ERASMUS UNIVERSITY ROTTERDAM

Erasmus School of Law

Master Thesis Legal Theory & Socio-Legal Studies

**An exploratory study on the role of judicial assistants in the judicial decision-making process in the Netherlands**

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# **To-do**

## METHODS

[ ] schrijfstijl methodology

## ANALYSIS

[x] regressie op aantal woorden uitleggen (vz minder / jm meer)

-> literatuur met meer specialistische kennis langere of kortere stukken schrijven

[x] regressie op referenties doen, en uitleggen

[x] t-toets voor woorden uitleggen

[x] aparte t-toets voor verwijzingen

[x] text analyse

[ ] ALLES OPSCHRIJVEN!!!!

[ ] Tables in APA reporting omg

## OTHER

[ ] discussion

[ ] abstract

# Abstract

xxx

**Key words**

Classification: judicial assistants, legal research, quantitative methods

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# 1. Introduction & research questions

## A. Context

Over the past 25 years, the role of judicial assistants has changed. While they used to perform mainly secretarial and administrative tasks, nowadays they are full-fledged assistants to judges and perform work directly related to cases. This is not only the case in the Netherlands (Holvast, 2017), but also in other countries and at international courts.

Nowadays, tasks of judicial assistants include “preparing memos for hearings, acting as sparring partners in deliberation and drafting judgements” (Holvast 2017, p. 16). Additionally, assistants have considerable power of the flow of cases throughout the court, for example by deciding the time allotment for hearings. According to Holvast, this trend corresponds with an increase of law degrees amongst judicial assistants; it is a trend that is not inspired by changes in law or policy, but “rather, they appear to be practical responses to changes at the workplace, a course which emerged tacitly within the practices in courts”. The rise of university educated judicial assistants corresponds with reforms in the judiciary introduced at the start of the millennium (Scholtens, 2006; Abram et al., 2011).

There is also anecdotal evidence that gives insight in the influence an assistant might have have. For example, job openings at various courts include the ‘writing of draft judgements’ as an important task description for judicial assistants. Additionally, in ‘a day of the life of a judicial assistant’ interviews on social media, published by the Netherlands Council of the Judiciary (*Raad voor de Rechtspraak*), writing the draft judgement is often highlighted as one of the most important and interesting tasks.[[1]](#footnote-2) In 2018, a new project was started by the Netherlands Council of the Judiciary where judicial assistants are trained in writing verdicts in commercial sections of courts (Commissie Visitatie Gerechten 2018 p. 36).

How might the role of the judicial assistant change in the future? Multiple initiatives and examples exist from which we can hypothesise that the influence of judicial assistants could grow in the coming years. Influence can grow by increasing the number of tasks allocated to judicial assistants. For example, Dutch courts faced budgetary issues in the past decade and is currently still financially struggling. According to the Netherlands Council of the Judiciary, the number of lawsuits is steadily decreasing while fixed costs remain constant (Raad voor de Rechtspraak, 2018). To find solutions for these budgetary issues, the Netherlands Council of the Judiciary hired Boston Consulting Group (BCG) to give advice. In their analysis, BCG concluded that more efficiency could be achieved by realizing a good division of tasks between judge and assistant. More specifically, they concluded more writing of draft judgements could be done by assistants. (Boston Consulting Group 2018, p. 189)

Another example of the role of judicial assistants changing, is a recent pre-advice issued by Stoepker & Schulmer (2020). In the pre-advice, they called for an experiment where the pre-trial investigation (*vooronderzoekscomparitie*) would be led by someone else than an administrative judge; more specifically, the judicial assistant. This could move part of the case burden from judges to judicial assistants. These types of ‘efficiency incentives’ can – subtly – lead to an increase of tasks and responsibilities for judicial assistants. An increase of tasks and responsibilities could lead to an increase in influence of judicial assistants.

There is also recent empirical evidence that shows what influence a judicial assistant could currently have. Holvast and Mascini (2020) conducted empirical research to answer the question whether assistants are actively involved in the decision-making process and whether they influence outcome of judicial decisions. In their research, they conducted an experiment to find out how assistants can influence decisions, what the perceived influence is and to what extend decisions are influenced by memos. They found that assistants often participate in the decision-making process in three ways: by providing the judge with a partner to reflect, by preparing cases for the judge and by drafting judgements.

In this paper, I will explore the position of the judicial assistants in Dutch courts. The starting point of my paper is an exploration of existing literature on the position of judicial assistants in the Netherlands, U.S. context, European context and international courts. I also explore the judicial decision-making process in Dutch courts, and the steps at which assistants could exert influence, the factors that determine this influence and the academic debate surrounding this influence. Based on this theoretical exploration, I formulate various starting points for exploratory quantitative research (section 2.E.).

[add a section on the quantitative research I did]

## B. Research questions

This paper contains a theoretical exploration on the influence of judicial assistants in the decision-making process. From this theoretical exploration, I will distil various factors that could be used to perform quantitative analysis to research the influence of judicial assistants. I will also perform this quantitative analysis. The starting point of my research, however, is my research question. Based on the context in the previous section, my research question is:

*Which factors affect the influence a judicial assistant has in the judicial decision-making process? [rephrase once paper is done]*

The relevance of this research question lies in the question if assistants should have a role in the decision-making process and, if so, the extend of that role. The disagreement over answering that question alone, makes the topic already worth researching. In section 2.D. I further describe the discussion around the position of judicial assistants in the decision-making process.

In order to better answer this question, I formulated a number of sub-questions. These sub-questions are answered throughout this paper, and their answers summarized in the final section. The sub-question are:

1. What quantitative or experimental research on the influence of judicial assistants on the decision-making process is still missing? (section 2.B.)
2. Which factors determine the extent of influence judicial assistants have? (section 2.C.)
3. In what ways can the influence of a judicial assistant be measured when analysing verdicts? [rephrase once quantitative research is done]

This paper is structured as follows:

* The next chapter contains a review of prior literature on the topic. In this chapter, I answer sub-questions 1 and 2. This section also contains a general reflection on the advantages and dangers of involving judicial assistants in the decision-making process.
* Chapter three contains the methodology of the research. The third sub-question is also answered in this chapter.
* Chapter four contains the results of my analysis, and a general interpretation thereof.
* Chapter five contains the findings of this paper in the broader context of previous research. I discuss the implications of the research and discuss options for further research.

# 2. Theories on judicial assistants and the judicial decision-making process

In order to figure out which factors affect the influence a judicial assistant has in the judicial-decision making process, a thorough understanding of the position of judicial assistants in courts is required. In section A section of this chapter, I elaborate on the position of judicial assistants in Dutch courts and how that position has evolved over the years.

In the section B of this chapter, I review the journey of a case from the moment it is submitted to court, until a verdict is published. In this review, I analyse which steps of this journey have been researched through quantitative or experimental methods. This section also answers the first research sub-question: what quantitative or experimental research on the influence of judicial assistants on the decision-making process is still missing?

Section C answers the second sub-question: what factors influence the extent of the influence of a judicial assistant? I do so by reviewing a body of existing theoretical and quantitative literature on the influence of judicial assistants.

In section D I review concerns and advantages described by academics regarding the increasing involvement of judicial assistants in the judicial decision-making process. Section E concludes this chapter with a short review and intermediary conclusions. It also contains three hypotheses for quantitative research which are researched in chapter 3 and 4 of this paper.

## A. The changing position of judicial assistants

The increase of participation of judicial assistants in the decision-making process might be – relatively – new in the Netherlands. In other countries, this trend has been described for years. Predominantly in the United States, academics have theorized and researched the role of ‘clerks’ in various courts. This section reviews the position of judicial assistants in Dutch courts, and compares them to the United States. It then reviews various concerns and advantages of increasing participation of judicial assistants in the judicial decision-making process.

### I. The changing position of judicial assistants in Dutch courts

In Dutch courts, assistants have a variety of tasks. They draft decisions, write memo’s in preparation for a case, decide whether a case is brought to a hearing, have contact with parties, et cetera. These tasks have not always been this way. Against a background of various commissions, reports and reforms, a new model for financing the judiciary was developed in the ‘90s and early ‘00s.[[2]](#footnote-3) This new model, the Lamicie-model, contained a new method of calculating the amount of funding the judiciary would receive. It was implemented in 2002. Generally speaking, the model takes the number of (expected) cases a court has (P), and multiples the type of case by a standard amount of minutes the case should take, expressed in euro’s (Q). This new type of funding model is often also described as: *funding = P x Q*.

Bevers’ (2004) doctoral thesis researched the cultural change within the judiciary after the implementation of these reforms. He concluded that “enabling teams or other types of 'enabling cooperation' lead to a higher standard of quality in the work to be accomplished”. Amongst other things, he said that, particularly for ‘legal clerks’ (interchangeably used with the term judicial assistant) the diversity and coherence of work increases with these reforms. Additionally, the relationship between judges and assistants improved as well. Bevers conducted his research right after the reforms were in place. Bevers describes the situation before the reforms as a situation where judges and assistants lived independently lived amongst each other. Each moved within their own compartment, with a strict separation between sections.

These two changes, social and financial, marked the start of the change in position of judicial assistants. More judicial assistants were hired after 2002 as noted by Van der Torre et al. who saw an increase of 11% of supporting staff over the period of 2002 to 2005. In their year report of 2020, the Netherlands Council of the Judiciary announced that more than 600 FTE worth of of judicial assistants (*gerechtsambtenaren*) was additionally hired between 2015 and 2020 (Raad voor de Rechtspraak, 2021d). New initiatives such as an internal training program and ‘the minimum requirement of holding a diploma from an institute of higher professional education was introduced’ (Holvast, 2017; Abram et al., 2011). The position of judicial assistant, from that moment, started to change from secretary to legal partner.[[3]](#footnote-4) From 2002 onwards, the position of judicial assistants has continued to change and are still changing as of now. Below are two examples of that change.

Firstly, multiple experiments have been proposed and held in the past years that affected the tasks and duties of judicial assistants. The most recent example is Stoepker & Schulmer (2020), who proposed an experiment to have pre-trial investigation in administrative law (*vooronderzoekscomparitie*) be led by someone else than an administrative judge. They propose two variants: a variant for which no legislative change is needed; the judge would mandate the judicial assistant to lead the pre-trial investigation. A second variant, which they propose only to pursue after an experiment with the first variant was successful, would formalize the role of the judicial assistant as the one leading the pre-trial investigation. A legislative change is needed for this variant as this would introduce a new role within the judiciary: the ‘preliminary researcher’.

Another experiment was conducted a few years after the change in funding model, the Netherlands Council of the Judiciary announced the start of a co-reading experiment, which meant that draft verdicts in single-judge cases would be proofread by either another judge or a judicial assistant (Baas, de Groot-van Leeuwen & Laemers, 2010). This shows two things: judicial assistants drafting verdicts was not a widespread practice in 2006, and judicial assistants started to receive more legal intensive tasks. Currently, the co-reading experiment is a widespread practice which is still used to enhance the quality of verdicts (Raad voor de Rechtspraak, 2021d).

The second example of the changing position of judicial assistants pertains the codification of tasks and duties of judicial assistants. Only some tasks and duties are codified. Those that are codified for assistants working in criminal law are codified in the Code of Criminal Procedure (*Wetboek van Strafvordering*). Transcribing during the trial is such a task (article 25), assisting judges who oversees criminal investigations (article 171) and article 172 even dictates how records of testifications and statements should be kept by the judicial assistant. Article 409 gives judicial assistants in district courts the obligation to distribute relevant information to Courts of Appeal when an appeal was initiated by either party. A final example, article 442 makes it mandatory for judicial assistants to co-sign verdicts together with the presiding judge. Roughly speaking, these tasks do not differ for assistants working in civil and administrative law.

Many other tasks and duties are not codified. Tasks that are not codified include judgement drafting, indicated by many judicial assistants as a task they find both important and interesting; many labelled it as their favourite duty (Holvast, 2017 p. 147). Other uncodified tasks are preparing bench memo’s prior to trial, participating in post-trial discussions with judges in formal (during panel discussions) and informal ways (sound boarding). While doing each of these uncodified tasks, assistants could exert influence (further described in section B).

Holvast (2017, p. 52) mentions that the lack of codification at a national level led to some courts developing additional guidelines as to what judicial assistants should be able to do. She further mentions that some court divisions have detailed documents that list the tasks of assistants. The existence of court-specific duties allows us to label the position of judicial assistant as fluid. It is likely that assistants from court to court do not have the same non-codified tasks.

In 2016 and 2017, judges from various areas of law convened to establish professional guidelines. Much of these guidelines were just formalizations of existing customs. The introduction of these standards, however, are a start of the codification of these tasks and duties. Right now, these guidelines only pertains to judges, however the Netherlands Council of the Judiciary announced in their annual plan of 2021 that they will research whether judicial assistants could benefit from professional standards as well (Raad voor de Rechtspraak, 2020 p. 11). That marks the most recent development on the position of judicial assistants in Dutch courts.

In conclusion, in this section I tried to give a brief historical overview of the changing position of judicial assistants from the 1990s to now. The position of judicial assistants is changing as we speak, and new experiments have been proposed to give further tasks to judicial assistants. Many of the tasks judicial assistants perform are not codified, however the Netherlands Council of the Judiciary is researching whether some of these tasks could be formalized in professional guidelines.

### II. The position of judicial assistants in other jurisdictions

The role of judicial assistants across jurisdictions can differ largely. For example, in some jurisdictions, such as the United States, judicial assistants (also called law clerks) do not perform formal duties (Holvast, 2017 p. 57). In other jurisdictions, for example Belgium, they perform tasks that are very similar to judicial assistants in the Netherlands. This section contains a comprehensive review and comparison of tasks of judicial assistants abroad and in the Netherlands.

#### United States

Regarding the United States, Ward and Weiden (2006) conducted research at the Supreme Court in the United States. They concluded that, as the role of the legal clerk changed over time, their tasks and responsibilities increased. When these increase, their potential to influence the decision-making process increases as well. A similar trend can be seen in the Netherlands, where the role of the judicial assistant used to be secretarial of nature but evolved – over time – to a legal expert that drafts judgements and prepares memos for judges.

Peppers (2006) concludes that, although there is a strong bond of trust and mutual respect between justices and clerks, there is no real evidence that justices let their final decision be dictated by judicial assistants. He, however, was more hesitant in concluding on the extent of (other types of) influence of clerks. For example, Peppers interviewed multiple law clerks and a justice at the Supreme Court in the United States for his book *Courtiers of the Marble Palace*. In his words: “law clerks do not wield an inordinate amount of influence”. However, there are signs of influence in the interviews he conducted. For example, he quoted a clerk who said they do have influence over their justice, for example by “exposing the justice to salient facts in the record rather than an influence that changed the justice's mind once all the facts were before him”. Gee (2008) and Collins (2008) both also recognized this in their book reviews. Clerks at the Supreme Court are, generally speaking, employed for just one year.

When comparing the US context to the Dutch context, we see a few notable similarities. The main similarity is that academics in the U.S. and Netherlands alike noted the changing role of judicial assistants. Holvast (2017, p. 66) points this out too: “With regard to American courts, Kronman (1993) and Posner (1985) have pointed to the changing entity of the judicial work; instead of draftsmen of judgments, judges have become reviewers of the work of law clerks. This development can also be recognised in the Dutch district courts. Currently, the judges seldom completely write judgments themselves; most of the time, the assistants produce the first draft of judgments.” (p. 66).

An additional similarity is the large reliance courts in both the U.S. and Netherlands on judicial assistants. Mak (2014) concluded that judges at the Dutch Supreme Court (*Hoge Raad*) and the High Administrative Court (*Raad van State*) both rely largely on the work of assistants when preparing and researching cases. This is similar to the role of clerks at the Supreme Court that fulfil a similar responsibility. Justices also rely on their clerks for authoring judgements, both Peppers (2006) and Ward and Weiden (2006) conclude.

Another similarity is the role assistants have at the *certiorari stage* (the stage whether a case is decided as being admissible or not). Both Ward and Weiden (2006), and Peppers (2006) do conclude that – if any influence exists – the influence is most prominent there. Judicial assistants in the Netherlands also have this responsibility. Holvast (2017) analysed the role assistants have in deciding if, when and how to adjudicate a case. For example, assistants decide whether a case is reviewed by a single judge or a panel of judges, based on criteria that “provide room for interpretation on certain topics” (p. 104). This power to influence is most notable in simple cases, where the judicial assistants decide a case can be completed without a hearing and the judge receives a draft judgement before even having seen the merits of the case. Holvast (2017) found the same: “judicial assistants control the progression of a case within the court”.

An important difference between U.S. literature on the Supreme Court and the Dutch judiciary context is the direct connection judges have with their assistants. While at the Supreme Court, judges can appoint their assistants who work exclusively for them, in the Netherlands judges share a pool of assistants. Mascini and Holvast (2020) make an important conclusion regarding this: studies based on an intimate, direct bond between judge and assistant cannot just be generalised to situations in which this bond does not exist. Additionally, the appointment of judicial assistants is highly politicised in the U.S., and studies “using principal-agent theory to explain assistants’ influence, in this specific setting, focus particularly on justices’ selection of assistants as a tool to control adverse selection and on the congruence of the political attitudes between assistants and justices.” (p. 2).

#### ***Europe***

The Consultative Council of European Judges (CCJE) conducted a survey in 2019 on the role of judicial assistants amongst members of the Council of Europe members.[[4]](#footnote-5) This survey contains the most recent, thorough overview of how courts are supported by assistants throughout member states. Sanders (2020) reviewed the results from this survey. A few notable conclusions from her (comparative) analysis are discussed below.

Judicial assistants rarely plan to have a long, permanent career as an assistant. For many assistants, learning on the job (from judges) is an important motive. When comparing this to the U.S. context, especially to law clerks at the federal level, we see a similarity. Clerks are often employed for a short term (one to three years) before continuing their career. For clerks, gaining experience and education is an important motive; clerkship is a stepping stone before continuing to teaching, commercial practice or working in government (Peppers, 2006).

In the Netherlands, we can recognize similar features. There is an active pool of student judicial assistants (*buitengriffier*) that work at district courts to gain experience and education. On the other hand, there are judicial assistants that have been employed for their entire career – and will be so until retirement. Generally speaking, higher courts and Courts of Appeal generally employ more experienced judicial assistants (see section 3.B.IV. for descriptive statistics on the experience of judicial assistants in administrative courts). Overall, courts often have a pool of assistants with mixed experience (Holvast, 2017 p. 167).

Sanders also concludes that, in most countries, assistants actively draft decisions. This is a practice not different from the Netherlands or in the U.S. In some countries, assistants conduct work independently (such as hearing cases or even make intermediate decisions); however this is only the case in a minority of countries such as Bosnia Herzegovina, Croatia, Finland, Iceland, Czech Republic, Sweden and Slovenia. This is not the case in the Netherlands, where almost all work is signed off or under the active supervision of a judge. In most countries, judicial assistants are not present in deliberations. This is different in the Netherlands, where judicial assistants are often present (which helps them when drafting the judgement) and often – in the case where a case is presided over by a single judge – conduct the deliberations with that judge.

#### ***International context***

There is various research conducted on the role of assistants on an international level.[[5]](#footnote-6) For example, in the context of rulings of the World Trade Organisation (WTO), Pauwelyn and Pelc (2019) conducted text analysis to determine the authorship of rulings.[[6]](#footnote-7) They found that the WTO secretariat “exerts significantly more influence over the writing of WTO panel reports than panellists themselves”. Important to note in this context is that panellists retain a temporary position (they are agreed upon by disputing parties), while employees of the secretariat are permanently employed.

Another example can be found at the level of the Court of Justice of the European Union (CJEU). At that level, judicial assistants (also called *référendaires*)perform similar tasks as judicial assistants in the Netherlands, such as drafting judgements and opinions when their judge is presiding a case (Kenney, 2000). Kenney notes that the institutional and social context is such, that it allows them to be much more powerful than clerks in the U.S. Supreme Court. This is mitigated by the “single collegiate judgement”, which does not allow for dissidents (p. 620).

Jensen (2020) reviewed the role of ‘tribunal secretaries’ at arbitral tribunals. He found that secretaries perform roughly the same tasks as their national counterparts: “support arbitrators in the entire conduct of the arbitration up to the rendering of the arbitral award” (p. 16). He notes that the power of secretaries might be greater at arbitral tribunals because of the “flexible procedures tailored to the parties’ specific agreements and needs”. He even calls for more transparency around the appointment of secretaries, and only employ secretaries with the consent of the involved parties.

## B. During which steps of the decision-making process can judicial assistants exert influence?

From the first moment a case is submitted to a court, judicial assistants are involved in the legal procedure. For example, in Dutch courts, some judicial assistants advise whether a case is brought to a hearing, or whether it can immediately be decided upon within a hearing. There are more ways in which an assistant can influence the outcome of a case. These ways are the topic of review in this section.

By exploring the various steps during which an assistant could exert influence, I try to give an overview of existing quantitative research, and find starting points for my own research. I therefore split this section up in two subsections: the first subsection describes the journey of a case through court, from the moment it is submitted until the verdict is send out. In the second section section I review quantitative research on the influence of judicial assistants during these steps.

### I. Description of **the journey of** a case through court

In the Dutch context, Holvast (2017) conducted research that was ethnographic of nature. By observing day-to-day proceedings in court and the decision-making process, she was able to closely analyse the relationship between judge and assistant, and look for signs on influence. She concluded that “judicial assistants can steer judges in a certain direction” (p. 201), for example by memos they produce, by composing draft judgements, and being a soundboard for judges in complex cases. The potential of influence does not mean that judicial assistants knowingly influence judges; it merely means that judges are susceptible to influences of their assistants

Holvast identified three different ways where “judicial assistants’ involvement affects the judicial decision-making process” (p. 200):

1. **Judicial assistants control the progression of a case within the court.** Multiple moments exist when this happens. For example in administrative law divisions, judicial assistants screen cases and determine the amount of time a hearing should receive and whether the case should be assigned one or multiple judges. After hearings, judicial assistants draft decisions. The speed with which they do so, compared to the deadline for publishing a verdict after hearing, determines the amount of time a judge has to proofread a verdict and how often corrections can be made. (p. 200)
2. **Judicial assistants are steering the judges in a certain direction.** During pre-trial preparations this could happen through methods such as writing memo’s, recommending possible outcomes or ordering relevant case files in such as way that certain arguments are presented with a higher priority. Post-trial this could occur when drafting judgements by including certain references to case law or the framing of arguments.
3. **Judicial assistants are providing judges with additional views to consider.** This happens often post-trial, for example when assistants serve as discussion partners for judges when deciding on the outcome of a case.

Additionally, the Consultative Council of European Judges (CCJE) (2019) identifies four types of work done by judicial assistants that are related to the decision-making process. These four types of work were taken directly from their opinion:

1. **Organising papers and researching facts**, for example by prioritising relevant documents submitted for the judge, or by performing pre-trial investigations,
2. **Drafting decisions or writing memos with a proposal for a decision**, for example by providing an overview of relevant case law before trial, advising which facts or arguments should be reviewed by the judge, or even recommending the outcome of a case,
3. **Independent work on cases**, for example in the context of routine cases or repetitive procedural steps such as appointing an expert or calculating costs of proceedings.
4. **Work in the selection of cases for appeal or constitutional review**, for example in the context of supreme or constitutional courts where they help identify cases that do and do not require specific attention from judges.

The basis of the CCJE opinion was a survey conducted amongst members of the Council of Europe. Sanders (2020) analysed that survey, and identified a scale on which the involvement in the judicial process can be arranged, which corresponds with the amount of influence an assistant can exert: “(1) only doing research, (2) moving on writing memos, and (3) drafting decisions. Then, (4) judicial assistants contribute in deliberations, (5) take an active and even visible role in hearings and might then, (6) on the other side of the scale, hear and decide certain cases themselves with the approval of a judge.”

Combining the insights from the CCJE, Sanders and Holvast, we can construct a schematic overview of the journey of a case and the tasks of judicial assistants in that process (table 2.B.I.). For each step in that process, I describe in which way a judicial assistant could exert influence.

|  |  |
| --- | --- |
| **Table 2.B.I. Overview of steps in court proceedings during which assistants could exert influence** | |
| **Step in process** | **Tasks performed by assistants that could influence the decision-making process** |
| **Submission of case to a court** | Decides whether single-judge or panel handles the case; determines amount of attention the case receives from the court. |
| Decides amount of time scheduled for hearing; determines amount of time litigants have for oral arguments. |
| **Pre-trial** | Structuring court files; order determines which files judges see first. |
| Main contact person for litigants; gives assistants the opportunity to ask questions on content-related matters or suggest settling. |
| Write memo’s to help the judge prepare for hearing; can present certain facts, evidence and arguments as particularly important which could lead to bias, especially when the judge solely reads the memo or the memo contains a recommendation on the outcome of the case. |
| In certain cases, conducts pre-trial investigations; decisions directly taken by assistants that influence the proceeding of a case. |
| **During trial** | Can give judges advice, although mainly on procedural matters. |
| Is sometimes given the opportunity to recommend questions to litigants. |
| In some jurisdictions, is allowed to participate or independently conduct hearings. |
| **Post-trial** | Participates in deliberations, although mostly passive; can direct attention to certain arguments, provide new views or present case law. |
| Drafts judgements; allows them to spend more or less text on certain arguments, evidence and motivations, limits space to consider other arguments. |
| Provides sound boarding for judges on particularly complex cases; by being discussion partners for judges, assistants can directly influence them through new arguments or highlighting particulars facts from the case. |

### II. Quantitative research on exerting influence during the judicial decision-making process

In the previous section, I described the various steps a case takes within a court by reviewing theoretical and ethnographic research of the judiciary. In this section, I will review quantitative research on the influence of judicial assistants during the decision-making process. I use the steps in table 2.B.I. as a guideline to structure this section.

#### Submission of case to a court

I have not found any quantitative research on the role of judicial assistants when a case is submitted. For example, research that analyses whether a case is admitted or not (in the U.S. Supreme Court context) or whether a case is handled by a single judge or a panel (in the Dutch context). Holvast and Mascini (2020) suggested further research on this topic as well: “it would be worth conducting experiments that assess the extent to which assistant wield influence via duties other than preparing bench memos. The influence wielded by memos in the process of reviewing requests for review (at the US Supreme Court petitions for certiorari) could, for instance, be a worthy focus for an experiment” (p. 17).

#### Pre-trial

The influence of the ‘bench memo’ – a preparatory document for judges that describes facts, evidence and merits of a case – is researched by Holvast and Mascini (2020). They conducted a survey-experiment amongst 63 judges through which they measured the involvement of a judicial assistant in the decision-making process. The researchers divided the pool of judges in three groups. The first group decided on the case without a bench memo, relying purely on their own interpretation of the merits of the case. The second group decided on the case with a memo suggesting to rule in favour of the plaintiff. The last group decided on the case with a memo suggesting to rule against the plaintiff.

They found that the bench memo explained 16.7% of the total variance in the judge’s decision, meaning that an opinionated bench memo written by an assistant has a significant effect on the outcome of a case (*p* < 0.01). In their research, they controlled for various variables such as the perceived risks and benefits of involving an assistant, their orientation towards the rule of law, and the courts they were employed in. In the same research, Holvast and Mascini asked judges to self-report on the influence of judicial assistants in their last case. 61.3% of the judges responded that assistants have (very) considerable influence on the case.

#### During trial

Like in the submission phase, there is little quantitative or experimental research done on the influence of judicial assistants during trials. In the Dutch context, Holvast (2017) mentions that she observed judicial assistants remind judges on procedural matters or a judge asking for advice from the assistant (p. 124), however there is no other research that examined this more closely.

One important role of assistants during trial is creating the record. In the Dutch context, this task is codified in law. The record is a direct reflection of what happened during the trial. It can be used to draft verdicts and is sometimes submitted to a higher court when a case is appealed. To my knowledge, no research has been done on the role of these records in the decision-making process. There is an extensive body of legal research and writings on the role and importance of (accurate) records though (i.e. see Timmerman, 2018; Den Tonkelaar & Visser, 2018; Dubelaar, 2014 chapter 10.3.1.3.).

#### Post-trial

Rosenthal and Yoon (2011) performed text analysis of U.S. Supreme Court judgements to find out who authored judgements. It is known that judicial assistants in the Netherlands author draft judgements. They analysed function words used in judgements to see who authored the judgement. They concluded that it was possible to see which justice authored a judgement based on the function words they used and saw that – over time – the variable writing style of justices increased. That may “indicate greater reliance on their law clerks when writing opinions”.[[7]](#footnote-8) However, although writing (and style) may be done by assistants, this does not automatically mean that the outcome of the case is also decided or influenced by the assistant. Judicial assistants authoring draft verdicts is a widespread known practice in the Netherlands.

A similar method of linguistic analysis was conducted by Pauwelyn and Pelc (2019) (see section 2.A.II for more details on the context of that research). They found that they could attribute the authorship of texts not to the panellists of the WTO, but to the secretariat. This indicates that the penmanship – and with that the choice of words – did not lie with those that decide on the outcome of cases. They also found a relation between the experience of WTO staff and the length of reports (p. 33):

*“When WTO staff, especially younger, less experienced staff, draft reports (instead of seasoned adjudicators themselves), language may become more technical and convoluted. This effect may be heightened when staff are assigned to, and draft for, the panel or AB division as a whole, instead of individual adjudicators.”*

While the authoring draft judgements maybe does not immediately influence the outcome of the case at hand, it does influence the understanding of the case in appeal, its interpretation by academics and the way future judges (and assistants) may use the verdict as case law. As Thirlway (2006) puts it: “Law is a matter of words; and it may be said that the choice of words to convey a legal point is in itself the decision of, or a decision on, that point.” Additionally, the process of writing a verdict also allows the author to reflect on the facts, evidence and merits of the case. It happens that, while writing a verdict, the author reconsiders their initial decision. Holvast (2017) observed this during her research. This is one quote taken directly from her research (p. 152):

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

Holvast (2017, p. 151) concluded that, the more experienced an assistant is, the more likely they are to develop their own style of writing. Put differently, inexperienced assistants write more conform the norm while more experienced assistants have their own take on judgement writing. In the Dutch context, there are quite a few default phrasings that occur in verdicts which are also taught in writing courses. As Holvast puts it: “While judicial assistants in the beginning quite strictly follow the style and format they were taught in the courses, various senior assistants mention that they later on developed individual styles;” (p. 151).

There has been some research regarding the importance of groups making decisions instead of individuals in the context of a case in criminal law. Research from Bauw, Van Dijk and Sonnemans (2013), with students (without legal background) instead of judges having to make a decision on a case, showed that a decision based on a majority of individual decisions led to a better decision than having one individual make a decision. There is much to say about the representativeness of their research (the research subjects were students without legal background, they were not trained in making decisions et cetera), however the conclusion of their research is a starting point to conduct more experimental research on decision-making processes amongst judges. More specifically, they found that group discussions (*raadkameren*) did not lead to a better decision, however it did lead to more unanimous decisions.

The other steps a case takes after trial, have not been subjected to quantitative research. Some of the steps, such as the role of judicial assistants during deliberations or sound boarding, are suited to be researched in an experimental context (see section 5.B. for an overview of future research).

#### Conclusion

There is some quantitative research available on exerting influence during the judicial decision-making process. The research that exists is mainly focused on the writing of judgements, and on the bench memo’s written by assistants. I enriched the schematic overview of table 2.B.I. with the quantitative research that exists for each step; the result can be seen in table 2.B.II. When looking at this table, there is a notable lack of quantitative and experimental research on the influence of judicial in the decision-making process.

Table 2.B.II. also contains the answer to the first sub-question of this paper: “What quantitative or experimental research on the influence of judicial assistants on the decision-making process is still missing?”

|  |  |  |
| --- | --- | --- |
| **Table 2.B.II. Journey of a case through court and whether quantitative research has been conducted** | | |
| **Step in process** | **Tasks performed by assistants that could influence the decision-making process** | **Extent of influence measured through quantitative / experimental research?** |
| **Submission of case to a court** | Decides whether single-judge or panel handles the case; determines amount of attention the case receives from the court. | No. |
| Decides amount of time scheduled for hearing; determines amount of time litigants have for oral arguments. | No. |
| **Pre-trial** | Structuring court files; order determines which files judges see first. | No. |
| Main contact person for litigants; gives assistants the opportunity to ask questions on content-related matters or suggest settling. | No. |
| Write memo’s to help the judge prepare for hearing; can present certain facts, evidence and arguments as particularly important which could lead to bias, especially when the judge solely reads the memo or the memo contains a recommendation on the outcome of the case. | Yes, Holvast and Mascini (2020) |
| In certain cases, conducts pre-trial investigations; decisions directly taken by assistants that influence the proceeding of a case. | No. |
| **During trial** | Can give judges advice, although mainly on procedural matters. | No. |
| Is sometimes given the opportunity to recommend questions to litigants. | No. |
| In some jurisdictions, is allowed to participate or independently conduct hearings. | No. |
| **Post-trial** | Participates in deliberations, although mostly passive; can direct attention to certain arguments, provide new views or present case law. | No, but there is some indicative, exploratory experimental research done by Bauw, Van Dijk and Sonnemans (2013). |
| Drafts judgements; allows them to spend more or less text on certain arguments, evidence and motivations, limits space to consider other arguments. | Yes, but mainly textual analysis to prove authorship, i.e. Rosenthal and Yoon (2011), Carlson, Livermore and Rockmore (2016), Bodwin, Rosenthal and Yoon (2013) and Pauwelyn and Pelc (2019). No experimental research has been conducted. |
| Provides sound boarding for judges on particularly complex cases; by being discussion partners for judges, assistants can directly influence them through new arguments or highlighting particulars facts from the case. | No. |

## C. What factors influence the extent of the influence of a judicial assistant?

In the previous section I explored during which steps judicial assistants could exert influence (culminating in a schematic overview seen in table 2.B.II). In this section, I will explore literature on the factors that determine the extent of the influence. When and why do assistants influence the decision-making process? Is this a conscious decision or done by accident?

The starting point for this section is Holvast’s seven factors that could determine the extent to which a judicial assistant has influence on the decision-making process. Those factors are (p. 163):

1. Trust between judge and assistant
2. Role perceptions of judges and assistants
3. Experience and expertise of both judge and assistant
4. Career perspectives and ambitions
5. Type and complexity of cases
6. Single-judge or panel decision-making
7. Time pressure and workloads

Another factor that determines the extent of influence of a judicial assistant is *time*. Not the time which can be spent on a case, but the time when the case happened. From the literature in the previous section, we learned that the role of judicial assistants has evolved over time. More than a decade ago, judicial assistants were often seen as secretaries. Now they fulfil the role of legal expert, and actively assist judges in the decision-making process. In the United States, this was also seen by Rosenthal and Yoon (2011), who analysed stylistic variance in verdicts over time. A judicial assistant employed hundred years ago, will – most likely – have had less influence over a judgement than a judicial assistant employed at this time. Concluding, another factor that determines the extent of the judicial assistant is *time*.

In the international context, Kenney (2000) identified various factors which determines the amount of influence assistants have at the CJEU. These were: “the length of time that référendaires serve, along with their often considerable age, experience, expertise, knowledge of the institution, and linguistic competency, when coupled with the shorter term of members of the ECJ [*part of the CJEU, red*] and a potential lack of expertise in language, judging, or EC law”. These factors – except for the language factor – also apply to the Dutch context.

The most relevant quantitative research in the Dutch context on these factors was done by Mascini and Holvast (2020). They surveyed 80 judges to determine the impact of some of these factors. They divided these factors up in two categories: factors related to principal-agent theory and factors that explain the context of a case. More specifically, they researched all seven factors mentioned by Holvast, except for the career perspective and ambitions of the assistant. They found that there are three factors that determine the outcome of a case (p. 15): the managerial role orientation of the judge (ß = 0.23, p < 0.05), the trust between judge and assistant (ß = 0.43, p < 0.01) and the perceived risk-benefit of involving an assistant in the decision-making process (ß = 0.21, p < 0.05). With their model, they were able to explain 45.8% of the variance in their dataset.

Theoretically speaking there are other factors that could explain the influence a judicial assistant might have in the decision-making process. There are direct effects, for example certain legal arguments might be perceived as more persuasive for some judicial assistants than others. Indirect and interaction effects also exist, for example the culture amongst judges within a panel could enhance or decrease the involvement of the assistant in pre- or post-trial discussion. Political ideology could play a role as well, especially in combination with the political ideology of the judge they work for; most research on this topic has been conducted in the U.S. Supreme Court context (i.e. see Bonica et al., 2016).

There is a broader corpus on research on what could influence judicial decision-making process. The role of the judicial assistant is not included in that research, however the role of other actors are. For example, Šadl and Sankari (2016) measured the influence of Advocate Generals (AG) at the European Court of Justice. They measure *implicit influence* by considering several parameters, of which the advice of the AG and the actual outcome of the case are two. Their theory is that an advice that corresponds with the outcome of the case means that the AG had influence; an advice and outcome that are not similar means that the court deviated from the advice of the AG, therefore the advice did not have any influence.

Another, more technical piece of research was conducted Medvedeva, Vols and Wieling (2020). They used machine learning to predict decisions of the European Court of Human Rights. They looked at multiple factors, such as the frequency of certain words combinations (*n-grams*), the time at which the ruling was made, and the judges that handled the case. They found a significant effect for each of these three factors, depending on the subject matter of the case. In the end, they were able to predict the outcome of a case with 75% accuracy. The other variation could be – in part – due to the involvement of assistants.

## D. Concerns and advantages of judicial assistants’ participation in the decision-making process

In the previous sections I described the increasing participation of judicial assistants in the judicial decision-making process both in the Netherlands and in other jurisdictions. I also described the judicial decision-making process in the Netherlands, and the steps during which assistants could exert influence. Finally, I described which factors determine the extent of this influence. Until now, I concluded that the participation of judicial assistants in the decision-making process has increased over the past two decades. This increase of participation is both criticised and welcomed by academics.

The relevance of this research lies in the question if assistants should have a role in the decision-making process and, if so, the extend of that role. The disagreement over answering that question alone, makes the topic already worth researching. In order to give the reader proper context of that discussion, discussing the concerns and advantages of judicial assistants in the decision-making process is important. Therefore this section contains a description of both the advantages and concerns academics have expressed of involving judicial assistants in the decision-making process.

### I. Concerns of involving judicial assistants in the decision-making process

Holvast (2017, p. 16 to 24) extensively discusses six concerns regarding the position of judicial assistants, of which two are further discussed in this section. The two concerns discussed in this section are related to the quantitative analysis done in this paper (see section D and chapter 4) and are particularly relevant for the Dutch context in which judicial assistants operate. The six concerns Holvast discusses are:

1. Firstly, the position of judge is special, and surrounded by important safeguards. The position of judicial assistants does not enjoy similar safeguards. That is a threat to the rule of law.
2. There will be a more legalistic type of adjudication because judicial assistants are more included to follow general guidelines instead of making their own decision. That decreases the individualistic nature that some cases require. Additionally, it hampers the law-making ability of the judiciary.
3. Judges adjudicate, assistants do not. The sense of responsibility a judge might feel if they do not prepare and write judgements decreases. That might affect the quality of their decision.
4. Intuition, not careful consideration of arguments from both sides, might become the dominant factor in deciding a case. Judges writing their own judgement, forces them to reconsider the case. When an assistant writes a judgement, the judge is relieved from that responsibility.
5. Judicial assistants affect the outcome of decisions because of their own ideological interests. Although the risk also applies to the Dutch context, it is less of a concern because judges are not politically chosen, Holvast concludes.
6. Judges become managers, because they need to manage assistants adjudicating for them, instead of adjudicating themselves.

The two concerns discussed further on in this section are the safeguards around the position of the judge (concern 1) and the legalistic type of adjudication (concern 2).

#### Safeguards around the position of judges and judicial assistants

In the first section, I described which tasks and duties of judicial assistants are and are not codified in the Dutch context. While some laws contain specific responsibilities of an assistant in legal procedures (for example, co-signing a verdict together with the presiding judge), many are not. Baas (2019, chapter 7.7.3) noticed that some judicial assistants actively participate in debates with judges regarding the outcome of verdicts, while other judicial assistants only do menial secretarial tasks. On the one hand, this provides the judiciary leeway to adapt the role of assistants to their current needs (‘an agile organisation’). On the other hand, if it is unclear for outsiders what the exact tasks and duties of a judicial assistant is, it makes it difficult for outsiders to understand the extent of the influence a judicial assistant could have.

To combat this concern, the role of the assistant could be subjected to more formalization. This would make it clearer what their tasks and duties are (and are not) and, in turn, would make it clearer during which steps of the decision-making process assistants could exert influence. For example, it is now an informal practice that assistants authors draft verdicts. Formalization of that task opens the discussion if it is necessary to increase safeguards around that task and, if so, how that could be achieved. Another example is the transparency surrounding side jobs of judicial assistants (i.e. teaching at a university, commercial practice, or a board membership at a local association). Judges have to publicly disclose their side jobs and professional historical experience; judicial assistants do not. A strong safeguard to ensure the independency of judicial assistants could be to disclose this information.

The concern regarding the safeguard of the position of assistants becomes even more pressing when reviewing recent initiatives to extend the duties and tasks of assistants. For example, the recent pre-advice by Stoepker & Schulmer (2020) called for an experiment where the pre-trial investigation in administrative law (*vooronderzoekscomparitie*) would be led by someone else than an administrative judge, such as the judicial assistant. Holvast (2021) reviewed that advice and expressed concerns on the (lack of) safeguards currently surrounding the position of judicial assistants in case they would receive a formal leading role in pre-trial investigations.

#### The legalistic type of adjudication of judicial assistants

Related to the fifth concern – the more legalistic type of adjudication judicial assistants have – is an increasing trend to focus on *recours subjectif* in Dutch administrative law. *Recours subjectif*, the opposite of *recours objectif*, is a doctrine that includes a strong focus on the personal position of participants of a procedure. When judging in a *recours subjectif* style, the judge tries to find a remedy that is suitable to all participants. This contrasts with *recours objectif* where the judge safeguards “the abstract legal order against unlawful infringements” (Van den Berge, 2017). In other words, *recours objectif* prioritizes legality, while *recours subjectif* prioritizes legal protection (Barkhuysen, Den Ouden & Schuurmans, 2012).

Judicial assistants – generally speaking – have less experience than judges (Hol, 2001). This is also seen in the dataset collected for this paper.[[8]](#footnote-9) Following a *recours objectif* doctrine is easier; the margin of error is smaller because there is a large amount of information, articles and case law available for assistants when drafting a judgement. Taking context into account and following a more personal approach, an ‘all things considered’ *recours subjectif* approach is more difficult for an inexperienced assistant. It is a process not taught in law school. It is a decision based on experience.

Posner (1985) thinks that relying on judicial assistants will result in a type of adjudication that relies more on statutes and case law: a more legalistic type of adjudication. “U.S. Law clerks are young and have not acquired any substantial experience in legal practice. They would, therefore, be more likely to build up an

argument by referring to authority. Clerks are ‘timid jurists’ who ‘feel naked unless they are quoting and citing cases and other authorities’” (Holvast, 2017 p. 22 quoting Posner, 1985 p. 108/109). Holvast continues: “An indication of this actually occurring in the US is that judicial decisions have become lengthier, more technical and contain more footnotes” (Holvast, 2017 p. 22 referencing Posner, 1985 p. 112).

An example can be found in the observations of Holvast (2017). She concludes that, with some exceptions, “assistants are often allowed a large amount of autonomy in writing judgments, and it can even be difficult for them to receive additional instructions from judges.” (p. 157). Although the outcome of a verdict could still be decided by the judge, the method of writing a verdict – a personal, case-based approach or a large number of references to law, previous articles and academics – is up to the assistant. This might be counterproductive to a general shift from *recours objectif* to *recours subjectif*.

As far as I know, there is no quantitative research done on referencing law and case law (in the Netherlands), and whether it correlates with the experience of the assistant.

### II. Advantages of involving judicial assistants in the decision-making process

Again, Holvast (2017, p. 16 to 24) extensively multiple advantages concerns regarding the position of judicial assistants, of which three are further discussed in this section. They are relevant for the quantitative analysis done in this paper (see section D and chapter 4) and are particularly relevant for the Dutch context in which judicial assistants operate. The seven advantages Holvast describes are:

1. Employing assistants can increase efficiency. Judicial assistants help with trivial and repetitive tasks that allow judges to better focus their time and expertise on matters only they can do.
2. Involving assistants in a case can decrease biases. Assistants give judges a second perspective on the case at hand through their bench memos and draft judgements. This can help combat biases amongst judges and helps judges to look at cases from a different perspective.
3. Assistants can function as sparring partners for judges. This helps judges in their professional reflection when dealing with a difficult case, without having to involve another judge or outsider.
4. Assistants are legal experts like judges. They – like judges – also read up on the latest case law and academic articles. Often, they are also employed within a specific section of the court, specializing in that type of law, while judges are typically generalists. They also do a first check whether procedural requirements are met. All of this can increase the quality of judgements.
5. Having assistants work on cases, can help assistants in their professional development. Like paralegals or junior lawyers employed in law offices, future judges must start somewhere. A position of judicial assistant in a court, could be an important career step for a future judge.
6. Judicial assistants rotate between judges. This means that they see multiple judges apply the same law. Because of this, assistants can enhance the principle of equality before the law.
7. Holvast also observed that “assistants, at times, support maintaining the image of impartiality of the judge by functioning as a buffer between judges and litigants when contact between these parties is needed” (p. 211).

Most of these advantages, like the concerns, have been extensively discussed in existing literature and do not need any further analysis. In the Dutch context, there have been specific developments that justify discussing three advantages more extensively. These are efficiency (advantage 1), professional reflection (advantage 3), and the apprentice model (advantage 5).

#### Efficiency: assistants are everywhere, right?

Assistance is common in all professions. In politics, memos for ministers are prepared, and speeches are written by civil servants. Doctor’s do not do everything themselves either. Medication is often administered by nurses, and simple medical procedures are handled by doctor’s assistants. And lawyers preparing for big cases receive help from junior lawyers, paralegals and their administrative staff. Why should that be any different for the judiciary?

Many collectivists and libertarians think alike on that matter: overspending public money where it is not required is a waste. Efficient allocation of resources is a political-neutral philosophy. However, in the context of *new public management* and *corporations,* efficiency is often seen as negative. But where tasks can be done more efficiently by others than judges, there is a potential for a more optimal allocation of resources. Realizing that potential should be explored.

Although it is a waste to allocate tasks to judges that could also be done by judicial assistants, a few precautions need to be taken. The special task of the judiciary – adjudicating conflicts – calls for special safeguards. While a nurse can only administer medication prescribed by a doctor, a judicial assistant should only write verdicts of which the decision is made by a judge. A nurse is still required to follow special education before she can work with patients; the position of a judicial assistant alike should be safeguarded with checks and balances to ensure impartiality, skill and integrity.

Abram et al. (2011) painted a picture of what the ideal cooperation between judge and judicial assistant would look like. The term *assistant* was quickly replaced by *legal advisor*. The advisor would provide “the legal advisor presents facts, ideas and opinions in comprehensible and correct language in writing and has a sharp legal analytical ability. He is able to signal possible problems and make connections. In addition, he is properly able to distinguish primary and secondary issues.” The advisor helps a judge to navigate a world that becomes more and more complex. In return, the judge receives more time to work on what they should do: adjudicate.

Important to note here is that instructions to assistants when executing their tasks can vary. There is not a manual as to how to give instructions, and there are neither manuals as to how to interpret instructions. Instructions to judicial assistants by judges, for example when writing draft verdicts, is the most important instrument for a judge to ensure a desired outcome. Holvast (2017, p. 143) observed that there are judges that – almost – dictate assistants what the text of the verdict should be like. She describes that one of the standard sentences pronounced by judges is: “*You’ll figure it out, right?*”. If judicial assistants are given a formal task to draft judgements – the practice in various district courts – judges should be aware of a new responsibility: to give useful instructions to their assistants. While judges excel at adjudicating, this does not guarantee an effective style of leadership.

The Consultative Council of European Judges opinion on judicial assistants also notices efficiency as an important rationale for employing judicial assistants (CCJE, 2019). They specifically mention that deciding cases in a “timely and cost-efficient way is an important goal for every judiciary. Moreover, the quality of judicial decisions after a fair consideration of the issues is an essential aspect of an efficient judiciary.” (p. 3). They also note that assistants are *not* part of the court, and hence it should not be used to replace appointing sufficient judges to oversee the quality of verdicts and ensure fair trials.

#### Professional reflection

In reaction to two (or more) parties arguing what ought to be right, a judge is expected to deliver justice in that conflict. While in multi-judge panels this responsibility is shared amongst judges, in a single-judge case it is carried by one judge alone. One of the judges interviewed by Holvast (2017, p. 141) said the following about this:

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

A judicial assistant with whom a judge can discuss the case, helps judges in dealing with that burden. By involving an assistant in the merits of a case – and even allowing them to write draft judgements – judges get an ‘external’[[9]](#footnote-10) opinion on the case at hand.

#### Apprentice model

In contrast to popular belief, judges do not just spring out of holes in the ground![[10]](#footnote-11) Ward & Weiden (2006) argue that law clerks originated from an apprentice model for legal education. In the Netherlands, a judicial assistant can also be a judge in education (*rechter in opleiding*). Holvast (2017, p. 67) found in her research that judges and judicial assistants alike find the “unique experience of gaining a deeper understanding of judicial decision-making” as important factors for becoming a judicial assistant. Having judicial assistants be actively involved in the decision-making process, contributes greatly to that understanding.

With more and more judicial assistants having academic law degrees (Abrams, 2006), it makes sense that aspiring judges, lawyers or legal professionals want to gain experience in the judiciary. Only performing administrative or secretarial tasks, such as recording proceedings, does not fit the academic profile judicial assistants currently have. There is also value to educate aspiring legal professionals in the position of judicial assistant: having them experience the process of adjudicating helps to gain a more thorough understanding of the legal process. The Consultative Council of European Judges opinion on judicial assistants also notices the importance of working as a judicial assistant as a source of experience for young lawyers and future judges (CCJE, 2019 p. 3).

## E. Theoretical framework as starting point for quantitative research

### I. Summary & intermediary conclusions

Reviewing what we know until now: in the past two decades, the role of judicial assistants in the Dutch judiciary has changed. While their role used to be secretarial of nature, assistants are now legal partners for judges that author draft verdicts, write memo’s and act as discussion partners in complex cases. Quantitative and ethnographic research confirms this.

This is not a new trend as discussed in section A. Earliest literature on the topic of judicial assistants is found in the United States, on the role of assistants at the Supreme Court. While the U.S. and Dutch context are not 1-on-1 comparable, it does provide us with examples of the active role assistants *could* play within courts. In jurisdictions across Europe and in courts in international levels (and their arbitral counterparts), we see similar trends Judicial assistants can exert considerable influence over the procedure and merits of a case. Their role is often not codified and their tasks customary of nature. Generally speaking, we can conclude that throughout jurisdictions and contexts, judicial assistants often have options to influence the judicial decision-making progress. Additionally, in the past decade there is a rise of studies and literature on the role of assistants in jurisdictions and contexts besides the existing corpus of U.S. based literature.

In section B, I answered the first sub-question of this paper: what quantitative or experimental research on the influence of judicial assistants on the decision-making process is still missing? I identified four phases a case goes through in a court: submission, pre-trial, trial and post-trial. By reviewing existing literature to these four steps, I concluded that there is little quantitative or experimental research conducted on the influence judicial assistants (could) exert in these steps. Table 2.B.II. Contains a schematic overview of all moments an assistant could exert influence and the quantitative and experimental research conducted thus far.

The research that does exist can generally be grouped in two categories: text analysis indicates that judicial assistants – in various contexts – influence the use of language of verdicts greatly. Often they draft first verdicts, leaving a lasting impression on the phrasing of verdicts (i.e. Rosenthal and Yoon, 2013). This is an important type of influence, since law is – in its essence – linguistic of nature. The second category of research is experimental of nature. Through an experimental survey amongst judges with bench memo’s, we can conclude that judges’ decisions can be affected by the recommendation assistants make in their memo (Holvast and Mascini, 2020).

Section C. contains an overview of which factors can determine the extent to which judicial assistants could have; this is also the answer to the second sub-question of this paper. In summary, many factors are theorized by various academics. These factors, amongst others, are: trust between judge and assistant, role perceptions of judges and assistants, experience and expertise of both judge and assistant, career perspectives and ambitions, type and complexity of cases, single-judge or panel decision-making, time pressure and workloads, time during which the case was held, proficiency of the judge and assistant in the language the verdict is written (especially important in international contexts), and political ideology of the assistant and the judge they work for.

Empirical research on the topic by Mascini and Holvast (2020) based on a survey amongst Dutch judges showed three factors to be relevant determinants: the managerial role orientation of the judge, the trust between judge and assistant and the perceived risk-benefit of involving an assistant in the decision-making process. They found that the experience of the assistant and judge and whether the case was brought before a panel or a single-judge, were not significant determinants.

Finally, in section D. I reviewed the concerns and advantages academics have expressed regarding involving judicial assistants in the decision-making process. More professional reflection, efficiency and educating future judges are important reasons to involve assistants in the decision-making process. Concerns generally deal with the safeguards around the position of the assistant, the independence of the judge and the different type of adjudication assistants might have. The active debate in academics surrounding the position of judicial assistants makes this topic important to further explore.

### II. A **basis** for exploratory quantitative **research**

Based on these intermediate conclusions, I see a large number of options for quantitative research (see table 2.B.II for a full overview). More specifically I identify three analyses that have not yet been done in the Dutch context:

1. Literature suggests that the experience of assistants has an effect on the length and complexity of verdicts (Pauwelyn and Pelc, 2019). This can be repeated for the Dutch context. The hypothesis would be that longer texts would negatively correlate with the experience of assistants.
2. Secondly, text analysis like Rosenthal and Yoon (2013) has not been conducted for the Dutch context. It is a widespread, known practice that assistants author draft judgements. Holvast (2017, p. 151) concluded that, the more experienced an assistant is, the more likely they develop their own style of writing. Inexperienced assistants write more conform the norm. Therefore, the hypothesis would be that the originality of the verdict should positively correlate with the experience of the assistant.
3. Literature also suggests that greater reliance on judicial assistants leads to a more legalistic type of adjudication. A legalistic type of verdict can be indicated by the amount of references to case law and law to form arguments, instead of reasoning. Therefore, the hypothesis would be that, with the increase of reliance on judicial assistants, the usage of references has increased as well.

Chapter 3 contains a methodological explanation of how the dataset for these analyses was collected. The chapter also contains an explanation of each type of analysis. Chapter 4 contains the analysis and the results.

# 3. Methodology for quantitative research

In chapter 2 I explored the influence of judicial assistants from a theoretical perspective. In section D of that chapter, I identified three quantitative analyses I want to do to further explore the topic: word counts of verdicts, references in verdicts and writing styles of verdicts. In this chapter, I describe the steps to collect and enrich a dataset. In section A I describe my research population: verdicts in general administrative law published in 2020. Section B contains the various steps taken to enrich the dataset, for example identifying which judge(s) and judicial assistant authored the verdict. This section also contains some general descriptive statistics of the dataset. Finally, in section C I further describe the statistical methods I employed.

## A. Research population

From a dataset containing around 1.8 million Dutch verdicts, I chose around 4967 verdicts to analyse. The exact data collection process is described in the next section; in this section I justify why I selected these verdicts and which criteria played a role in that process.

The verdicts I analyse are all published verdicts issued in 2020 from the administrative law section. The cases were published by 15 different institutions, ranging from district courts to High Administrative Court of the Netherlands (*Raad van State*). Some cases were adjudicated by a single judge, others by a panel. And in some cases, the plaintiffs were rules in favour of, in others they were ruled against.

In order to be able to do ensure that I measure the effect of the judicial assistant on the verdict, it is important to analyse cases that are as similar as possible. Each case is unique, but by selecting all cases available we have a representative dataset.[[11]](#footnote-12)

### I. All cases are from 2020

I chose to analyse from 2020 because having cases be similar in time, prevents changing legislation affecting the case. When comparing cases, it is important that the same law is applicable, otherwise control variables for the different legislation, which is complex, are required. These verdicts are all issued in 2020, which means that – grosso modo – they are decided upon based on the same legislation.

I chose recent cases, instead of older cases, because conclusions based on newer cases provide a more generalizable result than conclusions based on older cases. Additionally, the role of judicial assistants has evolved over time from a more secretarial role to a full-fledged legal expert. To find the influence they currently have, more recent cases had to be chosen.

### II. All cases are from administrative law

The choice for administrative law was made on two grounds. Pragmatism was the first reason: coding cases in administrative law is also easy since a plaintiff can be found right or wrong. There not many cases where both happen at the same time.

Secondly, Holvast (2017, p. 183) describes that the role of judicial assistants in administrative courts is, generally speaking, larger than other courts of law. Administrative courts are therefore the best starting point to look for significant effects.

## B. Data collection

* + 1. In the previous section I described based on which criteria I selected my research population. In this section I describe where the data originates from and the enrichment process.

### I. Origin of the dataset

The actual dataset of verdicts was retrieved from the website of the Council of the Judiciary.[[12]](#footnote-13) The total dataset used contained over 2 million verdicts from 1910 to 2020.[[13]](#footnote-14) Each verdict is identified by a unique ECLI. Only a small section of cases contained more information than ECLI, such as the actual text of the verdict, the decision and the legal area.

Dutch courts publish around 0.19% (2007) to 0.47% (2019) of all verdicts (Raad voor de Rechtspraak, 2020). The rest of the verdicts only contain metadata (section 1). Whether a verdict is published depends on several criteria formulated by the Netherlands Council of the Judiciary. For example, all verdicts from the Supreme Court (*Hoge Raad*) are made public, while only 0.27% of verdicts from district courts are made public.

This means that the criteria I based my decisions on to select this specific population to analyse, was based on a set of cases that do not represent the average type of cases a court has. It only includes cases that are special, publish-worthy (according to the judge or assistant) or adheres to one of the other criteria formulated by the Netherlands Council of the Judiciary. This is a bias in the research population that cannot be corrected for. The discussion section contains a more elaborate analysis on the accessibility of cases and other research data at the Dutch judiciary.

### II. Enriching the dataset: judges

The dataset of verdicts does not contain a formal relation between a verdict and a judge. Instead, the name of the judge is included somewhere in the raw text of the verdict. I extracted the name of the judge(s) by using pattern recognition, using the public register of judges as a basis (Raad voor de Rechtspraak, 2021e). For example, if a judge is called ‘D.A.B. van der Waal’, I scan each verdict on that name. If that name is recognized found, that judge is matched to the verdict.

There are a few weaknesses in this approach. First, the public register of judges is only available as a ‘snapshot’. This means that the register contains judges that are currently[[14]](#footnote-15) in office but does not contain judges that have retired. For example, a judge that retired a day before the public register was consulted, might not appear in the register while their name does occur in the verdicts studied. This also means that the longer ago the verdict is issued, the higher the chance a judge is missing from the verdict (another reason to pick verdicts issued in 2020).

Secondly, a spelling mistake in a verdict or if a name in a verdict does not contain middle names – for example ‘D. van der Waal’ instead of ‘D.A.B. van der Waal’ – the name would not be recognized. To combat this, I used the fuzzy string-matching method from Elasticsearch’s match query (Elasticsearch match query, 2021). By using that, we look for names that are highly like the names from the public register. The matching query looks for spelling mistakes that are common in the language of the text; for example, the name ‘Thomspon’ and ‘Thombson’ are both recognized as ‘Thompson’.

Thirdly, if judges have identical names, we do not know which judge issued the judgement. For that reason, judges with identical names were removed from the register.[[15]](#footnote-16) Fourthly, if an illogical number of judges were recognized in a case – for example 2, 4 or more than 5 judges – the verdict was discarded.[[16]](#footnote-17) This happened in 0.4% of all cases which were dropped.

Finally, I did a random manual check on 5% on the final dataset to confirm the accuracy of the method works. This resulted that in 99% of all verdicts the algorithm correctly identified the judge(s) that issued the verdict.

The dataset contains 322 unique presiding judges. The judge presiding the most cases was F.C.M.A. Michiels (122) cases, and various judges were only found presiding only one case. On average, judge presided over 15.4 cases.

### III. Enriching the dataset: judicial assistants

Idem to judges, the published verdicts do not have a formal link between verdict and judicial assistant. However unlike with judges, there is no public register of judicial assistants we can use to perform dictionary matching.

I used a machine learning model on Dutch news data from open-source machine learning library ‘spaCy’ to recognize the names of judicial assistants (spaCy, 2021). I retrained the model on 100 cases where I manually identified the names of judicial assistants. The model tried to find the name of the assistant after the judges were identified; this means that the model could not incorrectly label a judge as an assistant.

This is – relatively speaking – the weakest part of the data collection process: while the names of judges can be extracted quite easily from verdicts because of the publicly available register, recognizing the names of judicial assistants is quite prone to errors. To ensure this method works, I did a random manual check on 150 cases to ensure the method worked. I found that the untrained spaCy model was accurate in 93% of the times. The retrained model was accurate in 99% of the time. If no or more than one judicial assistant was recognized, the case was discarded.

There is a final edge case that needs to be considered. Sometimes, names of judicial assistants and judges were identical. This could happen in the case where judge in education is a judicial assistant, or a judicial assistant turned judge in the same year. Or in the coincidence that a judicial assistant and a judge just share the exact same name. The cases where this happened, were dropped from the dataset.[[17]](#footnote-18) Assistants shared the same name, were also dropped from the dataset.[[18]](#footnote-19)

Like with judges, I did a random manual check on 5% on the final dataset to confirm the accuracy of the method works. This resulted that in 99% of all verdicts the algorithm correctly identified the judge(s) that issued the verdict.

The dataset contains 519 unique judicial assistants. The assistant with the most cases was P.W. Hogenbirk (64 cases), and various assistants were only mentioned in one case. On average, an assistant was mentioned in 9.6 cases.

### IV. Enriching the dataset: experience of judges and judicial assistants

It is hypothesised that the experience of the judge and judicial assistant can influence the extent to which a judicial assistant can influence the decision-making process. To determine the experience of a judge, I used the professional working history data from the public register of the judges. I used the date of the first job as a working judge for this. This is a very accurate method to determine the experience of judges, because the public register is checked by the Netherlands Council of the Judiciary. For cases with judge panels, I used the experience of the presiding judge.

Unlike the public register for judges, there is no public register of judicial assistants that contain their professional experience. Instead, I searched in all public verdicts issued for the first occurrence of the judicial assistant in a verdict. I used that verdict as the start of their professional experience. This method could be inaccurate, because an assistant could have had years of working experience on cases that were just not published. However, I assume that this inaccuracy evens out over judicial assistants in a large dataset.

The experience of judge and assistant is calculated on a per-case basis by subtracting the starting date of their professional career from the date on which the case was issued. The result is the relative experience between the judge and the judicial assistant, like the variable used by Mascini and Holvast (2020). Using relative experience makes this research comparable to their research.

Finally, it is important to note that there are many cases where the experience of the judicial assistant was 0 days. This is because of the method of calculating their experience: it is based on the first case found in the public records with their name as assistant. If this was their first case, their experience was 0 days. This caused the higher kurtosis for judicial assistants.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Table 3.IV.1. Descriptive statistics of experience of presiding judges and assistants in days** | | | | | |
|  | **Mean** | **Median** | **Std. deviation** | **Skewness** | **Kurtosis** |
| Presiding judges | 6462 | 6407 | 3438 | .25 | -.79 |
| Judicial assistants | 3328 | 2883 | 2513 | .27 | -1.30 |
| Relative experience | 3133 | 3210 | 4234 | -.03 | -.48 |
| Experience in days. Relative experience was measured as follows: experience of presiding judge – experience of judicial assistant. | | | | | |

### V. Enriching the dataset: single-judge or panel case

To determine whether a case was adjudicated by a single judge or a panel, I counted the number of judges in each verdict. If a verdict contained one judge, it was coded as a single-judge case. If a verdict contained more judges, regardless of whether it were 3 or 5 judges, it was coded as a panel case.

|  |  |  |
| --- | --- | --- |
| **Table 3.V.1. Descriptive statistics of single-judge vs. panel case** | | |
|  | **Frequency** | **Percent** |
| Single-judge | 3910 | 78.7% |
| Panel | 1057 | 21.3% |

### VI. Enriching the dataset: complexity of the case

There is some existing literature on measuring the complexity of a case. Some literature suggests that complexity depends on the type of law and how quickly regulation in that field develops, the number of parties in the proceedings, the arguments made and the positions those parties could take (de Vey Mestdagh, 2017). Other literature also looks at the oral arguments made, responses from parliament and compliance from lower courts to determine the complexity of a case (Goelzhauser, Kassow and Rice, 2021). And others again use the number of trial days, the number of witnesses and the number of exhibits as factors to measure complexity (Ford, 2013). Most of the literature is US specific though, and some of the factors that determine complexity are not transferable to the Dutch context (for example oral arguments are not made public, there is no formal case law culture, etc.).

Only measuring lexical complexity (for example measured with a Flesch-Kincaid readability tests) is according to Van der Bruggen (2020, p. 2031) not a suitable proxy for the actual complexity of a case. Even the best available tools that measure lexical complexity are not accurate enough to predict the actual complexity of the case. Cases that are complex are handled by more judges than cases that are simple (Baas, de Groot-van Leeuwen & Laemers, 2010). The number of judges is already accounted for in the dataset through the single-judge / panel variable.

Specifically, for Dutch court cases, no real literature exists that measured complexity on cases. However, I generalized these concepts from US literature to determine the complexity of a case: (1) the length of the verdict in characters and (2) the legal complexity measured in the number of references to previous ECLI cases and (3) the legal complexity measured in number of references to laws. The references to previous cases was measured by counting the number of ECLI references in each verdict. The number of references to laws was directly taken for each case from the Linked Data portal of the Dutch government.[[19]](#footnote-20)

A higher measurement of each factor contributes to a more complex case. I made one ‘complexity’index from these three factors, through the following formula:

*Complexity index* = *length / 1000 + ECLI references + law references*

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Table 3.VI.1. Descriptive statistics of experience of presiding judges and assistants in days** | | | | | |
|  | **Mean** | **Median** | **Std. deviation** | **Skewness** | **Kurtosis** |
| ECLI references | 2.05 | 1.00 | 6.35 | 50.88 | 3193 |
| Law references | 3.48 | 3.00 | 3.71 | 2.75 | 23.55 |
| Verdict length (characters) | 14424 | 11633 | 16034 | 13.94 | 361.13 |
| Complexity index | 19.96 | 16.05 | 21.06 | 13.59 | 329.22 |
| The complexity index was calculated as follows: complexity index = verdict length / 1000 + ECLI references + law references | | | | | |

### VII. Enriching the dataset: outcome

The outcome of a verdict is coded binary: a plaintiff can be found right or not be found right. Outcomes of a case are not always this binary: in Dutch administrative law a case can be inadmissible or the judge thinks they cannot come to a judgement on the case. For this, I used the coding scheme in table (3.VII.1).

Cases with other outcomes were discarded. These cases included judgements where the court asked the CJEU to answer questions, or judgements in which the judge referred the case to a different judge, to a panel or another institution. Verdicts that challenged the judge(s) (*wraking*) were also discarded, since they do not pertain administrative law. Finally, verdicts that rectified a previous verdict (often seen at the CBB) were also discarded since they did not contain an outcome.

If the outcome was not clear, I followed the court’s decision on who should be paying the litigation costs for the trial. If the plaintiff was required to pay their own costs, the case was labelled as unfounded. If the defendant was ordered to do so, the case was labelled as founded. This was only done in the cases where an initial outcome was not clear.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Table 3.VII.1. Coding scheme outcome of cases (N = 4967)** | | |  | |  |
| **Outcome** | **Coded to** | **N** | | **%** | |
| Founded  (plaintiff is right, *gegrond*) | Founded | 1475 | | 29.7% | |
| Unfounded  (plaintiff is wrong, *ongegrond*) | Unfounded | 3173 | | 63.8% | |
| Unauthorized  (not allowed to reach verdict, *onbevoegd*) | Unfounded | 33 | | 0.07% | |
| Inadmissable  (procedural requirements are not met, *niet ontvankelijk*) | Unfounded | 286 | | 5.8% | |
| Total founded = 1475, 29.7%. Total unfounded = 3492, 70.3%. | | | |  | |

### VIII. Enriching the dataset: institution

To determine whether a case was adjudicated by a single judge or a panel, I counted the number of judges in the verdict.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Table 3.VIII.1. Coding scheme outcome of institutions (N = 4967)** | | |  | |  |
| **Institution** | **Coded to** | **N** | | **%** | |
| CBB (*College van Beroep voor het Bedrijfsleven*) | High court | 684 | | 13.8% | |
| CRVB (*Centrale Raad van Beroep*) | High court | 27 | | 0.5% | |
| GHARL (*Gerechtshof Arnhem-Leeuwarden*) | High court | 25 | | 0.5% | |
| RVS (*Raad van State*) | High court | 1557 | | 31.3% | |
| RBAMS (*Rechtbank Amsterdam*) | District court | 357 | | 7.2% | |
| RBDHA (*Rechtbank Den Haag*) | District court | 519 | | 10.4% | |
| RBGEL (*Rechtbank Gelderland*) | District court | 77 | | 1.6% | |
| RBLIM (*Rechtbank Limburg*) | District court | 225 | | 4.5% | |
| RBMNE (*Rechtbank Midden-Nederland*) | District court | 304 | | 6.1% | |
| RBNHO (*Rechtbank Noord-Holland*) | District court | 340 | | 6.8% | |
| RBNNE (*Rechtbank Noord-Nederland*) | District court | 83 | | 1.7% | |
| RBOBR (*Rechtbank Oost-Brabant*) | District court | 23 | | 0.5% | |
| RBOVE (*Rechtbank Overijssel*) | District court | 48 | | 1.0% | |
| RBROT (*Rechtbank Rotterdam*) | District court | 177 | | 3.6% | |
| RBZWB (*Rechtbank Zeeland-West-Brabant*) | District court | 521 | | 10.5% | |
| Total district court = 2674, 53.8%. Total high court = 2293, 46.2%. |  |  | |  | |

## C. Statistical methods: regressions

Linear regressions

t-test

writing style

**use of references over time:**

[ ] regressie op referenties doen, en uitleggen

finally, schrijfstijl

[ ] schrijfstijl literatuur

[ ] schrijfstijl methodology

[ ] schrijfstijl analyse

Inspiration to measure influence is taken from Šadl and Sankari (2016) who measured the influence of Advocate Generals (AG) at the European Court of Justice. They measure *implicit influence* by considering several parameters, of which the advice of the AG and the actual outcome of the case are two. The theory is that an advice that corresponds with the outcome of the case means that the AG had influence; an advice and outcome that are not similar means that the court deviated from the advice of the AG, therefore the advice did not have any influence. Šadl and Sankari, however, did not employ any statistical hypothesis testing. They only looked at descriptive statistics.

In this paper, I take a similar approach as Šadl and Sankari but I do employ statistical hypothesis testing. The theory to measuring influence is based on how well we can predict the outcome of a verdict based on several parameters. In this case, the most important parameter is the relative experience of judicial assistants to judges. The amount of influence this parameter has in explaining the outcome of a verdict, is an important indication for how much the influence an assistant might have.

I use a logistic regression for this because the outcome of a verdict is binary (see section 3.B.VII). The related hypotheses I want to test are:

*H0*: The relative experience between judge and judicial assistant has no effect on the outcome of a verdict.  
*Ha*: The relative experience between judge and judicial assistant has an effect on the outcome of a verdict.

A logistic regression can also account for the direction of the effect. In simple terms: does the parameter cause more founded or unfounded cases. By adding other parameters in the regression, we can create a stronger model. A logistic regression is used because the dependent variable, the outcome of the case, is binary.

The assumptions that should be tested for using a logistic regression were largely met. The sample size is large enough, and no collinearity was found amongst the interval variables. However, both the complexity index and the relative experience did not pass the Shapiro-Wilk test (test of normality) (*p* < 0.05). The relative experience variable passed Levene’s test (*p >* 0.05) while complexity did not (*p* < 0.05). That is a weakness to the test employed.

## D. Statistical methods: text analysis

#### Text analysis

Textual analysis does not provide a direct, causal relationship between the involvement of judicial assistants in authoring draft judgements and them actually exerting influence over the outcome of a case. Text analysis does allow us to get an indication of how much text is actually authored by judicial assistants (and not corrected by judges). While the authoring draft judgements maybe does not immediately influence the outcome of the case at hand, it does influence the understanding of the case in appeal, its interpretation by academics and the way future judges (and assistants) may use the verdict as case law. As Thirlway (2006) puts it: “Law is a matter of words; and it may be said that the choice of words to convey a legal point is in itself the decision of, or a decision on, that point.”

While it is a known, widespread practice that judicial assistants author draft verdicts, textual analyses like those done by Rosenthal and Yoon (2013) and Pauwelyn and Pelc (2019), have not been conducted in the Dutch context. That, in itself, makes the analysis relevant. However, it is also interesting to understand the extent of the authorship of judicial assistants. Can we find a connection between the experience of judicial assistants, judges and the originality of the text? Do we see inexperienced assistants use more standard formulations – taken from previous cases – to come to a decision, and are experienced assistants more inclined to write an original judgement? And how does the experience of the presiding judge, or whether there is a panel of judges reviewing the judgement influence this?

It is, however, difficult to research how this influence could exactly manifest without doing observational research (like Holvast, 2017) or experiment based research (like Holvast and Mascini, 2020). The research of Rosenthal and Yoon hints at assistants drafting verdicts in the U.S. Supreme Court context; it is a known, widespread practice that assistants author draft verdicts in the Netherlands at various levels of court. This does open up various options for quantitative research: how does writing style differ between assistants? Are there characteristics of verdicts that are related to characteristics of the assistant that authored this research?

The type-token ratio is “the number of different words in an opinion (types) as a percentage

of the total number of words in the opinion (tokens).” Paul J. Wahlbeck, James F. Spriggs II & Lee

Sigelman, Ghostwriters on the Court? A Stylistic Analysis of U.S. Supreme Court Opinion Drafts, 30

A M . P OL . R ES . 166, 176 (2002).

The authors analyzed eight stylistic features of the texts,

including average word length, average sentence length, footnote frequency, and footnote length. <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6227&context=law_lawreview>

#### The relationship between experience and verdict length

[ ] regressie op aantal woorden uitleggen (vz minder / jm meer)

[ ] t-toets voor woorden uitleggen

In the previous section, I discussed multiple factors that could explain the outcome of the case and the extent to which a judicial assistant can influence the decision-making process leading up to the verdict.

The research I will conduct is most similar to the research of Mascini and Holvast (2020). It is similar in that I will research the influence of the factors found by Holvast (2017), but it is different in three ways:

1. Mascini and Holvast asked judges about the last case they worked on with an assistant. I collect data directly from cases. This means that – while I cannot include some of the factors Mascini and Holvast could include – my dataset does not contain biases related to self-reporting.
2. I research a smaller number of factors. Mascini & Holvast were able to collect data directly from judges, meaning they were able to ask them for their perception on the rule of law, their orientation regarding their managerial role et cetera. Because I do gather information directly from cases, I cannot ask each judge about these factors. Therefore, I include these factors in my research. This is a weakness compared to the shared of Mascini and Holvast.
3. The survey of Mascini and Holvast had 76 respondents. My dataset is based on actual cases and is therefore larger. Having a larger dataset is a strength of my research, since larger sample sizes generally provide more accurate values and are better suited to find outliers. Generally speaking, the margin of error of larger datasets is also smaller.

In this research, I will focus on four factors that could influence the extent to which a judicial assistant can influence the decision-making process. These factors are taken from Holvast (2017):

* The experience of judge and judicial assistant (factor III)
* The complexity of the case (factor V)
* Single-judge or panel case (factor VI)
* The institution that handled the case

In the context of the research of Mascini and Holvast, the experience of the judge and judicial assistant is the only factor that fits in the principal-agent theory. The other factors are contextual factors related to the case.

I analyse the impact of these factors on the outcome of the case. A more extensive explanation on the setup of my research can be found in the methodology section.

-> literatuur met meer specialistische kennis langere of kortere stukken schrijven

[ ] aparte t-toets voor verwijzingen

# 4. Analysis & results

## A. **Length of verdicts**

aassafafd

## B. References in **verdicts**

asdfasfd

## C. Text analysis

Table 4 shows a logistic regression on four variables: relative experience, complexity panel and institution. Each It shows that our main hypothesis, the relative experience between judges and assistants has no significant effect on the outcome of a verdict, cannot be rejected. This outcome is similar to previous research conducted by Mascini and Holvast (2020) who found that the relative experience did not contribute to the outcome of a case.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Table 4. Logistic regression analysis of 4967 verdicts in administrative law in 2020** | | | | | |
| **Parameter** | **β** | **S.E.** | **Wald’s χ2** | **df** | ***p*-value** |
| Constant | 1.07 | .06 | 310.28 | 1 | .000 |
| Relative experience between judge and assistant | .00 | .00 | .14 | 1 | .708 |
| Complexity of verdict | -.013 | .00 | 38.69 | 1 | .000 |
| Judged by panel (vs. single-judge) | -.37 | .08 | 19.72 | 1 | .000 |
| Institution | .34 | .07 | 25.52 | 1 | .000 |
| Cox & Snell R2 = .03, Nagelkerke R2 = .04. Experience in days. Complexity is a composite index based on length of verdict, references to previous cases and references to law. Panel is codes such that 0 is a single-judge case and 1 is a panel case. Institution is coded such that 0 are district courts and 1 are higher courts. | | | | | |

## B. Other results

Three variables do show significant result: complexity, panel and institution (*p* < 0.001). This is different from the research by Mascini and Holvast (2020), who found that neither panel nor complexity of the verdict was a significant predictor to the outcome of a case. Mascini and Holvast did note that their methodology might be lacking, and that there was relatively little previous research done on these contextual factors.

This model shows a low R2. This means that this model can explain 4% of the variance in outcome of cases. An R2 of 4% is low, especially when compared to the 45.8% that Mascini and Holvast found when checking for other parameters. However, the 4% found for these contextual factors does correspond to the low R2 Mascini and Holvast found for contextual factors (1.3%).

Some other, exploratory research was done on the dataset. When using the original variables for relative experience (experience of judge and assistant in days), the result did not change both variables were not significant (*p* > 0.05). A metric that indicates how many cases an assistant has been involved with, also was not significant (*p* > 0.05). The individual factors of the complexity of the verdict each were significant (*p* < 0.05). This shows that each factor taken to construct the index contributes to model.

# 5. Discussion & options for further research

In the last chapter I discuss the findings of this paper in the broader context of previous research. I also discuss options for further research and conclude with a reflection on using quantitative methods in legal research.

*How do different factors affect the influence a judicial assistant has in the judicial decision-making*

*process?*

The main conclusion of this research was that no connection was found between the relative experience of a judge and assistant, or their individual experience, and the outcome of a case. Additionally, three other factors were found to have a significant result: the complexity of the verdict, whether the case was adjudicated by a single-judge or a panel, and the institution that handled the case.

## A. Implications of this research

This research fits within a newer field of research on the influence of judicial assistants within the judiciary. The idea to research the experience of judicial assistants came from Holvast (2017) who conducted ethnographic research within the judiciary. Holvast and Mascini (2020) showed that the relative experience of judges and judicial assistants did not contribute to the outcome of a case; this research supports that theory. In contrast to Holvast and Mascini (2020), this research does find that the complexity of the case and panel did contribute to the outcome of the case. This research did find that the level (district court vs. high court) at which a case is handled, does have a significant effect on the outcome of the verdict.

All of these findings should be seen within the context of this research. This research was based on a dataset if 4967 cases published in 2020. The method to analyse such a large number of cases has not yet been employed often within the Dutch context. In that context, this research is innovative. However, since this research is conducted on cases that were published by the Dutch judiciary, and only a small selection of cases are published, the population on which this research was done is biased.

Within the practical context of the judiciary, this research supports the theory that – from the perspective of the outcome of the case – no care should be taken which judge or assistant is assigned to a case. There might be other important factors that play a role in selecting a judge and assistant for a case (like expertise, ambition or sensitivity when it is a case of large societal importance).

In the broader context of legal research, this research is an example of how to use a purely quantitative method to research a practical legal question. Especially the method to construct a complexity index for cases, and the methodology to recognize judges and judicial assistants in large number of cases should allow other legal researchers to do big scale statistical analyses of cases more easily. In any case, this methodology, which has proven to be accurate, should prevent researchers from hand-coding large number of cases themselves.

## B. Further research options

Various options to extend this research exist. For example, this research can be repeated across different years and legal areas, in order to be able to increase the generalizability of the conclusions of this research. This research could also be combined with a survey amongst judges and assistants to collect information on their opinion on the principal-agent theory factors researched by Mascini and Holvast (2020). It is hypothesised that adding those factors should increase the explainability of this model.

The research by Rosenthal and Yoon (2013) has, to my knowledge, not yet been conducted in the Netherlands or on the Dutch judiciary. Repeating that research is interesting, based on this dataset, might be interesting because we would be able to see how much individual judges and assistants contribute to the writing of the verdict.

The research of Šadl and Sankari (2016) on the role the Advocate General plays at an EU level, could be repeated as well within the Dutch context. The Dutch AG has a similar role as the EU AG. Sadl and Sankari did not employ any thorough statistical hypotheses testing; their research was descriptive of nature. Repeating their research for the Dutch context should include statistical hypothesis testing though.

Similarly, further research needs to be carried out to determine the fre-

quency and impact of ‘speaking separately together,’ both with fellow judges

and with other members of the court, including clerks and staff of registries.

What motivates judges to initiate or join coalitions, are certain factors such

as national, political, or professional backgrounds predictive of their com-

position, and do they tend to be one-off or stable? Similar studies should be

conducted to determine when and how clerk influence on international

courts can be thought of as inappropriate. Should we adopt different ethical

standards for judicial clerks than for, say, legislative staffers, executive aides,

or other international civil servants? 289 Is there evidence to suggest that the

influence of judicial clerks on rulings supersedes that of the judges? 290

*p. 54 from Creamer and Jain (Separate judicial speech)*

*Concluding, there is some quantitative research available on exerting influence during the judicial decision-making process. I enriched the schematic overview of table 2.B.I. with the quantitative research that exists for reach step; the result can be seen in table 2.B.II. When looking at this table, we see that many steps in the decision-making process are not yet exhaustively researched.*

## C. Problems of this research

There are a few important methodological weaknesses that require attention. This research tried to find a

While the method of collecting data was innovative – it was a largely automated process – it is also subject to error. 5% of cases were manually checked and showed that the automated process yielded significant accurate results. This manual check does not guarantee the integrity of the rest of the dataset; a full manual check could be done to ensure this.

The experience of judicial assistants was measured by the first occurrence as an assistant in a published case. The national register of verdicts was used for this. This is only a proxy for their experience; I did not take prior legal experience into account (neither did I do so with judges). It is an indication, but an absolute measure for their experience. Self-reported experience might be more accurate than the method used to calculate experience in this research, although there is no literature that specifically deals with this question. It is unlikely, however, that the relative experience variable would become significant in this model with the addition of extra factors.

Other factors that explain the outcome of a verdict, such as the merits of the case, the arguments made by all parties, the parties involved with the case and more are not taken into account in this model. Adding those factors might prove factors that were shown significant to become insignificant. Adding those factors, however, is a large and time intensive process. Additionally, not all standard assumptions to employ a logistic regression were met. More specifically, tests of normality failed. This is mitigated by a relatively large sample size (N = 4967).

Lastly, this analysis was done on verdicts that were published by the Dutch judiciary. Only a very small number of cases (0.47% in 2019) were published. Only a specific selection of cases is made public, based on criteria of the Netherlands Council of the Judiciary. This is a significant methodological weakness, because the analysed research population is not generalizable to all verdicts. In other research this weakness is prevented because they analyse jurisdictions or courts where all cases are published. Most statistical analyses on statistics that I found, were done on the level of European courts. The next section contains a more specific analysis on this.

## D. A note on data accessibility within the Dutch judiciary

A transparent judiciary is essential for the rule of law. In the Netherlands, this is codified in Article 121 of the constitution. However, although all verdicts are ‘made public’, not all verdicts are publicly available. This confusing, but important distinction makes this research difficult. Article 121 only dictates that the verdict must be read out in public, not that the integral text of the verdict should be made public.

To do proper legal analysis that is representative for all cases, a researcher needs access to as much data as possible. An alternative is that the researchers build a representative sample of the total population. In the Dutch context, the sample of cases of which the integral text is available is decided on by the Netherlands Council of the Judiciary. Neither options to do a proper analysis are available to researchers.

That weakness is inherent to the current practice of the Council of the Judiciary. From an academic point of view, this is a shame as it does not allow researchers to conduct research over the full population of verdicts. This problem is not new. For a long time, academics, researchers and legal professionals have called on the Dutch judiciary to publish more verdicts. More recently, Marseille and Wever (2019) wrote about the effects this had on their empirical research. While the number of cases that have been published has risen over the years, there is no realistic outlook on when the judiciary will publish the outcome of all cases.

For research purposes, not having a complete dataset of all verdicts between 2010 and 2020, including the integral text of each verdict, is unfortunate. Not knowing the exact scope of which verdicts (type, legal area, institution, et cetera) are unpublished, means researchers cannot define a research population that is representative of the whole population. Put differently: when you do not know what you do not know, you cannot know whether what you know is enough to do an analysis. Additionally, with larger amounts of verdicts available, the power of statistical tests rises. For example, t-tests with larger sample sizes can be done when more verdicts are published.

While I was writing this paper, the Netherlands Council of the Judiciary announced their ambition to publish 75% of all cases (NRC, 2021). I was enjoyed reading this goal, but it did raise a few concerns. They did not speak of the structure in which they wanted to publish verdicts. If they use the data structures that they currently use, researchers will have a lot of effort analysing the role of judges and judicial assistants. They are not included in the dataset and need to be coded by hand or with an algorithm. This method is prone to errors, in contrast to publishing the verdict with the judges and assistants as separate attributes of the verdict. Their announcement also did not contain a deadline. The ambition to publish as many verdicts as possible is not an ambition that should wait until 2030; it is an ambition that should be realized as soon as possible.

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1. I.e. see <https://www.raadvanstate.nl/werkenbij/bestuursrechtspraak/klaar-start/>, <https://m.facebook.com/Rechtspraak/photos/a.325986370873530/1430467350425421> and <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Even-voorstellen-een-juridisch-medewerker-familierecht.aspx> [↑](#footnote-ref-2)
2. For a full, thorough examination of the process through which these reforms were established, see Scholtens (2006). [↑](#footnote-ref-3)
3. Interestingly, although the increase of judicial assistants was in part initiated by financial motives, some research indicates that there is no significant increase in productivity when exchanging judges for judicial assistants. See Van der Torre et al. page 17 for more information. Research by Dumaij et al (2014, p. 15) indicates that – over time – productivity in the judiciary after 2002 has not increased. [↑](#footnote-ref-4)
4. All replies can be found at: <https://rm.coe.int/compilation-all-replies-/16809463ff>. [↑](#footnote-ref-5)
5. The following examples were found through Creamer and Jain (2020, p. 43). For more examples and a thorough examination of the role of judicial assistants on an international level, see Baetens (2019). [↑](#footnote-ref-6)
6. The type of analysis is similar to the research of Yoon and Rosenthal described in section B. It belongs to a school of methods called ‘stylometry’. [↑](#footnote-ref-7)
7. Similar results were found by Carlson, Livermore and Rockmore (2016) for the US Supreme Court, and for the Canadian Supreme Court by Bodwin, Rosenthal and Yoon (2013). To my knowledge, this type of textual analysis has not yet been done in the Netherlands. [↑](#footnote-ref-8)
8. On average, judges presiding a trial have 6462 days of experience compared to 3328 days of experience for a judicial assistant. See section 3.B.IV for more information. [↑](#footnote-ref-9)
9. ‘External’ in this context means someone that does not have the same responsibility but is knowledgeable enough with the facts of the case to discuss the case within detail. [↑](#footnote-ref-10)
10. See J.R.R. Tolkien’s Lord of the Rings. [↑](#footnote-ref-11)
11. Note that not all cases were made public. There are selection criteria which the Dutch judiciary uses to determine which verdicts should be made public and which should not. See section 3B for more information. [↑](#footnote-ref-12)
12. <https://www.rechtspraak.nl/Uitspraken/paginas/open-data.aspx> [↑](#footnote-ref-13)
13. Note that the dataset does not contain all verdicts issued by the Dutch judiciary in that time. For example, in 2019, the Dutch judiciary issued approximately 1.54 million verdicts. Only a subsection of those cases receives an ECLI and is therefore included in the dataset. [↑](#footnote-ref-14)
14. A list of judges was compiled on February 21, which is used throughout this research paper. [↑](#footnote-ref-15)
15. Eight judges were removed from the dataset: A. de Boer, J.B. Smits, L. Stevens and S.M. de Bruijn. [↑](#footnote-ref-16)
16. Each case in the Netherlands has 1, 3 or 5 judges. There are no cases with an even number of judges. Cases in which more than 5 names were recognized generally occurred in three different contexts: (1) a conclusion from the Advocate General contained names from judges in lower cases, (2) cases where the integrity of the judge was challenged (‘*wraking*’), and (3) cases where a judicial assistant had the same name of a person that was on the central list of judges (which could be a coincidence or a judicial assistant becoming a judge). Cases where only 2 or 4 judges were recognized were not discarded; this happened because the central list of judges which could be recognized did not contain judges that already retired (see 2.A.II). [↑](#footnote-ref-17)
17. This was the case for 21 people: A.R. Vlierhuis, B. van Dokkum, C.E.C.M. van Roosmalen, C.G.M. van Ede, C.S. de Waal, D. de Vries, I.C. Hof, I.S. Ouwehand, J. de Graaf, J. de Vries, J.M.M. Bancken, L.N. Foppen, M. Duifhuizen, M.B. van Zantvoort, M.B.L. van der Weele, M.G. Ligthart, M.M. van Driel, P.M. Beishuizen, R. Grimbergen, R.H.L. Dallinga, V. van Dorst. [↑](#footnote-ref-18)
18. This was the case for 2 people: A. Jansen, A.J. Jansen, J. de Graaf, J. de Vries, M. Bos, M. de Graaf. These people were identified because they were mentioned in verdicts across a large amount of institutions either indicating they used to be lawyers or that multiple people share the same name. [↑](#footnote-ref-19)
19. For example, for ECLI:NL:CBB:2020:872 the total number of references to law is 7: <https://linkeddata.overheid.nl/front/portal/spiegel-lijstweergave?id=http%3A%2F%2Flinkeddata.overheid.nl%2Fterms%2Fjurisprudentie%2Fid%2FECLI%3ANL%3ACBB%3A2020%3A872> [↑](#footnote-ref-20)