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### In the shadow of the judge

*The involvement of judicial assistants in Dutch district courts*

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This book started by stating that although judicial assistants occupy a central position in all types of court systems, we know very little about what their involvement entails and what consequences their employment has on judicial decision-making. In an era in which the managerialisation of courts has become a major issue, and judicial assistants are expected to play a key role in increasing efficiency as well as the quality of judicial decisions, it is of key importance to gain a greater insight into the involvement of judicial assistants and to reflect on this involvement. This is the driver for the following research question for this book:

*In what ways are judicial assistants involved in the judicial decision-making process, and what consequences does their involvement have for the manner in which adjudication takes place?*

Judicial assistants prove to be indispensable in the process of judicial decision-making. At the same time, the involvement of judicial assistants is a particularly sensitive issue. The law appoints judges with the responsibility to adjudicate, and, hence, people expect that judicial decisions are taken under their sole authority. When it turns out that judicial assistants are, in fact, regularly highly involved in the decision-making, this raises questions about the legitimacy of this involvement. From a normative and theoretical angle, taking a rule of law and a managerial perspective, various potential difficulties related to the employment of judicial assistants are addressed. A tension between certain values (e.g. efficiency and transparency versus autonomy and independence) related to the different perspectives is also recognised. This research reveals that this tension affects the collaboration of judges and assistants in court practice. Concrete dilemmas that judges face, which came to the surface in the research, are, for instance: how to most effectively use memos written by assistants; in what manner to include assistants in running the hearing so that they are (and feel) valued but that also presents a suitable image of their position to the public; how (and to what extent) to have judicial assistants participate during deliberations; and how to retain the correct amount of control of the content of judgments while dealing with the fact that judgments are currently drafted by assistants.

In order to gain insight into the involvement of assistants in the judicial decision-making process and its consequences for adjudication, eight months of fieldwork was conducted at two Dutch district courts. Within each of those courts, two different divisions were studied (the administrative law and the criminal law division). Cases were followed from the start of preparing for the hearing to the writing of the judgment. In addition, numerous judges and judicial assistants were interviewed during the fieldwork.

District courts were studied because they handle a wide range of cases, namely both run-of-the-mill cases and large and legally complex cases. The cases in these courts, furthermore, are handled in different setups: by panels as well as by single-judges (with the majority of cases being handled by single-judges). This way, the involvement of judicial assistants in different situations could be observed. Broadening the selection of cases was also the reason for including two different court divisions. The criminal law division and administrative law division were selected because they were expected to differ in the types and degrees of involvement of judicial assistants (see more on the research method and selection criteria in chapter 2).

The results of the fieldwork, in the strictest sense, shed light on the practices as they occurred in the studied court divisions, but several patterns were recognised that are likely to be generalizable to other Dutch courts and also to different jurisdictions.<sup>1</sup> The specific conditions in which judges perform their adjudicative duties (as professionals assisted by subordinate staff) are, in fact, in many ways similar to other professions. Friction between enhancing managerial values and protecting the professional status is also visible in professions, such as the medical profession (see section 1.1). To be able to reflect on the results regarding the Dutch district courts and to place them in a broader, inter-jurisdictional perspective, the research also paid attention to the organisation of higher Dutch courts and of courts in different jurisdictions (namely the US and England and Wales; see chapter 3 for the selection of the studied assistance systems within these jurisdictions). For that reason, interviews were also conducted at Dutch courts other than the ones observed and at English courts.

The first section of this chapter outlines the three main empirical findings of the research. The following section provides an assessment of the desirability of administrative and/or secretarial and advisory and/or discussion-related involvement of judicial assistants in judicial decision-making. The two normative perspectives which guide the organisation of the Dutch judiciary (described in chapter 4) are employed to perform this evaluation. The last section examines the implications of the findings of the research for the judicial decision-making practice. The situation in Dutch district courts is thereby taken as a starting point, but elements

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1. See more on the external validity of the results in section 2.1.3.

of judicial assistance models of other courts and jurisdictions are also taken into account.

## 8.1 EMPIRICAL FINDINGS OF THE RESEARCH

This book contains many empirical findings regarding the involvement of judicial assistants, which are discussed elaborately in chapters 5, 6 and 7. In this concluding section, three central empirical findings are highlighted.

### 8.1.1 *Discrepancy between the formal position of judicial assistants and the wide variation in their actual involvement*

It has been a presupposition from the start of the research that the official and publicly recognised contribution of judicial assistants to the adjudicative process could well be different from their involvement in practice. The research reveals that there is, indeed, a discrepancy between the formally recognised position of assistants, as codified in Legal Acts and policy documents, and their actual involvement in judicial decision-making.

Chapters 3 and 4 reveal that Dutch Legal Acts, statutes and policy documents are quite specific about the recording duties of judicial assistants and their administrative responsibilities, but duties which entail active involvement in the content of judicial decision-making are barely mentioned. In the course of the introduction of various managerial principles to the courts, documents were produced that plainly mark the time that judicial assistants and judges are supposed to spend handling cases.<sup>2</sup> This did not instigate the development of general policy regarding the division of work or the collaboration between judges and judicial assistants, which is virtually non-existent in judicial policy documents. While collaboration with judicial assistants comprises a major part of the judges' daily work, this is, for instance, not reflected in the judges' function profiles.<sup>3</sup> The nationwide function profiles introduced in 2007 for judicial assistants do list the various duties which judicial assistants can have in the decision-making process. However, these descriptions remain very general; the profiles do not provide detailed information of what, for instance, 'assisting judges in conceiving judgment' entails (see section 3.2.2). Remarkably, the function profiles also do not mention the role of judicial assistants during deliberation sessions. At a court or court division level, the intensified employment of judicial assistants has generated some regulations: often, quite detailed guidelines and templates exist regarding the work of judicial assistants.

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2. The nationwide Lamicie-model provides indications for how to allocate the time, and the individual courts have adjusted these models as desired; see also section 4.2.2.

3. The only reference to the collaboration of judges with assistants that is mentioned in their 6-page-long profiles is that the judges 'work together with assistants and have contact with them'; see section 3.2.2.

These regulations clearly delineate what practical information should minimally be included in the documents produced by assistants. The regulations are, however, vague about whether and how judicial assistants should include their own views on cases in these documents (see sections 5.2.4 and 6.2.1).

Hence, the image which is presented in regulations and policy documents is that of a judicial assistant who is mainly an administrative figure and who has only limited involvement in the judicial decision-making. This image is reinforced by the fact that at the hearing – the main public element of the adjudicative process – the involvement of judicial assistants is usually minimal (see section 5.3.7).

This depiction is, at least partly, in contrast with the results of the fieldwork at the two district courts. A wide variation was observed in the involvement and influence of judicial assistants in the judicial decision-making practices, probably chiefly driven by the lack of regulation (see section 8.1.2). Judicial assistants in Dutch district courts are allocated duties in all stages of the decision-making process. Although their precise duties differ somewhat per court, court division and type of assistant (see section 3.2.1), on average, these duties include preparing memos, producing the court records, attending (and participating in) the deliberations and conceiving draft judgments. Thus, apart from several largely administrative duties, such as the creation of the court record, judicial assistants are also allocated various duties which contain more advisory or discussion-related features. Nonetheless, the actual contribution of judicial assistants to the judicial process by performing these duties varies greatly.

On one hand, the fieldwork exposed situations in which the judicial assistants' involvement in the judicial decision-making process was substantial. Various judges make extensive use of memos prepared by assistants as road maps for understanding the cases (see section 5.1.4). During the hearings, some assistants were involved in pointing out procedural aspects that the chairing judge was about to overlook. Judicial assistants are occasionally also involved by asking questions during the hearing.<sup>4</sup> In some deliberation sessions, assistants were also observed to be highly involved in the discussions. Lastly, the drafting of judgments is also a duty in which assistants frequently play an important role by writing the first drafts, often after having received only general directions (see section 6.1.6).

On the other hand, the research revealed occasions in which the involvement of judicial assistants in the judicial decision-making process was limited to almost non-existent. In the run up to the hearing, this was the case in situations in which (by protocol) no memos were prepared<sup>5</sup> or in which the judge (for various reasons) was not making much use of the prepared memo (see section 5.1.4). The involvement during the hearings was usually largely restricted to making the court records, which is an important but also largely administrative duty (see section

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4. Although I personally did not observe judicial assistants asking an important question during the hearing, a respondent mentioned that this does happen, see section 5.2.3.

5. Which is standard procedure for single-judge cases in one of the criminal court divisions.

5.2). In some deliberation sessions, judicial assistants were not invited to present their views, or sometimes, assistants themselves chose to hardly participate in the discussion (see sections 6.1.2, 6.1.3 and 6.1.4).<sup>6</sup> Lastly, in conceiving the judgments, the role of assistants is sometimes minimal when judges provide them with detailed instructions (sections 6.1.6 and 6.2.2) or when judges heavily alter the draft judgments afterwards (section 6.2.5).

In summary, the types and degrees of observed involvement of the judicial assistants was diverse. This is due to personal characteristics of the judges and assistants but also to various circumstantial factors (see also chapter 7). First and foremost, the judge has to be receptive towards the involvement of judicial assistants. Trust in the judicial assistant is a key factor for this. There must be a general willingness among judges to trust judicial assistants, but the *particular* judicial assistant who is involved also has to be regarded as trustworthy to the judge (Mayer et al., 1995). The research reveals that competence-based trust is especially important in this context.<sup>7</sup> Whether a judge considers a judicial assistant to be competent is, for a large part, dependent on their previous associations with the assistant. The perceived experience and expertise of an assistant are also important factors. Particularly, some senior assistants in the courts are highly respected, and they are therefore often highly involved in the decision-making.

While the receptiveness of the judge towards the judicial assistants' involvement is a precondition, the type and degree of involvement is also dependent on the proactivity of the judicial assistants in performing their duties. Some assistants (who have certain role perspectives) possess a more proactive attitude than others. However, this attitude is also something that develops over time; most assistants say that they became more confident and proactive as they worked for a longer period in the courts. The ambitions of assistants to further their careers also play a part in their proactivity. The newly hired assistants especially often regard a judicial assistant position as a learning experience to further their careers.

The circumstances in which the decision-making takes place also determine whether an assistant will play a substantial role. When the workloads are high and when decisions are made under time pressure, judges rely more heavily on the work of judicial assistants than they normally might. For instance, some judges mention that time pressure affects the time they spend on revising judgments (see section 7.2.6). Certain types of cases also require more involvement of judicial assistants. In simple routine cases, judicial assistants regularly play an important administrative and secretarial role, but in those cases, there is often less need for assistants to provide judges with advice or act as sparring partners. In complex

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6. Note that in certain cases, no deliberations take place (e.g. most single-judge criminal law cases).

7. When there is a lack of trust in the judicial assistants' abilities to produce adequate materials, this results in situations in which judges are simply not making much use of the memos. Other judges spend endless time checking whether every detail of a draft judgment is a correct reproduction of the information in the case files, because they do not trust the assistants' meticulousness.

cases, however, the knowledge and views of assistants are regularly regarded as welcome contributions to the discussion. Lastly, the setup of the legal procedure also defines the involvement of judicial assistants. Judicial assistants will more frequently act as discussion partners to single-judges than to judicial panels. Nonetheless, judicial assistants also play an important role in some panel deliberations, for instance, when a panel consists partly of new or deputy judges. Especially when several factors that enhance the role of judicial assistants co-occur, their involvement can be considerable.

### 8.1.2 *Ambiguity in the judge–judicial assistant relationship: a cautious search for the right balance*

The second finding of the research is the ambiguity observed regarding the position of judicial assistants and their relationship with judges. The judge is officially appointed as the adjudicator and, hence, is responsible for administering justice, but he or she is increasingly assisted by subordinates who may directly or indirectly influence the decision-making. This circumstance brings along several complex questions regarding the responsibility of judges, the suitable and permissible allocation of duties, the reliance on judicial assistants' work and the monitoring of judicial assistants (see e.g. Fiss, 1983; Hol, 2001; Kronman, 1993; McCree, 1981, also section 1.2). Many of these issues are similarly pressing in other professions. However (as emphasised in section 8.1.1), the Dutch judicial organisation is rather exceptional in providing very limited policy or regulations regarding the division of labour between judges and assistants. Particularly, the more advisory and discussion-related duties of assistants are scarcely codified or regulated. As a result, many decisions regarding how to give substance to the involvement of judicial assistants are transferred to the judicial officers in the workplace, resulting in a wide variation in this involvement in court practice.

One specific aspect that raises concerns among court officers is the fact that the increased involvement of judicial assistants in judicial decision-making could be considered a threat to the authority or legitimacy of the judicial office. This is a particularly complicated issue from a rule of law perspective on adjudication. When many of the duties that used to be exclusively entrusted to judges (appointed for adjudicative reasons) are, in fact, being performed by their assistants (mainly appointed for administrative reasons), this can potentially damage the status and legitimacy of the judicial office. In addition, the degree to which this information becomes public could also harm the general public's trust in the judiciary (see Bieri, 2016, p. 33; R. A. Posner, 1985, p. 110, see more on this topic in section 1.2). Van de Bunt (1985, p. 107) raised a similar concern when additional duties were mandated to assistants at the Dutch prosecution office in the 1980s (which he refers to as 'disenchantment' of the function of prosecution officers). Maintaining a façade of what the professional work stands for – despite the reality of the internal

stratification – is, in fact, recognised as one of the key collective aims of (legal) professionalism (Francis, 2001, p. 22-24). Freidson (2001, chapter 2) identifies, as one of the features of professionalism, that professionals will be sceptical towards allocating more duties to other personnel in the organisation. In the 1980s, Abbott argued that '*internal stratification provides the basis mechanism that keeps the public picture of professional life separate from the workplace one*' (Abbott, 1988, p. 134).

This research demonstrates that several Dutch judges are indeed concerned about the increased involvement of judicial assistants in judicial decision-making and especially about the appearance thereof to the public. This concern can, for instance, be observed when looking at the importance that several judges attach to the fact that, during the public hearing, the involvement of the assistant should be limited to administrative duties. Most judges do not provide judicial assistants with the opportunity to ask questions during the hearing, and some judges actually regard such a contribution as inappropriate (see section 5.3.3). Acting in such a manner allows the judges to maintain the public image of judicial assistants as merely administrative officers. Judicial assistants, too, seem to be aware of the existence of this concern regarding the authority of the judicial office. During interviews, on various occasions, judicial assistants began by downplaying their potential influence on the decision-making by pointing to their official duties as codified in legal codes, only to elaborate on situations in which they certainly had influence on the decision-making process later on in the interview. Another example of judicial assistants' reluctance to interfere too strongly in the public part of the adjudicative process is found in the response of a judicial assistant to the occasionally provided opportunity to ask questions during the hearing. This assistant says that she does not feel truly free to raise questions, as she feels it would come across as trespassing on the terrain of the judge to raise questions that the judge did not raise him- or herself (see section 5.3.3).

Conversely, social relations in the courts do appear to have changed over time (see also Commissie visitatie gerechten, 2014, p. 53-54), and the involvement of judicial assistants in various phases of the judicial decision-making process has become inevitable. In addition to criticism that court officials express towards managerialism,<sup>8</sup> the significance of efficiency that comes along with employing judicial assistants is also acknowledged and, to some extent, embraced by judges (see also Frissen et al., 2014, p. 61-64). In accordance with these trends, current social norms in the courts stress that it is also inappropriate for judges to disregard the involvement of judicial assistants. Various judges remark in interviews that it is important to take judicial assistants seriously and that they greatly benefit from the contributions of judicial assistants. This is partly because the occupation of judicial assistant has become professionalised: assistants currently are mostly law school graduates, and they are often allotted considerable time to prepare memos and other materi-

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8. E.g. in the manifesto of Leeuwarden, published in *Trema*, February 2013.



als for the judges (see e.g. section 5.2.4). Not providing judicial assistants with the opportunity to contribute to the discussion during deliberations is widely considered inappropriate (sections 6.1.2). It appears as if certain judges, perhaps unintentionally, want to display an even more open attitude towards the involvement of judicial assistants than they do in reality (see section 2.1.4). In this context, several judges also mention that they consider it important to 'respect' the work produced by judicial assistants. Consequently, carelessly altering an entire draft judgment without informing the judicial assistant is regarded inappropriate (section 6.2.6). Judicial assistants also regularly expect to be taken seriously and to – at least to some extent – be included in the decision-making. These norms regarding judicial assistants' involvement also presuppose that competence-based trust (Mayer et al., 1995) in the assistants' work exists in the collaboration between judges and assistants. When this trust is indeed present and the social norms are really endorsed, which appears to be the case for a large group of judges,<sup>9</sup> this intensifies the involvement of judicial assistants. However, when judges do not entirely trust the work of judicial assistants – a circumstance that was also occasionally observed in the research – the norms can also result in judges providing judicial assistants with room to participate merely for sake of appearances (see on trust, section 7.1.2). Hence, different standards exist regarding the appropriate involvement of judicial assistants. Some respondents display a firm attachment to various rule of law-related values, while others demonstrate a stronger appreciation for managerial values. This is related to the diverse opinions that circulate regarding what role judicial assistants play and ought to play in the judicial decision-making process (see section 7.2.1). Some judges and judicial assistants believe that the involvement of assistants should mainly be limited to administrative and secretarial duties, while others embrace a further-reaching advisory or discussion-partner role. Apart from some clear boundaries that appear to be widespread norms in the courts, such as the fact that a judge should not completely rely on the memo and that he or she should not refrain from reading the case files as preparation for the hearing (see section 5.1.4), ambiguity is exposed regarding what behaviour is and is not accepted: Are judges required to check all information included in a draft judgment? Is it acceptable to not read all the information in the case files? To what extent are assistants required to give advice, and are judges supposed to take this advice into account? These questions are answered differently by individual judges, but they also seem to be approached somewhat differently in the different court divisions (see section 7.3.2). The relationships between judges and assistants are noticeably tested when a judge or a panel of judges is planning to reach a decision with which the judicial assistant fundamentally disagrees. This raises the question of whether there are any prospects for judicial assistants – who are not officially accountable for the decision – to object to such a decision. Can assistants,

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9. These judges refer to their endorsement of the norms in their answers to interview questions.

for instance, refuse to draft or sign such a judgment? Some respondents firmly believe that refusing to write or sign a judgment is absolutely inconceivable. Others considered this to be a difficult issue that could best be handled pragmatically. A pragmatic approach was indeed chosen for the limited occasions in which this situation actually occurred; on one occasion, for instance, a different assistant was assigned to write a case (see section 6.1.5). Instead of instigating a fundamental discussion regarding these issues, such a pragmatic approach appears to be a more common way to cope with complex issues regarding the role of judicial assistants (e.g. the allowance of assistants to ask questions during the hearing or permitting assistants to write judgment drafts as memos). A pragmatic, or somewhat evasive, attitude is also observed in judges when providing judicial assistants with feedback regarding their performances. Judges mostly do not provide assistants with wide-ranging feedback (see section 6.1.5, p. 168 and 6.2.5, p. 192; see also *Commissie visitatie gerechtshof*, 2014, p. 51-55).

Hence, the complex power relationship between the judge and assistant appears to be something that many court officers are struggling with and which they handle in different ways. Officers seem to be balancing between adhering to a more formalistic ideal of the judicial assistants' position and finding a practical and social way to cooperate and benefit from each other. For judicial assistants, the ambiguity which is inherent to this balancing act can result in uncertainty regarding the type and degree of involvement that is expected of them (see also section 6.1.8).

Ambiguity regarding the involvement and potential influence of judicial assistants is also a prevailing issue in the literature on the analysed common law judiciaries in section 3.2. However, section 3.2 also reveals that in different judiciaries, different aspects of the involvement of judicial assistant are considered problematic. For instance, in the US, it is inconceivable that law clerks would participate in deliberation sessions, but their involvement in drafting judgments is currently considered rather common. This is related to the fact that the law clerks are appointed as personal assistants to the judges. In England and Wales, on the contrary, the possibility of judicial assistants participating in drafting judgments is considered inappropriate. Similar to the Netherlands, judges and assistants in these countries also appear to be searching for the right balance in their collaboration with one another. The observed ambiguity also appears to hinder the instigation of a discussion regarding the proper parameters for the involvement and influence of judicial assistants. This contributes to the perpetuation of the gap between the formal function of judicial assistants and their actual involvement in court practice, which was discussed in the previous section.

### 8.1.3 *Judicial assistants' involvement affects the judicial decision-making practice in various ways*

It is valuable to gain insight into the involvement of judicial assistants in decision-making, but an important follow-up question is what the consequences of this involvement are. In this last subsection, three different ways in which judicial assistants' involvement affects the judicial decision-making process are outlined.

#### *1 Judicial assistants control the progression of a case within the court*

When entering the work place in the courts, it becomes immediately obvious that judicial assistants are, to a large extent, in control of the course of the entire judicial procedure. Judicial assistants are the first judicial officers to receive the case files, and in the first stages of the process, they play an important role. In administrative law divisions, for instance, a special pool of assistants is appointed with the duty of screening cases to determine how much time should be scheduled for hearing them and to decide whether the cases should be handled by a single-judge or a panel (see section 5.2.1). The discretionary room they possess in deciding these matters provides them with power to determine how much attention a certain case receives from the judge(s) and how much time litigants receive to defend their positions in the courtroom. Although – unlike law clerks at the US Supreme Court – the Dutch assistants have no influence on which cases are selected to be handled (as there is no discretionary review in the Dutch district courts), they do affect the amount of consideration a case receives from the court.

In the run up to the hearing, judicial assistants are also in charge of structuring the court files: they assure that the files are complete and decide when the files (including the memo) are sent to the judges in order for them to prepare for the hearing. As it is the norm in Dutch courts that judges do not partake in direct contact with litigants or defendants outside of the setting of the hearing, assistants are often appointed to contact the parties when this is considered necessary (see section 5.2.6). Although the contact mostly relates to procedural matters, such as asking for missing documentation, on rare occasions, judicial assistants are also requested to obtain information from litigants concerning content-related matters, such as whether the parties might be interested in settling a case instead of going to court. It then partly depends on the approach taken by the assistant whether parties will indeed make an effort to settle the case.

During the hearing, assistants have to relinquish their controlling position, because the judge is indisputably responsible for chairing the hearing. Still, in the courtroom, assistants are usually carefully checking whether all the mandatory procedural steps are taken. A number of hearings were observed in which assistants indeed pointed out procedural aspects to the judge that he or she was about to forget (see section 5.3.3). When deliberations take place, the assistant also has to settle for a more submissive position. Nonetheless, because assistants are also present at

deliberations to collect the information needed for drafting the judgment, they must pay special attention to whether all aspects that have to be included in the judgment are discussed and decided upon. By compelling the judge(s) to focus on particular elements of the case, they can prevent them from taking decisions without carefully considering the legal and, particularly, procedural consequences.<sup>10</sup>

After the deliberations, the assistants commonly take the case files with them in order to draft the judgment. In drafting a judgment, most assistants usually do not take into account the specific style-related desires of the judge(s) they are drafting for (see section 6.2.4). Strict time limits are established by law for completing and publishing cases, particularly in criminal law divisions, where the judgment has to be completed within two weeks. Due to these deadlines, the timeliness with which assistants present the judges with the draft judgments also affects how much time judges have to read, reconsider and revise the judgment before it is finalised.

Hence, judicial assistants perform an important role as guards of the procedural aspects of the judicial process. Assistants also acknowledge this role themselves; they really feel responsible for ensuring that all procedural and administrative aspects of the decision-making process run smoothly. This is also the aspect of judicial assistants' work that most judges do trust and rely on. This setup releases judges from the burden of performing all these duties that do not directly relate to the core of their adjudicative responsibility. In this role, judicial assistants are not directly influencing the content of the judicial decisions, but they are affecting the working methods of judges. Their contribution, for instance, determines the time that judges are afforded to spend on their duties. Additionally, when assistants navigate the discussion in the deliberation room or when they emphasise certain aspects in their memos, they are also, to some extent, directing the content of cases that are discussed. In this way, they may indirectly affect the outcome of cases.

## 2 *Judicial assistants are steering the judges in a certain direction*

With regard to American courts, Kronman (1993) and Posner (1985) have pointed to the changing entity of the judicial work; instead of draftsmen of judgments, judges have become reviewers of the work of law clerks. This development can also be recognised in the Dutch district courts. Currently, the judges seldom completely write judgments themselves; most of the time, the assistants produce the first draft of judgments. In addition to this, judges are often presented with memos to help them get acquainted with the case files.

Although it has been argued that regardless of this changed entity, judges are perfectly able to make their own individual decisions (Edwards, 1981), literature regarding heuristics and cognitive biases in decision-making suggest otherwise (see e.g. Guthrie et al., 2007; Tversky & Kahneman, 1974). Hol (2001), moreover, argues that this changed entity can undermine the judge's ability to take into

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10. Which has been a concern of, e.g., Posner (2008); see also the next section.

account all complexities of the context in deciding cases. People, including judges, are inevitably influenced by the manner in which information is presented to them. For that reason, it can also be concluded that when memos produced by assistants are used by judges, these memos will steer the judges' attentions in certain directions, regardless of whether the assistants intended to do so. The impact of the memos is especially wide-ranging when judges rely heavily on them in preparing for the hearing. It is difficult in this qualitative research to reveal in detail how much judges relied upon memos, but several judges mentioned that memos do play an important role in their preparations. It was observed on two occasions that judges had exclusively read the memo in order to prepare for the hearing and following deliberation session (see section 5.2.4). The extent to which judges are steered into a specific direction additionally depends on the content and format of the memos. In the administrative law divisions, several assistants prepare memos in the form of a draft judgment in order to save time. This results in memos that often largely emphasise one side of the case. In the criminal law divisions, the formats of the memos are sometimes such that the memos mainly focus on incriminating evidence and do not pay attention to possible exculpatory circumstances (see section 5.2.4). When such memos are employed, the risk of judges becoming biased by the information in the memos increases.

It is not only memos that steer judges in a particular direction when adjudicating cases. Judicial assistants composing the first drafts of judgments also narrows the judges' room for thought and consideration, particularly when it comes to complex cases. Kronman (1993, p. 330) and Posner (2008, p. 286) have argued that the process of writing judgments serves as a natural avenue from which to reconsider one's initial judgment. When judicial assistants are creating the first draft judgments, this function is removed from the judge. This circumstance was, for some of the judges in this research, a reason to occasionally write a judgment themselves. However, they only did so on rare occasions (see section 6.2.1). All of the followed cases in this research were drafted by assistants. Thus, it appears that this reconsidering aspect of the judgment writing is largely adopted by the assistant. A remarkable finding is that, several times, judicial assistants realised while writing draft judgments that an initially taken decision turned out to be impossible to write down and required reconsideration. Subsequently, the assistants reopened the discussion about the case with the judges, which occasionally resulted in a different outcome. Although it is impossible to know whether the same action would have been taken if the judge had done the drafting him or herself, this does confer to the assistant an important responsibility. Furthermore, this unofficial responsibility requires assistants who are confident enough to speak up when they believe a judgment should be altered. Considering the introverted nature of some assistants, all assistants might not feel comfortable doing this.

Altering the key outcome of a case in such an occasion is still a rare event, but the judgment drafting also provides judicial assistants with the possibility of influenc-

ing smaller details of a judicial decision, such as the grounds or motivations given for certain (sub)decisions. The fieldwork revealed that judges often do not provide assistants with detailed instructions for writing drafts, leaving it up to the assistants to make proposals (see section 6.1.6). These proposals most likely function as important starting points for judges when revising the judgments. Particularly when judges are revising the draft judgments under time pressure, they may easily be tempted to adhere to the proposals of the judicial assistant (see section 7.2.6).

By performing assisting duties, judicial assistants clearly – intentionally or unintentionally – steer the judges in certain directions. It cannot be said whether this inevitably improves or deteriorates the quality of the judicial decisions. However, it does indicate the (frequently regarded as problematic) situation in which a person appointed as an assistant is in fact influencing the decisions of the appointed adjudicator. The fact that this influence occurs subtly makes it particularly difficult to grasp. In the American literature, the prospect of judicial assistants intentionally attempting to influence judges' decisions is often mentioned as a hazard (see e.g. Peppers, 2006, chapter 1; see also section 1.2). This prospect is also cited as the reason for including various measures to prevent law clerks from having too much influence. In the fieldwork at the Dutch district courts, the prospect of judicial assistants *intentionally* attempting to influence the outcome of the judicial decision-making did not arise as a prominent concern.<sup>11</sup> This section, however, reveals that subtle and even unconscious influence of judicial assistants is plausible. With regard to the memo, a few judges claim to be aware of such influence. Still, this potential influence does not appear to be on the minds of many of the judges and assistants, and it does not receive much attention from court management.<sup>12</sup>

### 3 *Judicial assistants are providing judges with additional views to consider*

In addition to the previously mentioned (largely) indirect manners in which judicial assistants affect the decision-making, judicial assistants also affect the decision-making with more direct and open approaches. This particularly occurs when assistants provide judges with advice or act as their discussion partners. When judges are responsive to such types of involvement and include judicial assistants in the decision-making, this results in situations in which the assistants are directly afforded room to affect the judicial decision-making.

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11. Even though a few judges did mention the threat of experienced judicial assistants attempting to overrule new judges with their knowledge, see section 7.2.2.

12. With regard to the managers, this limited attention is also derived from the lack of policy or training regarding this issue.

Introducing new information or extra arguments is regarded as advantageous for reaching good decisions,<sup>13</sup> so by introducing these, judicial assistants can enhance the quality of judicial decision-making. When assistants act as contrarians and actively provide judges with new viewpoints or contradictory information, they can improve the quality of the decision-making by preventing tunnel vision from occurring (see e.g. Rassin, Eerland, & Kuijpers, 2010). This research reveals, however, that advisory involvement is also the most controversial. Not all judges believe that judicial assistants should play a part in the judicial discussions and deliberations, and, moreover, not all assistants regard this as one of their duties (see section 7.2.1). At the same time, several judges and assistants also state that they greatly value such participation. For instance, one judge mentions how she missed discussing the case when she once had to handle a hearing without being assisted by an assistant who was familiar with the case specifics (see section 6.1.4). The fieldwork also revealed that judicial assistants regularly provide judges with additional information and/or deviating understandings of cases (see section 5.2.4). Particularly in the administrative law divisions, it is regarded as obligatory to a large extent for assistants to include their views on a case in their memos. Several judges use the memos as vehicles to challenge their own views on a case. One judge, for instance, says that considering the views of an assistant can prevent tunnel vision from occurring in this judges' decision-making (see section 6.1.4). In addition to getting acquainted with the views of the assistant via the memo, some judges also seek out informal oral discussions about cases with assistants.

The involvement of assistants as discussion partners is most evident during deliberation sessions. Respondents highlight that deliberations are about exchanging arguments; it is the strength of an argument that counts, not the person who brings it across. However, the research also demonstrates that the assistants' more-limited authority does affect their input (see section 6.1.8).

In the administrative law divisions, single-judges commonly hold deliberation sessions with the assistant who is appointed to the hearing. In all the observed single-judge deliberation sessions, the merits of the cases were discussed on very equal grounds (see section 6.1.4).<sup>14</sup> Given that the assistant is the only other court officer who is familiar with the specifics of a single-judges case, assistants regularly function as a significant discussion partners to judges.

During panel deliberations, judges can discuss the cases with the other judicial panel members, and judicial assistants do not always play an important role. However, especially when some of the judicial panel members are less knowledgeable

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13. This is the presupposition of research on knowledge sharing and hidden information in group decision-making. For the original study on hidden information, see Strasser & Titus, 1985. For a study on sharing information in deliberation sessions by Dutch judges, see Ten Velde & De Dreu, 2012. On knowledge sharing in courts, see Taal, 2016.

14. The judge and assistant were both speaking an equal amount of time and, on occasions, convincing each other of a certain approach.

or experienced, judicial assistants sometimes partly take over their position as discussion partners. Moreover, when the judges disagree, the opinions of judicial assistants can also function as levers to reach a decision (see section 6.1.2). In panel deliberations, it is also regarded as the norm that judicial assistants are provided the opportunity to present their views before the judges present their views. This provides the judicial assistant with the potential to influence the direction in which the deliberation heads. Bearing in mind the literature on *anchoring* (see Appendix 12; see also Tversky & Kahneman, 1974),<sup>15</sup> it is likely that these views will function as reference points in the decision-making that follows. Depending on how likely an assistant is to adjust his or her views to those of judicial panel members (e.g. because the judges possess a lot of authority), the assistant can also contribute to the occurrence of *groupthink* (see e.g. Janis & Mann, 1977). In some instances, judicial assistants indeed appeared to modify their analyses to what they believed the judges wanted to hear. More often, however, they did not. Since judicial assistants regularly have already written a memo in which they present their views to the judges, they may be compelled to defend their original presented opinions instead of going into the discussion with an open mind.

Hence, in situations in which judges are receptive to the advisory or discussion-related involvement of judicial assistants, and, concurrently, judicial assistants are proactively performing such duties, this results in the assistants influencing the decision-making. This type of influence occurs in a more open and direct manner than the influence presented in the previous subsections. This reveals a novel role that judicial assistants increasingly appear to play in judicial decision-making. This type of involvement is, according to some, very valuable for the decision-making process, whereas others regard it as problematic. The next section normatively evaluates the involvement and effect of judicial assistants on the decision-making process.

## 8.2 NORMATIVE EVALUATION OF THE INVOLVEMENT OF JUDICIAL ASSISTANTS IN JUDICIAL DECISION-MAKING

Chapter 4 of this book offered a normative framework for evaluating the involvement of judicial assistants in court practices. The framework builds on two perspectives: the classical rule of law perspective and the novel managerial perspective. These two perspectives are selected because they currently are important in guiding the organisation of the Dutch judiciary (and likewise many other judiciaries).

The rule of law perspective revolves predominantly around the idea that the judiciary should play a crucial role in restricting government powers; it is very much

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15. *Anchoring* is the phenomenon that one adjusts one's judgment to an initially presented value that then serves as a reference point for the judgment.



concerned about protecting the individual. Measures to ensure the independence and neutrality of the judiciary are key in this perspective. The rule of law perspective emphasises that adjudicative duties should be appointed to officers who are surrounded with proper institutional safeguards regarding their independence, impartiality and judicial and ethical competence, currently most strongly present for judges. Creating the right institutional surroundings for adjudicators would result in them providing justice to the public.

The managerial perspective derives its legitimacy primarily from its responsiveness to the needs of modern society. It is mainly aimed at the public purpose of judicial decisions; the efficiency and effectiveness of adjudication occupy a central position, and judicial assistants can play an important role therein. Adjudication receives its authority, within this perspective, by having objective quality standards to measure the functioning of courts and their officials. Transparency and a focus on the desires of litigants also play an important role. For a more elaborate description of these perspectives, refer to chapter 4.

A drive towards managerialism has recently been observed in the Dutch judiciary. This drive appears to mainly be a countermovement against what could be regarded as certain undesirable features of a too-rigid interpretation of the rule of law. However, the movement has subsequently been criticised for moving too far away from several highly desired rule of law values. In this book, it is acknowledged that both the rule of law and managerial perspectives provide valuable parameters (which are partly overlapping but can potentially also be conflicting; see Mak, 2008b) for shaping and evaluating the judiciary. Thereby other authors (Mak, 2008b, p. 95-101; Vining, 1981, p. 248) are followed in their accountings that it is important to balance the values related to both perspectives.

### 8.2.1 *Theoretical evaluation of different types of duties of judicial assistants*

In order to reflect on the involvement of judicial assistants, in chapter 4, an analytical distinction was introduced between 1) administrative and secretarial duties of assistants (which are duties for which judicial assistants are not directly involved in the content of the judicial decision-making), and 2) advisory and discussion-related duties (for which judicial assistants are directly involved in the judicial content of decision-making). The conclusion of the chapter regarding the first type of involvement was that strictly administrative and secretarial involvement of assistants is desirable from a managerial perspective, as it hypothetically will enhance the efficiency of adjudication. Given that this type of involvement, in theory, does not result in judicial assistants affecting the content of the decision making, the rule of law perspective raises few objections to this type of involvement and regards this involvement as permissible.

With regard to the advisory and discussion-related duties, the two perspectives raise more objections. Although both perspectives acknowledge the potential bene-

fits of judicial assistants' contributions to the quality of the decision-making, the perspectives also point at certain – partly perspective-specific – problems related to advisory or discussion-related involvement. These problems are related to the fact that, in order to perform advisory and discussion-related duties, judicial assistants, in many ways, have to possess competencies similar to those that judges are required to possess. This also means that – in line with the values related to the two perspectives – assistants should be selected after a thorough selection process and after following extensive training and education. However, from a managerial perspective, this has the substantial disadvantage that providing this training is costly, and, consequently, the (cost) efficiency of employing assistants is largely diminished. Principle-agent theory further points to the fact that allocating duties to subordinates can result in an asymmetric information position, which makes monitoring of the work of assistants challenging (see section 4.2.1). The rule of law perspective is, in relation to these duties, concerned about employing assistants who followed the right training to achieve the required virtues for being involved in adjudication. This perspective further adds that assistants can only be permitted to perform these duties when they are surrounded with various institutional safeguards regarding their impartiality and independence. Here, a tension between the two perspectives can be recognised, as providing these safeguards will bring about even more costs, making this type of involvement even less attractive from the managerial perspective.

### 8.2.2 *Evaluation of the involvement of judicial assistants in practice*

This research shows that, first of all, courts have high expectations for the benefits of employing assistants: judicial assistance is expected to increase the efficiency of courts, and, at the same time, judicial assistants are also expected to help improve the quality of the decision-making. The Dutch judicial organisation promotes an administrative and secretarial type of involvement of judicial assistants *and* – to some extent – advisory and/or discussion-related involvement. In practice, in the Dutch district courts, judicial assistants are indeed observed to perform both types of duties.

#### *Administrative and secretarial involvement*

Administrative and, to a lesser extent, secretarial duties have been part of the responsibilities of assistants for decades, and they still comprise a large portion of the judicial assistants' work. The extent to which administrative and secretarial assistance actually turns out to be beneficial depends on how much the efficiency and effectiveness are actually increased by it. During the fieldwork, some minor complications were observed which hinder the efficiency enhancement of assigning judicial assistants with administrative/secretarial duties. First of all, some assistants consider their secretarial role to be rather limited (see sections 7.1.2 and

7.2.1). These assistants, for instance, prepare much shorter summaries of cases than other assistants. Additionally, various respondents mention that they believe that some assistants lack the required skills to provide accurate summaries and to draft proper draft judgments. As a result, certain judges experience difficulties trusting the work of assistants and, consequently, spend a lot of time revising their work or simply do not make much use of it. When this occurs, the efforts which the judicial assistants are performing as part of their function may not really be beneficial to the judges.<sup>16</sup> Nevertheless, because the administrative and secretarial duties normally do not require a great deal of skills and knowledge, this trust aspect is usually not a major issue. Therefore, on average, the allocation of strictly administrative and secretarial duties to judicial assistants appears to function quite well. Judges and judicial assistants largely recognise that judicial assistants are required to perform these duties, and, commonly, assistants perform them without much supervision or monitoring by judges. Hence, from a managerial perspective, the administrative and secretarial involvement of judicial assistants generally appears to make the courts run more efficiently.

An important finding is, however, that while it may be possible to make a theoretical distinction between strictly administrative/secretarial duties (for which judicial assistants are not involved in the content of the judicial decision-making) and advisory/discussion-related duties (which may result in the involvement of assistants in the content of the decision-making), in reality, making such a distinction is not feasible. Section 8.1.3 shows how various primarily administrative and secretarial duties, in fact, potentially affect the content of adjudication and, furthermore, that many duties that seem secretarial (such as writing a memo) also contain advisory and discussion-enhancing elements (see e.g. section 5.2.4). This makes administrative and secretarial involvement of assistants more problematic from a rule of law perspective, as it to some extent expands the concerns regarding content-related involvement (see the section below for details on the concerns that arise). This results in the necessity to also incorporate measures to prevent biases in the decision-making and to safeguard the institutional position of assistants, with respect to the administrative and secretarial duties.

#### *Advisory and discussion-related involvement*

Prominent advisory and discussion-related involvement was also observed during the fieldwork. This type of assistance does not always occur, and it depends on various circumstances whether assistants are involved in this manner. In most of the observed situations in the courts, the judicial assistants' involvement in advisory and discussion-related duties was not excessive. Even though few regulatory boundaries are set, most judges only limitedly rely on the work of assistants. They

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16. Such a situation was, for instance, described in section 6.2.5, when – in an exceptional situation – a judgment had to be severely changed and was adjusted twice, as the first corrected version still contained inaccuracies.

are largely personally in control of the decision-making. On some occasions, judges were even so significantly in control that they did not allow judicial assistants to be involved at all. This appears to be largely related to the aforementioned lack of trust some judges have in the judicial assistants' capabilities, which becomes a more prominent concern when it relates to involvement in performing content-related duties. The views of judges and assistants concerning the appropriate involvement of judicial assistants also appear to play a role in this (see section 7.2.1). From a rule of law perspective, this reluctance to allocate too much responsibility to assistants seems comforting. However, given the fact that judicial assistants are compelled by the organisation to perform various advisory and discussion-related duties, this course of events is not in accordance with managerial values, as it is inefficient when judges hardly utilize the work produced by assistants. In contrast to the previous observations, in a few instances, judicial assistants' involvement in performing advisory and discussion-related duties was so significant that the judicial assistants were influencing and, to a degree, even controlling the decision-making. For instance, this is the case when judges completely rely on memos to prepare for a hearing (as was observed in two instances; see section 5.2.4) or when large parts of the judgment drafting are completely allocated to assistants without providing instructions, which also occurred (see section 6.1.6). This can be regarded as problematic, as the involvement of judicial assistants can cause biases in the decision-making (see e.g. section 8.1.3, part 2). Moreover, this creates a concern from a rule of law point of view because, although the qualifications of judicial assistants have been enhanced and more safeguards are applicable to them, assistants are still not as highly qualified and are not surrounded by comparable institutional safeguards as judges (see section 4.2.1). Hence, for these situations, more measures and regulations to limit the involvement of assistants appear to be required, *and/or* stronger measures to safeguard the competencies and institutional position of judicial assistants are needed (which, however, is difficult with regard to the cost-efficiency of the process).

This research reveals that employing assistants helps to meet certain managerial and rule of law values. At the same time, it is observed that their involvement can also conflict with values related to both perspectives. The current limited policy and guidance in the courts leaves considerable ambiguity and does not make optimal use of judicial assistants under either a rule of law or managerial perspective. This research indicates where the opportunities and problems lie in regard to the two perspectives; it is up to the judiciary to decide how to weigh the different values and cope with these opportunities and problems. The next section will discuss possible directions that the judiciary can take to find a proper balance in the employment of judicial assistants.

### 8.3 IMPLICATIONS FOR THE JUDICIAL DECISION-MAKING PRACTICE

This section explores the facets related to judicial assistance which, following the findings of the research, should receive attention in reforming the conditions for the employment of judicial assistants. In doing so, this section by no means claims to be exhaustive.

The Dutch model as observed in the studied district courts is taken as a starting point in the analysis. As the organisation of the Dutch district courts is rather similar, most of the observations will also be applicable to the Dutch district courts that were not studied in this research. Note that a few aspects of the research might be court-specific, which could make certain reflections less relevant or applicable to the judiciary as a whole. In searching for ways to possibly improve the current conditions in the district courts, the analysis of judicial assistance in other jurisdictions (see chapter 3) and information from interviews with judges and judicial assistants in other courts in the Netherlands and England and Wales is also considered (see section 2.3).

#### 8.3.1 *Embracing the benefits of judicial assistance*

This study reveals various ways in which adjudication can and does benefit from the involvement of judicial assistants. Some of these benefits are envisioned by the courts; others are unintentional side-effects of the manner in which assistance is organised.

One of the most apparent and anticipated benefits of employing assistants is that, by performing various trivial duties, assistants can support courts running efficiently. This means that judicial assistants are also contributing to reducing the time taken to process court cases in the courts. Another essential benefit that is clearly visible is the judicial assistants' role in ensuring that procedural requirements of the judicial procedure are met. Additionally, it is anticipated that judicial assistants contribute to the quality of decision-making by performing the role of expert in a certain field of law. This role is particularly played by staff lawyers<sup>17</sup> and ensures that judicial decision-making is based on the complete set of relevant (legal) data regarding a court case.

Not as apparent but also important are the contributions of judicial assistants to various other facets of the decision-making. First of all, by actively providing the judges with additional or even contradictory information and viewpoints, judicial assistants can play a role in preventing biases in the decision-making. Second, judicial assistants occasionally play a part in guaranteeing the principle of equality of law. When staff lawyers give advice in accordance with their specific knowledge of

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17. They regularly are specialised in a particular legal field, of which they possess more knowledge than the average judge, see section 7.2.2, as Dutch judges are typically generalists.

the prevailing case law, they can enhance this principle. Furthermore, the setup in which judicial assistants collaborate with a wide range of judges within a court division also stimulates the principle of equality before the law. Finally, it was also observed that assistants, at times, support maintaining the image of impartiality of the judge by functioning as a buffer between judges and litigants when contact between these parties is needed.

Only under certain conditions can the judiciary benefit from judicial assistants in the aforementioned ways. Judicial assistants are required to be competent and motivated to perform these duties. Additionally, especially for a substantial expert or contrarian role, judicial assistants are required to possess a certain authority within the courts.

### *Training and education*

The education and training that judicial assistants follow logically affects their competencies. For the judiciary, it is therefore important to select adequately educated assistants. This is especially relevant, as some complications were observed in the district courts regarding the perceived competencies of certain judicial assistants in performing advisory and discussion-related duties (see section 8.1.2). From the 1960s to the 1990s, Dutch courts mainly hired lower-educated personnel and provided them with extensive training during their employment (which is similar to what occurred with Magistrates' clerks in England and Wales). Currently, the courts mainly attract assistants who attended law school, just like US law clerks and UK Judicial Assistants (see also section 7.2.2). Thereby, the condition of possessing an adequate level of legal knowledge appears to be mostly satisfied. With regard to staff lawyers, for whom their legal knowledge on a specific subject of law is of particular importance, it is sensible to be extra cautious in the hiring process and perhaps recruit persons with work experience in a certain field of law.

With regards to additional training offered to anticipate the duties in court, it is observed that – in contrast to judges – no mandatory training is required before starting to work as an assistant. However, both judges and assistants are required to follow a set number of hours of training every year (see section 3.2.1), and the Training and Education Centre of the Judiciary (*SSR*) provide various special training for recently employed assistants. These courses are adjusted to the needs in the workplace.<sup>18</sup> To further enhance the competencies of assistants, it is recommended to consider adding courses to the existing pallet which provide assistants with skills to perform advisory and discussion-related duties. In addition to this, the judiciary could also consider offering special courses to assistants who have worked in the courts for a long time and have not completed the same level of legal education as new assistants. This can support them in getting accustomed to the duties recently added to the judicial assistants' function.

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18. Some are also specifically designed for assistants working in diverse sub-sections of the law.

*Generating motivated assistants*

It is important to create conditions that generate motivated assistants, as motivation affects the extent to which assistants will actively perform their duties (particularly advisory and discussion related) (see section 7.2.3). For this reason, it is first of all important to offer judicial assistants an interesting assortment of occupational tasks. With the responsibilities of judicial assistants having increased over the years, the versatility and challenging nature of the occupation has strengthened. Accordingly, the court managers of the studied courts mention that large numbers of candidates are currently applying for new judicial assistantships when they become available.<sup>19</sup>

The availability of career opportunities also generates motivated assistants. However, the follow-up career perspectives for judicial assistants in the Dutch judiciary are usually perceived as limited. Especially for the assistants who do not possess a law degree and for assistants who work in courts in more isolated areas, this is perceived as a genuine problem (see section 7.2.3).<sup>20</sup> Limited career opportunities could result in ambitious judicial assistants leaving the judicial organisations. The judicial assistants who are not in a position to leave can become frustrated (see section 7.2.3).

In order to improve the assistants' career perspectives, courts can, first of all, improve the career opportunities *within* the judiciary. In the past, being afforded the possibility to train to become a judge was one of the possible career paths for judicial assistants. Several different setups existed that provided assistants a special route to train to become a judge (see section 3.1.1). Since 2013, such a special route no longer exists.<sup>21</sup> Given that various (newly hired) assistants have the ambition to become judges, this is perceived as a loss by many of them. Without the possibility to internally opt for a training to become a judge, only rather limited career perspectives for assistants remain; they can develop from a junior assistant position to a senior one, and, for a limited group, further promotion to a staff lawyer position or a managerial position is conceivable. Since decent career perspectives attract ambitious candidates and this also provides existing assistants with an incentive to perform well, it is recommended to reconsider the current career prospects within the judiciary. Particularly, recreating a special path for assistants to train to become a judge should be considered.

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19. One manager (resp. 20) speaks of around 250 applicants for an open position; another manager (resp. 54) says he had around 200 persons applying for a position.

20. Interestingly, a similar problem is observed with regard to Magistrate clerks in England and Wales (see section 3.3.2).

21. All candidate judges are required to have at least two years of working experience outside of the judiciary, which makes internal promotion to becoming a judge impossible. When an assistant does take the effort to gain experience outside of the judiciary and is then selected to follow the judicial training, the circumstance that they previously were employed as an assistant may be a reason to shorten the total training one has to follow to become a judge.

Apart from, or in addition to, improving the internal career prospects for judicial assistants, courts can also learn from the US law clerk model and explore the possibilities of providing judicial assistants with career opportunities *outside* the judiciary. Former US law clerks are in high demand by various legal employers (see section 3.3.1). These career perspectives (combined with the fact that they are only committing themselves for one year) are probably an important reason why so many recent law school graduates apply for the position. This results in judges receiving applications from the best students of the highest-ranked law schools, who are highly qualified and motivated. Having such a type of assistants corresponds to the high-demanding duties which they have to perform.

Part of the appeal of law clerk positions is that they are situated in the highest courts of the US, where the most influential legal decisions are taken. In that sense, Dutch district courts are never able to offer a similar experience. Still, the idea of offering short-term positions to recent graduates for them to gain legal experience and garner a unique insight into how judicial decision-making occurs is an appealing option to create a career path outside of the judiciary.

Currently, district courts already offer part-time judicial assistant positions (*buitengriffierschappen*) and occasionally also internships to students who are in the final years of their studies. This is an attractive way to become visible to law school students as a prospective employer. It could also be taken further to create a stripped down and better-fitted version of the short-term law clerk-model in Dutch district courts. This also has additional benefits (see 8.2.1) but has disadvantages as well (such as high training costs of assistants and a loss in continuity in the assistance).

#### *Consolidating the authority of judicial assistants*

Finally, a precondition which should not be underestimated is that judicial assistants need to enjoy a level of authority within the courts in order to effectively function as an expert or contrarian. Ensuring that the quality of assistants is up to standard (by providing them training and career prospects) appears to be key in increasing their authority. However, a hierarchical difference between judges and judicial assistants still remains, which prevents assistants from gaining significant positions of authority. This, to some extent, prohibits their functioning as effective contrarians or equal discussion partners, but at the same time, this difference is also desirable, as it prevents assistants from overpowering judges. The latter is a reason to question the appropriateness of having assistants act as contrarians or discussion partners in the decision-making. At the same time, it underscores not too much is to be expected from the assistants' sparring partner duties.

If courts do wish to employ assistants to function as valuable discussion partners and to introduce contrarian views, it is important to establish conditions in which the assistant possesses enough authority to be taken seriously by the judges and, simultaneously, not possess so much authority that it causes a power shift from the judge to the assistant. With regard to staff lawyers (in most of the courts), such a



balance appears to be established; regarding other judicial assistants, establishing such a balance should receive more attention.

### 8.3.2 *Minimising the hazards of judicial assistance*

When embracing the benefits of judicial assistance, it is also important to pay attention to minimising the hazards. Potential hazards were elaborately discussed in section 1.2 of this book. In essence, they concentrate on the possible negative effect that the involvement of judicial assistants could have on decision-making; the quality of judgments could deteriorate, and employing judicial assistants could (besides preventing biases) also instigate certain biases to occur. Additionally, assistant involvement is regarded as problematic due to the limited safeguards regarding various rule of law values that are applicable to them.

Various measures that can be taken to minimise the hazards are explored in this section. Some measures concentrate on restricting the influence of judicial assistants; others mainly attempt to minimise the negative influence of assistants.

#### *Monitoring the work*

First, a common way to control the influence of judicial assistants is to closely monitor their work. This method is in line with the ideas regarding superior–subordinate relationships as defined in principal-agent theory (see e.g. Moe, 1984; Ross, 1973, see also section 4.2.1). Peppers (2006, p. 207–212) identified that US Supreme Court justices indeed use this approach; among other ways, Supreme Court justices organise this by having their law clerks check each other's work and by creating intra-chamber rules. This manner of controlling the work of judicial assistants is successful partly due to the specific setting in which the assistants are performing their duties. Supreme Court justices each receive assistance from multiple clerks who are assigned as their personal assistants.

Having personal assistants makes instructing, mentoring and monitoring them easier than in situations in which assistants perform their duties for multiple judges. Respondents in this research mentioned that in the past in certain Dutch district courts, judges were also matched with personal assistants.<sup>22</sup> However, there appear to have been various reasons to abandon this arrangement. First of all, this arrangement is organisationally challenging.<sup>23</sup> More importantly, the personal associations can also create situations in which extreme forms of collaboration (very large or little involvement of assistants) exist, while there is little oversight or external control over what occurs between the two officers. This is espe-

22. In certain sub-divisions of Dutch courts, this is still the case. E.g. at the first instance level with regard to investigating judges (*rechter-commissaris*) in criminal cases and in some civil law cases. Judges at the Supreme Court are also assisted by personal assistants.

23. It is difficult to match the time schedules of the various, regularly part-time working judges and assistants, and it is also challenging to arrange the assistance in panel hearings.

cially true when assistants are assigned to judges for numerous years.<sup>24</sup> Furthermore, during the fieldwork, various judges mentioned that working with different assistants is very valuable for the uniformity of judicial decisions (see section 5.3.4). Not being assisted by personal assistants does not entail that no monitoring occurs. Several Dutch district judges also mention monitoring the work of assistants (see e.g. sections 5.2.4 and 6.2.5). In the criminal law divisions, it is even a rule that the most junior judge of a panel checks whether the assistant has incorporated the factual details of a case correctly in the judgment. In other situations, the monitoring is unregulated, and the level of monitoring depends on the involved judges and their trust in a particular assistant.

Monitoring can, to some extent, be an effective way to prevent undesired influence, but in order to monitor properly and give helpful feedback, one also has to spend considerable time doing this. Section 8.2.2 mentioned that this comes at the expense of the overall efficiency of the decision-making. When extensive monitoring is required, this can even result in the involvement of judicial assistants being more ineffective than effective overall. Monitoring also only limitedly prevents undue influence and biases. Monitoring the work of assistants is especially a suitable way to guarantee that the memo provides a proper summary of the court files and that the judgment follows the line of reasoning proposed during deliberations. Components of assistants' involvement related to giving advice and acting as discussion partners are less easy to monitor due to what principle-agent theory calls the information asymmetry.<sup>25</sup> Hence, additional manners of controlling the influence of assistants are required.

### *Temporary position*

An arrangement that is especially mentioned in American literature to limit the power of judicial assistants is having short-term (often one-year) assistantships (see section 3.4). The idea is that short-term assistants will never fully master the job and therefore will not be able to garner considerable power (Peppers, 2006, p. 207). This arrangement also prevents assistants from attaining too personal relationships with judges (which is particularly relevant when judicial assistants are assigned to individual judges). As mentioned, the one-year law clerk setup works well to attract highly qualified and motivated assistants. For these reasons, Dutch courts could consider offering a similar track. The fact that the temporary assistants will not fully master the job is obviously also a considerable disadvantage when courts seek to employ assistants to create expertise. This type of setup also requires substantial time spent each period selecting new assistants and facilitating getting them accustomed to the job. Selecting new assistants each year also diminishes the

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24. On this matter, also see Bruinsma, 1995, p. 98–99.

25. The agent possesses more information regarding the conditions under which he or she is performing certain duties.

continuity in the assistant model. For these reasons, it does not seem desirable to completely rely on short-term assistants.

### *Procedural constraints*

Courts can decide to incorporate certain procedures to minimalise the occurrence of biases (such as anchoring or framing) due to the involvement of judicial assistants. Currently, this aspect is not explicitly considered in procedures of Dutch district courts.

In the US, a clear constraint on the role of law clerks is that assistants are not invited to attend the deliberation sessions. This prevents them from being involved in the discussions that occur among judges during deliberations. Law clerks also have no duties during the public hearings, which precludes them from asking questions or being otherwise involved during the hearings. However, these provisions do not prevent less-visible, and thereby perhaps more perilous, forms of influence. Chapters 5 and 6 revealed that assisting duties performed behind the scenes (such as the writing of the memo and the drafting of judgments) are especially potential sources of biases. Likewise, at the UK Supreme Court and Court of Appeal, a restriction is generated by not having assistants draft opinions (see section 3.2.3), although that rule is not officially recorded. Dutch district courts used to also be reluctant to allow judicial assistants to draft judgments, but more recently, it has become common for judicial assistants in the studied courts to prepare the first drafts of judgments (see section 6.1.2).

Given that the writing of the judgment can function as a way to reconsider an initially taken judgment (Bruinsma, 1995, p. 105-107; Kronman, 1993, p. 330; R. A. Posner, 2008, p. 286) and can help judges to truly familiarise themselves with a legal issue, it is regrettable that this duty is passed onto judicial assistants.

As mentioned before, memos can also be a source of decision-making biases. Although it is difficult to control the manner in which judges use memos, it seems recommendable to raise their awareness of how the information in the memo can subconsciously affect their decision-making. It is furthermore important to pay attention to how the information in the memo is presented to judges. Clearly marking the difference between factual information adapted from the court files and the personal analysis of the assistant is sensible. Additionally, especially when judges use the memos as road maps to understand cases, it is important for the memos to present neutral descriptions of the facts and balanced depictions of the relevant legal arguments in the cases.

### *Constructing institutional safeguards*

The current safeguards concerning judicial assistants in the Netherlands are, in various respects, more limited than those applicable to judges (see section 4.1.2). Therefore, a last aspect that requires consideration is the institutional arrangements that, according to the rule of law perspective, should be made to safeguard the

independence, impartiality, professionalism and integrity of judicial assistants. Depending on the type and degree of involvement of judicial assistants, various arrangements can be considered. Some provisions that apply to judges seem by definition too far-reaching to extend to judicial assistants. For instance, the provision of life-tenure offered to Dutch judges seems farfetched for judicial assistants. Other provisions could more easily be extended to judicial assistants. The rules regarding the recusal of judicial officers and regarding the publishing of extra-judicial functions are examples of the former provisions. However, extending both of these provisions to judicial assistants also has drawbacks which should be taken into consideration.<sup>26</sup> Which safeguards are most important to reinforce depends on the role that courts reserve for assistants. However, when an influential role is reserved for assistants, serious reconsideration of the current institutional safeguards is also required.

### 8.3.3 *Creating professional standards and guidelines*

Key observations in this research are that few regulations exist, especially regarding the advisory and discussion-related involvement of judicial assistants, and that wide variation is found in the type and degree of involvement of judicial assistants in practice (see section 8.1). This indicates that clearer guidelines should be generated to give direction to the employment of judicial assistants.

This section stresses that in creating guidelines, it is important to leave considerable room for judicial officers to determine their own methods of work. The manner in which the judicial professionals determine how they collaborate, however, should be more transparent, and more accountability is needed than currently exists.

#### *Necessity of discretion*

Judges and, to a lesser extent, judicial assistants are bound to various professional codes and are selected and trained to perform their duties in a righteous manner and with integrity (see section 4.1.2). As a result, they are well equipped to ensure that in many cases, the cooperation and use of the judicial assistant goes smoothly. Additionally, providing judges with room to determine their working methods is also in accordance with the rule of law values of independence and autonomy, as well as with the notion of the judge as a professional (Paterson, 1983).<sup>27</sup>

Moreover, it is desirable to have judges and judicial assistants in charge of organising their mutual collaboration because, in the course of their work, they are the

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26. E.g. extending the possibilities to ask for recusal of judicial assistants would provide litigants an extra opportunity to make improper use of this procedure (see on the reasons for making use of the recusal procedure Van Rossum, Tigchelaar, & Ippel, 2012).

27. On the conditions of professionalism, see also e.g. Freidson, 2001; and on the legal profession, Abel, 2003.

ones who are directly confronted with the perks and dilemmas regarding the assistance in individual cases. Every court case is different, and as so-called 'street-level workers' (Lipsky, 2010; see also Maynard-Moody & Musheno, 2003), judges and assistants are the only persons to oversee the full complexity of cases and are able to assess the efforts that have to be taken to reach a judicial decision.<sup>28</sup> In order for them to determine the best working method per case, they require a certain degree of discretion. When judges have significant control over their tasks during a work day, they are also likely to perceive less mental strain in performing their work (Karasek, 1979; Schaubroeck & Merritt, 1997).

The fieldwork at the district courts correspondingly supports the idea of promoting discretion, as it demonstrates that employing uniform, organisationally imposed procedures of assistance is not satisfactory. Although new judicial assistants particularly benefit from the uniform formats which are available for making memos, assistants often believe that these formats are too limiting. For that reason, various assistants adjust the formats and add additional information in ways they consider to best support the judicial decision-making (see section 5.2.4). Similarly, several judges state that they do not believe every type of memo to be equally useful for preparing different types of cases (see section 5.2.5). Hence, this is not only an argument in favour of discretion but also for customising the assistance to fit the particular circumstances.

#### *Demand for more transparency and accountability*

However, too much discretion can also result in arbitrariness and in ineffective collaboration between judges and assistants. When there is little transparency about how officials give substance to the employment of assistants, there are also few possibilities offered to control the process and prevent excesses in the employment from occurring. That is why managerialism introduces the values of transparency and accountability as important quality measures.<sup>29</sup>

Courts and court officers could be more transparent and explicit about the manner in which assistants are involved in the decision-making and, especially, about the underlying choices that are made regarding the duties assistants perform under specific circumstances. It would be sensible to promote discussion on this topic.<sup>30</sup> First, this could support reaching a level of agreement about what type of involvement is and is not desirable and, subsequently, achieve more uniformity in the current practices. This does require breaking the silence surrounding this issue which has prevailed thus far.

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28. For a nuanced account of whether judges can be considered street-level bureaucrats, see Biland & Steinmetz, 2017.

29. See e.g. Ng, 2007, p. 12.

30. For a similar conclusion regarding freedom to express personal opinions by Dutch judges, see Dijkstra, 2016, p. 297–300.

Given that judges and judicial assistants are the most capable of recognising the preferred assistance and related hazards, it is sensible that these officers should play a key role in this discussion and in the creation of guidelines or standards regarding the involvement of judicial assistants in adjudication. Currently, the different divisions of Dutch courts are actually already working on the creation of general documents consisting of professional standards for adjudication, in which some minimum norms are explicated (on this development see the report by Noordegraaf, Schiffelers, Van de Camp, & Bos, 2014). This development seems to offer great possibilities to also create specific standards regarding the involvement of judicial assistants. It is a shame that the present process of creating professional standards has not instigated a discussion regarding the involvement of judicial assistants. Unfortunately, the current standards hardly settle any of the prevailing issues regarding judicial assistance.<sup>31</sup>

Besides the bottom-up creation of professional standards, top-down involvement of the judiciary and courts management is also significant. Only at the top level can measures be taken to create the proper organisational, procedural and institutional conditions regarding the involvement of judicial assistants. Involvement at this level is especially required for creating the required conditions to embrace the benefits of judicial assistants while minimalizing the hazards.

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31. The published professional standards of criminal judges specifically mention that the standards are not applicable to judicial assistants, and little of the standards concern the collaboration of judges with assistants. Draft versions of the (as this book went to print) not-yet published standards of the administrative and civil law divisions of the courts display a similar image.