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## *The Power Of The Judicial Assistant/Law Clerk: Looking Behind The Scenes At Courts In The United States, England And Wales, And The Netherlands.<sup>1</sup>*

By Nina Holvast<sup>2</sup>

### Abstract:

Although largely invisible to the public, behind the scenes, judicial assistants/law clerks frequently play a vital role in the process of adjudication. Yet, especially outside of the U.S., little is known about their role and duties in the judicial decision-making process. This article provides insight into the organization of the employment and the duties of judicial assistants in three different jurisdictions: the U.S., England and Wales, and the Netherlands. In particular, this article aims to gain an understanding of the effects different organizational structures have on the potential influence of assistants on the judicial process and to observe what restrictions are employed to prevent assistants from wielding too much influence.

**Keywords:** judicial assistants, law clerks, courts, judicial decision-making

### 1. Introduction and Concerns Regarding Judicial Delegation

During the hearing, the main public phase of the judicial process, the judge is literally and figuratively positioned at the center. Judicial staff members are usually absent or only present in the background to record the proceedings. Behind the scenes, however, judicial staff members play a vital role in the judicial process. They perform various administrative duties and, in addition, they can assist judges in their adjudicative responsibilities. Virtually all judicial systems employ these types of staff members; however, the position that they occupy in the judicial process and the duties they perform vary significantly from jurisdiction to jurisdiction. In this article, the terms “judicial assistant” and “judicial staff member” are used to describe staff members (in the US also called law clerks) who assist judges in the adjudicative content of their work, but who do not perform any adjudicative duties on their own. This should not be confused with the function of Judicial Assistant (in capital letters), which exists in England and Wales or judicial assistants employed at some American courts.

Most research on this topic originates from the United States, and concentrates predominately on law clerks in the U.S. Supreme Court.<sup>3</sup> This research reveals that law clerks play an important role in judicial decision-making and that their abilities to influence are far-reaching.<sup>4</sup> These findings are remarkable, as law clerks are not appointed as adjudicators, but are intended to provide research and support to the judiciary. When a substantial portion of judicial duties are in fact performed by judicial assistants (in this case law clerks) who have not completed a comparable training or gone through the same selection process as judges and who are not subject to the same institutional safeguards (e.g. life-tenure) to ensure their impartiality and independence, this raises fundamental questions about the legitimacy of this allocation of duties (see on this matter also section 4 of Bieri’s contribution to this issue). The probability that law clerks and other non-judicial personnel influence judicial decision-making is an ongoing topic of discussion. It has been a concern of lawyers and academics in the U.S. for decades.<sup>5</sup> Whether the assistants’ influence is regarded as “undue” depends on the perspective one has on adjudication. When taking a classical Rule of Law perspective on adjudication, the involvement of non-judges is perhaps more frequently regarded as “undue” than when one endorses a pragmatic or economic view on adjudication.

<sup>1</sup> I would like to thank Henk van de Bunt, Nienke Doornbos, Alan Paterson, Todd Peppers, Wibo van Rossum and the participants of the Paul Scholten Centre colloquium on the September 9, 2014 for their comments on earlier versions of this article.

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<sup>3</sup> For some important exceptions, see e.g., Cohen 2002 and Oakley & Thompson 1980.

<sup>4</sup> See e.g. Peppers & Ward, 2013 introduction; Peppers & Zorn, 2008; Peppers, 2006; Ward & Weiden, 2006; Posner, 2006; Kronman, 1993, p. 325-331; Fiss, 1982.

<sup>5</sup> See e.g. Rehnquist, 1957; Fiss, 1982; Vining, 1981; Posner, 2006.

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Besides issues concerning differences in training, selection and institutional safeguards, the prospect of diluting one individual's sense of responsibility for a judgment when large portions of the judicial work are performed by subordinates is also mentioned.<sup>6</sup> In that vein, Posner observes a loss when judgments are "ghostwritten" by law clerks, as clerks are bright, but inexperienced and "judges fool themselves when they think that by carefully editing, they can make a judicial opinion their own."<sup>7</sup> Posner furthermore argues that extensive delegation could result in more uniform and legalistic judgments, as law clerks would not have the authority and experience to look beyond the (case) law.<sup>8</sup> In addition, Kronman claims that the preparation of memos on cases by subordinates, commissioned and reviewed by a judge, can threaten the deliberative imagination of judges and would make the judges' perspectives on cases essentially "monocular".<sup>9</sup> A particularly prominent fear in the U.S.<sup>10</sup> is that of law clerks pursuing their own (political) goals instead of judges' goals, thereby steering the political outcomes of cases.

Notwithstanding these concerns, it is widely acknowledged that law clerks have also played a key role in reducing the caseload crises that arose in the U.S. in the 1980s.<sup>11</sup> Given that many countries face rising caseloads and decreasing judicial budgets, delegating certain duties might be ineluctable (see also Bieri in this journal). Judicial assistants can contribute to the efficiency of the adjudication process, and, under certain conditions, also to the quality thereof.<sup>12</sup> According to Edwards the above concerns are, in fact, "much ado about nothing." Competent and conscientious judges will provide their law clerks with instructions and will "not allow an opinion to issue in their name until the words constituting the opinion precisely reflect their views on the proper disposition of the case."<sup>13</sup>

In most judicial systems outside the U.S., there is remarkably little knowledge regarding the role of judicial assistants. In those judiciaries, this topic is not a prominent issue of discussion.<sup>14</sup> However, many of the previous concerns could apply equally well to judicial assistants in courts in those jurisdictions. In order to attain greater insight into the issue of delegation of judicial duties to judicial assistants, this article investigates several ways in which judicial assistance is organized in three judiciaries. The central question is: in what ways can the employment of judicial assistants be organized and what are the consequences thereof in relation to the ability of judicial assistants to influence the judicial decision-making? To keep the overview,<sup>15</sup> this article examines only a sample of the existing organizational structures in these judiciaries.

In the next section, the methodology of the article is discussed. Following that section, the selected judicial assistant models are analyzed. Thereafter, the article introduces six features by which judicial assistant models can be distinguished and the ways in which these factors affect judicial assistants' ability to influence are explored. This is followed by the conclusion which recapitulates the main features that result in or limit the influence of assistants and emphasizes the importance of formalizing their role in the adjudicative process.

## 2. Methodology and Characteristics of the Studied Judiciaries

Legal systems differ in several aspects and, even within the same judicial system, the court structure and staffing vary. Therefore, the circumstances in which judicial assistants are employed are globally truly diverse. This article does not aim to conduct a comparative study between entire judicial systems. Instead, this article aims to record specific ways in which judicial assistant roles can be organized to discover different ways of coping with possible difficulties relating to the allocation of responsibilities and duties.

A survey of organizational structures of judicial assistance in various jurisdictions suggests that there exist several kinds of judicial assistant models. This article includes four models (see table 1) on which detailed information is available and which illustrate different types of assistance. The article does not claim to present a representative selection of all possible models of judicial assistants that exist globally. The studied models are selected for their differences. They do not represent all different types of assistance that exist in the judicial systems included in the study. In order to realize the

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<sup>6</sup> Fiss, 1982.

<sup>7</sup> Posner, 2006, p. 34.

<sup>8</sup> Posner, 2006; 2008, p. 34, see also Fiss, 1982.

<sup>9</sup> Kronman, 1993.

<sup>10</sup> As in the U.S. judgments are frequently considered to reflect the political opinions of judges. Posner, 2008, p. 9-11.

<sup>11</sup> See Posner, 1985, p. 94-119.

<sup>12</sup> See Holvast, 2014, p. 45-47.

<sup>13</sup> Edwards, 1983, p. 888.

<sup>14</sup> However, a handful of scholars in England and Wales and the Netherlands have raised their concerns. See on England: Parker v the Law Society, [1998] 143 S.J. L.B. 45; Paterson 2013, p. 254-257, and on the Netherlands: Hol, 2001.

<sup>15</sup> More reasons behind the selection can be found in the following section.

widest variety, the level of courts included in the selection also differs, as this most likely impacts the role and influence of judicial assistants.<sup>16</sup>

Table 1. Assisting models included in the study

<b>Judiciary</b>	<b>U.S.</b>	<b>England and Wales</b>		<b>The Netherlands</b>
<b>Judicial assistant type</b>	Law clerks at the US Supreme Court and Federal and State Courts of highest Appeal	Magistrates' clerks - positioned at Magistrates' Courts	Judicial Assistants - positioned at the Court of Appeal and Supreme Court	Judicial staff members at trial courts
<b>Court level</b>	Highest level and level just below.	First instance level	Highest level and level just below.	First instance level

The selection includes the most studied type of assistant in the U.S.: the law clerk (as assigned in the Courts of Appeal and the Federal Supreme Court). Additionally it includes two models of the judicial system from which the American system originates; the judiciary of England and Wales. Namely, Magistrates' clerks, who play a notable role in the system of lay involvement in adjudication, and the new position of Judicial Assistants, who are currently employed at the Court of Appeal and Supreme Court. Finally, judicial assistants at trial courts in the Netherlands are analyzed. The Dutch judiciary in many ways exemplifies a typical civil law judicial system which contrasts the other two common law systems examined. Although this article does not aim to define the precise relationship between the judicial traditions of the studied systems and the judicial assistant models, it is beneficial to briefly typify certain characteristics that mark the legal traditions and foundations of these judicial systems. The reader is presumed to possess a certain level of background knowledge on this matter. What follows is only a rudimentary summary.

It is of foremost importance to note that we deal with two judicial systems which share a common law tradition: the U.S. and England and Wales. The Dutch legal system, on the other hand, is based on a civil law tradition. In common law countries, the judiciary is considered a body that has the ability to create law.<sup>17</sup> Judicial decisions are therefore an important source of law. Dissenting or concurring opinions can be issued and senior judges are usually dominant public figures.<sup>18</sup> The U.S. and England and Wales have adversary systems, which are, to a great extent, based on "immediacy." This entails that the oral hearing occupies a central position in the judicial process, especially at the appellate level. Evidence is presented during the hearing ad hoc and relatively little additional background documentation and paperwork is produced at this point in the process.<sup>19</sup> Trial by peers, via jury trials and lay people participation, is another important element of these judicial systems.<sup>20</sup> The legal process in England and Wales and in the U.S. is to a large extent controlled by the adversarial parties, with courts occupying a more passive, monitoring position.<sup>21</sup> Another aspect relevant for this paper is that the Supreme Courts in these judiciaries exercise mainly discretionary review. This results in only a small number of cases requesting appeal actually being heard and adjudicated by the Supreme Courts.

In the Dutch civil law judiciary, the law is codified to a greater extent. Judges are typically not considered lawmakers; they primarily apply the law. Given that statutes require judicial interpretation, judicial decisions still have a considerable legal impact.<sup>22</sup> Judges in the Netherlands speak as one unit and individual opinions on a case are not shared with the public.<sup>23</sup> The Dutch judicial process is much more based on "mediacy"; indirect evidence in the form of reports (e.g. from the police) is widely employed. The procedure usually consists of a series of communications, both written and during oral

<sup>16</sup> The judicial assistant models at lower US courts are for instance often organized in a different manner to that of the highest courts and they might – in several aspects – be quite similar to the assistant models studied at first instance courts in England and Wales and The Netherlands.

<sup>17</sup> See e.g. Shapiro, 1981, p. 28-29; Eisenberg, 1991.

<sup>18</sup> See Bell, 2006, p. 39 and 341.

<sup>19</sup> In comparison to civil law judiciaries. This does not mean that in US courts there is no paperwork involved whatsoever. Parties do have the right to submit papers/briefs in support of their oral arguments and appellate judges review record of proceedings in the lower courts.

<sup>20</sup> Neubauer & Meinhold, 2010, p. 105.

<sup>21</sup> This adversarial model is most present at the highest courts of the countries.

<sup>22</sup> Merryman, 1969, p. 40-49.

<sup>23</sup> Similar to other civil law judiciaries, see Merryman, 1969, p. 38.

hearings. A large part of the process occurs through written reporting.<sup>24</sup> In the Dutch system, with various inquisitorial features, the judge's role is relatively active. He or she controls the legal process pre-trial and also in court. Lay people participation hardly occurs.<sup>25</sup> The Dutch judicial review system is – with few exceptions – a system of review “as of right”. It is expected that the significant differences in the judicial systems also are reflected the manner in which judicial assistants are employed.

### **3. The Specifics of the Four Judicial Assistant Models**

This section analyses the different judicial assistant models, beginning with U.S. law clerks, followed by Dutch judicial staff members, and finishing with Magistrates' clerks and Judicial Assistants in England and Wales.

#### **3.1 U.S. Law clerks, Young and Ambitious Personal Assistants to Judges**

The U.S. judicial system consists of many facets and likewise various types of judicial staff members are employed, but the most well-known is the law clerk. The law clerk analyzed in this study, is employed at the State Courts of Highest Appeal and the Federal Appellate Courts (the second level courts that are in hierarchy just beneath the federal supreme court) and US Supreme Court. Primary jurisdiction courts and administrative courts usually have different organizational structures.<sup>26</sup> Since the 1950s, a great amount of research was devoted to these law clerks.<sup>27</sup> This information forms the foundation for the following portrayal.

##### ***A Brief History of the U.S. Law Clerk***

The first law clerks date back to the late 19<sup>th</sup> century at the Supreme Court.<sup>28</sup> Peppers, and Ward and Weiden draw a clear picture of the development of the role of law clerks in the Supreme Court.<sup>29</sup> Until about 1920, law clerks performed primarily secretarial and clerical duties; from 1920 to 1940, their role increasingly resembled that of a research assistant; and from 1940 to 1960, law clerks became involved in all stages of the judicial process. This increased role probably relates to increased judicial workloads.<sup>30</sup> Beginning in the late 1950s, the suitability of the law clerk's role and influence became the focus of public debate. This topic gained more attention in the early 1980s after publication of *The Brethren* (1979), a book by two journalists that provided vivid insight into the practices behind the closed doors of the Supreme Court. Following *The Brethren*, law clerks remained a popular research topic.<sup>31</sup> During the last fifty years, the law clerks' involvement in judicial decision-making increased and the number of law clerks also grew.<sup>32</sup>

The history of law clerks at the State Courts of Highest Appeal and the Federal Appellate Courts while not as well-studied; however, appeared to followed a rather similar pattern.<sup>33,34</sup>

##### ***Institutional Embedding and Guidelines for Law Clerks***

Law clerks do not perform any formal (procedural) duties. For that reason, their duties and responsibilities are not recorded in legislation. However, after publications revealing confidential details about court practices, judges were urged to set guidelines for law clerks.<sup>35</sup> All law clerks at Federal courts are obliged to follow *the Code of Conduct for Federal Judicial Employees*. This code includes general statements regarding the integrity and independence of judicial employees and the avoidance of impropriety. It also provides guidelines regarding conflict of interest and activities outside

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<sup>24</sup> See Merryman, 1969, p. 121-123; Shapiro, 1980.

<sup>25</sup> See Malsch, 2009, p. 69.

<sup>26</sup> Occasionally, they also employ law clerks; however, the models are rather different.

<sup>27</sup> E.g., books by Peppers, 2006, and Ward & Weiden, 2006, are based on data from surveys and interviews with former members of the Supreme Court. See also Oakley and Thompson, 1980, on law clerks at federal Courts. A volume by Cohen, 2002, contains a chapter on law clerks at federal Appellate Courts, as does work by Wasby, 2005; 2008 and Swanson & Wasby, 2008. Perry, 1991, offers insight into the role of law clerks in the certiorari process.

<sup>28</sup> Oakley & Thompson, 1980.

<sup>29</sup> Peppers, 2006; Ward & Weiden, 2006.

<sup>30</sup> Posner, 1985, p. 102-119.

<sup>31</sup> See Peppers, 2006, p. 1-10.

<sup>32</sup> In 1941, Supreme Court justices were permitted to hire a second law clerk. In the 1970s a third and fourth one.

<sup>33</sup> Given that the rise in caseloads at Appellate Courts was problematic earlier in time, the increased delegation of duties might have happened there at an earlier stage.

<sup>34</sup> To release some of the pressure on law clerks, additional central (permanent) attorney staff members were employed at Courts of Appeal and State High Courts in the 1970s. The Supreme Court later introduced a legal office, modelled on the central staff models, Ward & Weiden, 2003, p. 44. See also: Hellman, 1980.

<sup>35</sup> See Ward & Weiden, p. 16.

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the judiciary and states that political activities in particular should be avoided.<sup>36</sup> Several courts have adopted additional codes of conduct for law clerks. In 1989, the Supreme Court created *the Code of Conduct for Law Clerks of the Supreme Court of the United States*. This code, which has never officially been published, includes six canons which focus on topics related to those of the code for federal employees. As a result of incidents in which confidential information was leaked by (former) clerks, the code specifically emphasizes the confidentiality of the clerking position.<sup>37</sup> It also explicitly allows for individual judges to set additional rules.

### **Organization of the Law Clerk Assistance**

Judges throughout the U.S. are assisted by law clerks in performing their judicial duties. Supreme Court Justices are assigned four law clerks each and federal Appellate Court judges will generally be assigned two to three law clerks. State High Court Judges are attended by approximately three legal assistants (not necessarily all being law clerks).<sup>38</sup> The clerk corps consists of the brightest recent law school graduates from elite law schools. A clerkship is a highly coveted position and a stepping-stone to a successful legal career.<sup>39</sup> Clerkships at the Supreme Court and Federal Appellate Courts are the most highly sought after, but there are also large numbers of clerkships available at other courts. The justices are in control of the selection of their own clerks. They often interview candidates themselves.

In addition to seeking to employ recent graduates, the courts also place strict time limits on clerkships. One-year clerkships are currently the rule in most of the highest courts. To save time on selecting and training new clerks, some federal and state Appellate Courts have partly abandoned the one-year clerkships and look to hiring clerks for a longer period.<sup>40</sup>

### **Duties of Law Clerks**

The current duties of law clerks are diverse and dependent on the judges to whom they are appointed. As the Supreme Court has the authority to exercise discretionary review, deciding on which motions for appeal to review (writs of certiorari) is a major obligation of the court. Since caseloads started to increase in the 1950's,<sup>41</sup> law clerks are preparing certiorari memoranda (cert. memos) for judges in order for them to screen the writs of certiorari.<sup>42</sup> These documents summarize the facts of the case and contain a recommendation to grant or deny the writ. Law clerks point out this the facet of their employment as the one in which they are most influential.<sup>43</sup> As other appellate courts do not normally have the broad discretionary review powers of the Supreme Court, cert. memos are not written.<sup>44</sup>

Another important duty of law clerks is to conduct research on the legal issues in cases and to prepare bench memoranda. These bench memos help judges prepare for oral arguments. The specific content of the memos depends on the judges' preferences. Usually, the memos include a summary of the relevant facts and law, the legal questions, and the arguments for both sides of the case. Several Appellate Court judges<sup>45</sup> referred to the bench memos as "road map[s] of the case." Conversely, some judges do not assign this duty to their clerks, as they do not regard it as valuable.

The bench memos also function as a springboard from which judges may discuss the case with their clerks.<sup>46</sup> Participating in case review discussion is another key feature of most clerkships. Relationships between judges and their law clerks are frequently intense.<sup>47</sup> Several Justices and clerks have referred to the relationship as "like family".<sup>48</sup> Some judges hold a formalized pre-oral argument meeting with their clerks and most judges also meet with them after the conclusion of the hearings.<sup>49</sup> This is especially important if the law clerk will later draft the opinion or judgment; the most controversial duty of law clerks. From the 1960s onward, Supreme Court justices began delegating parts of judgment-drafting to their clerks.<sup>50</sup> Today, most Supreme Court and Appellate Court justices have grown comfortable with this

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<sup>36</sup> See <http://www.uscourts.gov/rulesandpolicies/codesofconduct/codeconductjudicialemployees.aspx>, visited at 21-07-2014. The Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges, 2<sup>nd</sup> Edition, Eds S.A. Sobel, d.d. 2007 provides some additional information to (new) federal law clerks.

<sup>37</sup> Peppers, 2012, p. 104-105.

<sup>38</sup> Swanson & Wasby, 2008, p. 26; Cohen, 2002, p. 87.

<sup>39</sup> E.g. several large law firms give signing bonuses of up to 350,000 US dollar to former clerks who join the firm.

<sup>40</sup> Oakley & Thompson, 1980, p. 107-139; Cohen, 2002, p. 88; Wasby, 2008, p. 33-36.

<sup>41</sup> The current docket consists of over 10,000 requests for appeal, of which each year approximately 100 are granted.

<sup>42</sup> See Perry, 1991; Black & Boyd, 2012.

<sup>43</sup> Ward & Weiden 2003, p. 145.

<sup>44</sup> Wasby, 2008; Swanson & Wasby, 2008.

<sup>45</sup> Interviewed by Cohen, 2002, p. 91-93.

<sup>46</sup> Cohen, 2002, p. 92.

<sup>47</sup> See contributions to Peppers & Ward, 2013.

<sup>48</sup> Peppers, 2006, p. 201.

<sup>49</sup> See regarding Appellate Courts; Cohen, 2002, p. 109-112.

<sup>50</sup> Peppers, 2003, p. 148-152.

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practice.<sup>51</sup> This does not entail law clerks making decisions regarding the content of opinions on their own. Most judges will provide detailed instructions and drafts will go back and forth between judge and clerk.

A final way in which law clerks can assist judges is by participating in the so-called “clerk network”.<sup>52</sup> During the coalition-forming stage of decision-making, the clerks – who interact regularly with their fellow clerks in other judge’s chambers – can function as intermediaries between the judges in forming coalitions. Some judges send their law clerks to the chambers of other judges to speak with their law clerks to discuss less significant issues than would occur between the judges directly.<sup>53</sup> Others judges reject this process and consider it to be inappropriate lobbying.<sup>54</sup>

### **3.2 Judicial “Case Managers” in the Netherlands**

The Dutch judiciary has a long history of employing judicial staff members, but Dutch judicial assistants are quite different from their American counterparts. This section elaborates primarily on judicial staff members who are appointed to Dutch trial courts. Judicial assistant models at criminal and civil Courts of Appeal are in many ways rather similar to the models at trial courts. Administrative Courts of Appeal and the Dutch Supreme Court are organized fairly differently. Very little literature has been devoted to the role of judicial assistants in Dutch courts.<sup>55</sup> This section is based on the available literature. In addition, it builds on data collected during an eight month-period of fieldwork at two Dutch District Courts (trial court which handle cases in first instance).<sup>56</sup>

#### ***A Brief History of Dutch Judicial Assistants***

The occupation of *griffier* dates back to Napoleonic times, when the Netherlands adopted the French legal system. Until 1957, a voluntary position as *griffier* was one of the main routes to becoming a judge. Newly graduated lawyers would acquire clerking positions and, after a few years, transfer to becoming judges.<sup>57</sup> This practice changed when, in 1957, a separate training to become a judge was designed.<sup>58</sup> With the introduction of this new judicial training, judicial assistants evolved into a separate function for which a law degree was no longer required. Over the years, it became customary for judicial assistants to develop from performing an administrative function at the court into becoming a “court secretary” (as assistants were called at the time). This could be achieved by attending a special internal education program. In the 1960s through the 1980s, judicial assistants functioned separately from judges with little social interaction between the two positions.<sup>59</sup>

The Dutch courts were gradually professionalized and the court processes required more collaboration. Judges and assistants began to work more closely together and judges’ appreciation for the judicial assistants’ work improved.<sup>60</sup> In 2006 the internal education program deteriorated and the minimum requirement of holding a diploma from an institute of higher professional education was introduced.<sup>61</sup>

#### ***Organization of the Judicial Assistant Position***

The ratio of judges to assistants varies marginally between different courts and court divisions. Trial courts employ slightly more judicial assistants than Courts of Appeal; on average 1.3 assistants per judge in the year 2013.<sup>62</sup> In the Netherlands, judicial assistants are not assigned to specific judges. Instead, they are associated with specific cases with which they assist the judges from the beginning up to the writing of the judgment. Employment as a judicial assistant is not a temporary position as is common for law clerks; rather, it can be a lifelong career. Various assistants are employed by the court for decades. During the period of their employment, these assistants obtain more experience in court operations than most judges. Since judicial assistants are not assigned to an individual judge, a large part of the selection and

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<sup>51</sup> Peppers, 2003, p. 192, Peppers & Ward, 2013, p. 8; Cohen, 2002, p. 112.

<sup>52</sup> See Ward & Weiden, 2006, p. 159-170; Cohen, 2002, p. 139-146.

<sup>53</sup> Cohen, 2002, p. 140.

<sup>54</sup> Ward & Weiden, 2006, p. 168-169; Cohen, 2002, p. 144.

<sup>55</sup> Exception are: Abram e.a., 2011; Praagman & Doornbos, 2012, Holvast, 2014.

<sup>56</sup> These data consist of field notes, observation reports of 27 hearings, analyses of memos and draft-judgments, and 68 interviews with judges and judicial assistants.

<sup>57</sup> De Groot-Van Leeuwen, 1991, p. 35.

<sup>58</sup> This track existed next to a track for experienced lawyers from outside the judiciary. It remained as such until 2013, when a new training was introduced. Roos & Van Amelsfort-Van der Kam, 2012.

<sup>59</sup> Bevers, 2004, p. 8-9.

<sup>60</sup> Bevers, 2004, p. 9.

<sup>61</sup> In Dutch “*Hoger Beroeps Onderwijs*”, Abram e.a., 2011, p. 8.

<sup>62</sup> Civil and criminal Courts of Appeal employ 0.8 assistant per judge, according to a dataset provided by the Dutch Council for the Judiciary. This number includes only staff members who assist judges in the judicial content of their work. Assistants who perform administrative duties are excluded.

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recruitment of assistants is completed by court managers rather than judges.<sup>63</sup> In the past, a large number of judicial assistants were internal transfers; currently, the majority of new assistants are entrees from outside the judiciary. Given that the duties of assistants have become more challenging at the same time that opportunities to enter legal practice or the training to become a judge reduced, judicial assistant positions have become popular among law school graduates. Although the minimum educational requirement for new judicial assistants is a degree from an institute of higher professional education, most applicants possess a university law degree. As the follow-up career perspectives in the judiciary are limited, various judicial assistants only work at the court at the beginning of their career. For them, a judicial assistantship serves as a decent way to gain legal experience, which can be an advantage when applying elsewhere. Even so, judicial assistant job experience does not provide employment opportunities equivalent to those afforded to law clerks in the U.S.

### ***Institutionalization of Judicial Assistants and Guidelines***

Dutch legislation mainly focuses on the judicial assistants' function as recorders at hearings and on their administrative duties.<sup>64</sup> Other duties are not codified. Yet, the *Judiciary Organization Act* holds several provisions which are also applicable to judicial assistants. These provisions require judicial officers to maintain confidentiality regarding discussions during deliberations and the content of case files.<sup>65</sup> Article 14 states that judicial assistants should be appointed by the board of a court and are required to take an oath prior to their appointment. In the Dutch judiciary two codes of judicial conduct exist of which one, developed in 2010 by the Dutch Council for the Judiciary, is also applicable to judicial assistants. This code is formulated in general terms and emphasizes the values independence, impartiality, integrity and professionalism.

For a long time, few official documents defined the duties of judicial assistants. In 2007, job descriptions for judicial assistants were introduced which currently delineate the key duties and required competencies of judicial assistants. In 2005, two years before these profiles were created, the organization of the judiciary was altered. This alteration resulted in the creation of new norms regarding the distribution of the workload between judges and assistants.<sup>66</sup> The new financing structure inspired several courts to create additional guidelines that delineate the division of labor and the time spent on cases.

### ***Duties of Judicial Assistants***

Characteristic of Dutch judicial assistants at trial courts is that they perform duties in all stages of the judicial process. Originally, their primary duty was to record the court hearings and they still conduct this duty. A certain amount of judicial knowledge is required for this task, because the assistant has to decide what statements are relevant to the case at hand. It is a combined responsibility of the judicial assistant and the trial judge to provide a correct transcript of the hearing.<sup>67</sup> During the hearing, the judicial assistants also regard it their duty to monitor whether the judges apply the procedural rules correctly. If they spot an error they may subtly point this out to the judge.

Judicial assistants in the Netherlands also perform several additional duties. These duties differ to some degree based on the court (division), and are largely informally outlined. Individual judges generally have little influence over the manner of execution of these duties. One phase of the judicial process in which the judicial assistants have obtained a prominent role is the pre-trial stage. Judicial assistants generally prepare a document that resembles the U.S. bench memo. Ideally, this memo summarizes all important information in the case, i.e., the facts, legal questions, and relevant legislation. At times, the document also includes relevant case law and a preliminary view on the merits of the case.<sup>68</sup> Furthermore, certain preliminary procedural decisions have to be made prior to a hearing; for example, whether a case is handled without a hearing or whether a case is assigned to one judge or a panel. Frequently, judicial assistants make these preliminary decisions, monitored by a judge.

The role of sounding board is inherent in clerkships in the U.S.<sup>69</sup> Judicial assistants in the Netherlands also regularly perform this function. Their memos frequently include a section in which the judicial assistant delivers his or her views on the case. This part of the memo can function as a vehicle for discussion. However, the greatest amount of dialogue regarding cases happens during deliberations. Unlike judicial assistants in many other (particularly common law) judiciaries, Dutch assistants are present during deliberations.<sup>70</sup> They attend the deliberations to collect information for

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<sup>63</sup> See Holvast, 2014, p. 50.

<sup>64</sup> E.g., in several provisions of the Code of Civil Procedure and the Code of Criminal Procedure.

<sup>65</sup> Articles 7 and 13.

<sup>66</sup> The Lamicie-model. Courts can also create their own models, provided that they stay within their budget.

<sup>67</sup> For criminal law, see Corstens, 2005, p. 553-554.

<sup>68</sup> Because the Dutch judiciary mostly employs written evidence, the files of a case can consist of hundreds of pages.

<sup>69</sup> See e.g., Cohen, 2002, p. 109-112.

<sup>70</sup> In administrative law cases, single sitting/assigned judges regularly plan a meeting to discuss a case solely with the assistant.

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writing the draft-judgment; while present, they may also participate in the discussion. This is even stipulated in the function-profiles of some courts.

In certain court divisions, sections of the judgments are still completely written by judges, but in most cases assistants produce a first draft of judgments.<sup>71</sup> These drafts can then be adjusted by the judges as they see fit.<sup>72</sup>

A special group of Dutch judicial staff members are the staff lawyers. Apart from assisting judges on complex cases, they also commonly function as experts in certain fields of law. Occasionally, they are also involved in organizing educational training sessions and in formulating certain court policies.<sup>73</sup>

### **3.3 The Traditional Clerks as Legal Advisers of Lay Magistrates**

The judiciary of England and Wales – where there is a strong tradition of immediacy, a large dependence on the adversaries to direct proceedings, and, therefore, relatively little judicial document collection – historically had little need of employing judicial assistants. Judges at most lower courts still do not receive any assistance from non-judicial staff.<sup>74</sup> The clerks in the Magistrates Courts, analyzed in this section, have always been an exception.<sup>75</sup> Two separate doctoral studies<sup>76</sup> were conducted on this subject. Although published in the 1980s, insights from these studies are still relevant. In addition, Magistrates' clerks are also mentioned in several other publications.

#### ***A Brief History of Magistrates' Clerks***

The presence of clerks in Magistrates' Courts dates back to the beginning of the Magistrates' Courts in the fourteenth century. The function was not created by statute; the first clerks were simply assistants who happened to be literate.<sup>77</sup> In the seventeenth century, the clerkship had developed into a part-time function, often occupied by attorneys who were paid in the form of fees. The position of the 'Justices' clerk' as a full-time public servant was eventually formalized in 1877. At that point in history, the Justices' clerks would not perform their duties alone. Rather, they would employ assistants, currently referred to as court legal advisers. It was not until halfway through the twentieth century that these assistants held full-time positions. In 1980, minimum qualifications for assistants were introduced. However, research by Darbyshire and Astor in 1984 reported that a large number of the clerks were still unqualified.<sup>78</sup> Several alterations in the last two decades have changed the organization of Magistrates' Courts, gradually making them increasingly more professional. Reforms in 1999 required all new court legal advisers to have completed the exams to become barristers or solicitors.<sup>79</sup> Since 2005, all Magistrates' Courts are administered by the Her Majesty's Court Service,<sup>80</sup> reinforcing the professionalization of the selection and training of Magistrates.<sup>81</sup>

#### ***Organization of the Function of Magistrates' Clerks***

England and Wales are currently divided into about 330 justice areas and each has its own Magistrates' courthouse. At these courts, Magistrates without legal training, hear about 95% of criminal cases and decide in several civil matters as well (Ministry of Justice, 2012, p. 31). Magistrates usually sit in panels of three, assisted by a court legal adviser. Currently, there is a trend in which salaried and professional district judges hear cases sitting alone. Still, the vast majority of Magistrates' Courts' judges are volunteers.<sup>82</sup>

Approximately 50 Justices' clerks are allocated to two or more courthouses.<sup>83</sup> Their main responsibility is to provide the Magistrates with advice about the law. In addition, they have several administrative and managerial responsibilities and they are in charge of arranging the training of Magistrates. The Justices' clerks delegate a large part of their duties to court legal advisers.<sup>84</sup> Currently, about 2,000 legal advisers frequently perform duties of the Justice clerk – particularly duties in court – in his or her place. Since all new Justices' clerks and legal advisers are required to have passed the

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<sup>71</sup> This too is recorded in some of the function-profiles of the judicial assistants.

<sup>72</sup> In accordance with the decisions made during deliberations.

<sup>73</sup> At certain courts they perform managing duties too.

<sup>74</sup> On rare occasions, a judge can ask for assistance. However, this is uncommon.

<sup>75</sup> The term "Magistrates' clerk" is used to label all judicial assistants at the Magistrates' Courts including Justices' clerks, Deputy Justices' clerks, and court legal advisers.

<sup>76</sup> Darbyshire, 1984; Astor, 1984.

<sup>77</sup> Darbyshire, 1984, p. 5.

<sup>78</sup> About half of the clerks interviewed by Darbyshire (1984, p. 135) did not possess any professional qualifications; see also Astor, 1984, p. 53.

<sup>79</sup> It furthermore required all existing advisers under 40 to gain this requirement in 10 years' time.

<sup>80</sup> Before the administration of Magistrates' Courts was locally defined.

<sup>81</sup> See Elliot & Quinn, 2009, p. 257-260.

<sup>82</sup> In April 2011, there were 26,966 Magistrates, 137 district judges and 143 deputy district judges operating in Magistrates' Courts. Ministry of Justice, 2012, Judicial and Court Statistics.

<sup>83</sup> In the past each courthouse had its own Justices' clerk.

<sup>84</sup> Previously called clerk assistants or court clerks.

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academic requirements of the barrister or solicitor training, the corps of Magistrates' clerks slowly but steadily becomes increasingly qualified. After entering the court, the trainee legal advisers are required to follow an on-the-job training program for up to two years. Similar to judicial assistants in the Netherlands, court legal adviser positions are not temporary. Another similarity is the limited career opportunities for legal advisers.<sup>85</sup> It is expected that the qualified clerks are more inclined to leave the Magistrates' court after a few years.

### ***Institutionalization of Magistrates' Clerks and Guidelines***

For a long time, legislation did not take note of Magistrates' clerks. However, beginning in the 1950s, several court cases were published accusing Magistrates' clerks of interfering with the conduct of proceedings, acting out of bias and retiring with the bench uninvited. These cases highlighted the controversial nature of the advisory role of the clerks.<sup>86</sup> It still took considerable time after the publication of these cases before real change occurred. Only in the 1990s were various legal documents produced that delineated the duties of the Justices' clerk. The most important one is the *Crime and Disorder Act 1998*, which particularly enlarged the managerial duties of Justices' clerks. To further determine the duties of the Justices' clerks, the 2000 *Practice Direction (Justices: Clerk to the Court)* was issued. This direction also officially records the duties of court legal advisers. It aimed to provide more transparency into the manner in which legal advice is given to Magistrates by stating that advice should be presented in open court.<sup>87</sup> Guidelines for the conduct of Justices' clerks and assistant Justices' clerks are currently also available. The latest version, dated October 2007, specifically stresses the independence and impartiality of clerks.<sup>88</sup>

### ***Duties of Magistrates' Clerks***

Formally, all assisting responsibilities in Magistrates' Courts are appointed to the Justices' clerk. In reality, the vast majority of duties in court are delegated to court legal advisers.<sup>89</sup> Justices' clerks previously had many administrative duties, but these are currently largely delegated to administrative staff. With the introduction of the *Crime and Disorder Act 1998*, Justices' clerks at present function primarily as court managers. They are also afforded various pre-trial judicial powers that can be exercised by a single justice.<sup>90</sup> These include, for example: extending bail, requesting pre-sentence or medical reports, extending custody time limits, and granting legal aid for an appearance in Crown Court. These powers are regularly further delegated to legal advisers.

However, the main duty of Magistrates' clerks remains to advise the Magistrates on questions of law, mixed law and facts, and practice and procedure. Therefore, they are present in court and they often are called into the retiring room. Their influence is constrained by the fact that they are not permitted to get involved in decisions on matters of facts or the level of sentence. However, research of Darbyshire disclosed that the clerks did not always stay within these boundaries.<sup>91</sup> In court, an important duty is to formulate the court record.

Another extraordinary responsibility of Magistrates' clerks is to provide help to unrepresented defendants.<sup>92</sup> When a defendant is unrepresented, the Magistrates' clerk is the person in court with the legal understanding to ensure that the defendant receives a fair trial. Key responsibilities are to explain to the defendant what will happen in court, what the rules of procedural law are, and what their legal position involves. However, the clerk should restrain him or herself from acting as a representative.

There is ongoing debate regarding whether or not to expand the tasks of Magistrates' clerks. It has even been suggested that Legal Advisers be appointed as members of the bench.<sup>93</sup> Others have argued to restrict their powers.<sup>94</sup>

### **3.4 The Recently Introduced Function of Judicial Assistants**

In 1997, the function of Judicial Assistant was created at the Court of Appeal of England and Wales. The model was later extended to the UK Supreme Court. Given that Judicial Assistants are a rather new phenomenon, their role is still

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<sup>85</sup> They can only be promoted to one of the few Justices' clerk positions or to a court management function.

<sup>86</sup> See Darbyshire, 1984, p. 2-3, 30-60.

<sup>87</sup> And advice given in private should be repeated in court.

<sup>88</sup> By referring to the Bangalore Principles of Judicial Conduct.

<sup>89</sup> See Darbyshire 1984; Astor 1984; Gibson & Watkins, 2009, p. 80-81.

<sup>90</sup> Elliot & Quinn, 2009, p. 263.

<sup>91</sup> Many clerks would retire with the bench uninvited, even though case law emphasised that clerks should be asked to retire.

<sup>92</sup> Astor, 1986.

<sup>93</sup> Cox, 2010, p. 585.

<sup>94</sup> Darbyshire, 1999.

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developing and fairly little information is available on the specifics of the occupation.<sup>95</sup> To complement the available information, several interviews were conducted with judges and their assistants.<sup>96</sup>

### **A Brief History of Judicial Assistants**

Judicial Assistants play an entirely different role than Magistrates' clerks, as they work with experienced lawyers. They also have a much shorter history in the judiciary. The first Judicial Assistants were appointed to the Civil Division of the Court of Appeal in 1997. The Judicial Assistant position was initially presented as a temporary response to the backlog of applications for leave to appeal.<sup>97</sup> In the early years, the courts experimented with different forms of organization. During the first year, a pool of sixteen Judicial Assistants was appointed for a period of one year on a part-time basis of 2.5 days a week. The following year, in addition to the part-time assistants, some of the Judicial Assistants worked full-time and stayed for three years. From that year onward, Judicial Assistants would also be assigned to one or two particular senior Justices.<sup>98</sup> Currently, the Court of Appeal offers eight positions for full-time assistants every half a year.

In 2001, the House of Lords<sup>99</sup> followed in the footsteps of the Court of Appeal and also began to employ Judicial Assistants. At first, only four Judicial Assistants,<sup>100</sup> who were assigned to the four Senior Law Lords for the duration of one year. When the House of Lords transformed into the Supreme Court in 2009 and moved into a larger building,<sup>101</sup> it employed four additional Judicial Assistants, bringing the total to eight. Nesterchuk and Paterson suggest that the changes in quantity and location of the Judicial Assistants facilitated the expansion of their role.<sup>102</sup>

### **Organization of the Judicial Assistant System**

The Supreme Court currently still employs eight Judicial Assistants to assist its twelve judges; seven assistants with a one-year contract and one with a permanent position.<sup>103</sup> The assistants are either assigned to one of the four senior judges or to two others. The Court of Appeal currently employs eight full-time Judicial Assistants for a spring or an autumn term of about four months. Hence, each year a judge in the Court of Appeal will be appointed two assistants successively. These assistants are assigned to the most senior judges of the court of 38 judges.

Judicial Assistants are selected by their managing judges from bright young (pupillage) barristers and (trainee) solicitors.<sup>104</sup> The managing judge aims to provide diversity in the professional, educational, and cultural background of the Assistants. More recently, attempts are made to match the Judicial Assistants to the preferences of the particular Justices. Some Supreme Court Justices appear to prefer Judicial Assistants who are specialized in an area different from their own, so the Assistants can provide them with extra support in that area.<sup>105</sup> There is no training available for Judicial Assistants; they are required to learn on the job.

A position of Judicial Assistant in the Supreme Court has developed into a popular way to enhance one's CV.<sup>106</sup> Nevertheless, a Judicial Assistantship in England is not as coveted as a U.S. law clerkship. This is possibly due to it being a relatively new function of which the benefits of the experience are not yet established. Moreover, young lawyers have to take a year off from practice to fulfil a position and not all law firms are enthusiastic to provide this permission.<sup>107</sup> It is emphasized by the judges that their assignment is intended to benefit the assistants. The judges, some more than others, will tutor the young lawyers during their court apprenticeship.<sup>108</sup>

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<sup>95</sup> However, a few publications are (partly) dedicated to Judicial Assistants. See Nesterchuk, 2013; Paterson, 2013.

<sup>96</sup> 8 (collective) interviews were conducted with a total of 5 (former) judges of the Supreme Court and Court of Appeal, 8 Judicial Assistants of the Supreme Court and Court of Appeal, and 2 District judges.

<sup>97</sup> It followed the recommendations of the reports by Lord Woolf (1995; 1996) to the Lord Chancellor on the English and Welsh Civil justice system. Press release, Lord Chancellors' Department, November 28, 1996, <http://www.prnewswire.co.uk/news-releases/lord-woolf-to-blitz-court-of-appeal-backlog-158755375.html>, visited on 29-04-2014. See also Munday, 2007, p. 458.

<sup>98</sup> Jamieson, 1998.

<sup>99</sup> UK's highest Court of Appeal, before it became the Supreme Court.

<sup>100</sup> That was all there was room for in the court building.

<sup>101</sup> Paterson, 2013, p. 247.

<sup>102</sup> Nesterchuk, 2013, p. 101; Paterson, 2013.

<sup>103</sup> The latter is a source of information for new Assistants and helps to bring continuity.

<sup>104</sup> At the Supreme Court, the Judicial Assistants are required to be fully qualified. At the Court of Appeal, candidates who have not conducted their pupillage or training period are also considered.

<sup>105</sup> Paterson, 2013, p. 248.

<sup>106</sup> In 2013, over 300 candidates applied for the seven open positions at the Supreme Court. See, The Times (London), 14 okt 2010, "A supremely good start to your career." See also 23 may 2013, "A supreme chance to spend a year with the country's finest legal minds."

<sup>107</sup> These reasons were mentioned by several respondents.

<sup>108</sup> Paterson, 2013, p. 251. This was also emphasised in the judgment of Lord Woolf in the case of Parker v. the Law Society [1998] 143 S.J. L.B. 45.

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### ***Institutional Embedding of Judicial Assistants and Guidelines***

Given that Judicial Assistants do not perform any formal legal procedural duties, their position is not recognized in legislation. In fact, hardly anything is recorded regarding their duties. There are similarly no codes of conduct or confidentiality specifically relating to Judicial Assistants. However, the assistants do owe a duty of confidentiality as covered by the provisions of the *Civil Service Code*. They are additionally bound by the *Official Secrets Act* and the *Data Protection Act*. Judicial Assistants are recognized as being civil servants. Yet, they are headed by the chief executive of the court and not directly by the Minister. During the passing of the *Constitutional Reform and Governance Act 2010* it was made clear that the administration of the Supreme Court (including Judicial Assistants) occupies a special position and is not accountable to the UK Ministers.<sup>109</sup>

The judges who are now appointed an assistant had previously been accustomed to performing their work without any assistance. Therefore, most judges are still investigating how to make the most of Judicial Assistants. The majority of the existing proceedings are informally defined.

### ***Duties of Judicial Assistants***

The duties of Judicial Assistants in the Supreme Court are diverse. They partly serve the court as a whole and partly serve the individual judges.<sup>110</sup> A duty that benefits the entire court is the writing of the press summaries of judgments for publication on the Supreme Court website. Another core task is to provide the judges with memos on petitions to appeal. These memos typically cover maximum four pages and are aimed at providing the judicial panel with a neutral summary of the case. It has gradually become common for Justices to ask their Judicial Assistants to write additional notes to help them make decisions granting leaves to appeal and to prepare for the hearing.<sup>111</sup> These notes usually reflect the views of the Assistants. The Judicial Assistants who are involved in writing memos also acquire the opportunity to attend the petition to appeal hearing, which takes place in private by a panel of three judges. At the end of the hearing, when the judges have reached their decision, the Judicial Assistants are occasionally invited to present their views. According to Nesterchuk, on one or two occasions a plea at the end of the hearing actually changed the minds of the Justices, and resulted in the appeal being granted.<sup>112</sup> However, this is not common practice.

An additional duty of most Judicial Assistants is to perform legal research. The types of research questions vary among justices and are often open-ended. Assistants are also encouraged to attend the related hearing to become familiar with the issues that arose during oral argument.

Finally, Judicial Assistants can contribute to adjudication by discussing cases with judges. Not all judges appear to employ their Judicial Assistants in this manner, but several indicate this as an important duty. The judges emphasize the benefits of thinking out loud and taking note of the views of Judicial Assistants.<sup>113</sup> Some judges also send draft-judgments to their assistants for comments.<sup>114</sup>

Judicial Assistants can also be of assistance to judges by providing them with information regarding what is happening in the courthouse. A Judicial Assistant-network, similar to the U.S. law clerk-network, does not exist. Though, as the Judicial Assistants work together in one room, they often are well aware of what is going on in the justices' chambers.

The duties of Judicial Assistants in the Court of Appeal resemble in many ways those of their counterparts in the Supreme Court, although in the Court of Appeal, a similar number of assistants must be shared by a considerably larger group of judges. It is also expected that Judicial Assistants in the Court of Appeal will spend more time on preparing petition memos, as the court deals with about twenty times as many petitions to appeal.<sup>115</sup> Another difference is that in the Court of Appeal, Judicial Assistants are also invited to attend the private deliberation meetings of the judges before and after hearings. At these meetings, the assistants will occasionally be asked to elaborate on their views regarding a case.<sup>116</sup> Because there are fewer Judicial Assistants per judges than at the Supreme Court, the assistants primarily assist the senior judges.

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<sup>109</sup> See Arnold, 2014.

<sup>110</sup> Nesterchuk, 2013.

<sup>111</sup> Paterson, 2013, p. 249.

<sup>112</sup> Nesterchuk, 2013, p. 106.

<sup>113</sup> Paterson, 2013, p. 251-252.

<sup>114</sup> Paterson, 2013, p. 252.

<sup>115</sup> See Ministry of Justice, 2012, Judicial and Court Statistics 2011.

<sup>116</sup> However, given that they have already laid out their views in the bench memo, this rarely occurs.

#### 4. Six Factors that Distinguish the Judicial Assistant Models

The previous section reveals that although judicial assistants' functions are similar in certain respects, the judicial assistant models retain their individual characteristics. In this section, six key features that distinguish the roles and positions of judicial assistants are delineated. Keeping in mind the concerns regarding over-delegation and undue influence, special attention goes to the manner in which certain aspects can constrain (or enhance) assistants' influence.

Table 2. Factor on which judicial assistant models can be distinguished.

Distinguishing factors
1. Reasons for employing judicial assistants
2. Ratio of judicial assistants to judges
3. The qualifications of judicial assistants and the terms of their employment
4. Duties of assistants and their participation in various stages of the judicial process
5. Judicial assistants' assignment to individual judges or the entire court
6. Judicial assistants working with professional or lay judges

##### 4.1. Reasons for Employing Judicial Assistants

The first aspect that determines the judicial assistants' role is the reasoning behind employing them. With regard to U.S. law clerks, the rise in caseloads is the most frequently cited reason for the creation of law clerk positions and for continuing to expand their number.<sup>117</sup> It is also cited as a motivation for the increased allocation of duties to law clerks.<sup>118</sup> This is essentially a motive based on efficiency, as employing assistants is assumed to save judges time. It enables them to handle more cases than would be possible without assistance. A backlog of applications for leave to appeal was also cited as the main reason for starting to employ Judicial Assistants in England and Wales. The Dutch judiciary is increasingly focused on the efficiency of adjudication too and the creation of models with which to delineate the time that judges and assistants spend on cases, reveals a consciousness about the economic benefits of employing assistants. Magistrates' Courts have also been repeatedly evaluated on their costs, but these studies appear to focus on the (in)efficiency of the employment of lay judges (instead of professionals) and not on the clerks.<sup>119</sup>

Ward and Weiden conversely state that the establishment of the law clerks position is actually an outgrowth of the apprentice model of legal education.<sup>120</sup> The apprentice component and the unique experience of gaining a deeper understanding of the judicial decision-making process are still mentioned by law clerks, and by Judicial Assistants too, as reasons for applying for the position. Judges frequently emphasize this aspect as well.<sup>121</sup> The Dutch judicial assistant model also originates in an apprenticeship model, but this model was abandoned in the 1950s. From then on, the educational element seems to have vanished. Currently this is of relatively little importance, just as it is for Magistrates' clerks.

A third motive for employing judicial assistants is their plausible contribution to the quality of adjudication. Research contributions of assistants and their involvement as sparring partners clearly help improve the adjudication. All assistants seem to perform these duties to a certain degree, although the processes work differently. The impact on quality is perhaps most obvious at Magistrates' Courts, where it is the clerks' responsibility to advise the Magistrates on questions of law. Law clerks and Judicial Assistants mainly serve as sparring partners for the individual judges in their chambers. Dutch judicial assistants are frequently involved in the discussion amongst judges in deliberations. Furthermore, most assistants<sup>122</sup> present their views on cases in memos, which can serve as vehicles for discussion.

Finally, Magistrates' clerks and judicial assistants in the Netherlands also perform several administrative and recording tasks, independent of the judge. Ensuring that these tasks are performed is clearly an additional reason for employing the assistants.

The amount of influence that assistants can have in the recording role is probably minimal. The prospect of wielding (undue) influence is more prominent when assistants are employed for efficiency reasons. Especially when this means

<sup>117</sup> According to Bieri (in this issue), this is also the main reason for increasing the number of law clerks in Switzerland.

<sup>118</sup> Cohen, 2002 p. 9; McCree, 1981e.g. p. 789.; Rubin, 1980.

<sup>119</sup> See e.g. Morgan & Russell, 2000.

<sup>120</sup> Ward & Weiden, 2006, p. 5.

<sup>121</sup> See contributions to Peppers & Ward, 2013; Paterson, 2013, p. 251.

<sup>122</sup>Magistrates' clerks form the exception.

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that the number of assistants per judge is high. When assistants are employed for reasons of quality improvement, it is actually intended that they have a certain influence on the content of judgments. In this case, the diffusion of responsibilities between judges and assistants is especially likely to become an issue.<sup>123</sup>

#### 4.2. Ratio of Judicial Assistants to Judges

Another aspect in which judicial assistant models differ substantially is the degree to which judicial assistants are employed. Employing more assistants increases the likelihood of them having influence. It may turn judges into managers who spend most of their time supervising and coordinating assistants.<sup>124</sup>

In the Dutch trial courts, judicial assistants generally slightly outnumber the judges. The judicial assistants' role is particularly important because of the significance of court records for the process of review on appeal. In the U.S., the largest numbers of law clerks are positioned at the top of the judiciary.<sup>125</sup> The higher the position of a judge, the more law clerks will be assigned to him or her. The number of law clerks for every Supreme Court Justice is four. Judges at other federal Courts and State Highest Courts have about two to three judicial assistants.<sup>126</sup>

It is remarkable that the U.S. judiciary has evolved into a system with high reliance on law clerks at the highest level courts, whilst professional judges of its predecessor system in England and Wales, until very recently did not attain any kind of judicial assistance. At present, the English Court of Appeal (38 judges) and Supreme Court (12 judges) still both employ a modest eight judicial assistants. This results in English and Welsh judges having to perform most of the work themselves. The duties of Judicial Assistants are also rather limited and do not include judgment-drafting. This is different from Magistrates' Courts, where every panel of Magistrates is assisted by one Magistrates' clerk to provide them with legal advice.

#### 4.3. The Qualifications of Judicial Assistants and the Terms of their Employment

The study of judicial assistant models in this article highlights roughly two types of judicial assistants in relation to terms of employment, experience, and credentials. The first type is represented by the U.S. law clerks and English Judicial Assistants in the Courts of Appeal and Supreme Court. These are young, recently graduated lawyers who regularly only occupy the position for a brief period of time, this type of assistant is referred to as temporary assistants. The other type is represented by the Magistrates' clerks and Dutch judicial assistants in the lower level courts and this type is referred to as the career assistant. These judicial staff members are not necessarily young lawyers, they can be older as well. Moreover, they are employed by the courts for an indefinite time. In the past, these assistants would typically not be legally qualified, but both judiciaries tightened the entry requirements and currently most new assistants are qualified lawyers.

The choice for temporary assistants serves several purposes. First, it is said to be an important check to prevent undue influence, given that the short term law clerks will never fully master the job and therefore will not be able to consolidate considerable power.<sup>127</sup> In addition, an important motivation for employing recent graduates is that these assistants can present the judges with the latest academic insights on recurrent discussions.<sup>128</sup> By providing young lawyers the opportunity of a rather short clerking experience, the justices also assure themselves of getting the best students who are willing to work exceptionally hard during their year of employment.<sup>129</sup> It also fits the notion of the position as an apprenticeship.

However, temporary assistant positions entail spending large amounts of time and effort on selecting and training new assistants. Selecting new assistants each year also comes at the expense of attaining continuity in the assistant model and in building expertise. The career assistants, such as the clerks at Magistrates' Courts and the specific assisting position of staff lawyer in the Dutch judiciary, are employed for their legal knowledge and extensive experience. Furthermore, Dutch staff lawyers are, every so often, involved in producing court policies. Since these judicial assistants are increasingly legally qualified, their contribution to the quality of adjudication can be substantial. However, in the Dutch as well as the English and Welsh system, a lack of career perspectives is observed. This results in the threat of well qualified judicial assistants leaving the judiciary for better job opportunities elsewhere. Experienced assistants are also in a powerful position in relation to judges. Regarding Magistrates, Astor clarifies: "*Most lay Magistrates spend half a day, or a day, in court once a week or once a fortnight. They are, in a sense, regular visitors to a complex organization which they*

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<sup>123</sup> See Fiss, 1982.

<sup>124</sup> See Vining, 1981, p. 251; Posner, 1985, p. 103-104.

<sup>125</sup> Lower courts do employ different type of assistants.

<sup>126</sup> See Swanson & Wasby, 2008, p. 26; Cohen, 2003, p. 87.

<sup>127</sup> Peppers, 2006, p. 207-208; Ward & Weiden, 2006, p. 36.

<sup>128</sup> Ward & Weiden, 2006, p. 48; Oakley & Thompson, 1980, p. 67.

<sup>129</sup> Oakley & Thomas, 1980, discovered that judges agree that career clerks are not of the same quality as short-term clerks.

play little part in running. It is the Clerk to the Justices and the Clerk's staff, who control this organization and who ensure that the hundreds of cases scheduled to be dealt with each day are properly processed."<sup>130</sup> This could also, to a lesser degree, be the case in the Netherlands. In particular, in relation to new judges, Dutch judicial assistants can have a powerful position. Evidently, this introduces the risk of career assistants having too much influence and judges relying too much on their expertise, thereby preventing judges from fully considering the merits of cases themselves.<sup>131</sup>

#### **4.4. Duties of Assistants and their Participation in Various Stages of the Judicial Process**

When comparing the duties of judicial assistants, those of the Dutch assistants seem to be the most wide-ranging, as they include participation in all stages of the judicial process. A historically important responsibility of Dutch judicial assistants is that of creating the court records. Producing a correct record is in fact a shared responsibility of the judge and assistant. In the U.S. and England and Wales (except for in Magistrates' Courts) administrative staff perform this duty. Recently, Dutch assistants also attained an important role in the preparations for hearings and in drafting judgments, thereby also becoming involved in the content of judicial decision-making. U.S. law clerks are also, to a large extent, involved in the judicial content. In the Supreme Court, their role is particularly far-reaching in the process of deciding what cases will be reviewed (the certiorari process), a feature which is not part of the Dutch mandatory review system. Using memos (in the review process or in preparation for oral arguments) results in the judge no longer being directly confronted with the plurality of claims of the parties but rather receiving a representation of the case from the viewpoint of a subordinate.<sup>132</sup> This is likely to affect judges' decisions.<sup>133</sup> Kronman fears that this makes the judges' perspective more monocular.<sup>134</sup>

Similar to Dutch assistants, U.S. law clerks play a key role in drafting judgments. There is a risk, however, that this involvement inhibits the judge from reconsidering his intuitive first stance on a case.<sup>135</sup> Furthermore, having the drafting of a judgment done by a subordinate could result in judges (and courts) creating more guidelines in order to assure that the assistants in fact write drafts in accordance with the judge(s)' views. This could result in less attention for cases that might require deviation from the general directives. Unlike in the Netherlands, in the U.S. Courts of Appeal it is strictly forbidden for anyone other than the judges to enter the deliberation room. This rule limits the actual influence as well as the appearance of law clerks wielding influence. This is different from Dutch judicial assistants, who regularly are present during deliberations.

The duties of the two types of English judicial assisting staff members are different in many ways. The Magistrates' clerks play a key role in the courtroom and during deliberations. An interesting observation of Darbyshire was that various court actors viewed court clerks to be more in control of the proceedings than the chair of the Magistrates' panel.<sup>136</sup> Magistrates' clerks are also afforded various pre-trial judicial powers. Darbyshire claims that this extends the role of the Justices' clerk too much.<sup>137</sup> She argues that case management is a judicial task that should be performed by judges and not by clerks. Judicial Assistants assist judges primarily in preparing memos for applications for leave to appeal and, to a lesser degree, in preparing bench memos and acting as sounding boards. Although the function of Judicial Assistant is less than 20 years old, during its existence, the duties have expanded and the contribution of Judicial Assistants to the decision-making process seems to have increased.<sup>138</sup> In England and Wales, judges appear to be less rigorous about the presence of Judicial Assistants at deliberations than in the U.S. However; they are more restrained in giving assistants a role in drafting judgments.<sup>139</sup> Although the Judicial Assistant scheme was loosely based on the U.S. law clerk model,<sup>140</sup> there is a strongly held opinion amongst judges in England and Wales that Judicial Assistants should not attain the influence that American Law Clerks appear to have.<sup>141</sup>

#### **4.5. Judicial Assistants' Assignment to Individual Judges or the Entire Court**

The fact that, in common law judiciaries, Appellate Court judges are more adjudicating as individuals (being able to display their individual views on cases through dissenting and concurring opinions to support or deny the final decision) rather than anonymous representatives of the court, is reflected in the manner in which assistants are employed. That is, they are assigned as individual assistants to the judges rather than as assistants to the entire court. England and Wales

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<sup>130</sup> Astor, 1984, p. 3.

<sup>131</sup> See also Kenney, 2000, p. 619.

<sup>132</sup> See also Hol, 2001, p. 99.

<sup>133</sup> See Guthrie, Rachlinski & Wistrich, 2007.

<sup>134</sup> Kronman, 1993.

<sup>135</sup> Posner, 2008; Holvast, 2014.

<sup>136</sup> Darbyshire, 1980, p. 151-183.

<sup>137</sup> Darbyshire, 1999.

<sup>138</sup> Paterson, 2013, p. 253-257.

<sup>139</sup> Several judges and Judicial Assistants with whom I spoke emphasized this.

<sup>140</sup> Jamieson, 1998; Munday, 2007.

<sup>141</sup> See also Paterson 2013, p. 253-257, particularly p. 256 in the footnote.

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began their Judicial Assistant model by constructing a pool of assistants available to all judges; however, soon after its creation, this was altered and assistants were assigned to individual judges. This type of arrangement results in assistants frequently having personal relationships with their judges. Peppers indicates several monitoring mechanisms which U.S. Supreme Court justices apply to control the work of law clerks and to prevent them from shirking or wielding undue influence.<sup>142</sup> Some judges, for instance, reduce the likelihood that law clerks have different political preferences by taking this aspect into consideration in the selection procedure. They also monitor law clerks by having products (such as draft-judgements) reviewed by multiple clerks. The personal relationship that many law clerks have with the judges also enhances their loyalty to the judges.<sup>143</sup> The assignment of assistants to individual judges also creates a situation in which judicial assistants associate themselves with professional judicial values held by the specific judge they are supporting and thus may be less concerned with organizational aims.

In the Dutch judiciary, where judicial assistants work with various judges, the assistants occasionally obtain a role in maintaining the consistency of judgments. Perhaps this setting also results in them being more concerned with upholding organizational aims, such as court efficiency.<sup>144</sup> In all judicial systems, the judicial assistants are employed by the judicial service. As a consequence, the management of the court has more power over them than over the judges, who obtain special provisions to ensure their independence.

Like Dutch judicial assistants, English Magistrates' clerks are not assigned to a specific judge. Their employment alongside part-time lay judges places them in a special position. Astor observes a process of balancing organizational aims and procedural rights and legitimacy which Magistrates' clerks experience when assisting unrepresented defendants.<sup>145</sup>

#### **4.6. Judicial Assistants Working with Professional or Lay Judges**

Panels consisting exclusively of adjudicators without legal training mark the role of the Magistrates' clerk as a rather unique one. It is exceptional to have adjudication exclusively by lay judges; most countries that employ lay participation utilize systems that group lay and professional judges.<sup>146</sup> In the English and Welsh system it is the judicial assistant who is required to enhance the legal knowledge of the panel. This is different from judicial assistants who work with professional judges; in that situation, the judges normally retain more legal knowledge than their assistants. A study on Magistrates' Courts revealed that Magistrates' justices seek advice more frequently than the professional District judges and the former regard the contribution of Legal Advisers more highly as well.<sup>147</sup>

Their superior legal knowledge combined with their greater experience with court procedures provides Magistrates' clerks with a unique space to wield influence, which is very different from systems in which assistants are supporting professional judges. Given that Magistrates' clerks provide legal advice to justices who are not legally qualified, it seems that decisions on law and procedure "[are] invariably that of the clerk".<sup>148</sup>

### **5. Conclusion**

This article offers a reflection on various judicial assistant models. For the purpose of better understanding the role and influence that judicial assistants can have in judicial decision-making and to observe how different judicial systems attempt to diminish the risk of wielding (undue) influence. The study of four judicial assistant models within three judiciaries revealed a great difference in the organizational structure. The duties of the studied judicial assistants also vary, although many are remarkably similar.

Certain features of assistant positions are accompanied by larger risks of having undue influence; for instance, when a large number of assistants are employed or when assistants are highly qualified and experienced. Other features can shield judicial systems from too much delegation; for example, employing assistants on a temporary basis and the employment of young and unexperienced assistants. Each model includes its own individual mix of features that, on the one hand, enable judicial assistants to make a contribution to the efficiency and quality of the judicial process, but on the other hand, contain safeguards to prevent assistants from gaining too much power.

It can also be observed that in all the judiciaries, the roles and duties of judicial assistants are scarcely mentioned in legislation and official documents. The majority of their duties are informally defined. Possible mechanisms to prevent

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<sup>142</sup> Peppers, 2006.

<sup>143</sup> Peppers, 2006, p. 206-212.

<sup>144</sup> See Posner, 1985, p. 133 on staff attorneys.

<sup>145</sup> Astor, 1986.

<sup>146</sup> Malsch, 2009.

<sup>147</sup> Morgan & Russell, 2000.

<sup>148</sup> Darbyshire, 1984, p. 223.

exercising undue influence are generally also not cited as such in official policy. At the same time, the role of judicial assistants seems to have increased over time, probably due to worldwide concerns with the efficiency of adjudication.<sup>149</sup> It is rather worrisome that the duties of judicial assistants are substantial, yet little of their position is officially codified. Nevertheless, when the organization of judicial assistant models are formalized and/or altered – for efficiency or other reasons – it is important to understand that the models consist of bundles of features which have been shaped within a specific judicial and societal context. Judicial systems should be cautious of cherry picking mechanisms to prevent undue influence from other judicial systems, as these mechanisms might not be transportable into their system without making adjustments.

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<sup>149</sup> See regarding common law judiciaries also Paterson, 2013, p. 253-257.

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