approach another colleague to discuss the legal issues of a case, but this person will not be familiar with the specific content of the case at hand.

13. See De Rechtspraak, 2015, p. 53.

for the involvement of judicial assistants. Most single-judges, however, are quite receptive towards judicial assistants' involvement, as judicial assistants are their only well-informed sparring partners. In single-judge cases, there is also less collegial interaction, which results in there not being a situation which activates judges to display their judicial abilities to their judicial colleagues (see also Baum, 2006, p. 76-81). The majority of judicial assistants who reflect upon the difference between assisting single-judges or panels say that their involvement is usually greater during single-judge decision-making.<sup>14</sup>

#### *Adjudication in judicial panels*

In panel decision-making, the interaction between the judges of a panel occupies a central place in the adjudication. In several instances, this diminishes the role as discussion partner of the assistant. An assistant says:

*'I do notice that, when you assist in a panel case, you see macho behaviour occurring (...) Then the judges are so engaged with each other that the assistant does not really matter anymore. (...) While one-on-one, you are a full partner in deliberations, during three-on-one situations, you are all of a sudden not anymore. I'm not really bothered by that; I still try to be a full discussion partner. But I believe that one is less visible then, as an assistant.'* (resp. 51)

It was indeed observed that during deliberations in most judicial panels, assistants acted less proactively. Judicial assistants have to be quite self-assured to engage fully in the discussion in the deliberation room and, hence, primarily it is experienced assistants who get involved. However, the memo commonly functions as an important document (and probably also as an anchor) for the judges to become familiar with the case, particularly given that panel cases are, on average, larger and legally more complex. Likewise, judicial assistants also attain a powerful secretarial position as judgment drafters. Still, the possibility of assistants having substantial influence on the content of judicial decisions is less in panel adjudication, given that not one but three judges are monitoring the assistants' work.

While the part that assistants play in the discussion is, on average, minimal in panel deliberations, this occasionally changes when there is disagreement among the judges. Section 6.1.2 reveals that when judges continue to disagree about the outcome of a case during deliberations, they sometimes turn to the judicial assistant to obtain an extra view on the matter. When this occurs, the opinion of the assistant suddenly becomes important, especially when the assistant substantiates his or her opinion with compelling arguments.

Hence, in general, the *involvement* of judicial assistants in deliberations will be larger in single-judge cases than in panel cases. In single-judge cases, judicial assistants are the only legal officers with case file knowledge that judges can discuss the

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14. This is particularly true for administrative cases.

case with, whereas in panel cases, judges also have the opportunity to turn to their judicial colleagues. As most single-judge cases are simple, this involvement mostly does not result in substantial influence of the assistants. This is, however, different for the minority of single-judge cases which are more complex.

As panel cases are generally legally more complex (resulting in more possible outcomes of the cases) than single-judge cases, there is more room for all judicial officers to affect the outcome of the decisions. The relative *influence* of judicial assistants on the decision-making may therefore actually be larger than in most single-judge cases. Especially when it concerns cases in which the panel members disagree with each other.

### 7.1.7 *Time pressure and workload*

Lastly, the workload and time pressure that judicial officers experience determine the types and degrees of involvement of assistants.

#### *Workload*

Via different means, a number of Dutch judges have raised their concerns about their belief that the judiciary is increasingly focused on output.<sup>15</sup> The judicial workload is generally also considered to be high. A study in 2013 revealed that 73 percent of all its 648 respondents (judges and prosecutors) believed the workload to be too high.<sup>16</sup>

Although it differs substantially among judges how they consider their workload (see also Van Duijneveldt et al., 2017, p. 33-38),<sup>17</sup> concerns regarding the workload were widely exposed during the interviews. For most of the judges, working in the evenings and on weekends is quite common (see also Van Duijneveldt et al., 2017, p. 33-35). It appears to happen regularly that a judge only has time to read some of the cases of a hearing the night before. While most judges say they will not compromise on the quality of judicial decisions, some also acknowledge that they have to make choices which can affect the overall quality. One judge, for instance, says:

*'Sometimes you've got little time, and then you indeed think, 'Well, it is written down... and it's not my ideal judgment, but it is good enough. It's a six out of ten. So, it's going through.' And the busier it gets, the more it happens. And that does happen quite a number of times.'* (resp. 83)

15. This was, e.g., specifically stated in the Leeuwarden Manifesto by a substantial group of judges; see *Trema*, February 2013. It was also mentioned in various publications in journals and newspapers by judges. A recent survey among 852 judges also confirms this. Eighty-eight percent of all respondents agree with the statement that there is too much focus on output, which challenges the quality. See survey related to (Berendsen et al., 2015) see also <https://www.rechtspraak.nl/SiteCollection/Documents/Resultaten%20enquête%20Tegenlicht.pdf>.

16. According to these respondents, the quality of adjudication is 'sometimes' or 'often' compromised due to the high workloads; see similarly Lensink & Husken, 10-12-2013.

17. Several respondents also mentioned to me that they consider the workload to be reasonable.

Several studies revealed that time pressure can negatively influence (judicial) decision-making, as it results in less sharing of information and more reliance on heuristics (see Bowman & Wittenbaum, 2012; Ten Velden & De Dreu, 2012, p. 85). This results in not only less discussion among judges but also less discussion with the judicial assistant. High workloads, resulting in more time pressure, can also result in judges relying heavily on the documents produced by judicial assistants, such as the memo or draft judgment. On average, the interviewed judges firmly rejected the idea of relying entirely on the memo whilst preparing for a hearing. However, this was observed happening in two instances. Additionally, some respondents also mentioned some of their colleagues doing this (see section 5.1.4). Respondents qualified this as a consequence of acting under time pressure. Several judges mention that time pressure also affects the time they spend on revising assistants' judgment drafts. One judge says:

*'A high workload can come at the expense of quality. That is something I can agree with. At a certain moment, you get tired of all the reading. Then at a certain moment, you think, 'Enough', and you sign the judgment.'* (resp. 11)

Similar to judges, judicial assistants occasionally also have to deal with substantial workloads (see Van Duijneveldt et al., 2017, chapter 3). During the fieldwork at one of the administrative courts, an assistant raised the issue of assistants' high workloads during a division meeting. When judicial assistants do not receive enough time to adequately perform their duties, this can also affect the quality of their work and, as a result, the degree to which judges are inclined to rely on it.

#### *Temporary decision-making under time pressure*

Sometimes, courts have to make preliminary decisions, for instance, regarding the extension of pre-trial custody in criminal cases or to provide temporary arrangements in administrative cases. These cases typically have to be decided upon at short notice, which means there is little time to read the files and contemplate the legal issue at hand. The reached decisions have temporary validity and can be adjusted in the procedure on the merits. This justifies the quick and modest procedure which is often employed in these cases. In one of the criminal law divisions of the courts, it is customary in custody decisions to distribute the cases of a hearing among the panel of judges and one or two judicial assistants.<sup>18</sup> These persons (either judges or assistants) will then read the case carefully and produce a memo. The other panel members usually only read that memo. This has the effect that, in the cases in which a judicial assistant prepared the memo, usually no judge has read the case files in order to reach a judgment. In complex custody cases, it is, of

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18. In these cases, these assistants are normally not involved during the hearing, as the judges are then accompanied by a junior judicial assistant who has received only limited judicial training.

course, possible that judicial assistants point out the complexity and suggest that the judges *do* read the files. Conversely, a judge can – at any time – decide to read the files if he or she believes it to be necessary. However, in a seemingly ordinary custody case, this gives the judicial assistant a key role in determining the relevant factors to build the decision on.

Unlike the previous depiction, in the administrative law division, cases in which temporary arrangements need to be made are usually handled through single-judge adjudication by senior judges. They are assisted by senior assistants who are often specialised in handling these types of cases. The underlying cases are usually complex, and it demands experience to understand the essence of these cases rapidly. Given that these cases frequently should be heard only days after they are filed at the court, they have to be scheduled quickly, often leaving the judge with little time to prepare for the hearing. When an assistant has time to create a memo, the odds are that the judge will heavily rely on that memo. In such circumstances, the contribution of assistants is substantial.

Hence, when the judges are under increased pressure to produce judicial output, they are occasionally more receptive to the input of judicial assistants and less critical regarding the products assistants create. This increases judicial assistants' potential to influence the judicial decision-making. This effect is strengthened when judges are dealing with substantial workloads and are operating under severe time pressure. Though, in such situations, judges will also possess less time to discuss cases, which can result in them deciding cases alone instead of discussing them with their judicial colleagues or assistants.

## 7.2 DIFFERENCES AND SIMILARITIES IN THE STUDIED COURTS AND COURT DIVISIONS

The empirical fieldwork focused on two divisions (criminal law and administrative law) of two Dutch first instance district courts. These courts and court divisions were studied in order to get a broad, varied set of data for analysis; they were not primarily selected in order to compare court divisions (see section 2.2.1). Nevertheless, it is interesting to discover whether there are differences and if these differences can explain some of the variation between court practices.

### 7.2.1 *Court location characteristics*

It was expected that the characteristics of particular courthouses would have an effect on the involvement of judicial assistants in adjudication. The study, however, did not reveal major dissimilarities between the two studied courts. Merely smaller differences were observed, the most important of which are discussed in this section.

An important reason for the fact that minimal differences were observed between the studied courts seems to be that the Netherlands is a relatively small country in which there are no major differences in the social, cultural and economic conditions of the areas in which the courts are located. Smaller differences that some respondents suggested to be of relevance were the location of the courts in either the north or the south of the country, and in more desolate areas or larger cities. Furthermore, respondents mentioned that the size of a court or courthouse also matters: smaller courthouses would be less hierarchical. The research was not designed in a manner that allowed verifying these claims, so it cannot be determined whether they are accurate or how this may affect the involvement of judicial assistants.

Even so, it became clear from the interviews that some courts are acknowledged for their slightly more formal atmosphere, which, according to some, also results in more hierarchical relationships between judges and judicial assistants. Respondents in this research mark both of the studied courts as among the less formal courts.

As identified in previous chapters, there is some dissimilarity in how the studied courts are organised and managed. An important difference is that no memos were prepared for police-judge cases in one of the courts (see section 5.1.4). Another difference is that in administrative cases in one court, hardly any pre-hearing meetings occurred, whereas in the other court, meetings were held regarding all of the followed hearings (see section 5.1.5). These aspects clearly affect the involvement of assistants.<sup>19</sup>

Apart from these organisational differences, there is one significant difference which stands out in relation to the theme of this research. This concerns the perceived career perspectives of judicial assistants in and outside of the studied courts. While judicial assistants recognise that the career opportunities within the judiciary are, on average, rather limited, the assistants of the studied courts perceive their career opportunities fairly differently. This appears to be related to the fact that one of the courts is located in the *Randstad*, the western part of the Netherlands, in which most large cities are located. The other court is located outside the *Randstad* and is relatively far away from other larger cities. For the judicial assistants in the court in the *Randstad*, it seems to be relatively easy to switch jobs; there are regularly vacancies in nearby courts or other legal establishments (e.g. law firms or government agencies) in the area. The latter was less observed in the more isolated court. Respondents in this court stated that several assistants were unhappy with the internally offered career prospects. When the assistants were asked about the alternative option to switch to a position outside of the court,

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19. Without a memo, the involvement of the assistant is likely to be smaller. The impact of the occurrence of pre-hearing consultations is somewhat more complex. These meetings can function as a way for judicial assistants to wield influence. On the contrary, they can also function as a way for judges to monitor and direct the assistant, which could diminish their influence.

respondents often mentioned the limited possibilities for the legally trained in the area. This results in some assistants feeling 'stuck' in a position with which they are not entirely content. Responding to the question of whether this could cause friction, a court manager responds:

*'Yes. Regularly. I can easily name five to six people in our department who would like to become judges but didn't get the opportunity from the organisation and are disappointed about it. And they also feel kind of stuck. (...) So, then you've been working here for nine years and your social life is settled and maybe your partner is located here. Then you won't say that easily, 'Let's try and find a nice position in The Hague'.'* (resp. 55)

Thus, although the limited internal career opportunities are partly inherent to the way that the assisting scheme is organised, the effects of these are most strongly visible at the court that is located in a more isolated place. How career opportunities are associated with the involvement of judicial assistants in judicial decision-making is defined in section 7.1.4.

#### 7.2.2 *Criminal versus administrative law divisions*

Various respondents pointed to the fact that the divisions have different characteristics. The data of this research also reveal some differences between the criminal and administrative law divisions, resulting in somewhat different types and degrees of involvement of the judicial assistants. Nonetheless, these differences only determine a small part of the observed variation in court practices. Much more variation was observed between different judicial officers within court divisions.

##### *Similarities of the two public law divisions*

To start this section, it is worth noting that the criminal and administrative law divisions bear several resemblances to each other, particularly in comparison to the civil law divisions. Both fields identify as public law, meaning that the dispute does not involve a conflict between two private parties but, rather, the government is involved. This also entails that an official government body – either the police/prosecution office (in criminal cases) or the accused government agency (in administrative cases) – has already prepared files and presented its views on the merits of the case in the case files. It is important to recognise that not only the judicial assistants' memos can function as anchors to judges. The case files usually also contain information that can affect the understandings of the judges or the judicial assistants who read them. For instance, the charge of the prosecution officer generally functions as a starting point for the discussion in the deliberation room.

In addition, the hearing has a central position in public law procedures. In the private law divisions, a more substantial number of cases are handled without a hear-

ing.<sup>20</sup> Several respondents also mention that the work of judges and judicial assistants in the civil divisions is more individualistic and, to a larger extent, based on the exchange of arguments in written documents. An interviewed judicial assistant who previously worked in the civil division describes:

*'There were weeks that I would just get a pile of cases on my desk, and then I was just writing and writing. You don't see anyone. You do speak about it with the judge; it should head in that direction. But there was no hearing or anything.'* (resp. 49)

This can result in civil judgments being more a product of either the efforts of a judge or a judicial assistant, whereas in the criminal and administrative law divisions, the preparation for the hearing and the hearing itself require that both the judge and the assistant are involved in the process.

#### *Different historical background*

Criminal and administrative law divisions have dissimilar historical backgrounds. Criminal law has been part of the judiciary from the early beginnings.<sup>21</sup> Legal protection against acts of the administration emerged much later; administrative law only really flourished in the second half of the 20th century.<sup>22</sup> At first, administrative law was a fragmented field with strong connections to the involved government agencies. With the codification of the General Administrative Law Act (*Algemene wet bestuursrecht*) in 1994, various procedures were unified. Separately operating first instance administrative courts were also merged and incorporated into one single division of administrative law in the district courts (which already handled all criminal and civil first instance cases). Only since January 2002 have these administrative law divisions been officially recognised as 'courts part of the judiciary', as defined in Article 2 of *the Constitution*.<sup>23</sup> From then on, all institutional safeguards of the judiciary have also been applicable to the administrative law division to the same extent.

The historically strong association with the government and the previous special position within the court system appear to result in a somewhat different culture in the administrative law divisions. Various respondents mention that these divisions are less formal and less hierarchically organised than the other divisions. Some also argue that administrative law assistants would (consequently) be more influential than assistants in the criminal law division, as judges would assign them with further-reaching duties. This could be a reflection of the practice of far-reaching dele-

20. See for the figures: De Heer-de Lange et al., 2013.

21. Since the establishment of the judiciary by Napoleon in 1811, criminal cases have been heard by professional judges at Dutch courts; see Bosch, 2011.

22. For an overview of the development of administrative law in Europe, see Mannori & Sordi, 2009.

23. Prior to this date, the administrative law divisions were acknowledged as courts that function outside of the judiciary. Some of the administrative appellate courts are still part of the latter category Mak, 2008b, p. 129.

gation of duties in government agencies (see e.g. Bovens, 2000). The research design does not enable drawing any conclusions regarding whether differences between the divisions are actually related to the historical background. It is expected that cultural differences will become less dominant over time, with administrative law divisions being integrated into the courts and especially given that it is policy for judges to rotate between court divisions.

#### *Type of cases*

The content of cases that are handled by the criminal law and administrative law divisions also differs. On average, criminal cases are recognised for being more focused around assessing the facts, while administrative cases will typically concentrate more on legal rules and policy. A criminal law judge explains:

*'At the administrative law division, it is more legal than here [criminal law]. Because here, it is like, 'Yes, he slapped someone, at least that is the accusation. What evidence do we have for that? The declaration of the victim, maybe we will have a witness. We have a declaration of the doctor who says that someone has been injured.' That is a list of a number of factual documents, and if you have enough of those, and they do not allow for much noise, then the crime is said to be proven.'* (resp. 3)

Not only are criminal cases more factual, the criminal legislation is also more limited in quantity. The vast majority of issues are strictly codified in the Dutch *Criminal Code*, whereas the field of administrative law consists of numerous different acts and regulations. Many of these regulations consist of open clauses. Additionally, there is a larger variation in the types of persons/organisations involved in administrative cases. In criminal law cases, the encounter is always between the prosecution office and the accused. In administrative cases, parties can be individuals but also various types of government agencies, interest groups, semi-public organisations and so forth.

These differences are reflected in the contributions of assistants to the judicial decision-making. Criminal law assistants primarily focus on the incriminating evidence in their memos, while administrative law memos often concentrate on what legislation is applicable and how the legislation should be applied to the case at hand. In administrative law cases, it is also more common for assistants to add additional information regarding legislation and case law to the memo. In criminal memos, this is mostly regarded unnecessary or even inappropriate (see section 5.1.4). The administrative law divisions also have organised more specialisation among judicial assistants, particularly in the capacity of staff lawyers (see sections 6.1.7 and 7.1.3) who specialise in a specific segment of administrative law. These characteristics result in administrative law assistants often being more involved in the capacity of transferring legal knowledge to the judges, whereas criminal law assistants are involved as summarisers of the (sometimes extensive amount of) information in the case files.

*Procedural differences*

Previous chapters already pointed to some procedural differences in the handling of criminal and administrative law cases. With regard to the involvement of judicial assistants, it is relevant that during the run up to criminal law hearings, the prosecution office plays a key role in deciding what cases are scheduled at the hearing and in what capacity the hearing will occur. In administrative cases, judicial assistants take the lead in arranging most of these issues (see section 5.1.1). Additionally, in a small percentage of administrative cases (8 percent in 2012),<sup>24</sup> no hearing is part of the procedure. In those relatively simple cases, judicial assistants play an important role, as they write the draft judgments, usually without first contacting a judge (see section 5.1.2). Another aspect in which the procedures differ is the need for pre-hearing consultation of the parties. In administrative cases, contact with parties occurs more frequently than in criminal cases. As judges are prohibited from having contact with the parties prior to the hearing, it is an important duty of the assistants to act as a buffer (see section 5.1.6).

Furthermore, the percentage of adjudication by judicial panels is slightly higher in the criminal law divisions than in the administrative law divisions (15 percent of all criminal cases in 2014 compared to 11 percent of all general administrative cases).<sup>25</sup> Panel cases are handled in a quite similar manner in the two court divisions, but there is a remarkable difference in the way that single-judge cases are handled. In so-called police-judge cases in criminal courts, it is common procedure for the judge to reach a decision immediately after the hearing. This means that, normally,<sup>26</sup> there will be no deliberation by the judge and assistant between the end of the hearing and reaching the verdict. This limits the contribution of judicial assistants, especially when they also did not prepare a memo (which is the standard procedure in one of the studied courts). In the administrative law divisions, judges can also reach decisions immediately, but this is an exception. In the majority of cases, judges decide the case within six weeks.<sup>27</sup> This entails that judges first plan a meeting to discuss the case with the assistant (see section 6.1.4). At that meeting, the judicial assistant often functions as a sparring partner for the judge, particularly because the assistant is the only person, apart from the judge, who is familiar with the specifics of the case.

*Exchange of views prior to the hearing*

The most noticeable difference between the two divisions is the manner in which judges and assistants perceive the idea of exchanging views prior to the hearings.

24. De Heer-de Lange et al. 2013, p. 234.

25. In criminal law, a norm of 15 percent is set for cases to be handled in a panel. In regular administrative cases, the norm is set at 10 percent. These numbers exclude immigration cases, in which the norm is set at 5 percent, and the actual percentage of panel judgments in 2014 was 3 percent. See De Rechtspraak, 2015, p 53.

26. There are exceptions in which the judge can delay the decision for up to two weeks.

27. Art 8:66 Awb. Which also can be extended with an extra 6 weeks if needed 8:66 sub 2 Awb.

In the administrative law divisions, it appears to be rather common to discuss the merits of a case before the hearing. This is also reflected by the fact that it is common for assistants' memos to include their views on the cases. On several occasions, the assistants even wrote the memos in judgment format (see section 5.1.4). In addition to this, pre-hearing consultations have become common settings for administrative law judges and assistants to discuss cases prior to the hearings (see section 5.1.5). These practices are very different from what occurs in the criminal law divisions. In those divisions, the hearing is traditionally regarded as *the* central place to exchange views. As a result, it is considered crucial to enter the hearing open-minded and unprejudiced. For that reason, the memos are usually prepared in the most neutral manner by the assistants. Planning meetings to discuss cases prior to the hearings is perceived as inappropriate.<sup>28</sup>

This variance in exchanging views in the early stages of the process results in assistants in the administrative law divisions operating more as sparring partners than in the criminal law divisions. Consequently, in criminal law divisions, under normal circumstances, the influence of assistants in the stage prior to the hearing is more limited. However, there is nonetheless a likelihood of a more indirect, and perhaps unintentional, influence by criminal law assistants on judges. As it is impossible to write a memo that is truly neutral, the way in which information is ordered, the choice of words and the selection of information all inevitably add colour to the memo. The criminal law memos are, moreover, often one-sided, as they predominantly focus on the incriminating evidence (see section 5.1.4). Thus, a judge who uses the memo to prepare for the hearing is unavoidably influenced by it. When judges treat the memos as if they are neutral summaries of the files, they may be unaware of the anchoring effect that may occur (see section 5.1.1).

### *Workload*

Judicial officers in the two divisions also deal with different workloads, at least, according to various respondents. They say that, due to the strict deadlines for publishing the judgments in the criminal law division,<sup>29</sup> criminal law judges experience, on average, more time pressure. A judge who was previously positioned in the criminal law division declares about his transfer to the administrative law division:

*'Yes, in the beginning, it was a lot of catching up. But the hearings are much more relaxed. You have time to write the judgment, six weeks. And if you can't make that, you can extend it. The bustle of criminal law is not present.'* (resp. 47)

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28. This difference between the divisions is probably related to the more immediacy-based origin of the criminal proceedings, whereas in administrative law, the process is to a larger extent based on the documentation, see section 5.1.4.

29. Two weeks for criminal cases, while it is six weeks – which can be extended for another six weeks – in administrative procedures.

To summarise, several characteristics of the field of administrative law seem to generally result in administrative law judicial assistants having a somewhat greater role, especially in the early stages of the decision-making process. The existence of a more open attitude to assistants' participation in the administrative law divisions also shows in the opportunities offered to judicial officers in that division to participate during the hearings. Providing assistants with the ability to be involved in questioning the parties during the hearing was only observed in the administrative law divisions (see section 5.1.3). This potentially makes the significant position of judicial assistants somewhat more exposed to the public. Though in practice, this opportunity does not result in a major difference between the divisions. Although various administrative law judges provide judicial assistants the opportunity to be involved during the hearing, only in a small minority of cases do judicial assistants actually act on it.

### 7.3 CONCLUSION

This chapter reveals that the types (administrative and/or secretarial or advisory and/or discussion related) and degrees of involvement of assistants in adjudication particularly depends on seven factors: four factors related to individual officers and three situational factors. First of all, trust – which can be of various types – plays a key role in the openness of judges towards the involvement of assistants. Second, the ideas of the judicial officers regarding what the appropriate role of a judicial assistant should be effects the involvement of judicial assistants in court practice. Third, experience and expertise of both the judge and the judicial assistant are key factors that define the involvement and influence of judicial assistants. There is wide variation among assistants regarding their experience and expertise. Particularly when judges with limited experience are working with highly experienced and specialised assistants, judicial assistants' involvement is often far reaching. The career perspectives and ambitions of judicial assistants also influence the ways in which assistants are involved in the decision-making. The educational backgrounds of judicial assistants are diverse, and this affects the career perspectives as well as the ambitions of the assistants. Assistants who possess law degrees are often especially interested in furthering their careers and, consequently, fulfil their duties more ambitiously.

Apart from these individual factors, various situational factors also play a role. To start with, the types of cases that have to be adjudicated affect the interaction between the judge and judicial assistant. Complex cases often require more consideration, which results in more opportunities for judicial assistants to have influence on the content of the judicial decision-making. Routine cases, on the other hand, are often quite clear cut, leaving little or no room for influence. Yet, in some cases that appear to be standard but in fact may require a closer read, the influence of judicial assistants can be – sometimes unintentionally – substantial. Partly related

to the previous factor is the factor of whether adjudication takes place by a single-judge or a judicial panel. In general, judicial assistants will be more actively involved in single-judge adjudication than in panels. Particularly, in administrative single-judge cases (in which the judge and the assistant plan a meeting to discuss the cases after the hearing), judicial assistants can function as important discussion partners. The fact that cases adjudicated in panels are more legally complex as well as organisationally more challenging, however, may also cause judicial assistants to play an important role. Yet, in the discussions, their views will be competing with those of the three judicial panel members. Lastly, the pressures caused by time and workloads also affect the involvement and influence of judicial assistants in the decision-making. Severe time pressure and high workloads are related to judges relying more heavily on judicial assistants' work. Hence, various factors determine whether a judicial assistant's involvement is small or far-reaching.

Although the factors are discussed separately, in practice, these factors co-exist. It is important to realise that, particularly when several factors are enhancing each other's effects, this can, and sometimes will, lead to quite far-reaching involvement and potential influence of judicial assistants. On the contrary, it can also lead to assistants being hardly involved in the judicial decision-making at all.

The last section of the chapter was devoted to the question of whether differences were found in the involvement of judicial assistants between the two studied courts and the two court divisions. The external validity of these results is somewhat limited (see section 2.1.3), as only two courts and, within each court, two court divisions, were studied, but the account of the data on this subject still reveals some interesting results. First, no major differences were observed between the two court locations. One smaller aspect that appeared to differ between the courts was the career perspectives. In the more isolated court, assistants experienced less possibilities to further their careers, which frustrated them and could harm their working relationship with the judges. A few more differences were observed between the court divisions. On average, the differences caused judicial assistants to perform a somewhat greater role in the administrative law divisions. However, no great difference was observed there, either; more variation was observed in the practices within one court division than between divisions.