



In the Shadow of the Judge: The Involvement of Judicial Assistants in Dutch District Courts

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Summary

While judicial assistants occupy a central position in all types of court systems, the contribution of these staff members to the process of adjudication remains largely unknown, even though their involvement can have significant effects on the perceived quality and credibility of adjudication. This research aims at unravelling the involvement of this group of judicial officers in judicial decision-making.

Although it did not occur as noticeably as in other jurisdictions such as the US, it seems that in the last two decades the essentials of the function of judicial assistant in the Netherlands have changed, and the allocation of duties to assistants has increased. At the same time, Dutch judicial assistants have progressively become more qualified. This is a development that – under the influence of the *New Public Management* movement – is observed more widely in public service organisations.

In the context of the judiciary the involvement of 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 regularly highly involved in the decision-making, this raises questions about the legitimacy of this involvement. Particularly in reference to the American law clerk model, several authors have raised their concerns about the possibility of judicial assistants influencing the judicial decision-making and the potential effects thereof. These authors are for example concerned about the loss of the sense of responsibility of judges when they mainly function as editors of judicial assistants' work. The possibility that adjudication will become more legalistic and based on procedural guidelines and less concerned with general moral principles and societal consequences is also mentioned as a concern. Furthermore, the difference in institutional safeguards with respect to judges and judicial assistants is mentioned as a latent problem. Lastly, the actual efficiency of employment of judicial assistants is also questioned.

In order to assess whether the aforementioned concerns are fair, it is first of all important to gain more insight in the role of judicial assistants in adjudication. This book aims to provide this insight by studying Dutch district courts, thereby answering the following research question:

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?

Methodology

The core of this research consists of an empirical field study in two Dutch district courts. In order to conduct this study a qualitative multi-method approach was used which is elaborated on in chapter 2. Eight months of fieldwork was conducted in two different divisions of each of the studied courts. This fieldwork entailed document analyses, participant observations and in-depth interviews. In essence a method of following the decision-making in 137 court cases (heard at 27 hearings) was engaged. The produced documents related to the cases (usually memos and draft judgments) were analysed and all gatherings and (informal) contacts between judges and judicial assistants related to the cases (commonly the hearing, the deliberations sessions and sometimes pre-trial meetings) were observed. In addition, 66 judges and judicial assistants were interviewed during the fieldwork, 51 of which were involved in the observed hearings.

In addition to this field study, seven Dutch judges and judicial assistants were interviewed prior to the fieldwork. Additionally, a set of 10 interviews with Dutch judicial officers after the fieldwork was conducted. Finally, 10 interviews were conducted with judges and judicial assistants during a research stay in England.

Inter-jurisdictional reflections

In order for one to understand the specific setting in which this research took place, the judicial assistance models in Dutch courts, with particular attention to the model in the district courts, are outlined in chapter 3. Subsequently, in this chapter, these models are contrasted to three entirely different judicial assistance models: 1) The law clerk model in the US, which is the most studied type of assistant, 2) Magistrates' clerks, who play a remarkable role in the system of lay adjudication in England and Wales, and 3) The new function of Judicial Assistants, who are currently employed at the English and Welsh Court of Appeal and the UK Supreme Court. The chapter introduces six features by which judicial assistance models can be distinguished:

1. The reasons for employing judicial assistants
2. The ratio of judicial assistants to judges
3. The qualifications of judicial assistants and the terms of their employment

4. The 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

The study of judicial assistance models furthermore reveals a great difference in the organisational structures of the assistance. The duties of the studied judicial assistants were also found to vary, although many duties are actually remarkably similar. Another remarkable observation is that in all jurisdictions the involvement and responsibilities of judicial assistants are rather scarcely mentioned in legislation and official policy documents. The majority of the assistants' duties are informally established.

The exploration of the different assistance models furthermore shows that all judiciaries struggle with the issue of how to make the best use of judicial assistant, but also attempt to diminish the risk of assistants being too influential. Each model includes its own individual mix of features that, on one hand, enable judicial assistants to make a contribution to the efficiency and quality of the judicial process, and on the other hand, contain safeguards to prevent assistants from gaining too much power. It is important to understand that the models consist of bundles of features which have been shaped within specific judicial and societal contexts. Judicial systems should therefore be cautious of cherry picking features from other judicial systems.

Two normative perspectives

In chapter 4 two perspectives are introduced which can be taken in evaluating the benefits and hazards of employing judicial assistants. These perspectives are: the rule of law perspective and the managerial perspective. The first offers a classical legal theoretical perspective on adjudication, based on principles and values that were established during a century-long history, particularly shaped during the period of enlightenment. The second perspective provides newer insights, largely from economic theory regarding organisations, which arose particularly in the second half of the 20th century as a response to a widely held belief that court organisation needed to better reflect the needs of modern society. The chapter defines what these perspectives stand for and how the principles and values related to these normative ideas are incorporated into the law and policy in Dutch courts. The chapter ends with an assessment of different types of involvement of judicial assistants in adjudication from a theoretical perspective making an analytical distinction between 1) administrative and secretarial duties of assistants (which are duties that are not directly involved in the content of the judicial decision-making), and 2) advisory and discussion-related duties (which are directly involved in the judicial content of decision-making).

It concludes that a strictly administrative and secretarial involvement of assistants is desirable from a managerial perspective, as it will enhance the efficiency of adjudication. 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 benefits 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.

The involvement of judicial assistants in different phases of the decision-making process

Chapters 5, 6 and 7 present the results of the fieldwork at the criminal and administrative law divisions of two Dutch district courts. Chapters 5 and 6 describe and analyse the judicial decision-making process in chronological order to illuminate what part judicial assistants play in different phases (pre-hearing, hearing, deliberations and judgment writing) and how this affects the way in which adjudication takes place.

The run-up to the hearing

The research reveals that judicial assistants regularly play an important role in the phase prior to the hearing. This role is largely invisible and unknown to the larger public. The assistants can hold a powerful position at the early beginnings of the legal procedure, in which they make initial decisions on procedural questions such as whether a case can be adjudicated without a hearing (in administrative cases).

Judicial assistants, furthermore, prepare memos which are sometimes documents that reveal the views of the judicial assistants. At other times, these documents are primarily neutral summaries of the case files. The manner in which, and extent to which these memos are employed by judges in preparing for the hearing also varies greatly. Still, it is widely agreed upon by judges that being provided a memo saves time. Additionally, memos can also provide new insights on a case and function as vehicles for discussion. Depending on their content and the manner in which they are used they can either prevent or generate biases in the judicial decision-making to occur.

The hearing

The duties of judicial assistants during the hearings still consist primarily of the traditional tasks of creating the court record and providing administrative assistance. The notion of the judge as the core decision-maker, who adjudicates without substantial support, is thereby upheld at the public hearing. Several of the interviewed judges seem to adhere to this depiction. Consequently, they are cautious about changing

the involvement of assistants during the hearing. Various assistants are similarly satisfied with a more limited role during the hearings.

Nonetheless, there are some means by which judicial assistants are involved and may influence what occurs during the hearings. These are mainly informal practices which take place outside of the purview of the larger public. A minority of (primarily administrative) judges additionally welcome a more substantial involvement of judicial assistants during the visible part of the hearings. They have taken favourably to the recent development of providing judicial assistants the opportunity to ask questions during the hearings. A minority of judicial assistants, are also positive about being actively involved during the hearing. However, because of the diverse views on the expected involvement of judicial assistants, the norms about the appropriate contribution of the assistants to the hearings are ambiguous and frequently unclear to assistants and judges. This leaves room for various executions. It also results in judges and assistants often having complex relationships.

Deliberations

Although judicial assistants do not have an official vote during deliberations, it is nowadays mostly regarded as normal that assistants participate in the deliberation process. Moreover, most judges and assistants regard it as a duty of assistants to contribute to the discussion. As deliberations essentially consist of an exchange of arguments, a well-presented argument by the assistant can influence the decision-making. Particularly when judges are unsure how to deal with a certain issue or disagree with each other, the views and arguments of assistants can and do steer the decisions that are made. Especially in panels with less-experienced judges, the contribution of certain highly respected judicial assistants can be crucial. On such occasions, assistants sometimes function as substitute discussion partners for less-experienced judges. Another aspect that provides assistants a powerful position is the fact that the judicial instructions for writing judgments given during deliberation sessions often leave much room for the assistants to complete and fill the gaps.

However, that judicial assistants are usually the persons with the least authority of all people involved in deliberations sessions affects their potential contribution. Various assistants are in fact hesitant to reveal their views and to participate in deliberations. In addition, some judges do not provide assistants with opportunities to become involved in the discussion. Consequently, judicial assistants do not participate in the discussions at all times.

Because judicial assistants do not have an official vote during deliberations, it remains unclear what is precisely expected of them in the process of discussing cases and reaching decisions. This lack of clarity also resonates in what respondents report regarding their views on their required level of participation in deliberation and the boundaries of their involvement.

Drafting the judgment

Judicial assistants are responsible for writing the first drafts of judgments. This is likely to increase the productivity of the courts. At the same time, it provides assistants with room to affect the content of the judgments. Assistants are often allowed a large amount of autonomy in writing judgments. As the decision is normally already made during deliberations, this creates the expectation that assistants will mostly wield influence on the reasoning behind a decision. However, the involvement of judicial assistants can also go beyond the legal reasoning, as the practice of judgment writing appears to function as an important way to reconsider initial decisions taken during deliberations. That the writing process indeed functions this way is affirmed by the fact that, on various occasions, the writing of the draft judgment resulted in reassessing certain facets of a judgment or sometimes in altering the judicial decision.

While the data display situations in which judicial assistants are powerful, they also include cases in which judges left little room for assistants' contributions. This is particularly the situation when judges heavily alter draft judgments to precisely resemble their own views. While the altering occasionally involves the key elements of the judgment, it mostly is in regard to less important elements, such as the choice of words. Substantial alterations of draft judgments predominantly occur when judges feel that the performance of assistants falls short. Yet, the occurrence of this also seems to be related to the character of the judges.

Determining factors

Chapter 7 delineates seven key factors – stemming from the fieldwork – that affect the involvement of judicial assistants and, thereby, their potential to influence judicial decisions. First of all, trust – which can be of various types – plays a key role in the openness of judges towards the involvement of assistants. Especially, trust based on the competencies of the judicial assistants determines how much room judges provide assistants with to be involved in adjudication. Second, the ideas of the judicial officers regarding what the appropriate role of a judicial assistant should be (a more substantial or a more limited role) effect the involvement of judicial assistants in court practice. When judicial officers, for instance, believe a more limited role to be preferable, this will generally also be how the involvement of judicial assistants is exercised. Third, experience and expertise of both the judge and the judicial assistant are key factors

that define the involvement and influence of judicial assistants. Particularly when judges with limited experience are working with highly experienced and specialised assistants, judicial assistants' involvement is regularly far reaching. The career perspectives and ambitions of judicial assistants also influence the ways in which assistants are involved in the decision-making. The educational backgrounds of judicial assistants are diverse, and this affects the career perspectives as well as the ambitions of the assistants. Assistants who possess law degrees are often especially interested in furthering their careers and, consequently, fulfil their duties more ambitiously.

Apart from these individual factors, various situational factors also play a role. To start with, the types of cases that have to be adjudicated affect the interaction between the judge and judicial assistant. Complex cases often require more consideration, which results in more opportunities for judicial assistants to have influence on the content of the judicial decision-making. Routine cases, on the other hand, are often quite clear cut, leaving little or no room for influence. Yet, in some cases that appear to be standard but in fact may require a closer read, the influence of judicial assistants can be – sometimes unintentionally – substantial. Partly related to the previous factor is the factor of whether adjudication takes place by a single judge or a judicial panel. In general, judicial assistants will be more actively involved in single-judge adjudication than in panels. Particularly, in administrative single-judge cases judicial assistants can function as important discussion partners. The fact that cases adjudicated in panels are more legally complex as well as organisationally more challenging, however, may also cause judicial assistants to play an important role. Yet, in the discussions, their views will be competing with those of the three judicial panel members. Lastly, the pressures caused by time and workloads also affect the involvement and influence of judicial assistants in the decision-making. Severe time pressure and high workloads are related to judges relying more heavily on judicial assistants' work. Hence, various factors determine whether a judicial assistant's involvement is small or far reaching.

Court and court division similarities and differences

In addition to determining these factors, chapter 7 also pays attention to the question of whether differences were found in the involvement of judicial assistants between the two studied courts and the two court divisions. No major differences were observed between the two court locations. One smaller aspect that appeared to differ between the courts was the career perspectives. In the court that is more isolated, assistants experienced fewer possibilities to further their careers.

Between the court divisions, no great difference was observed there, either. Only a few smaller differences were observed. On average, these differences caused judicial assistants to perform a somewhat greater role in the administrative law divisions.

Conclusion

Empirical findings

The concluding chapter, chapter 8, starts with highlighting three central empirical findings of the research. First of all, a discrepancy is observed between the formal position of judicial assistants and the wide variation in their actual involvement. In regulations and policy documents the administrative and secretarial role is emphasised, while little is regulated regarding the potential advisory and discussion-related duties of assistants. This presents the image of the judicial assistant as a mainly administrative figure and who has only limited involvement in the judicial decision-making. This is, at least partly, in contrast with the actual involvement of judicial assistants, because great variation in their involvement is observed in practice. In some situations judicial assistants are indeed only limitedly involved in a mainly administrative manner, but in other situations they play an important role in making decisions regarding the content of cases.

A second finding of the research is that ambiguity is observed in the relationship of the judge and the judicial assistant. Two different sets of norms are present at the courts. On the one hand a more formalistic ideal of the judicial assistants' position is adhered which emphasised the fact that judges should not rely too much on the work of judicial assistants. More specifically, court officers are concerned about the fact that the appearance of increased involvement of judicial assistants in judicial decision-making could be considered a threat to the authority or legitimacy of the judicial office. On the other hand, current social norms in the courts stress that it is also inappropriate for judges to disregard the involvement of judicial assistants. This is related to the circumstance that the involvement of judicial assistants has become inevitable. It is widely acknowledged that the involvement of judicial assistants can have various positive effects, for example on the efficiency of adjudication. Officers seem to be balancing between the two sets of norms. When this ambiguity leads to potential conflicts between judges and judicial assistants (e.g. when an assistants disagrees with a decision of the judge) often pragmatic solutions are chosen to resolve the conflicts. Particularly for judicial assistants, the ambiguity can result in uncertainty regarding the type and degree of involvement that is expected of them.

Thirdly, the research finds that judicial assistants' involvement affects the judicial decision-making practice in various ways. Three manners in which this occurred are mentioned: 1) Judicial assistants control the progression of a case within the court; judicial assistants play a key role in assuring that the judicial procedure runs smoothly and by performing their administrative duties they can indirectly affect the working methods of judges. 2) Judicial assistants are steering the judges in a certain direction. This is particularly done through memos in which judicial assistants might emphasise certain information which concurrently can affect the judges' decision-making. The drafting of judgments can additionally also steer judges' decision-making especially when little instructions are given for writing a judgment. 3) Judicial assistants are providing judges with additional views to consider. This last practice particularly occurs when judicial assistants provide judges with advice, for instance in memos, or when they function as discussion partners.

Normative evaluation

The conclusion continues the evaluation of the involvement of judicial assistants started in chapter 4 by including the findings of the fieldwork. The current manner in which some clearly administrative and secretarial duties are conducted appears to be organised in a manner that can raise the efficiency of adjudication (although some minor complications were observed which may hinder the efficiency enhancement). An important finding is, however, that while it may be possible to make a theoretical distinction between administrative/secretarial duties and advisory/discussion-related duties, in reality, making such a distinction is not feasible. Various primarily administrative and secretarial duties, in fact, potentially affect the content of adjudication and, furthermore, many duties that seem secretarial (such as writing a memo) also contain advisory and discussion-enhancing elements. This makes administrative and secretarial involvement of assistants problematic from a rule of law perspective, as it to some extent expands the concerns regarding content-related involvement.

In most of the observed situations in the courts, most judges only limitedly rely on the advice of assistants. They 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. From a rule of law perspective, the 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.

In contrast to the previous, in a few instances, judicial assistants' involvement in performing advisory and discussion-related duties was so significant that the judicial assistants were significantly influencing the

decision-making. This can be regarded as problematic, as the involvement of judicial assistants can cause biases in the decision-making. Moreover, this creates a concern from a rule of law point of view because judicial assistants are currently not as highly qualified and are not surrounded by comparable institutional safeguards as judges.

Implications for the judicial decision-making practice

The book ends with discussing possible directions that the judiciary can take to find a proper balance in the employment of judicial assistants. It first of all emphasises the importance of embracing the aids of the contribution of judicial assistants to adjudication and discusses some possible conditions to best accomplish this, such as providing the required education and training to assistants, generating adequate career opportunities and consider enhancing the authority that assistants have at the courts. It is also mentions the importance to pay attention to minimising the potential hazards. In order to minimise these hazards, courts should consider: incorporating structures to monitor the work of judicial assistants, offering assistants temporary contract, incorporating procedural constraints to bind the involvement of judicial assistants and reconsider the institutional arrangements to safeguard the independence, impartiality, professionalism and integrity of judicial assistants.

Lastly, the significance to improve transparency and accountability by generating clearer guidelines which give direction to the employment of judicial assistants is mentioned. Ideally, judge and judicial assistants in the workplace should play a key role in this process. This current development of professional standards seems an appropriate vehicle to arrange these guidelines.