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Judicial Assistants in Europe – A Comparative Analysis

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In almost all Council of Europe Member States, judges do not work alone but are supported in their adjudicative duties by a growing number of judicial assistants. At first glance, these judicial assistants are as different as the legal systems in which they are employed. On a second glance, however, common features can be identified to analyse and compare judicial assistant schemes across courts and legal systems.

First, the paper identifies three types of judicial assistants: potentially permanent “scribes” as in the Netherlands and Switzerland, “interns” fresh from legal education as in the UK, and “seconded judges” as in Germany, who spend a limited time at a higher court to gain experience for promotion.

Second, the paper looks at the organisation of judicial assistants. They can be assigned to a specific judge (cabinet system) or organised in a pool for the whole court (pool system) or for a division or chamber (panel system).

Third, the paper classifies the duties of judicial assistants in different systems on a scale according to the degree of involvement in the judicial process from mere research as in the UK to the complete drafting of decisions as in Switzerland and the Netherlands to (almost) independent work on small cases as in Slovenia.

Keywords: Law clerks; judicial assistants; CCJE; Council of Europe; Court Administration

1. Introduction

In many legal systems, judges are supported in their adjudicative work by legally trained judicial assistants. The role and influence of such assistants has been the subject of academic discussion in the US¹ for some time and is gaining more interest in Europe² as well. This paper takes a comparative approach and provides an insight into judicial assistant schemes in 37 Council of Europe Member States. The study is based on responses to a questionnaire sent out by the CCJE in preparation of Opinion No. 22 (2019) on judicial assistants.³ The questionnaire asked about the role, organisation, duties, education and career prospects of

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¹ Ward & Weiden (2006), and on US Federal district courts: Peppers, et al (2008); Ward (2017).

² The Netherlands: Holvast, (2016) and (2017); Germany: Massing (2016) pp. 180–187; Krahnepohl (2010) pp. 126–128, 246–249; UK: Nesterchuk (2013); Paterson (2013) p. 247–255; Ireland: Coonan (2006); Norway and the Nordic Countries: G. Grendstad et. al (2020); Switzerland: Bieri (2016); A. Lienhard & P. Bieri, (2017).

³ <https://rm.coe.int/opinion-22-ccje-en/168098eeeb> [accessed 6 May 2020].

judicial assistants in different member states as well as their interaction with judges. Albania, Andorra, Austria, Azerbaijan, Bosnia and Herzegovina, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Georgia, Germany, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Romania, Russia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom handed in responses.⁴ With the exception of Liechtenstein, all replied that their judges are supported by judicial assistants. Given the differences between all the legal systems involved, this is already a remarkable fact. In most Member States, judicial assistants support judges at all courts and instances.⁵ In some judicial assistants only work at the highest courts⁶ and/or the constitutional court,⁷ or at specialised courts.⁸ In some countries, the support of judges by judicial assistants is a rather recent phenomenon⁹ or has grown recently, for example in Norway,¹⁰ the UK, Ireland, Luxembourg or Malta.¹¹ In countries like Slovenia¹² and Croatia,¹³ but also Switzerland,¹⁴ and the UK¹⁵ judicial assistants schemes were introduced or extended in order to cope with backlogs.

This widespread and growing employment of judicial assistant schemes make comparative studies across European systems rewarding and necessary. The aim of the paper is not to identify the “best” solution, but to identify major differences and commonalities as a first step of a comparative analysis. Given the great differences in the traditions and legal cultures of all these judicial systems, the paper can only paint with a broad brush.¹⁶ More detailed research remains necessary. The paper concentrates on three aspects to distinguish between different judicial assistant schemes:

- Who are judicial assistants and why are they doing this job? (Part 2)
- How are judicial assistants organised and how do they interact with judges? (Part 3)

⁴ The responses and the questionnaire are available together with a summary by the CCJE expert Anne Sanders at: <https://www.coe.int/en/web/ccje/opinion-no.-22-on-the-role-of-court-clerks-and-legal-assistants-within-the-courts-and-their-relationships-with-judges> [accessed 6 May 2020].

⁵ CCJE responses: Andorra, Azerbaijan, Belgium: gréffier at all courts, different numbers of référendaires at different courts, see for details Belgian response; Bosnia and Herzegovina: different kinds of judicial assistant at different courts; Croatia different duties at different instances; Czech Republic, Finland but more support at higher courts, Georgia, Iceland, Latvia, Lithuania, Malta, Moldova, Monaco, the Netherlands, Poland, Romania, Russia, Slovenia, Spain (LGTs only at Supreme Court), Sweden, Switzerland, Ukraine.

⁶ CCJE responses: Austria, Cyprus, Denmark, Germany, Ireland: personal judicial assistant at superior courts, for lower courts only research office, Luxembourg, Norway, UK: Court of Appeal and Supreme Court, High Court just being introduced in certain areas.

⁷ CCJE response: Italy.

⁸ According to the Albanian response only at administrative courts. However, this seems unlikely because of the large number of seconded judges at top courts and their extensive regulation in Law 96/2016 on the Status of Judges and Prosecutors in the Republic of Albania.

⁹ UK: Nesterchuk (2013); Paterson (2013); Ireland: Coonan (2006); Norway and the Nordic Countries: Grendstad et. all (2020) pp.1 30–140, 155–171; Switzerland: Bieri (2016); Lienhard & Bieri, (2017); CCJE responses: Luxembourg, Malta: last four years, Moldova since 2012; Norway, UK.

¹⁰ Grendstad et. all (2020), p. 130–140.

¹¹ Slovenia employed more judicial assistants to fight backlogs. Romania. In Turkey, in May 2019, assistant judges will be introduced who may become judges after a certain amount of time and taking an exam. While the role of these assistant judges was not specified, they might perform judicial duties under more or less intense supervision of a judge, thereby working as a kind of judicial assistant.

¹² CCJE response Slovenia. Interviews in Slovenia.

¹³ CCJE response Croatia.

¹⁴ Bieri (2016).

¹⁵ Following the recommendations of Lord Wool 1995; 1996 to the Court of Appeal Holvast, (2016)10, 19 n. 97.

¹⁶ For comparative work on judicial assistants see also: Holvast, (2016) takes a comparative look at four judicial assistant schemes in the US, UK and the Netherlands; Grendstad et. all (2020), pp 155–171 for the Nordic countries.

- What are the duties of judicial assistants and how deeply are they involved in the judicial process? (Part 4)

As an annex, a comparative overview of the judicial assistant schemes of different member states on the basis of the analysis developed in the article is provided. The paper presents the duties of judicial assistants on a scale of increasing involvement from mere research to almost independent decision making. This high degree of involvement in the judicial process raises questions about how the impartiality of judicial assistants can be ensured and how their status and professional relationship with judges should be regulated.¹⁷ However, these important issues can only be touched upon in this paper which focusses on mapping differences between judicial systems as a first step of comparative analysis.

A few remarks about the data used for this analysis should be made: While the information gathered by the respective national representatives for the CCJE, who are selected by the member states,¹⁸ is usually very accurate, this is not necessarily the case. It is the responsibility of each representative to gather the information needed to fill out CCJE questionnaire. Some might have based their answers on personal experiences and a questioning of current judicial assistants. Others might have relied on information provided by research offices or court managers which might not always accurately reflect how things actually work in practice. Countries which only provided very limited or unclear information are not included in the appendix. Wherever possible, the information presented here is corroborated with other sources, especially with information gathered in the UK, Switzerland, Slovenia and Germany, where I conducted half-structured interviews with judges and judicial assistants at different courts, in the UK at the UK Supreme Court¹⁹ and Court of Appeal for England and Wales,²⁰ in Slovenia at the Slovenian Supreme Court,²¹ the Slovenian Constitutional Court²² and two Slovenian Courts of first instance,²³ in Germany at the German Federal Constitutional Court,²⁴ the Constitutional Court of Northrhine-Westphalia,²⁵ the German Federal Court of Justice,²⁶ and Switzerland at the Federal Supreme Court,²⁷ the Court of Appeal of the Swiss Canton of Bern,²⁸ Courts of first instance in the Canton of Bern for criminal, civil and administrative law.²⁹ This study allows insights into individual perspectives and experiences of judicial assistants and judges in their cooperation. Interviews conducted at the European Court of Justice,³⁰ European Court of Human Rights,³¹ and the International Criminal Court³² will only be referred to in order to illustrate certain aspects. A detailed discussion of the judicial assistants at international courts must be left to another time.

¹⁷ See for that CCJE No. 22 (2019) para 35–58.

¹⁸ The selection depends on the rules regulating the administration of the judiciary each member state. In some country, the selection is made by the national Judicial Council, in others by the government.

¹⁹ 1 Judge, 6 judicial assistants and 2 former judicial assistants.

²⁰ 5 judges, 2 judicial assistants and 1 former judicial assistant.

²¹ 3 Judges and 3 judicial assistants, the Secretary general and Organisational secretary.

²² 2 judges and 4 judicial assistants.

²³ 2 judges, 2 judicial assistants.

²⁴ 1 former judge, 1 former judicial assistant in formal interviews, also my own working experience there and that of my friends and colleagues.

²⁵ President and 3 judicial assistants.

²⁶ 7 judges and 3 judicial assistants.

²⁷ 4 judges, among them the president of the court, 11 judicial assistants.

²⁸ 4 judges, 7 judicial assistants.

²⁹ 4 judges, 4 judicial assistants.

³⁰ One judge who was a judicial assistant and 3 members of the administration who are also former judicial assistants. See about référendaire there: Kenney (2000), Zhang (2016).

³¹ So far 1 former judge and 1 former judicial assistant.

³² 17 Judicial assistants.

2. Scribe, intern and seconded judge: Different judicial assistants in different legal systems

Just like CCJE Opinion No. 22,³³ this paper understands judicial assistants as being persons with a legal education who support judges in their adjudicative work. Court staff who take on purely administrative duties or decide minor cases, for example in matters of registration in their own right, such as the German *Rechtspfleger*, are outside the scope of the Opinion and this article. Judicial assistants can be found in common law systems like England and Wales and Ireland as well as in civil law systems belonging to Romantic, Germanic and Nordic legal traditions. Judicial assistants can be found in the so-called new democracies of middle, Eastern and South-Eastern Europe just as in the so-called established democracies of Western Europe.

It is no surprise that judicial assistant schemes are as different as the legal systems in which there are employed. Moreover, within one legal system, different approaches may be used by different courts.³⁴ Nevertheless, it is possible to distinguish cautiously between different models of judicial assistants, which are named here “interns”, “seconded judges”, and “scribes”. These models build on different traditions and also serve different purposes, even though there are significant overlaps, especially between the categories of “intern” and “scribe”. A list of member states indicating the model used there is provided in appendix 1.

2.1. Internship model

In the “internship model”, young graduates serve as judicial assistants for a short time, usually up to five years, to gain insights “from behind the bench”.³⁵ Thus, such work has an educational purpose, even though it may also speed up the court’s work. Such internship positions serve as a springboard to another job rather than a career on its own.³⁶

The most famous example of such an internship scheme was developed in the late 19th century at the US Supreme Court.³⁷ To this day, ambitious young graduates of elite law schools serve there as law clerks for a year. Today, law school graduates may clerk at different state and federal courts³⁸ and are rewarded with improved career opportunities.³⁹

The Canadian courts use a similar approach.⁴⁰ The US clerkship served also as a model in Ireland,⁴¹ South Africa⁴² and the UK, where judicial assistants schemes were introduced at the Court of Appeal for England and Wales, the House of Lords⁴³ and Supreme Court and quite recently, at the High Court.⁴⁴ While working as a judicial assistant at these courts is not regarded as prestigious as in the US, it was described by judges and judicial assistants in interviews as increasingly popular, because it offers the opportunity to witness great advocates in action. In other countries where judicial assistant schemes have been introduced, for example Norway, the US Supreme Court functioned as a model as well.⁴⁵

³³ CCJE Opinion No. 22 (2019) para 4.

³⁴ Holvast, (2016) p. 10, 17–21; CCJE Responses: Belgium, Germany, Slovenia, UK.

³⁵ CCJE responses: Ireland, UK.

³⁶ Kenney (2000) p. 593, 606.

³⁷ Peppers (2006), Wars & Weiden (2006) pp. 21–53; Johnson et al (2014).

³⁸ Peppers, et al (2008).

³⁹ Ward (2017) pp. 100, 114–117.

⁴⁰ Coonan (2006) p. 179–180.

⁴¹ Coonan (2006).

⁴² See for the clerkship programme, which hires foreign and local lawyers as judicial assistants: <https://www.con-court.org.za/index.php/law-researchers/about-law-clerks> [accessed August 8 2020].

⁴³ Paterson (2013) p. 247–255.

⁴⁴ CCJE response UK.

⁴⁵ Grendstad et. al (2020) 9.

However, the US inspired law clerk is not the only origin of today's judicial assistant schemes. In Austria, Germany, Finland, Slovenia,⁴⁶ and Switzerland, working at courts for a short time can be a part of legal education and qualifying for practice, especially before becoming a judge.⁴⁷ While serving as a judicial assistant is no prerequisite to becoming a judge in most countries,⁴⁸ it is often seen as the normal way to gain experience before becoming a judge.⁴⁹

2.2. Scribes

The second model suggested here is called the “scribe”. While “interns” only serve for a limited time, approximately five years at most, a scribe position offers a lifelong career on its own with possibilities for advancement,⁵⁰ with potentially substantial duties in the judicial process.

On old pictures of court scenes, such as the 14th century fresco of the Good and Bad Judge in the Portuguese village auf Monsaraz,⁵¹ a scribe can be seen next to the judge. In many judicial systems, particularly those with a Romanic legal tradition, there seems to be a tradition of court scribes to this day, who write the official protocol of court hearings, keep the register, make certain procedural decisions and might even write court decisions like a secretary or notary. The Belgian *gréffier*, *greffe* or “*Letrado de la Administracion de Justicia*” (LAI) in Spain perform duties as “court notaries”, while support in the adjudicative work like research and drafting assistance is provided by other judicial assistants, as for example the *référéndaire* in Belgium and special assistants at the court of cassation in Spain (*Letrados del Gabinete Técnico del Tribunal Supremo*, LGTTs).⁵² However, the Swiss *Gerichtsschreiber* or *gréffier*⁵³ and the Dutch *griffiers*,⁵⁴ write not only official protocols of the hearing, but also undertake more substantial duties, like writing memos for judges and drafting judgments.⁵⁵ In the Swiss system, the *Gerichtsschreiber* even has an advisory vote and has the opportunity in some cantons, e.g. Zürich, to give a dissenting opinion.

However, even where working as a judicial assistant for life is possible, it is not necessarily the goal of young assistants. Young judicial assistants from Switzerland and Slovenia explained in interviews that they did not see their work as a desirable career.⁵⁶ A young Slovenian judicial assistant expressed a common feeling:

“I think there comes a day when you just want to get some extra responsibility and want to be in charge. Because here we are just helping judges do their work. For me, actually, personally, this will be a problem someday.”

⁴⁶ The mandatory practice period before the bar exam can include work at court.

⁴⁷ CCJE responses.

⁴⁸ CCJE responses: Andorra, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria: law graduates must serve as interns for six month, but the position is different from serving as a judicial assistant; Cyprus, Czech Republic, Denmark, France, Georgia, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Russia, Slovenia, Spain, Sweden, UK.

⁴⁹ CCJE responses: Bulgaria, Monaco (69% of new judges have been judicial assistants before); Finland: court notary, Latvia, Lithuania, Romania, Slovenia, Switzerland.

⁵⁰ CCJE responses: Andorra, Azerbaijan, Belgium: *gréffier*, *référéndaire* often stay for a couple of years as well, Bosnia and Herzegovina, Bulgaria, Cyprus, Georgia, Switzerland; Denmark at highest courts, Latvia, Lithuania, Moldova, Monaco, The Netherlands; Norway CA, Romania, Spain: LAJ.

⁵¹ <http://www.cm-reguengos-monsaraz.pt/pt/visitar/Paginas/museu-do-fresco.aspx> (accessed May 4th 2020).

⁵² CCJE responses Belgium and Spain.

⁵³ See for the development Uebersax (2018) 322–323.

⁵⁴ See for the history Holvast (2016) p. 10, 15–16.

⁵⁵ *Holvast* (2017); *Holvast* (2016) p. 10, 16; Uebersax (2018) 322, para 13; CCJE response.

⁵⁶ See also *Holvast* (2017) p. 171 who found the same for judicial assistants in the Netherlands.

Almost all judicial assistants I interviewed in Slovenia and Switzerland wanted to become judges and saw their work as a useful stepping stone. The judges among my interview partners agreed. A Swiss judge explained:

“I would not have liked to miss my years as a *Gerichtsschreiber*, because they gave me the opportunity to learn a lot and gain experiences without bearing the full responsibility for a case.”

However, if there are not enough open positions in the judiciary at the right time, the assistant has family responsibilities or lacks the right political connections as is necessary in Switzerland,⁵⁷ judicial assistants might stay in their position longer than originally planned.

This sentiment was described by a *Gerichtsschreiber*:

“I do not belong to a political party... Not yet. (...) A job as a *Gerichtsschreiber* is a chance for people who want to work at a court but who cannot be elected as judges.”

Some judicial assistants at highest courts, for example the Swiss Federal Supreme Court, also come to love their well-paid, influential work at Switzerland’s highest court, which can be combined with teaching and research. In Switzerland, there are *Gerichtsschreiber* who stay for a couple of years and move on and those who stay for life.

Thus, it should be noted that there can and often is overlap between intern and scribe models. In appendix 1, this is indicated this way: intern->scribe. Slovenia offers a good example how an internship model may turn into a de facto scribe model. In Slovenia, serving as a judicial assistant was first meant as a short-term position to bridge the time between the end of legal education and appropriate age to become a judge. However, to cope with backlogs, a large number of judicial assistants and judges were hired after 2005. Afterwards, new judges were not needed and many judicial assistants got stuck in their position as judicial assistants, never having a chance to work as judges despite their qualifications. In reaction to the lack of open judgeships, judicial assistants demanded increased pay and opportunities for promotion. A judicial assistant in Slovenia expressed it this way:

“So, at the end you see these advisors with long years of working experience, they are doing the same job [as judges] without the right status.”

2.3. Seconded judges

Judicial assistants can also be young judges who are seconded to higher courts to gain experiences and qualify for promotion as in Germany, Albania, Bosnia and Herzegovina, Slovenia (rarely) and Spain.⁵⁸ Interns and seconded judges have in common that they serve only for a short time as judicial assistants. For them, working for a judge at a high court may provide valuable experiences and thus serve an educational purpose, but also offer prestige and opportunities to network with colleagues and judges.⁵⁹ The difference is, however, that seconded judges have more experience in the judiciary and a different status. They do not only learn at higher courts, but also bring valuable experiences from lower courts. An interview partner, judge at the Slovenian Supreme Court explained this point:

⁵⁷ In Switzerland, judges are elected by parliament. Judges need the support of a political party and are expected to donate part of their salary to that party. GrecoEval4Rep(2016)5 p. 25–32.

⁵⁸ CCJE responses.

⁵⁹ For the German FCC: Krahnepohl (2010) 89.

“Enforcement for example, a lot of [supreme court] judges have never worked in enforcement. There are some specific problems and it is very good if we have a judge from the local court, (...) who knows some of the problems.”

While the internship-model was developed at the US Supreme Court and is popular in common law countries, seconding judges as judicial assistants to higher courts presupposes a career judiciary,⁶⁰ where judges start young, learn from older colleagues by assisting them and have opportunities for promotion. In professional systems like the UK, Ireland and Norway, where judges are appointed after a successful career, judges assisting other judges are difficult to imagine.

3. The organisation of judicial assistants

Not only do the models of judicial assistants differ, so does the way their work with judges is organised. Three different models can be distinguished. However, in different courts,⁶¹ or even within one court, different models⁶² can be used.

3.1. Cabinet, pool and panel system

First of all, it is possible to assign one or more judicial assistants to a judge individually. Two judges may also share one assistant. The most important point about this approach is, however, that a judge always works with the same assistant(s), whom he or she often selects⁶³ personally. This approach is used for instance at the German Federal Constitutional Court,⁶⁴ the Austrian Constitutional Court,⁶⁵ at the CJEU,⁶⁶ and in the UK.⁶⁷ Given that the same term is used at the CJEU⁶⁸ and by the CCJE, this system is called “cabinet system”.⁶⁹

The opposite of the cabinet system is the “pool system.”⁷⁰ Here, judicial assistants form a pool for the court or part of the court and work with different judges. A mixture of the pool and cabinet system is the “panel system”⁷¹ where judicial assistants are assigned to one panel or senate of judges. There are also mixtures between cabinet and pool system within one court for different cases, as at the Supreme Court of Slovenia. A list of member states indicating the model used there is provided in appendix 1.

Looking at the countries employing the different systems, it is submitted that systems which follow an intern or seconded judge model are more likely to follow a cabinet or panel system than a pool system. Examples are the UK and Germany which follow a cabinet and panel approach with an internship or seconded judge model. This way, judicial assistants who serve

⁶⁰ For the differences between different judicial systems.

⁶¹ CCJE responses: Austria, Bulgaria, Germany.

⁶² Interviews: Federal Swiss Supreme Court, ICC.

⁶³ This is the case at the German FCC and the CJEU: Kenney (2000) p. 593, 605; Zhang (2016) 17.

⁶⁴ CCJE response; Krahnepohl (2010) 87.

⁶⁵ CCJE response.

⁶⁶ Kenney (2000) p. 593, 605.

⁶⁷ CCJE response, Holvast (2016) p. 10. 19–20, interviews.

⁶⁸ Kenney (2000) p. 593, 605–612.

⁶⁹ CCJE responses: Austria for education and at Constitutional Court, Azerbaijan, Belgium gréffier; Bosnia and Herzegovina Constitutional Court; Croatia; Cyprus, Georgia, Germany Constitutional Court, Ireland Superior Court, Latvia plus several for whole court; Lithuania except Supreme Court, Malta, Moldova, Poland; Russia, UK, Ukraine.

⁷⁰ CCJE responses: Andorra first instance; Belgium usually référendaire; the Netherlands; Switzerland; Czech Republic, Finland, Iceland, Romania, Slovenia but partly cabinet at SC; Spain traditionally panel but now more and more service units for whole court; Sweden, usually Switzerland, mixed system at Federal Supreme Court.

⁷¹ CCJE responses: Andorra second instance; Austria, Supreme Administrative Court; Bosnia and Herzegovina, Bulgaria; Denmark, Finland, Germany Federal Courts, Ireland first instance Research Office, Latvia plus one per judge individually; Lithuania Supreme Court, Luxembourg, Monaco, Norway.

for a shorter time for educational purposes can be assigned to one specific instructor or – in a panel system – a group of them. Countries following a scribe model, like Switzerland⁷² and the Netherlands, but also Belgium seem to be more likely to follow a pool system. Moreover, it is noticeable that not all Middle and Eastern European countries follow one approach, even though with Russia, Ukraine, and Poland, large legal systems follow a cabinet system.

3.2. Advantages and Disadvantages of the Cabinet System

Interviews with judges and judicial assistants of courts in the UK and at the German FCC indicate that in a cabinet system, judges may be more likely to build a high degree of trust with their personal judicial assistants and may turn into mentors. Holvast has shown that a higher degree of trust might increase the influence of judicial assistants.⁷³ In both the UK and at the German FCC, judges follow the careers of their former judicial assistants and organise regular meetings with their former judicial assistants just like judges (justices) of the US Supreme Court do.⁷⁴ However, interviews in Slovenia and Switzerland, where a pool system is used, showed that much depends on the individual style and temperament of judges. While some judges enjoy serving as mentors, others are more reserved. Judges who enjoyed mentoring their assistants had often been judicial assistants before.

It is also possible that a cabinet system might lead to a higher degree of dependence between judicial assistants and judges. In cabinet systems, the employment of judicial assistants is often restricted to a specific time – one year at the US Supreme Court or in the UK – or depends on the term of the judge, like at the German FCC or the CJEU.⁷⁵ This may not be a problem for a highly paid *référénaire* at the CJEU⁷⁶ or the seconded judges at the FCC who go back to their courts. In the Ukraine, however, after a change in the law in 2015, judicial assistants lost their status as civil servants and are now so called “political advisors” whose position depend on the respective judge.⁷⁷ Judicial assistants reported in personal conversations that this had limited their rights, for example in case of pregnancy. An extensive discussion of the status of judicial assistants would go beyond the scope of this paper. However, it should be noted that the CCJE⁷⁸ warned that inadequate remuneration and working conditions may increase the risks of corruption for judicial assistants and thus negatively affect a judicial system.

3.3. Views of Judges and Judicial assistants

Asked in interviews about their preferences, judges who worked in pool systems, pointed out that a pool system allowed them to work with judicial assistants with different qualities and specialisations, but that they were not always compatible with different assistants. Judges who worked in cabinet systems, for example at the German FCC and the CJEU, pointed out how important the trusting working relationship with their assistants was for them. This may indeed be important at courts where cases of high political importance are decided. Judicial assistants at the ICC, where different approaches are used and judicial assistants are highly qualified experts of international criminal law who are deeply involved both in the procedures as well as the drafting of decisions, said they preferred a pool approach because it made team-work easier. In the UK, a cabinet system is used, but all assistants share open space office. This facilitated interaction between them, they explained. One, who had worked

⁷² Mixed system at Federal Supreme Court with cabinet and pool models.

⁷³ Holvast (2017) 163–164; Holvast and Mascini (2019).

⁷⁴ See the memories of law clerks in Peppers & Cushman (eds) (2015) 253–341; Ward (2017) 114–117.

⁷⁵ Kenney (2000) p. 593, 605; Zhang (2016) 17.

⁷⁶ Zhang (2016) 20.

⁷⁷ CCJE response Ukraine.

⁷⁸ CCJE Opinion No. 22 (2019) para 54.

at the CJEU, noted that the large cabinets at the CJEU with their distinct teams had reminded her of “little kingdoms”. An interview partner at the CJEU explained that the cabinet system was meant to encourage intensive work between judges and assistants rather than work in a separate pool of long-term judicial assistants as at the ECtHR. It seems indeed plausible that a cabinet system might encourage teambuilding within a cabinet, i.e. between a judge and his or her judicial assistants, while a pool system might lead to more teambuilding among judicial assistants.

4. The Involvement of judicial assistants in the decisions making process

In this section, the duties of judicial assistants shall be analysed according to the degree to which judicial assistants are involved in the decision-making process. This is done by distinguishing and arranging different duties of judicial assistants on a spectrum where judicial assistants are not involved at all on one side, undertake research (4.1), move on to preparing memos, suggest decisions, including whether a case should be accepted for appeal or constitutional review (4.2), and then draft complete decisions (4.3). While all these duties are carried out in the “judicial back-office”, some judicial assistants have a unique procedural role in deliberations (4.4) and hearings (4.5). In some Member States, judicial assistants take on an even greater role by holding hearings and deciding certain small cases themselves with the approval of the judge (4.6).

4.1. Research and Discussion

By conducting research, judicial assistants may contribute but are usually not deeply involved in the judicial process as a whole. In most Member States, judicial assistants are asked to undertake research, often summarized in a memo.⁷⁹ They may also have discussions with judge(s)⁸⁰ thereby serving as a “sounding board” for their ideas.⁸¹ In the UK and Ireland, common law countries, legal research is mainly the responsibility of the parties and counsel (advocate), therefore little research is done by judicial assistants.

4.2. Summarising and Suggesting in a Memo

Judicial assistants may also provide memos with a summary of the facts of a case and the relevant law.⁸² If these memos conclude with suggestions how to solve cases, judicial assistants become more involved in the decision making process.⁸³ In the majority of Member States,

⁷⁹ CCJE responses: Austria, Azerbaijan, Belgium yes for référendaire, no for gréffier; Bulgaria, Cyprus, Croatia mostly for domestic and foreign case law; Czech Republic; Denmark, Finland: referendary and a draftperson, sometimes court notary (young lawyer at first instance court in education), France, Georgia, Germany, Iceland, Ireland, Latvia, Luxembourg, Malta (court attorney), Moldova, Netherlands: often first to read the case, summarise facts in a memo, put tags on important pages, chase missing documents, Poland, Russia, Romania, Slovenia, Spain, Sweden, UK.

⁸⁰ CCJE responses: Andorra, Austria, Belgium yes référendaire no gréffier, Bulgaria: as far as needed to deal with the assigned task; Croatia: if judge is a mentor, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Iceland, Ireland, Lithuania: officially no, informally possible, Latvia, Luxembourg, Malta (court attorney), Netherlands, Slovenia, Sweden, UK Paterson (2013) p. 251.

⁸¹ *Hall v. Small Business Administration* 695 F2d175 (5th Cr. 1983).

⁸² CCJE responses: Austria; Belgium yes for référendaire, for gréffier only if hearing/procedure is concerned; Bulgaria, Croatia, Cyprus; Czech Republic; Denmark, Finland, France, Georgia, Iceland, Ireland, Latvia, Lithuania, Malta, Moldova, Poland, Russia, Romania, Slovenia, UK.

CCJE responses: Austria, Belgium yes référendaire, no gréffier, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Iceland, Ireland, Lithuania: officially no, informally possible, Latvia, Luxembourg, Malta (court attorney), Netherlands, Slovenia, Sweden, UK.

⁸³ CCJE responses: Austria, Azerbaijan, Belgium yes référendaire, gréffier only rarely, in simple cases; Croatia, Czech Republic, Denmark, Finland: typical duty of a référendary; France; yes, less for assistants de justice au sense strict who are usually undergraduates working on an hourly basis at courts and therefore only work on the facts of

this duty can be performed by judicial assistants. In the UK and Ireland, judicial assistants are not always allowed to do this.⁸⁴

In Courts of Appeal, Supreme and Constitutional Courts without an automatic right to review, cases must be selected. Judicial assistants often help by summarizing the facts and relevant law of an application in a memo, ending with a suggestion on whether the case should be accepted for review.⁸⁵ Especially where a large number of applications for review is made to a top court with only few judges, judicial assistants can provide important support. In the cert-pool of the US Supreme Court, law clerks undertake such duties,⁸⁶ just as at the German FCC,⁸⁷ the UK Supreme Court⁸⁸ and the Norwegian Supreme Court.⁸⁹

4.3. Involvement in the Drafting of Decisions

In most countries judicial assistants are active in the drafting of decisions. A thorough analysis of the interaction of judges and judicial assistants in the drafting of decisions would go beyond this paper. Here, a few remarks must suffice.

Judicial assistants may just help with the proofreading of decisions,⁹⁰ which may include making suggestions to improve the draft. Crosschecking references is another duty judicial assistants may undertake.⁹¹ In some countries, drafting press releases⁹² is also a duty of judicial assistants. According to the responses of the Member States, drafting may be restricted to the facts, or to easy cases with well established case law.⁹³ However, in most countries, judicial assistants help to draft complete judgments.⁹⁴ In Switzerland and the Netherlands, judicial assistants are regularly asked to draft all judgments.⁹⁵ At the German FCC, judicial assistants have the greatest influence in the preparation and drafting of small chamber decisions, decided by three judges, while judges deliberate, draft and discuss the most important cases in the senates with eight judges.⁹⁶

Interviews in the UK showed that the drafting of judicial decisions by judicial assistants is seen as objectionable. In Ireland and the UK, a judicial assistant might only be asked to read

the case or simple matters; Georgia; Germany, Iceland, Latvia, Lithuania, Netherlands, Norway, Poland, Slovenia, Spain: judicial assistants at Supreme Court (LGTTs), Sweden, Russia, UK: if the judge requests it. Magistrates (lay judges) are supported by an advisor with legal training.

⁸⁴ CCJE responses.

⁸⁵ CCJE responses: Andorra, Austria, Croatia, Czech Republic, Denmark, Finland; Georgia; Germany, Iceland, Lithuania, Norway, Poland, Romania, Slovenia, Spain: LGTTs at the Supreme Court, UK: sometimes at the SC.

⁸⁶ Ward & Weiden (2006) 109–149.

⁸⁷ Krahnepohl (2010) 88–91.

⁸⁸ Interview, Nesterchuck (2013) 99, 104.

⁸⁹ Grenstadt et.al (2020) 24–27.

⁹⁰ CCJE responses: Andorra; Austria: sometimes, Belgium; Cyprus, Czech Republic: not usually, Finland; Georgia; Germany, Iceland, Ireland, Latvia; Lithuania usually no, it depends on the individual judge's discretion. Luxembourg, Netherlands, Norway: SC; Poland, UK.

⁹¹ CCJE responses: Austria, Belgium référendaire yes, gréffier no Croatia at Supreme Court, Cyprus, Czech Republic: not usually, Finland; Georgia; Germany, Iceland (SC, CA) Ireland, Latvia, Lithuania, Netherlands, Norway; Poland, Russia, UK.

⁹² CCJE responses: Belgium référendaire yes, gréffier no, Croatia: Yes if assistants are attached to the spokesperson of the court; Georgia; Lithuania, Netherlands: judicial assistants write summary of the case which is added when the judgement is published on the website, Norway; UK SC, Slovenia, in Switzerland, in the canton of Bern, judicial assistants at first instance courts are responsible for the court's public relations.

⁹³ CCJE responses: Bulgaria: usually; Georgia.

⁹⁴ CCJE responses: Austria, Azerbaijan, Belgium yes référendaire/gréffier only rarely in simple cases; Bulgaria, Croatia; Czech Republic Denmark, Finland; France: yes, in simple cases; Georgia; Germany, rarely at the FCC or another federal court, if so only for routine cases; Latvia, depends on individual judge's discretion; Malta; Moldova, Netherlands, Poland, Russia, Slovenia, Sweden (normally in the Admin Courts), Switzerland; Ukraine.

⁹⁵ CCJE responses: Switzerland, in some courts in the Netherlands.

⁹⁶ Krahnepohl (2010) 126–128.

a draft, suggest another wording or make suggestions on how to strengthen an argument.⁹⁷ The reason for this limited involvement might be due to tradition but also a professional ethic which sees drafting – rather than managing drafting assistants – as a central part of a judge’s work which must not be outsourced. While it is tempting to assume a common law/civil law divide in this respect, law clerks in the US regularly draft opinions.⁹⁸

4.4. Presence in Deliberations

If judicial assistants are active in deliberations and hearings, they may not only observe but even take part in the decision-making process. If judicial assistants are allowed to speak, they can offer new perspectives to the discussion. At the German Federal Court of Justice, where judicial assistants are allowed to be present, one judge explained: “In our discussion, only the quality of the argument matters, not whether it comes from a judge or assistant.” Moreover, if judicial assistants draft complete judgments, it is easier for them to fully reflect the judges’ discussion in their work. If judicial assistants are present, it is interesting to inquire if formal or informal rules prescribe their role in the deliberation room. At many top courts judicial assistants are not present in deliberations, such as the German FCC, the German Constitutional Court for the State of Northrhine-Westfalia, the UK Supreme Court and the CJEU. At the CJEU, my interview partner explained that *référéndaires* were not present in deliberations. In their deliberations, the judges worked intensively for hours on their drafts without their assistants. This intensive joint work of the judges is also the practice at the FCC, where there are two deliberations for each case decided by the full bench of eight judges: one deliberation for the decision and one to discuss the draft judgment without their assistants present.⁹⁹ The exclusion of assistants at the FCC is usually justified with the need to keep the judges’ discussion confidential. Otherwise, judges might feel less free to share their thoughts openly, they explain in personal conversations. However, an indirect effect of this custom might be that it forces judges to know their cases well because they cannot rely on an assistant for additional information.¹⁰⁰ In an interview, a former FCC judge explained her and a colleague’s surprise as a third colleague suggested to bring an assistant to a discussion of the three judges. The two judges suggested politely that the colleague should go back and prepare. Moreover, if assistants are not present in the deliberations, judges must either draft decisions themselves or supervise the drafting process closely in order to make sure that the decision reflects the deliberations. Leaving judicial assistants outside the deliberation room could therefore function as an (informal) safeguard¹⁰¹ to prevent judges from passing important duties to their assistants. This perspective is supported by the reflections of a Slovenian judge who saw the risk that if judicial assistants participated actively in deliberations, their work rather than that of the judge rapporteur became the focus of discussion: “If the assistant is not present, responsibilities are clear.”

According to the responses to the CCJE, this reluctance to include judicial assistants in deliberations is not limited to the highest courts. Judicial assistants are not present in deliberations in most Member States,¹⁰² even if they draft complete judgments. Responses from Russia and Ukraine both explained that the adoption of the judgment was a task which law

⁹⁷ CCJE responses: Ireland; some judges in the UK according to my interviews.

⁹⁸ Ward (2017) 111–113. Choi & Gulati, (2005).

⁹⁹ Krahnepohl (2010) 89, 94–103.

¹⁰⁰ Krahnepohl (2010) 89–91.

¹⁰¹ Holvast (2016) 10, 24.

¹⁰² CCJE responses: Andorra, Azerbaijan: judicial assistants may only participate in informal discussions before hearings, Bulgaria, Cyprus, Czech Republic; France, Georgia, Germany FCC, constitutional courts in the federal States, Iceland, Ireland, Latvia, Lithuania: Luxembourg; Malta, Monaco, Moldova, Norway (sometimes, to answer questions), Poland, Russia, Spain, UK Supreme Court; Ukraine.

reserved for judges alone.¹⁰³ In some Member States where judicial assistants are usually not present in deliberations, judges may invite them.¹⁰⁴ In other countries, according to the responses to the questionnaire, judicial assistants are present but do not participate¹⁰⁵ or only when asked.¹⁰⁶

In still other systems, they participate in the discussion¹⁰⁷ and may even present their work as for example in Slovenia or Bosnia and Herzegovina. This is also the case in some senates of Federal Courts in Germany,¹⁰⁸ where according to interviews the chairpersons of the senates have developed their own rules if and how to include judicial assistants in the deliberation.

On the other end of the spectrum, there are Member States such as Romania and Switzerland, where judicial assistants have a distinct procedural role in the deliberations. In Romania, judicial assistants are present in deliberations of the High Court of Cassation, have an advisory vote and sign the record.¹⁰⁹ In Switzerland, judicial assistants participate at all levels with an advisory vote and sign the judgment together with the judge.¹¹⁰ In certain Swiss cantons¹¹¹ and in Finland,¹¹² judicial assistants might even record their dissenting vote.

However, even if judicial assistants participate in deliberations, this does not mean that there are no differences between them and the judges. Even the advisory vote of a Swiss *Gerichtsschreiber* is not a decisive vote. One *Gerichtsschreiber* at the Federal Supreme Court expressed it like this:

“You must live with the fact that you may have influence but not the last word. That’s not easy for all.”

Moreover, informal rules seem to exist in many higher courts, for example in Slovenia and Switzerland, which prescribe the order and extent of speaking. Most judicial assistants in both countries explained that judges spoke first and that they only contributed when an important point had been overlooked.

It is not surprising that the relationship between judicial assistants and judges remains hierarchical even if they are present in deliberations at higher courts. After all, judges have been appointed through a different procedure and are subject to special rules protecting their independence. Such rules might function as affirmations of the positions of the judges and prevent ambiguities about the respective roles. If a judge’s formal position is backed up by competence and experience, my interviews indicate that there seems to be no problems with his or her authority. Judicial assistants are aware that the judges, not they decide cases. Moreover, judicial assistants are usually much younger and less experienced. Judicial assistants both at the German FCJ, Slovenian Supreme Court and at the Court of Appeal for England and Wales expressed admiration for the judges they work for. However, if a judicial assistant is more experienced than the judge, the formal hierarchy may become more problematic,¹¹³ as for example at the Swiss Federal Supreme Court, where judicial assistants often work for decades. Such *Gerichtsschreiber* may even be called “Schattenbundesrichter”;

¹⁰³ CCJE responses: see also Azerbaijan.

¹⁰⁴ CCJE responses: Lithuania, Malta.

¹⁰⁵ CCJE responses: Belgium, Denmark,

¹⁰⁶ CCJE responses: Austria, UK court of appeal.

¹⁰⁷ CCJE responses: Croatia; Finland; Sweden; Netherlands, Slovenia at all levels.

¹⁰⁸ Not to be confused with the Federal Constitutional Court, where assistants are not present.

¹⁰⁹ CCJE response.

¹¹⁰ Bieri (2016) 31.

¹¹¹ According to interviews in Zurich.

¹¹² CCJE response.

¹¹³ See Holvast (2017) p. 168–171 who mentions that experienced JA’s could take over the decision-partner role of new judges when discussing cases.

“Shadowjudges”. However, an open-minded judge may also be grateful to learn from such an experienced *Gerichtsschreiber*.

At first instance, the distance between judges and judicial assistants at lower courts seemed smaller than at the top courts. A judge who sits alone on a case may welcome the opportunity for exchange with a judicial assistant. In Slovenia and Switzerland, the word “teamwork”¹¹⁴ or “cooperation” was used often to describe the working relationship between judge and assistant. In the Netherlands,¹¹⁵ but also in Switzerland and Slovenia, some judges spoke of “our” judgment. The age difference was smaller here and many judges had been judicial assistants before becoming judges.

4.5. Presence in Hearings

In the public hearing, the judge is in the centre of attention. Therefore, it is interesting to investigate if judicial assistants take on a role in the court room and thus become visible to the public. In some Member States, judicial assistants are not present¹¹⁶ or only present if judges invite them. In most Member States, judicial assistants may be present in hearings only as silent observers in the audience.¹¹⁷

In some Member States with a “scribe model”, however, judicial assistants must be present to write the official record of the hearing.¹¹⁸ While such judicial assistants have a distinct role in the court room, they do not usually ask questions. In the Netherlands, however, judicial assistants are present during hearings, wear an official gown, take notes and check with an eye on the memo of the case which they have prepared if all the (important) questions have been asked. Most judges in the Netherlands inquire with the judicial assistant if they have any (additional) questions, and it becomes more and more common for judicial assistants to ask questions themselves, especially when there is only one judge presiding over the case.¹¹⁹

In Switzerland, the *Gerichtsschreiber* is present in the hearing and has a role in writing the official record of the hearing.¹²⁰ The *Gerichtsschreiber* also has an advisory vote,¹²¹ wears an official dress in court and is often introduced by the judge to the parties at the beginning of the hearings. In the public deliberations at the Federal Swiss Supreme Court, the *Gerichtsschreiber* has a right to speak, Article 24 Bundesgerichtsgesetz.¹²²

4.6. Independent Work on Cases

In a small number of Member States, judicial assistants take on a more independent role. In Malta and Slovenia, special judicial assistants collect evidence for judges including questioning witnesses, though not the accused.¹²³ In other countries, judicial assistants may decide procedural issues such as appointing an expert or deciding on costs of proceedings.¹²⁴ More research on these systems would be very interesting.

In some Member States, judicial assistants conduct hearings and work on small criminal and civil cases and enforcement more or less independently. Such opportunities are open in

¹¹⁴ See also Lienhard & Bieri (2017)3.

¹¹⁵ Holvast (2017) p. 166.

¹¹⁶ CCJE responses: Czech Republic, Denmark, Latvia, Lithuania, Luxembourg, Moldova, Poland.

¹¹⁷ CCJE responses: Austria, Azerbaijan; Belgium: référendaire, Bosnia and Herzegovina, Bulgaria, France, Georgia, Germany, Iceland, Ireland, Malta, Norway, UK, Ukraine.

¹¹⁸ CCJE responses: Andorra; Belgium: gréffier, if he is not present, it is a violation of procedure; Monaco, Romania, Spain: yes, if hearing is not recorded electronically; Switzerland.

¹¹⁹ See the Dutch questionnaire and Holvast (2017).

¹²⁰ See for a discussion of the history and the role at the Federal Supreme Court: Uebersax (2018) 317–344.

¹²¹ Art. 24 (1) Bundesgerichtsgesetz for the Federal Supreme Court, there are separate rules in the cantons.

¹²² Before regulated in Art 22, BBl. 2001, 4484, see for the development Ueberax (2018)321–324.

¹²³ CCJE responses, interviews in Slovenia.

¹²⁴ CCJE responses: Andorra; Croatia, Czech Republic, Finland, Slovenia, Spain.

Bosnia and Herzegovina¹²⁵ Croatia,¹²⁶ the Czech Republic,¹²⁷ Finland,¹²⁸ Iceland,¹²⁹ Slovenia¹³⁰ and Sweden.¹³¹ In Croatia, Bosnia and Herzegovina and Slovenia, the judicial assistant's decisions require the approval of a judge.¹³² Judicial assistants decide these cases alone or under the supervision of a judge, they run the hearing and ask questions.¹³³ In Slovenia, the judicial assistant does not wear a gown and has a judge sitting next to him or her. In my interviews in Slovenia, I have asked judges and judicial assistants about this practice. Judicial assistants found it a great learning experience and judges said it really helped them save time because they had not to prepare for the hearing in the same way.

In these cases, the judicial assistants move from someone who prepares decisions for the judge to making decision on his or her own.

4.7. A scale of involvement

The duties of judicial assistants and consequently their involvement in the judicial process show an impressive variety of approaches in different Member States. The different duties of judicial assistants lead to a different degree of involvement in the judicial process and consequently to a different role in the judicial system. The involvement of judicial assistants can be imagined as a scale with judicial assistants involved only doing research (1) moving on to writing memos (2) and drafting decisions (3). On the next level, judicial assistants then actively participate in deliberations (4), take an active role in hearings (5) and might then, on the other side of the scale, hear and decide certain cases themselves with the approval of a judge (6). At this point, the judicial assistant has almost replaced the judge.

The different degrees of involvement identified in this paper can be used to classify different judicial systems or courts on a scale. A list of Council of Europe member states with the respective score on the scale can be found in appendix 1. In **Figure 1**, only four different countries shall be analysed as an example. In the UK and Ireland, judicial assistants are only little involved by comparison, no more than a 1 or 2 on the scale. Judicial assistants in Germany go up to a 3 or 4 depending on the court, while the Netherlands and Switzerland go up to a 5. Slovenia and Croatia even reach a 6.

The scale builds on the observation that duties of judicial assistants increase in a similar fashion in different member states from the duties described under 1–6. However, in rare cases, a level is left out on the scale. In Romanian lower courts, for example, judicial assistants draft and have a role in hearings but do not participate in deliberations, so 1–3 and 5 on the scale are reached but not 4. However, such cases are extremely rare and are indicated in the list provided in the appendix.

¹²⁵ CCJE response: Legal associates in Municipal courts of the Federation of BiH act independently in simple civil and enforcement cases. In the Republika Srpska Legal Associates in Basic and District Commercial courts may, upon authorisation and under immediate supervision of the judge, work on certain, small civil and criminal cases and enforcement. In the Brčko Distrikt, legal associates may act independently on undisputed cases and enforcement.

¹²⁶ CCJE response: Croatia: at courts of first and second instance, judicial assistants decide procedural issues and simple cases.

¹²⁷ CCJE response: Judicial assistants can make decisions on payment orders and enforcement.

¹²⁸ CCJE response: lawyers in training can hear and decide simple civil and criminal cases autonomously.

¹²⁹ CCJE response.

¹³⁰ CCJE responses and my own interviews: usually the decision has to be approved by a judge (e.g. all simple criminal, commercial cases), investigations, enforcement.

¹³¹ CCJE response: Conducting hearings and deciding simple cases autonomously, enforcement, or simple criminal cases at a later stage in their employment. In criminal cases the decisions are made together with lay judges.

¹³² CCJE responses: Croatia, Slovenia, Bosnia and Herzegovina.

¹³³ CCJE responses: Croatia, Slovenia there is even case law on the question if a judge has to be present during such hearings: yes for main hearings, no if judicial assistant is questioning witnesses.

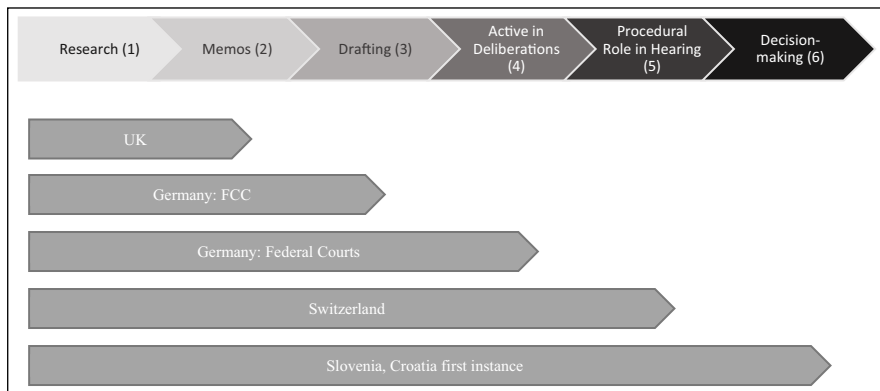


Figure 1: A scale of involvement with five examples.

As other models suggested in this paper, the involvement scale aims at identifying broad differences and similarities to provide an admittedly oversimplified starting point for comparative analysis across legal systems. Each system deserves a thorough investigation on its own.¹³⁴ It should also be noted that identifying the degree of involvement is only a first step in investigating the actual influence of judicial assistants. Assistants might exert influence even if they just perform duties on level 1 or 2 of the scale. Factors of importance may be, as the research of Holvast and Mascini¹³⁵ suggests, the degree of trust a judge has in a judicial assistant, the workload of the judge and the experience of the judicial assistant. The organisational models discussed in part 2 and 3 of this paper might play a role as well. Nevertheless, the more duties judicial assistants hold, the stronger their position is likely to be.¹³⁶ A high score on the scale should therefore encourage an investigation if the law makes appropriate provision to secure the status and impartiality of judicial assistants.¹³⁷ National and international law guarantee that judges can make decisions independently and impartially in the interest of the parties. While judicial assistants support judges and are not independent from them, the law should make adequate provision that they can conduct their substantial duties impartially and free from inappropriate influence.

5. Conclusion

This paper discussed the different roles judicial assistants play in different legal systems. The paper identified three different types of judicial assistants: “seconded judges” as in Germany, who spent limited time at a higher court to gain experience for promotion; potentially permanent “scribes” as in the Netherlands and Switzerland, and “interns” fresh from their legal education as in the UK and Ireland. The analysis showed, however, that there can be

¹³⁴ Like the impressive study by Holvast (2017) on judicial assistants in Dutch courts. Regulation of the duties of judicial assistants is not discussed in this paper, but it should be noted that in some Member States, there are only informal rules, while there is regulation especially in Central European Member States: CCJE responses: Andorra, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Lithuania, Moldova, Monaco, Poland, Romania, Russia, Slovenia, Spain, Sweden, Switzerland. Ukraine. In Croatia, judicial assistants are mentioned in the constitution. In some, only in contracts or handbooks: Georgia, Ireland, Latvia, Luxembourg, Malta, Norway, UK. In some countries, the rules securing a judge’s impartiality also apply to judicial assistants: Denmark, Finland, Norway, Croatia, see also Malta, Slovenia, Sweden, Switzerland. Holvast (2016), 10, 25.

¹³⁵ (2019).

¹³⁶ Holvast (2016) p. 10, 16; CCJE response, see also CCJE Opinion 22 (2019) rec. 4.

¹³⁷ Holvast (2017) 217–219 has shown how little the role of judicial assistants is often regulated.

considerable overlap between intern and scribe models, depending on the availability of judgeships as in Slovenia. Even in scribe systems with a long tradition such as Switzerland, judicial assistants rarely plan to make it a permanent career but aim at becoming judges. Thus, while an educational element is most noticeable for interns and seconded judges, learning from experienced judges seem to be important for almost all judicial assistants.

Judicial assistants can be assigned to a specific judge individually (cabinet system) organised in a pool for the court (pool system) or, as a mixture of the two systems, assigned to a division, chamber or panel of judges (panel system). While the working relationship of judicial assistants depends on many factors, cabinet systems might create a higher degree of mutual trust, opportunities for mentorship, but also – possibly – dependence between an individual judge and assistant. Pool systems allow judicial assistants and judges to work with different people and gain more varied experiences.

The involvement in the judicial process can be arranged on a scale with judicial assistants involved only doing research (1) moving on writing memos (2) and drafting decisions (3). Then, judicial assistants contribute in deliberations (4), take an active and even visible role in hearings (5) and might then, on the other side of the scale, hear and decide certain cases themselves with the approval of a judge (6). The comparative analyses show how the role of judicial assistants and their working relationships with judges change with increasing duties. Securing the impartiality and an adequate status of judicial assistants becomes more important.

In most judicial systems, judicial assistants draft decisions. Thus, these schemes reach a number 3 on the scale. The involvement of judicial assistants is comparably low in Ireland and the UK, where judicial assistants do not draft judicial decisions. In countries where judicial assistants are involved in deliberations, hearings and even decide cases, their contribution becomes visible to other judges and even the public. Thus, there is a sliding scale of seemingly growing influence of judicial assistants. My research shows, however, that the roles of judges and judicial assistants remain distinct and their relationship hierarchical even if the actual influence of judicial assistants grows. Informal rules and organisational approaches may contribute to keeping this relationship hierarchical. Much more research on individual systems is needed. However, the list of member states in appendix 1 analysed according to the approach developed in this paper, provide a starting point for further discussion with respect to the role, organisation and influence of judicial assistants in different legal systems.

Additional File

The additional file for this article can be found as follows:

- **Appendix 1.** Comparative overview of the organisation and involvement of judicial assistants in Council of Europe Member States. DOI: <https://doi.org/10.36745/ijca.360.s1>

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Competing Interests

The author has no competing interests to declare.

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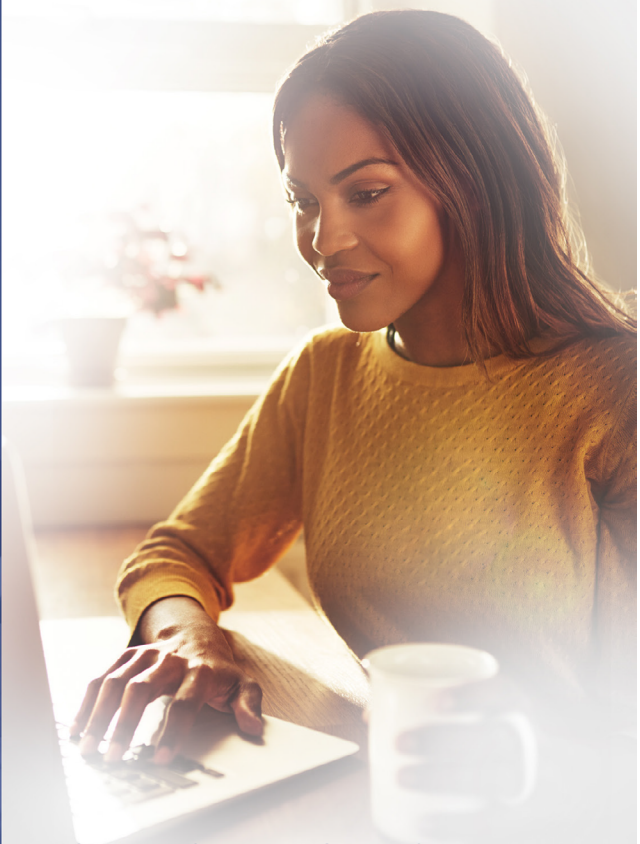
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