International Journal For Court Administration

Anne Sanders, and Nina Holvast, 'Empirical Studies on the Role and Influence of Judicial Assistants and Tribunal Secretaries' (2020) 11(3) International Journal for Court Administration 1. DOI: https://doi.org/10.36745/ijca.359

EDITORIAL

Empirical Studies on the Role and Influence of Judicial Assistants and Tribunal Secretaries

Anne Sanders* and Nina Holvast†

This special issue investigates the role and influence of judicial assistants/law clerks, in different legal systems and of secretaries in arbitral tribunals in Europe. The authors, which have backgrounds in sociology, law, political science, economics and the practice of arbitral tribunals, present original research based on empirical studies using various methods, such as experiments, interviews and analyses of statistical data.

Keywords: Judicial assistants; law clerks; court administration

At many courts, in many legal systems, judges are supported by assistants with a legal training who are not judges at that court. The education, career prospects and organisation of judicial assistants vary considerably between different judiciaries and courts. The content of their assistance to judges can reach from acting as a "sounding board" for the judge's ideas, to conducting research and performing administrative duties to the drafting of decisions and participating in deliberations. However, as different as the role of judicial assistants and the organisation of the assistance scheme may be, all setups have in common that the assistants support the judicial decision making process without being judges (at that court) themselves. Given that judges are appointed with the responsibility to adjudicate, this raises a number of questions. What are the role and duties of judicial assistants in different courts and different legal systems? What, if any, is their influence on the decision making process and the outcome thereof? What type of professional relationships exist between judges and judicial assistants? How can a judges' work be supported best in order to improve the efficiency and quality of adjudication? And, in what ways do other dispute resolution bodies, for instance arbitral tribunals, make use of assistants?

In many jurisdictions – the USA being an exception – research on judicial assistants has been scarce, leaving many of these questions unanswered. In this special issue, we contribute to the body of knowledge by addressing several of these questions for a variety of court settings.

* Bielefeld University, DE, anne.sanders@uni-bielefeld.de
† Erasmus University Rotterdam, NL, holvast@law.eur.nl

Gunnar Grenstad, Nina Holvast, Ole Jensen, Peter Mascini, Anne Sanders and Jørn Øyrehagen Sunde first met in August 2019 at a workshop on judicial assistants generously funded and organised by the ZiF Zentrum für interdisziplinäre Forschung (Center for Interdisciplinary Studies) at the University of Bielefeld. After having shared and discussed their research on judicial assistants in the beautiful facilities of the ZiF, helped by its effective and supportive staff, they agreed to a joint publication. In this special issue, we proudly present the results of our joint efforts.

Anne Sanders' article *"Judicial assistants in Europe – a comparative analysis"* analyses and compares the roles, organizational models and duties of judicial assistants in 37 Council of Europe Member States. This research is based on responses to a questionnaire sent out by the Consultative Council of European Judges (CCJE) and an interview study by the author. While the organization and duties differ widely across Europe, a limited number of organizational models can be identified. Judicial assistants can be classified as either short term "interns", longterm "scribes" or "seconded judges". Judicial assistants can be organized in pools or assigned to specific judges. Moreover, their duties can be analyzed on a scale of increasing involvement in the judicial process from mere research over drafting to decision making with the approval of the judge.

Gunnar Grendstad, William R. Shaffer, Jørn Øyrehagen Sunde, and Eric N. Waltenburg in their article *"From Backlogs to Quality Assurance. The Development of Law Clerk Units at Norwegian Courts"* investigate the history and role of judicial assistants at Norwegian courts taking into account the recommendations of CCJE Opinion 22 (2019). They show how the pretext of hiring clerks changed from dealing with backlog problems to quality assurance, and how the increasing number of law clerks contributed to the institutionalization of Norwegian courts. The authors explain that clerks influence decision making and perform the tasks of the judges, thereby replacing judges to some degree. However, the authors conclude that law clerks have not become judges or make final decisions.

In their two papers, Nina Holvast and Peter Mascini address the influence of judicial assistants, a fundamental question. While the potential influence of judicial assistants has long been a cause for speculation, the authors investigate the question empirically. Their article *"Is the judge or the clerk making the decision? Measuring the influence of judicial assistants via an experimental survey among Dutch district court judges"* tests the influence of judicial assistants on the outcomes of court cases by means of an experimental survey including a fictitious but realistic court case. The results confirm the hypothesis that judicial assistants influence judges' decisions.

In their second article in this special issue, *"Explaining judicial assistants' influence on adjudication with principal-agent theory and contextual factors"* Peter Mascini and Nina Holvast build on the results presented in their first paper, creating an explanation for judicial assistants' influence based on principal-agent theory and contextual factors. They find that – of their principal-agent theory based hypotheses – judges' managerial role orientation, trust in judicial assistants and favourable risk-benefit perception of assistants' input increase assistants' influence. Contrary to the author's expectations, however they did not find judges' rule of law role orientation and relative experience of assistants to be correlated with assistants' influence. Likewise, none of the contextual factors – panel judgments (vs. single-judge judgments), complexity of court cases and time pressure – are correlated with assistants' influence.

There is an entire body of literature dedicated to the application of the rational judge theory, which is used to explain the trade-offs that judges make between different costs and benefits. Fatih Deyneli' and Peter Mascini's paper *"Utility maximizing judges and judicial assistants: Testing the rational judge theory in 22 EU countries"* incorporates judicial assistants in

the rational judge theory using Council of Europe European Commission for the efficiency of justice (CEPEJ) data.

While the previous papers focus on the judicial assistants in state courts, Ole Jensen's article *"Secretaries to Arbitral Tribunals: Judicial Assistants Rooted in Party Autonomy"* concentrates on the role of secretaries in arbitral tribunals. While parties to state court litigation may be able to designate a competent court (by way of a choice of court agreement) this freedom usually does not extend to the identity of the individuals who decide their cases. By contrast, it is one of the hallmarks of international arbitration that parties may determine the identity of their arbitrators. Jensen argues that the exercise of this right results in an *intuitu personae*-choice of arbitrators and that this choice defines the degree to which international arbitrators may resort to assistance.

This collection of articles sheds new light on the role and influence of judicial assistants. However, many questions remain open for investigation. We hope that this collection is the first step on a journey of fruitful research into the organization of courts and the role of judicial assistants within them.

Competing Interests

The authors have no competing interests to declare.

How to cite this article: Anne Sanders, and Nina Holvast, 'Empirical Studies on the Role and Influence of Judicial Assistants and Tribunal Secretaries' (2020) 11(3) International Journal for Court Administration 1. DOI: https://doi.org/10.36745/ijca.359

Published: 15 October 2020