 Trafficked Rohingya Muslims abandoned at sea and rescued by Myanmar Navy Officials

Myanmar Information Ministry
The International Journal For Court Administration is an initiative of IACA’s Executive Board and its diverse membership. The Journal is an effective communications vehicle for the international exchange of experiences, ideas and information on court management, and contributes to improving the administration of justice in all countries. The collective international experience of its Executive Board and Editors has been that every judicial system, even in countries in the earlier stages of transition, has elements to it that may be of interest to others. The variations in practice and procedure from one region of the world to another, from one court system to another, also reveal major similarities across all systems. IJCA serves as a resource for justice system professionals interested in learning about new and innovative practices in court and justice system administration and management, in common law, continental, and Shari'ah-based legal systems throughout the world. The Editors publish two issues per year.

The Editors welcome submissions from court officials, judges, justice ministry officials, academics and others whose professional work and interests lie in the practical aspects of the effective administration of justice. To view the Editorial Policy and Procedures for Submission of Manuscript and Guidelines for Authors, visit the IACA website (www.iaca.ws) and chose IACA Journal.

The Journal accepts advertising from businesses, organizations, and others relating to court and justice systems by way of services, equipment, conferences, etc. For rates, standards, and formats, please contact one of the editors.
In this issue:

Professional Articles:

Social Media and the Electronic “New World” of Judges
By Hon. Judith Gibson ................................................................. 1

The Power Of The Judicial Assistant: Looking Behind The Scenes At Courts In The United States, England and Wales, And The Netherlands
By Nina Holvast ........................................................................... 10

Law Clerks in Switzerland – A Solution to Cope with the Caseload?
By Peter Bieri ................................................................................ 29

Book Reviews:

The High Court, the Constitution and Australian Politics
Reviewed by Greg Reinhardt and Liz Porter .................................. 39

International Courts and the Performance of International Agreements. A General Theory with Evidence from the European Union
Reviewed by Giacomo Di Federico ............................................. 41

Edições Almedina, 2015
Reviewed by Markus Zimmer ...................................................... 44

From the Executive Editor:

Emerging Challenges In Implementing The Rule Of Law On The High Seas
By Markus Zimmer

The Golden Age of Piracy, an era characterized by wanton maritime anarchy, endured circa 80 years, from the 1650s to the 1730s. Factors spawning the anarchy ranged from the low risk of intercepting and stealing increasingly valuable seaborne shipments of goods on the high seas to pursuing piracy as a lucrative alternative to a stagnating job market when the 11-year War of Spanish Succession expired. Notwithstanding its romantization in fictional period works, the Golden Age of Piracy essentially reduces to a series of opportunistic criminal enterprises. Beginning in the Caribbean and eastern Pacific, over time the criminal pandemic of piracy expanded to more distant targets in the Indian Ocean, the Red Sea and the coast of West Africa.

Underfunded colonial governments in developing states coupled with the inadequacy of European naval fleets to effectively patrol the world’s high seas encouraged the proliferation. Nourishing the growth of piracy, infectious greed for quick profits generated by colonial imperialist spread quickly throughout Europe’s government and business communities. Profit-making enterprises sponsored by these colonial governments included coerced unpaid labor for terms up to seven years, imposition of taxes on the peasantry, the forced conscription of indigenous peoples in developing countries for overseas export into slavery, and the exploitation and theft of natural resources.

The British Empire’s 1700 Act for the More Effectual Suppression of Piracy (Piracy Act of 1698) authorized acts of piracy to be “examined, inquired of, tried, heard and determined, and adjudged in any place at sea, or upon the land, in any of his Majesty’s islands, plantations, colonies, dominions, forts, or factories.” It greatly facilitated the administration of justice by eliminating the requirement that all defendants charged with piracy acts be tried in England, thereby ensuring speedier trials for defendants. This led to a proliferation of English admiralty courts throughout the developing world, an important step forward for the rule of law. Prompt maritime justice and a collective effort by the European states to strengthen their naval forces eventually led to the demise of the Golden Age.

Our own era has seen the rise of more insidious accounts of piracy and a slew of other maritime crimes whose perpetrators often evade justice for want of appropriate enforcement mechanisms, of clearly defined jurisdiction, of applicable criminal statutes, and of states willing to commit the resources required to pursue and bring maritime criminals to justice. In 2014, according to a New York Times database, in three maritime regions – Southeast Asia, West Africa’s Gulf of Guinea and the Indian Ocean -- in excess of 5,200 unfortunate seafarers came under attack from modern-day pirates and thieves with circa 10% taken and held as hostages. Today, fuel thieves conspire with maritime police and/or naval forces in the chaotic ports of teeming third-world mega-cities, triggering insurance claims. Traffickers in human payloads, capitalizing on civil wars, violent religious extremism, and economic mismanagement in myriad states, avoid airports and highways in favor of international waters to transport record numbers of desperate migrants, asylum seekers, and war-zone refugees in lucrative and competitive markets in the Black, Mediterranean, Timor, Coral and other seas. Some rival traffickers’ vessels, or they disable or sink their own to trigger rescue operations or disperse the human evidence of their criminal enterprise. Increasingly aggressive competition for dwindling stocks in prime fishing regions, particularly in East Asia and Oceania, for export to lucrative markets in Europe and North America, routinely sparks violent encounters, even murder, between boat crews. To conserve costs, unscrupulous marketers prey on unwary victims of poverty in rural and urban areas, many from Cambodia and Myanmar. Enticing their human prey with offers of comparatively well-paying jobs working on fishing and seafood trawlers, dangling the lure of
long-haul travel on the high seas as an incentive, these marketers offer loans to cover the costs of smugglers who convey them from their homes to designated ports in other countries. Rohingya Muslims are held captive in brutal jungle camps, their women subject to gang rape and other abuses. These undocumented workers are coerced into forced labor on unregistered fishing boats or in Thai–based seafood processing plants under abusive, violent and slave-like conditions that may continue for years. Access to courts and justice for the vast majority of these unfortunate victims remains a pipedream. For an introduction to this horrifying netherworld, see the series of well-researched and gripping articles published in 2015 in the *New York Times* and *The Guardian*.

Direct intervention by governments remains spotty, notwithstanding international conventions and pacts that prohibit forced labor. Where maritime law may apply, naval, coast guard and other law enforcement officials from many countries often are reluctant to board vessels in international waters; some accept bribes to avoid confrontations. When they do investigate, frequently they do so to clear their country's involvement, not to apprehend suspects. Some states have maritime criminal laws that have lapsed into obsolescence, leaving them without robust legal frameworks within which prosecutors and judges can adjudicate justice. Numerous governments, inadequately resourced to engage maritime criminal suspects, simply punt by urging shipping firms to employ private security forces, a solution that typically entails a cross-section of foreign mercenaries, ex-military, ex-police, ex-convicts, and poorly vetted, trained and paid amateur grunts. Frequently, actions taken by these private agents proceed in the absence of legal due-process requirements that leave suspects whose presumptive rights may have been co-opted without clear or affordable legal recourse.

In these and other respects, the rule of law on the high seas often resembles frontier justice as developing nations' law enforcement and justice institutions gradually evolve and criminal jurisprudence slowly coalesces. For reining in the anarchy of the high seas and establishing the rule of maritime law, considerable effort remains to be undertaken by the world’s nation states, including how to apportion maritime and admiralty jurisdiction among a growing body of international and regional courts and defining their role vis-à-vis that of sovereign national court systems, a challenge of enormous proportions.

DOI: http://doi.org/10.18352/ijca.198
Promoting regional and global approaches to justice administration

18-20 May 2016
World Trade Center
Prinses Margrietplantsoen 33
2595 AM The Hague

Registration / agenda on:
www.iaca2016.eu
Email: info@iaca2016.eu
Tel: +31(0)620168583 / +31(0)611920969
Carline Ameerali / Syed Riaz Haider
Social Media and the Electronic “New World” of Judges

By Judith Gibson

Abstract:

Courts in Australia not only have social media policies to control social media use in the courtroom, but are starting to use social media to publish judgments and court-related information. How will the interactive nature of social media affect the discourse between the court and litigants? Will social media require courts to take court “user” satisfaction into account in the provision of justice, and how is the dissemination of judgments on social media affecting public perceptions of traditional rules such as the doctrine of precedent? This discussion paper examines the future of courts in a social media world where the “like” button, and not just the legislature or stare decisis, may play an increasingly powerful role in shaping both the content of the law and the way in which courts administer justice.

Keywords:

1. Introduction

Social media use by judges, court administrators, and courts, although viewed with concern only a few years ago, is now hailed as an “exhilarating opportunity for the Courts to tell the public we serve who we are.” Over the past three years, courts in Australia and in New Zealand have set up social media accounts, allowed social media reports of court proceedings and dealt with the tender of social media evidence in a wide range of civil and criminal proceedings.

However, acceptance of technological change (and not just in relation to social media) by the courts in Australia has been uneven and at times resisted. Although social media use is commonplace in business and homes, many judges and court administrators have raised questions about its impact on judicial independence and the desirability of judicial or court use of this informal, public, form of communication. Longstanding unease about the adequacy of media court reporting has also played a part. Their fear is that social media is not a “new world”, but the end of the world, hence the humorous title given by the Hon. T F Bathurst AC to his 2012 Warrane Lecture speech: “Social Media: The End of Civilisation?”

1 Judge, District Court of New South Wales, 2001 -. This is a revised version of a presentation for the 23rd Biennial Conference of District and County Court Judges of Australia and New Zealand, 8 – 11 April 2015. All hyperlinks listed in this paper were last accessed as at 1 November 2015.
3 The Hon. Marilyn Warren AC, Chief Justice of Victoria, 2013 Redmond Barry Lecture, “Open Justice in the Electronic Age”, 21 October 2013 stated: “Technology and social media present an exhilarating opportunity for the Courts to tell the public we serve who we are, what we do, how we do it and why the rule of law matters.”
4 See the list of courts with social media accounts set out below.
7 M Krawitz, “Summoned by social media: why Australian courts should have social media accounts”, (2014) 23 23(1) JJA 182 – 198. However, Pamela D Schultz warned of the need for courts and judiciary to maintain their integrity and independence while attempting to become more “media savvy”: “Trial by Tweet? Social media innovation or degradation? The future and challenge of change for courts”, (2012) 21(1) JJA 29 – 36.
9 Warrane Lecture, University of New South Wales, 21 November 2012.
There is good reason for caution about social media use by courts and judges, both for work and private purposes. Even ardent proponents of social media acknowledge that, while the judiciary must confront changing public expectations of judicial engagement and communication, the courts must still preserve the fundamental elements of the rule of law. Some commentators warn that the shady (indeed illegal) nature of the businesses which created social media (as well as most other 20th century communications developments), the security risks and the interactive nature of social media render its use by courts, and in particular by judges, a two-edged sword.

Whether courts and judges use social media or not, social media has “utterly transformed the way people communicate and business is done. The Hon. Marilyn Warren AC, in her recent speech to the Federal and Supreme Court Commercial Seminar, explains this change as part of the necessary development of Australia as “a national and regional commercial hub”, in which technological innovation will play a vital role. Courts are one of those businesses.

This “commercial” view of court services is probably just as controversial as the uses of social media, which are bringing these changes into play. Social media will require courts to reconsider traditional views about court services and, in particular, what constitutes satisfactory case management in the eyes of court users rather than courts, as well as communication with the public generally. Social media’s impact on the court is not simply as a new means for publishing judgments and information, but also on how judges and courts perform their activities in an electronically-connected community where the users of the system can, and will, respond directly to how justice is being administered.

2. Social Media Place in the Technological Revolution
It is important to see social media in its proper context as one of a series of interrelated technological innovations that will fundamentally alter all aspects of how courts carry out their functions, ranging from research to e-courts. These developments are:

- Mobile computing and wireless technology.
- Interconnectivity, notably the Internet of Things and cloud computing.
- “Big data” analysis (e.g. the use of “predictive coding” in discovery).
- Electronic records management systems (“ERMS”) for retention of electronically stored information (“ESI”).

10 A Blackman & G Williams, “Australian Courts and Social Media” (2013) 38 Alternative Law Journal 170 at 170 – note concerns expressed by Australian courts about court use of social media, such as the “collaborative and participatory” nature of social media, which is “antithetical to traditional judicial processes”. See also S Rodrick, “Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public” (2013) 19 Deakin L Rev 123.

11 In other words, the porn business, which is the market force behind nearly all 20th century communications developments, including camcorders, VHS video, pay-per-view cable and satellite and hotel-based cable: Feona Attwood, “Porn.Com: Making Sense of Online Pornography”, New York, Peter Lang, 2010, p. 236. John Arlidge (“The dirty secret that drives new technology: it’s porn”, the Guardian, 3 March 2002) noted that by 2002 there were already 80,000 ‘adult’ and prostitution sites with total profits of more than £1 billion – more than any other e-commerce sector at that time. Many of the first social networks were, however, not pornographic but dating and chat sites, such as IRC (developed in 1988), ICQ and other messaging programs.


16 Many courts have committees to deal with the impact of wireless technology and social media on courts. One of many in the United States is the Arizona Judicial Branch, established on 7 March 2012 to advise the court on rule changes and ethical issues arising from social media and Internet use, and to report to the Judicial Council. These judges’ insightful report (and arresting front page artwork) can be found at http://www.azcourts.gov/Portals/74/WIRE/FinalWirelessReportRED.pdf.

17 Gregory J Millman explains this in “Cyber Cavalry rides to the rescue of the Internet of Things”, Wall Street Journal, May 5, 2014. Transmissions from one device to another can occur involuntarily, but fears that electronic equipment spies on its users (G Adams, “Is your TV spying on YOU?” Daily Mail, 26 November 2013) appear unfounded: Download this Show, Australian Broadcasting Corporation, 14 February 2015.

18 Predictive coding enables identification of relevant documents in large e-discoversies; see S Nance-Nash, “Predictive coding and emerging e-discovery rules”, Corporate Secretary, 14 August 2013.
Social media’s interaction with these new forms of technology.  

Social media is, above all, one of a series of technological innovations used for communication and for doing business. The real issue underlying the court social media controversy is whether courts “do business” with “customers” (i.e. court users) in an interactive way, and whether the administration of justice is a process in which being “liked”, responded to or retweeted by these court users should form any part of the courts’ function (or that of a judge, even in his/her private capacity).

Setting up Court Twitter/Facebook account seems straightforward; what sort of organization would refuse to be part of a means of communication used by everyone else? But it leads to the next issue the courts must determine, namely whether managerial techniques appropriate to other parts of the public sector are appropriate for courts. Are the judgments of courts part of the community’s business and social activities in which the service user has a say, or is the court’s role “part of a broader discourse by which a society and polity affirm its core values, apply them and adapt them to changing circumstances” in a manner which is without parallel to other parts of the public sector?

The role of the courts in the public sector, and their accountability in terms of delivering justice efficiently, have been matters for debate since the issue of effective case management was first raised in the late 1980s and 1990s. Court “productivity” in Australia is generally determined by how quickly the courts complete proceedings rather than by business-related methods used in business, such as consumer feedback. The traditional view of the court’s role has been that it is not providing business, or even government, services, but explaining and dispensing justice.

The World Bank’s annual “Doing Business” reports emphasize the role courts play in ensuring economic efficiency in business and government. The World Bank measures court and legal system efficiency differently, by emphasizing low-cost, one-stop-shop streamlining of services and the use of specialist courts. The World Bank’s reports then apply a “ratings” system given by court users, resulting in a “grading” of each country’s legal system. For the World Bank, the delivery of services to the satisfaction of court users is a central feature, contrary to the more traditional views expressed by many judges, such as those of the Hon. James Spigelman AC that are set out above.

The nettle has been firmly grasped by the Hon. Marilyn Warren AC, who has warned that “Australia’s continued development as a national and regional commercial hub will require a collaborative and co-operative effort by the courts, the role of the courts in the public sector, and their accountability in terms of delivering justice efficiently, have been matters for debate since the issue of effective case management was first raised in the late 1980s and 1990s. Court productivity in Australia is generally determined by how quickly the courts complete proceedings rather than by business-related methods used in business, such as consumer feedback. The traditional view of the court’s role has been that it is not providing business, or even government, services, but explaining and dispensing justice.

The World Bank’s annual “Doing Business” reports emphasize the role courts play in ensuring economic efficiency in business and government. The World Bank measures court and legal system efficiency differently, by emphasizing low-cost, one-stop-shop streamlining of services and the use of specialist courts. The World Bank’s reports then apply a “ratings” system given by court users, resulting in a “grading” of each country’s legal system. For the World Bank, the delivery of services to the satisfaction of court users is a central feature, contrary to the more traditional views expressed by many judges, such as those of the Hon. James Spigelman AC that are set out above.

The nettle has been firmly grasped by the Hon. Marilyn Warren AC, who has warned that “Australia’s continued development as a national and regional commercial hub will require a collaborative and co-operative effort by the judiciary, the bar and the profession”. Her Honor noted that “[T]he potential is there: the thriving economies of the Asia-Pacific region continue to provide exciting opportunities for Australian practitioners and courts”, and that “support by...
Australia’s superior courts of commercial litigation and arbitration will be crucial”. In other words, Australian courts need to satisfy court users that they are efficient and understand business needs.

If courts are to satisfy court users (especially businesses), the questions are what these court users want, whether those needs are being met, and what can be improved – just as any other business entity would. When courts set up a Twitter/Facebook feed to publish judgments and announcements, they are participating in an interactive form of communication, where the public will be able to respond – by personal message, “like” button, emoji or some other public response. This will indeed be a “new world” of interactive communication.

The next major way in which social media will change the court system will relate to its impact on court procedure and the law. Electronically-based communication will not only affect how proceedings are case managed and run; it also will have an impact on judgment style and publishing, as judgments become available to a global social media audience. Judges will have to exercise caution in what they say on social media to avoid apprehensions of bias. Social media also may foster changes in certain legal principles and causes of action. There will be new crimes and torts, discovery and court management issues, and new courtroom set-ups – perhaps even “virtual” ones.

Additionally, courts have already had to accommodate changes to how those in court-related activities carry out their tasks if they use social media to do so, such as journalists and “citizen journalists” tweeting from court, trial publicity and directions to jurors. This includes having effective court social media policies for court employees and the public, as well as for judges themselves. These are problems that first became apparent with the impact of the Internet on traditional legal principles, law research and case management.

3. Current Use of Social Media by Australian Courts and Judges

Courts in only three States of Australia currently use social media. Judges do not have official social media accounts, although some judges (such as Justice Lasry in the Victorian Supreme Court) identify themselves as judges in their Twitter or Facebook accounts.

In May 2011, the Supreme Court of Victoria became the first court in Australia to set up a Twitter account (@SCVSUPREMECourt) and now has a Facebook account as well. The County Court (@CCVMedia) soon followed and the Magistrates Court set up a Twitter account in July 2012. Both courts publish a wide range of public announcements as well as links to judgments and sentencing remarks.

The Supreme Court of New South Wales joined Twitter in September 2013 and has published significant judgments, a video and links to speeches. The New South Wales Civil and Administrative Tribunal joined Twitter at the beginning of 2014 and the District Court of NSW on May 13, 2015. The Judicial Commission of NSW has a YouTube site.

The Supreme Court of Tasmania published its first tweet on June 17, 2014. Other State courts do not have social media accounts, although the South Australian Supreme Court was the first court to have its own YouTube site. Queensland was the first State to develop the “eTrial”. Practice Direction 8 of 2014, which clarifies which electronic devices may be used in courtrooms, refers to social media use in courts.

The Family Court has conducted a Twitter site (@FamilyCourtAU) since October 2012, as well as a YouTube account, and it is the only court with “Live chat”. The Federal Court of Australia uploaded a video to YouTube in October 2014 (“Mediation in the Federal Court of Australia”), but closed its inactive Twitter handle some time in 2014. The Federal Circuit Court has a Twitter account (@CircuitCourtAU9) which has not been used to send tweets.

27 The first hearing to have tweeting journalists in court was Roadshow Films Pty Ltd v iiNet Limited (No 3) (2010) 263 ALR 215, as Cowdroy J noted in the Abstract at the commencement of the judgment.
29 For analysis of the Victorian Supreme Court Twitter followers, see A Blackham and G Williams, “Courts and social media: opportunities, challenges and impact” (2014) 17(9) INTLB 210.
In New Zealand, following the Media Review Panel’s report to the Chief Justice on in-court media recommendation [64] that social media “must be recognized”,[31] the New Zealand courts set up a Twitter account in June 2015.

The gradual spread of social media use, and the period of time over which it has been used, indicates that Australian courts are increasingly accepting that a social media presence for courts is an important part of their public functions. How will the use of social media impact on the court system?

4. Social Media’s Impact on the Court System
Social media, in the form of publication of many previously unavailable judgments, will impact the court system in four major areas – the form and content of judgments, court case management and structure, legislation and trial procedure.

4.1. Changes to Judgment-Writing – Precedent, Form and Style
Guides to good judicial writing[32] stress the importance of judges understanding the audience for whom they write. If judgments are published on social media to a potentially global audience, what will be the result? Should judges simplify, or jazz up, their language for this new audience?

A recent Canadian decision may demonstrate how legal language is changing. Nakatsuru J, the sentencing judge in R v Armitage (2015) ONCJ 64 (CanLII), wrote the whole of his sentencing remarks in plain language, stating: “Judges write not only for the parties before them. Judges write to other readers of the law. Lawyers. Other judges. The community”.[33]

Nakatsuru J’s judgment is of interest not only because of its communicative qualities. Online judgment reporting makes previously unavailable judicial determinations, such as sentencing remarks and other trial-level judgments, available worldwide; the authorised reports which previously dictated what decisions were important are no longer wheeled into court on trolleys. Judges at intermediate and local level can see how other judges are judging. What will happen when parties and the court are faced with an unattractive or out-of-date appellate decision, as opposed to an alluring first-instance alternative, perhaps even from another country?

Precedent and the Common Law in the Age of Social Media
Judges have not always wanted their judgments recorded for posterity[34] but, once accustomed to it, they expected only the best to be published in authorised law reports. This has meant that, over the ensuing centuries, only a limited number of judgments, generally at appellate level, were able to shape the law.

Until courts began publishing online, precedent principles were reinforced by the selective basis upon which only a limited number of such judgments was made available for publication in authorised reports. Some jurists, such as the Hon. Sir Anthony Mason AC, considered this imposed undue rigidity on the development of the law.[35]

Although the terms “precedent” and “common law” seem interchangeable, this is not in fact the case.[36] The doctrine of precedent is of recent origin and has undergone significant change since its acceptance in 1898.[37] The identification of precedent is not static, as the changes to appeal rights to the Privy Council (A A Tegel Pty Ltd v Madden (1985) 2 NSWLR 591 at 601, 608 and 615 – 6) and views on the status of interstate appellate court judgments[38] demonstrate. However, despite criticism from academics[39] and even judges,[40] precedent law continues to dominate the common law system.

---

34 Lord Cockburn, “Memorials of his Time” (1909) at p.158.
35 This extra-curial statement comes from a speech quoted by Tony Blackshield in “Judicial Reasoning”, a chapter in Blackshield, Coper & Williams (eds.), “The Oxford Companion to the High Court of Australia”, online edition 2007, at p. 373.
Should courts tweet first-instance judgments at all? Such decisions are not binding as precedent, and they may detract from the traditional role of the appellate court in determining precedent, especially if the first-instance judgment raises a novel or compelling issue of law for which the appellate courts are not yet ready (as was the case following publication of Bleyer v Google Inc [2014] NSWSC 897, where a first-instance judge struck out proceedings on the basis of lack of proportionality). This could cause confusion and uncertainty. The Hon. Michael Kirby AC, speaking at the 2006 International Association of Comparative Law conference, warned:

“One development which has had an enormous, and yet largely ignored, effect on the use of precedent in Australia is the Internet…The challenge for lawyers and judges in common law countries is how best to use the increasing accessibility of precedent to strengthen legal analysis and the just development of the law, without being swamped by the sheer quantity of legal information that is now at our finger-tips.”

However, the most significant changes caused by social media will occur in the area of court policy, case management and the conduct of trials.

4.2. Social Media, Court Policy and Case Management

Courts are only one of a series of governmental bodies which must show openness in terms of making electronic information available to the public. The “transparency” effect of social media will be a significant issue. For example, court document retention policies will need to include social media, and it may be wise for courts to consider using locked or secure accounts to which only those authorized may respond.

Courts of the future will need to consider new rules for electronic publications (including social media) and use of modern technology to permit remote-access appearances. Thanks to the interactive nature and extensive publication range of social media, court users will quickly learn what is available in other courts and can use social media to complain if dissatisfied. Courts will need to develop policies to cope with adverse criticism of courts and judges on social media.

A Court Social Media Compliance and Security Program

Whether or not a court sets up a social media site, it will have to acknowledge that many of the court staff (and judges) use social media, and set up a compliance programme. Courts should also be consulted about whether staff restrictions on the use of social media applicable to other public servants, are appropriate for court staff (e.g. associates) as they increasingly use social media in their work. Security will be a vital issue, requiring constant vigilance, and employees must be made aware of this.

E-courts, e-Filing, e-Case Management and e-Appearances

Social media’s impact on the court administrative system is part of the electronic world. In that world, is the courtroom a service, or a place? Will a social media address be sufficient address for service? Will social media platforms such as Skype and Twitter Periscope replace the physical courtroom entirely? This is the question posed by Richard Susskind in his analysis of the courtroom of the future, which he foresees being not only paper-free but place-free. He warns:

“For tomorrow's lawyers, appearance in physical courtrooms may become a rarity. Virtual appearances will become the norm, and new presentational and advocacy skills will be required.”

5. Changes to Research Methods and to Court Libraries

“Future libraries will be valued more for services than for book collections.” – David Lankes

---

40 Lord Wright, “Precedents” (1943) 8(2) Camb L J 118, criticizing the (now relinquished) rule that the House of Lords was bound by its own decisions.
41 Ewoud Hondius (ed.), loc. cit, footnote 67, p. 82.
43 Wu He, loc. cit., at p. 176 – 7.
45 Richard Susskind, loc. cit.
The role of the court library will change from book provider to services adviser. This will include not only research advice but new services such as “e-lending”. As the worlds occupied by academics and judges grow closer, judges will find social media site searches particularly useful for finding just-published articles, by checking or following court judgment sites, BAILII and/or other judges. There are also many law “apps”. YouTube, the second biggest search engine in the world, is also a useful resource.

6. Social Media and the Trial Process

The potential for manipulation of court proceedings, inflammatory court statements or pleadings and grandstanding long predates social media. The problem is that social media could make it easier to disrupt case management, or for the proceedings to be hijacked by unscrupulous (or simply indignant) litigants and/or their lawyers. Recent examples in the United Kingdom include the naming of persons covered by suppression orders, publishing material about innocence (or guilt) and contamination of identification evidence. The potential for misuse of case management of the litigation by Internet publicity, including publications on social media, will be a significant issue for courts of the future, in addition to the many other impacts that social media may have on the conduct of proceedings.

6.1 Evidence Issues

To date, “practitioners in the Australian jurisdiction appear to have been slower than practitioners in other jurisdictions to embrace the use of social media content in litigation”. This is particularly evident in civil proceedings, where the tender of social media evidence, requests for service by social media, and requests for it to be discovered are still relatively uncommon.

How does social media fit into the existing procedural and evidentiary rules, and what ethical issues do the gathering of information about an opponent through social media raise? To date there has been little judicial consideration, as social media has been admitted into evidence without discussion of these issues in personal injury cases.

There are three potential problem areas: adapting existing discovery rules to deal with electronically stored information (ESI) and social media; dealing with failure to produce social media records; and tender of social media records.

Managing ESI and Social Media in Discovery

The sheer volume of ESI has added to the burden of discovery generally. Australian courts have struggled for some time to keep discovery manageable; they have moved away from the “culture of discovery”, preferring limited discovery relevant to issues (Liesfield v SPI Electricity Pty Ltd [2013] VSC 634 at [29], citing Victorian Law Reform Commission, Civil Justice Review, Report No 14 (2008) at Part 5) or the more stringent “necessity” test.

Voluminous e-discovery is now commonplace – soon courts will even stop referring to the term “e-discovery” with an “e” in front at all. The discoverability of social media will add to that burden in the following ways:

- There will be a significant increase in the number of applications for preliminary discovery requiring production of social media records or, because of their ephemeral nature, for the preservation of social media records.
- Predictive coding will be introduced to enable the reading of mass discovery documents, including hundreds of pages of social media records.
- Information governance strategy for electronic records generally (not just social media) will be a big issue (as the phone hacking prosecutions have shown).

---

49 See the Monash University app guide at http://guides.lib.monash.edu/law/apps.
50 There are entire university online courses, such as Harvard University’s Chinese history course.
51 See, for example, the concerns of Flick J about submissions designed as “media releases” in Fraser-Kirk v David Jones Ltd (2010) 190 FCR 325 at [4].
52 P George (ed.), “Social Media and the Law”, loc cit., p. 311.
53 Social media entries have been successfully used to challenge plaintiff’s accounts of their ongoing disabilities in Frost v Kourouche (2014) 86 NSWLR 214 and Munday v Court (2013) 65 MVR 251.
Anonymous social media apps will complicate discovery, and courts will struggle to control production of evanescent records such as those originating on mobile phones.

Will there be legislation to protect privacy in relation to social media content, or will the Australian courts follow the lead of US courts, and develop privacy rules to protect overzealous requests for confidential material from third parties?

Records may be held outside Australia. Many companies outsource archive retention, but doing so may be risky. News Limited, in the phone-hacking prosecutions, at one stage blamed its Indian outsourcer for its loss of millions of email and other electronically archived records.

**Destruction of social media evidence**
Do the same discovery rules apply to social media at all? Some judges in the United States have taken the view that the ephemeral nature of social media is such that it should be expected for at least some to be destroyed. However, the contrary view has been taken in Australia: *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523, where the plaintiff’s claim was struck out when she produced her computer and Facebook records but not her actual mobile phones, which she admitted she had destroyed (see also *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264).

The obligation to retain relevant ESI, even in litigation such as personal injury, is a significant issue in other common-law jurisdictions, and spoliation claims are increasingly common. In *Brookshire Brothers Ltd v Aldridge* 438 S W 3d 9 57 (Tex 2014) at 22, Lehrman J of the Texas Supreme Court noted that:

“Because of the prevalence of discoverable electronic data and the uncertainties associated with preserving that data, sanctions concerning the spoliation of electronic information have reached an all-time high: Dan H Willoughby Jr et al., "Sanctions for E-discovery Violations: By the Numbers", 60 Duke L J 789 at 790 (2010).”

**Tender of Social Media Records**
The opposing party’s social media records do not fall into the same category as surveillance video. It is an interesting question whether obligations to disclose such material prior to trial (in New South Wales, under the *Uniform Civil Procedure Rules*, Pt 31 r 10) would apply.

**6.2 Social Media and Criminal Offences**
The uncensored, non-geographic and interactive nature of social media can be expected to increase the existing “tidal wave” of child pornography. Existing crimes, such as hate crimes, will find wider audiences; social media is also a powerful weapon for hate crimes, cyberstalking (already a feature of domestic violence) and graphic posts by terrorist organisations. New cybercrimes, such as “virtual crime” will require new legislation, drafted by legislators who understand the complexities of the new technologies being used to commit these crimes. This is a vast topic; all that can be done here is to note that the potential for misuse of social media will be one of the most serious problems for legislatures and courts of the future.

**The Criminal Trials of the Future**
There are many problems confronting criminal trial conduct arising from social media issues. I will briefly note some of those most commonly discussed:

- The impact of social media publicity on the role of the jury, which has been extensively discussed elsewhere.
- How material should be presented to a jury, where their levels of technology knowledge widely differ and where evidence is technical, has been a source of concern for some years, as has the question of jury warnings and directions concerning use by individual jurors of social media or other research during the trial.

---

56 A typical recent case is *Bakhit & Miles v Safety Marking, Inc*, District Court of Connecticut, 26 June 2014 (Holly B Fitzsimmons, Magistrate, dealing with Rule 26(b)(1) and 34(a) *Federal Rules of Civil Procedure*, and applying the US Supreme Court’s decision *Riley v California* 573 US Ct 2473 (2014).


59 For a list of problem areas see Louise Fairbairn, “Hi tech laws needed for hi tech crimes: Cyberstalking” (2014) 17(10) INTLB 222.

60 M Krawitz, “Guilty as Tweeted”, University of Western Australia Faculty of Law Research Paper 2012. For a commentary from the United States, see Meghan Dunn, “Jurors’ Use of Social Media During Trials and Deliberations”, Federal Judicial Center, 2011; her survey of 508 US judges also sets out sample jury instructions some participating judges have given in court.

• Pre-trial publicity on social media\(^6\) may require a complete reconsideration of the law of contempt,\(^6\) and problems with suppression orders\(^6\) will continue.

• As Peek J points out in Strauss v Police [2013]115 SASR 90 at [12] – [37] (headed “Part 2: Identification evidence in the age of Facebook”), social media will have a significant impact on the law of identification due to the substantial risk of contamination and the temptation for private investigation.

• Crossover problems where both civil and criminal law issues arise, such as misuse of private information,\(^6\) This will include disclosure of private sexual information, particularly if that included conduct of a criminal nature.\(^6\)

• Computer security, and not just court security, will be a significant issue. Unlike other parts of the public service, courts regularly have to deal with persons accused of crime. The anonymity of cyberspace may be an incentive for those persons to troll or attack court computer records, or to use social media to attack it.

7. Conclusions
Although social media is a “new world” for courts and judges, dealing with technological change is nothing new for court systems, as US Supreme Court Justice Roberts’ entertaining 2014 Annual Report (comparing the electronic courtroom in 2014 to an earlier technological communication miracle, the installation of the pneumatic tube in 1893) demonstrates.\(^6\)

The principal problem for courts is not the technology of social media, but (i) how the powerful tools it offers are redefining interactive communications between courts and the public, and (ii) how most courts, apart from those few on the cutting edge, are being compelled to respond to this constantly evolving electronic interactive communications platform, sometimes against their will. It is a new paradigm for older generation judges and administrators accustomed to a lengthy tradition of largely one-way communication from court to litigant. Under this new paradigm, litigants already accustomed sometimes against their will. It is a new paradigm for older generation judges and administrators accustomed to a lengthy tradition of largely one-way communication from court to litigant. Under this new paradigm, litigants already accustomed to interacting electronically with and even questioning the professional judgments of government officials and medical practitioners, for example, will adopt similar interactive models, querying Google’s enormous legal resources and documenting their scepticism in response to court-imposed judgments and services. Already this is a contributing factor in dramatic increases in self-representation on both the trial and appellate levels and, in response, the establishment of “self-help centres”\(^6\) in courts in the United States in response to these perceived needs. Dealing with these challenges to judicial authority, where an increasing number of litigants will expect a greater say in all areas of case management and conduct of the trial, will be a challenge that today’s courts will be compelled to deal with in the full glare of the new social media world.\(^6\)
PROMOTING THE PURSUIT OF JUSTICE INTERNATIONALLY THROUGH EXCELLENCE IN COURT MANAGEMENT AND ADMINISTRATION

BENEFITS OF MEMBERSHIP:

- Extensive Resource Library
- Access to past conference materials
- Social networking with the ability to create special discussion groups and invite members
- Discounted conference attendance rates

We welcome your interest in IACA and urge you to consider joining us through one of our categories of membership and participating in our conferences. We also encourage all current and future members to actively involve themselves in IACA’s future development and expansion through taking on leadership roles at the regional and national levels. We are a dynamic organization and perpetually interested in ideas and suggestions as to how we might improve and expand the services we provide.

To learn more about who is eligible, our fee structure, and to join us, please visit IACA’s website at:

www.iaca.ws/join-iaca.html

Directly directed by an International Executive Board and Advisory Council.

Members include judges, administrators, academics and others from around the world.

Sponsors international and regional conferences. Past conferences include:

- Ljubljana, Slovenia
- Verona, Italy
- Dublin, Ireland
- Istanbul, Turkey
- Trinidad and Tobago
- Jakarta / Bogar, Indonesia
- Peace Palace, The Hague
- Buenos Aires, Argentina
- Dubai, UAE
- Sydney, Australia

Publishes the International Journal for Court Administration - www.IACAJournal.org

IJCA is a bi-annual electronic journal which focuses on court, judicial, and justice system administration, and governance.

Publishes IACA’s Newsletter

The newsletter is a quarterly publication focused on news from around the world on courts, their practices, and news related to IACA.
The Power Of The Judicial Assistant/Law Clerk: Looking Behind The Scenes At Courts In The United States, England And Wales, And The Netherlands.¹

By Nina Holvast²

Abstract:

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

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

1. Introduction and Concerns Regarding Judicial Delegation

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

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

¹ I would like to thank Henk van de Bunt, Nienke Doornbos, Alan Paterson, Todd Peppers, Wibo van Rossum and the participants of the Paul Scholten Centre colloquium on the September 9, 2014 for their comments on earlier versions of this article.
² Nina Holvast is a PhD Candidate at the Faculty of Law of the University of Amsterdam, Oudemanhuispoort 4-6, 1012 CN Amsterdam, The Netherlands e-mail: N.L.Holvast@uva.nl.
³ For some important exceptions, see e.g., Cohen 2002 and Oakley & Thompson 1980.
⁵ See e.g. Rehnquist, 1957; Fiss, 1982; Vining, 1981; Posner, 2006.
Besides issues concerning differences in training, selection and institutional safeguards, the prospect of diluting one individual’s sense of responsibility for a judgment when large portions of the judicial work are performed by subordinates is also mentioned. In that vein, Posner observes a loss when judgments are “ghostwritten” by law clerks, as clerks are bright, but inexperienced and “judges fool themselves when they think that by carefully editing, they can make a judicial opinion their own.” Posner furthermore argues that extensive delegation could result in more uniform and legalistic judgments, as law clerks would not have the authority and experience to look beyond the (case) law. In addition, Kronman claims that the preparation of memos on cases by subordinates, commissioned and reviewed by a judge, can threaten the deliberative imagination of judges and would make the judges’ perspectives on cases essentially “monocular.” A particularly prominent fear in the U.S. is that of law clerks pursuing their own (political) goals instead of judges’ goals, thereby steering the political outcomes of cases.

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

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

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

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

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

---

6 Fiss, 1982.
7 Posner, 2006, p. 34.
8 Posner, 2006; 2008, p. 34, see also Fiss, 1982.
10 As in the U.S. judgments are frequently considered to reflect the political opinions of judges. Posner, 2008, p. 9-11.
15 More reasons behind the selection can be found in the following section.
widest variety, the level of courts included in the selection also differs, as this most likely impacts the role and influence of judicial assistants.16

<table>
<thead>
<tr>
<th>Judiciary</th>
<th>U.S.</th>
<th>England and Wales</th>
<th>The Netherlands</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judicial assistant type</strong></td>
<td>Law clerks at the US Supreme Court and Federal and State Courts of highest Appeal</td>
<td>Magistrates' clerks - positioned at Magistrates' Courts</td>
<td>Judicial Assistants - positioned at the Court of Appeal and Supreme Court</td>
</tr>
<tr>
<td><strong>Court level</strong></td>
<td>Highest level and level just below.</td>
<td>First instance level</td>
<td>First instance level</td>
</tr>
</tbody>
</table>

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

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

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

16 The judicial assistant models at lower US courts are for instance often organized in a different manner to that of the highest courts and they might – in several aspects – be quite similar to the assistant models studies at first instance courts in England and Wales and The Netherlands.
17 See e.g. Shapiro, 1981, p. 28-29; Eisenberg, 1991.
18 See Bell, 2006, p. 39 and 341.
19 In comparison to civil law judiciaries. This does not mean that in US courts there is no paperwork involved whatsoever. Parties do have the right to submit papers/briefs in support of their oral arguments and appellate judges review record of proceedings in the lower courts.
21 This adversarial model is most present at the highest courts of the countries.
23 Similar to other civil law judiciaries, see Merryman, 1969, p. 38.
hearings. A large part of the process occurs through written reporting.\(^{24}\) In the Dutch system, with various inquisitorial features, the judge’s role is relatively active. He or she controls the legal process pretrial and also in court. Lay people participation hardly occurs.\(^{25}\) The Dutch judicial review system is— with few exceptions—a system of review “as of right”. It is expected that the significant differences in the judicial systems also are reflected the manner in which judicial assistants are employed.

3. The Specifics of the Four Judicial Assistant Models

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

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

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

A Brief History of the U.S. Law Clerk

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

The history of law clerks at the State Courts of Highest Appeal and the Federal Appellate Courts while not as well-studied; however, appeared to followed a rather similar pattern.\(^ {33,34}\)

Institutional Embedding and Guidelines for Law Clerks

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

\(^{24}\) See Merryman, 1969, p. 121-123; Shapiro, 1980.

\(^{25}\) See Malsch, 2009, p. 69.

\(^{26}\) Occasionally, they also employ law clerks; however, the models are rather different.

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

\(^{28}\) Oakley & Thompson, 1980.

\(^{29}\) Peppers, 2006; Ward & Weiden, 2006.


\(^{32}\) In 1941, Supreme Court justices were permitted to hire a second law clerk. In the 1970s a third and fourth one.

\(^{33}\) Given that the rise in caseloads at Appellate Courts was problematic earlier in time, the increased delegation of duties might have happened there at an earlier stage.

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

\(^{35}\) See Ward & Weiden, p. 16.
the judiciary and states that political activities in particular should be avoided. Several courts have adopted additional codes of conduct for law clerks. In 1989, the Supreme Court created the Code of Conduct for Law Clerks of the Supreme Court of the United States. This code, which has never officially been published, includes six canons which focus on topics related to those of the code for federal employees. As a result of incidents in which confidential information was leaked by (former) clerks, the code specifically emphasizes the confidentiality of the clerking position. It also explicitly allows for individual judges to set additional rules.

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

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

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

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

The bench memos also function as a springboard from which judges may discuss the case with their clerks. Participating in case review discussion is another key feature of most clerkships. Relationships between judges and their law clerks are frequently intense. Several Justices and clerks have referred to the relationship as “like family”. Some judges hold a formalized pre-oral argument meeting with their clerks and most judges also meet with them after the conclusion of the hearings. This is especially important if the law clerk will later draft the opinion or judgment; the most controversial duty of law clerks. From the 1960s onward, Supreme Court justices began delegating parts of judgment-drafting to their clerks. Today, most Supreme Court and Appellate Court justices have grown comfortable with this
practice. This does not entail law clerks making decisions regarding the content of opinions on their own. Most judges will provide detailed instructions and drafts will go back and forth between judge and clerk.

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

3.2 Judicial “Case Managers” in the Netherlands

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

A Brief History of Dutch Judicial Assistants

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

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

Organization of the Judicial Assistant Position

The ratio of judges to assistants varies marginally between different courts and court divisions. Trial courts employ slightly more judicial assistants than Courts of Appeal; on average 1.3 assistants per judge in the year 2013. In the Netherlands, judicial assistants are not assigned to specific judges. Instead, they are associated with specific cases with which they assist the judges from the beginning up to the writing of the judgment. Employment as a judicial assistant is not a temporary position as is common for law clerks; rather, it can be a lifelong career. Various assistants are employed by the court for decades. During the period of their employment, these assistants obtain more experience in court operations than most judges. Since judicial assistants are not assigned to an individual judge, a large part of the selection and
recruitment of assistants is completed by court managers rather than judges. In the past, a large number of judicial assistants were internal transfers; currently, the majority of new assistants are entrees from outside the judiciary. Given that the duties of assistants have become more challenging at the same time that opportunities to enter legal practice or the training to become a judge reduced, judicial assistant positions have become popular among law school graduates. Although the minimum educational requirement for new judicial assistants is a degree from an institute of higher professional education, most applicants possess a university law degree. As the follow-up career perspectives in the judiciary are limited, various judicial assistants only work at the court at the beginning of their career. For them, a judicial assistantship serves as a decent way to gain legal experience, which can be an advantage when applying elsewhere. Even so, judicial assistant job experience does not provide employment opportunities equivalent to those afforded to law clerks in the U.S.

**Institutionalization of Judicial Assistants and Guidelines**

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

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

**Duties of Judicial Assistants**

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

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

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

---

64 E.g., in several provisions of the Code of Civil Procedure and the Code of Criminal Procedure.
65 Articles 7 and 13.
66 The Lamicie-model. Courts can also create their own models, provided that they stay within their budget.
67 For criminal law, see Corstens, 2005, p. 553-554.
68 Because the Dutch judiciary mostly employs written evidence, the files of a case can consist of hundreds of pages.
70 In administrative law cases, single sitting/assigned judges regularly plan a meeting to discuss a case solely with the assistant.
writing the draft-judgment; while present, they may also participate in the discussion. This is even stipulated in the function-profiles of some courts.

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

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

3.3 The Traditional Clerks as Legal Advisers of Lay Magistrates

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

A Brief History of Magistrates’ Clerks

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

Organization of the Function of Magistrates’ Clerks

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

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

---

71 This too is recorded in some of the function-profiles of the judicial assistants.
72 In accordance with the decisions made during deliberations.
73 At certain courts they perform managing duties too.
74 On rare occasions, a judge can ask for assistance. However, this is uncommon.
75 The term ‘Magistrates’ clerk’ is used to label all judicial assistants at the Magistrates’ Courts including Justices’ clerks, Deputy Justices’ clerks, and court legal advisers.
76 Darbyshire, 1984; Astor, 1984.
77 Darbyshire, 1984, p. 5.
78 About half of the clerks interviewed by Darbyshire (1984, p. 135) did not possess any professional qualifications; see also Astor, 984, p. 53.
79 It furthermore required all existing advisers under 40 to gain this requirement in 10 years’ time.
80 Before the administration of Magistrates’ Courts was locally defined.
82 In April 2011, there were 26,966 Magistrates, 137 district judges and 143 deputy district judges operating in Magistrates’ Courts.
84 In the past each courthouse had its own Justices’ clerk.
85 Previously called clerk assistants or court clerks.
academic requirements of the barrister or solicitor training, the corps of Magistrates’ clerks slowly but steadily becomes increasingly qualified. After entering the court, the trainee legal advisers are required to follow an on-the-job training program for up to two years. Similar to judicial assistants in the Netherlands, court legal adviser positions are not temporary. Another similarity is the limited career opportunities for legal advisers. It is expected that the qualified clerks are more inclined to leave the Magistrates’ court after a few years.

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

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

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

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

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

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

85 They can only be promoted to one of the few Justices’ clerk positions or to a court management function.
86 See Darbyshire, 1984, p. 2-3, 30-60.
87 And advice given in private should be repeated in court.
88 By referring to the Bangalore Principles of Judicial Conduct.
90 Elliot & Quinn, 2009, p. 263.
91 Many clerks would retire with the bench uninvited, even though case law emphasised that clerks should be asked to retire.
92 Astor, 1986.
94Darbyshire, 1999.
developing and fairly little information is available on the specifics of the occupation.\textsuperscript{95} To complement the available information, several interviews were conducted with judges and their assistants.\textsuperscript{96}

**A Brief History of Judicial Assistants**

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

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

**Organization of the Judicial Assistant System**

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

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

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

\textsuperscript{95} However, a few publications are (partly) dedicated to Judicial Assistants. See Nesterchuk, 2013; Paterson, 2013.
\textsuperscript{96} 8 (collective) interviews were conducted with a total of 5 (former) judges of the Supreme Court and Court of Appeal, 8 Judicial Assistants of the Supreme Court and Court of Appeal, and 2 District judges.
\textsuperscript{98} Jamieson, 1998.
\textsuperscript{99} UK’s highest Court of Appeal, before it became the Supreme Court.
\textsuperscript{100} That was all there was room for in the court building.
\textsuperscript{101} Paterson, 2013, p. 247.
\textsuperscript{102} Nesterchuk, 2013, p. 101; Paterson, 2013.
\textsuperscript{103} The latter is a source of information for new Assistants and helps to bring continuity.
\textsuperscript{104} At the Supreme Court, the Judicial Assistants are required to be fully qualified. At the Court of Appeal, candidates who have not conducted their pupillage or training period are also considered.
\textsuperscript{105} Paterson, 2013, p. 248.
\textsuperscript{106} In 2013, over 300 candidates applied for the seven open positions at the Supreme Court. See, The Times (London), 14 okt 2010, “A supremely good start to your career.” See also 23 may 2013, “A supreme chance to spend a year with the country’s finest legal minds.”
\textsuperscript{107} These reasons were mentioned by several respondents.
\textsuperscript{108} Paterson, 2013, p. 251. This was also emphasised in the judgment of Lord Woolf in the case of Parker v. the Law Society [1998] 143 S.J. L.B. 45.
Institutional Embedding of Judicial Assistants and Guidelines

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

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

Duties of Judicial Assistants

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

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

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

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

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

109 See Arnold, 2014.
110 Nesterchuk, 2013.
111 Paterson, 2013, p. 249.
112 Nesterchuk, 2013, p. 106.
113 Paterson, 2013, p. 251-252.
114 Paterson, 2013, p. 252.
116 However, given that they have already laid out their views in the bench memo, this rarely occurs.
4. Six Factors that Distinguish the Judicial Assistant Models

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

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

<table>
<thead>
<tr>
<th>Distinguishing factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Reasons for employing judicial assistants</td>
</tr>
<tr>
<td>2. Ratio of judicial assistants to judges</td>
</tr>
<tr>
<td>3. The qualifications of judicial assistants and the terms of their employment</td>
</tr>
<tr>
<td>4. Duties of assistants and their participation in various stages of the judicial process</td>
</tr>
<tr>
<td>5. Judicial assistants’ assignment to individual judges or the entire court</td>
</tr>
<tr>
<td>6. Judicial assistants working with professional or lay judges</td>
</tr>
</tbody>
</table>

4.1. Reasons for Employing Judicial Assistants

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

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

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

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

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

\(^{117}\) According to Bieri (in this issue), this is also the main reason for increasing the number of law clerks in Switzerland.

\(^{118}\) Cohen, 2002 p. 9; McCree, 1981 e.g. p. 789.; Rubin, 1980.

\(^{119}\) See e.g. Morgan & Russell, 2000.

\(^{120}\) Ward & Weiden, 2006, p. 5.

\(^{121}\) See contributions to Peppers & Ward, 2013; Paterson, 2013, p. 251.

\(^{122}\) Magistrates’ clerks form the exception.
that the number of assistants per judge is high. When assistants are employed for reasons of quality improvement, it is actually intended that they have a certain influence on the content of judgments. In this case, the diffusion of responsibilities between judges and assistants is especially likely to become an issue. 123

4.2. Ratio of Judicial Assistants to Judges

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

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

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

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

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

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

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

123 See Fiss, 1982.
125 Lower courts do employ different type of assistants.
129 Oakley & Thomas, 1980, discovered that judges agree that career clerks are not of the same quality as short-term clerks.
play little part in running. It is the Clerk to the Justices and the Clerk’s staff, who control this organization and who ensure that the hundreds of cases scheduled to be dealt with each day are properly processed.”130 This could also, to a lesser degree, be the case in the Netherlands. In particular, in relation to new judges, Dutch judicial assistants can have a powerful position. Evidently, this introduces the risk of career assistants having too much influence and judges relying too much on their expertise, thereby preventing judges from fully considering the merits of cases themselves.131

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

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

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

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

130 Astor, 1984, p. 3.
131 See also Kenney, 2000, p. 619.
132 See also Hol, 2001, p. 99.
137 Darbyshire, 1999.
139 Several judges and Judicial Assistants with whom I spoke emphasized this.
141 See also Paterson 2013, p. 253-257, particularly p. 256 in the footnote.
began their Judicial Assistant model by constructing a pool of assistants available to all judges; however, soon after its creation, this was altered and assistants were assigned to individual judges. This type of arrangement results in assistants frequently having personal relationships with their judges. Peppers indicates several monitoring mechanisms which U.S. Supreme Court justices apply to control the work of law clerks and to prevent them from shirking or wielding undue influence.142 Some judges, for instance, reduce the likelihood that law clerks have different political preferences by taking this aspect into consideration in the selection procedure. They also monitor law clerks by having products (such as draft-judgements) reviewed by multiple clerks. The personal relationship that many law clerks have with the judges also enhances their loyalty to the judges.143 The assignment of assistants to individual judges also creates a situation in which judicial assistants associate themselves with professional judicial values held by the specific judge they are supporting and thus may be less concerned with organizational aims.

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

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

4.6. Judicial Assistants Working with Professional or Lay Judges

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

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

5. Conclusion

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

Certain features of assistant positions are accompanied by larger risks of having undue influence; for instance, when a large number of assistants are employed or when assistants are highly qualified and experienced. Other features can shield judicial systems from too much delegation; for example, employing assistants on a temporary basis and the employment of young and unexperienced assistants. Each model includes its own individual mix of features that, on the one hand, enable judicial assistants to make a contribution to the efficiency and quality of the judicial process, but on the other hand, contain safeguards to prevent assistants from gaining too much power. It can also be observed that in all the judiciaries, the roles and duties of judicial assistants are scarcely mentioned in legislation and official documents. The majority of their duties are informally defined. Possible mechanisms to prevent...

142 Peppers, 2006.
144 See Posner, 1985, p. 133 on staff attorneys.
146 Malsch, 2009.
148 Darbyshire, 1984, p. 223.
exercising undue influence are generally also not cited as such in official policy. At the same time, the role of judicial assistants seems to have increased over time, probably due to worldwide concerns with the efficiency of adjudication.\footnote{See regarding common law judiciaries also Paterson, 2013, p. 253-257.} It is rather worrisome that the duties of judicial assistants are substantial, yet little of their position is officially codified. Nevertheless, when the organization of judicial assistant models are formalized and/or altered – for efficiency or other reasons – it is important to understand that the models consist of bundles of features which have been shaped within a specific judicial and societal context. Judicial systems should be cautious of cherry picking mechanisms to prevent undue influence from other judicial systems, as these mechanisms might not be transportable into their system without making adjustments.

**Bibliography**


S.J. Kenney, Beyond principals and agents: Seeing courts as organizations by comparing référentaires at the European Court of Justice and law clerks at the U.S. Supreme Court, Comparative Political Studies, 33(5), 2000, pp. 593-625.


Abstract:

In Switzerland, law clerks hold an important position, which is a particularity of the Swiss judicial system. Law clerks have a wide range of tasks. For instance, they are involved in the instruction of the cases, as well as in the decision-making process. The number of law clerks is continuously increasing, which is namely due to the growing caseload. Nowadays, at many courts in Switzerland there are more law clerks than judges. The result of this development is that judges have a different role than in the past. Despite the crucial role of law clerks, science has paid little attention to their function.

This article aims to describe the important role of law clerks from a legal point of view. It also enumerates concerns connected to the position of law clerks. Methodologically, the paper is based on a document analysis and on the results of a quantitative survey. Specifically, the article will discuss the following question: Is the Swiss legal system – where law clerks are key-players – a reasonable solution in order to cope with the increasing caseload in an efficient way?

The paper is divided into six parts:

1. Introduction
2. The Swiss judicial system
3. Definition and function of law clerks
4. Development and legal issues
5. Performance targets for law clerks
6. Conclusion and research needs

Keywords: Law clerks, Switzerland, Judicial Independence, Lay judges, Judicial assistants, Performance targets.

1. Introduction

The caseload has been increasing steadily at Swiss courts over the last decades, whereas financial resources have become scarce. Therefore, the efficiency of the judiciary has moved into the spotlight of public interest and political discussions. Even the highest courts are under pressure to perform effectively and efficiently.2

There are different ways to cope with the increasing caseload.3 Firstly, the number of judges could be increased. However, this would be associated with more costs and it would be more difficult to maintain a consistent jurisdiction within a court.4 Secondly, the procedural law could be reformed (e.g. to broaden the scope of application of summary proceedings).5 Though this may be compatible with the right to a fair trial only to a certain degree (see Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms; ECHR). Thirdly, organizational and management reforms may lead to a more efficient jurisdiction (keywords: caseload studies, caseload management, performance measurement, knowledge sharing, more transparency etc.). Lastly, E-Justice has a lot of potential as well.6
In Switzerland, also for historical reasons, an additional option to cope with the caseload has often been chosen in the recent years: More law clerks have been hired. Compared to the number of judgeships, the number of law clerks has disproportionately increased over the last years.\(^7\) In other words, the ratio between judges and law clerks has changed dramatically. For instance, in 1875 the Federal Supreme Court only consisted of two law clerks and nine judges.\(^8\) At the end of the 1980ies, the ratio between judges and law clerks was one law clerk on one judge.\(^9\) Today there are around 132 law clerks at the Federal Supreme Court, whereas it has only 38 ordinary judges and 19 part-time judges.\(^10\)

The increased importance of law clerks raises several legal issues. For instance, how many law clerks should work for one judge, so that the judge can still carry out his or her responsibility? Should the number of law clerks be restricted? From a constitutional point of view, two guarantees are important: the judicial independence and the right to a lawful judge. Below, the paper discusses these issues. It aims to answer the question whether the Swiss system is a lawful solution in order to cope with the increasing caseload. Initially, the Swiss judicial system will be explained; afterwards, the term “law clerk” is defined. Subsequently, the development of the importance of the law clerk’s role is explained more in detail. Finally, the paper describes empirically how law clerks meet performance targets at Swiss courts.

2. The Swiss Judicial System
To get a better understanding of the Swiss context, it is necessary to start with a few explanations of the Swiss judicial system.

The Swiss Judicial system is heterogeneous because each of the 26 cantons (Kantone, the states) has far-reaching autonomy due to the structure of its justice system.\(^11\) As a result of the federal structure, both Confederation (Bund) and the 26 cantons have their own judicial systems.\(^12\) Therefore, the courts in Switzerland are organized in a wide variety of ways.\(^13\) The federal judiciary contains, on the one hand, the Federal Supreme Court which’s role is to adjudicate appeals of the highest cantonal courts of appeals and the decisions of the federal courts of first instance. Its jurisprudence ensures uniform application of federal and international law throughout Switzerland and its continued development. On the other hand, the federal judiciary consists of the Federal Administrative Court, the Federal Criminal Court and the Federal Patent Court.\(^14\)

At cantonal level, each of the 26 cantons has its own constitution and its own court system. There are district courts, serving as courts of first instance in civil and criminal matters, and a cantonal court, serving as a court of appeal. In most cantons there are also a number of specialized courts: for instance, specialized administrative courts, juvenile courts or labor courts.\(^15\) The varying size of the cantons and the structural diversity in court organization lead to considerable differences in the size of the courts. This ranges in Switzerland from ordinary cantonal civil and criminal courts with one professional judge, to the Federal Administrative Court, which has around 75 professional judges.\(^16\) The composition of courts varies considerably according to legal discipline or type of case. Often, decisions are taken by single judges (Einzelrichter).\(^17\)

Judges usually are elected by popular vote or by a parliament. They must periodically run for re-election (typically every four to six years).\(^18\) This is a peculiarity of the Swiss judicial system compared with other continental European countries. Elections and re-elections shall give the judges a specific democratic legitimation.\(^19\) Traditionally, lay judges hold an important position at the courts in Switzerland – namely at courts of first instance. This is another characteristic of the Swiss case. Lay judges shall bring in the common sense in the decision-making process. The high number of lay judges is a consequence of the democratic system as well.\(^20\) Only in a minority of cantons is legal education a statutory eligibility

---

\(^7\) See Feller, p. 281 ff.; Leuenberger, p. 100.
\(^9\) Reiter, N. 561.
\(^11\) Lienhard, Kettiger, Winkler, p. 44; Bieri, N. 10.
\(^12\) Kiener (2012), p. 405.
\(^13\) Lienhard, Kettiger, Winkler, p. 44.
\(^16\) Lienhard, Kettiger, Winkler, p. 44 f.
\(^17\) Federal Supreme Court, p. 13.
\(^18\) Lienhard (2014), p. 29 f.
\(^20\) See Ziegler, p. 66 ff.
3. Definition and Function of Law Clerks

Law clerks are the judicial (not the administrative) staff of the judges. They belong to the judging body when the decision is taken by collegiate judging body, as well as by a single judge. Furthermore, they are involved in all stages of a process. For instance, their main functions are defined in Article 24 of the Federal Supreme Court Act (Bundesgerichtsgesetz). In addition, these tasks are specified in Art. 3 of the Regulations on the Federal Supreme Court (Bundesgerichtsreglement). For example, before a hearing they prepare a memorandum and are involved in the instruction of the cases. In a written procedure they often write a judgment proposal (on their own or under the direction of the responsible judge). They take part in the hearing and record in writing the proceedings. In the majority of the cases they write the reasoning of a judgment after the hearing. The fact that a judgment is usually co-signed by the law clerk emphasizes their important role in the judicial system of Switzerland.

In the decision-making process, law clerks have wide-ranging rights. Usually, they have an advisory vote during the deliberation; sometimes they even have a right of application. However, they do not have a voting right. Law clerks should be able to bring new ideas into the discussion. Their involvement as sparring partners contributes to the quality of adjudication. The following examples shall illustrate the wide-ranging powers of law clerks in Switzerland: At the Federal Criminal Court, a law clerk can request an oral deliberation instead of a circulation resolution. In the Canton of Glarus, a law clerk can be a substitute of a judge in a collegiate judging body with all the rights and duties of a judge. In the Canton of Thurgau, the leading law clerk makes decisions in terms of deferment of payment or reduction of procedural costs. There, a law clerk also has competences in the field of legal aid. In the Canton of Zurich, a law clerk can add his or her dissenting opinion to the records.

As illustrated, the functions of law clerks come close to those of a judge. Considering that, the German term “Gerichtsschreiber” (French: “greffier”; Italian: “cancelliere”) is not quite appropriate. Hence, the former federal judge Hans Wiprächtiger introduced law clerks as “junior judges” to foreign visitors. Nevertheless, they are not judges. There are several important differences: on the one hand judges can be distinguished from clerks in terms of their professional status. Judges are elected by popular vote or by the parliament for a limited term of office (usually between 4 and 6 years) and due to that they have a specific democratic legitimation and responsibility. Judges of higher instances are even magistrates. Law clerks, however, are employees; they are employed by a public law-contract and the personal acts are applicable to their employment. The courts are the appointing authority. On the other hand, there are differences in terms of the accountability, the remuneration and the allowance of extra-official activities or the legal protection. For instance,

---

23 Bundesgesetz vom 17. Juni 2005 über das Bundesgericht (Bundesgerichtsgesetz, BGG; SR 173.110).
26 As an example of the advisory vote see Article 24 section 2 BGG und Article 39 BGerR. In the Canton of Basel-Landschaft, law clerks have by law a right of application (see § 6 section 2 of the Cantonal Court organization Act [Gesetz über die Organisation der Gerichte vom 22. Februar 2002; Gerichtsorganisationsgesetz; GOG; SGS 170]). See also Feller, p. 293.
27 Hauser, Schweri, Lieber, § 133 N. 20.
28 Reiter, N. 476
30 See Article 18 section 3 and Article 19 section 3 of the organizational regulations of the federal criminal court (Organisationsreglement vom 31. August 2010 für das Bundesstrafgericht [Organisationsreglement BSIGer; BSIGerOR; SR 173.713.161]).
31 See Article 27 of the Cantonal Court Organization Act (Gesetz vom 6. Mai 1990 über die Gerichtsorganisation des Kantons Glarus [Gerichtsorganisationsgesetz, III A/2]).
32 See § 12c section 2; § 44 section 3 of the ordinance of the criminal and civil justice process (Verordnung vom 27. Mai 2010 des Obergerichts über die Zivil- und Strafrechtspflege [Zivil- und Strafrechtspflegeverordnung, ZRSV; RB 211.11]).
34 Uebersax (2007), p. 84.
35 Heimgartner, p. 296; see also Mosimann, p. 91.
36 In terms of judges see Kienes (2012), pp. 411 ff. In terms of law clerks see Feller, pp. 294 ff.;
Unlike judges’ remuneration, the salaries of law clerks are often performance-related. Summing up, a law clerk is involved in the deliberation but not in the rendition. The judges are solely responsible for the verdict.\(^{38}\)

Law clerks are highly qualified lawyers. They need at least a law-degree, sometimes the licence to practice as an attorney-at-law (bar exam) is required as well. The formal criteria of appointment for judges often are lower.\(^{39}\) Different to other European countries, Switzerland does not have a career judiciary.\(^{40}\) Consequently, there is no procedure for promotion of a law clerk to the position of a judge. Law clerks, usually, are employed for an indefinite time and they are not necessarily young lawyers, they can be older as well.\(^{41}\) Still, the job as a law clerk is frequently an entry point in the judicial system. Therefore, later on a part of the law clerks become judges or prosecutors.\(^{42}\)

The variety of the Swiss system is also reflected in the different organizational inclusion of the law clerks in the courts. On the one hand, law clerks can be personal employees of a judge; on the other hand, pool-systems exist. In a pool-system, law clerks support all judges of a court. Usually within a team of law clerks there is no hierarchy. However, most of the courts have a “leading law clerk” that is responsible to fulfill tasks in the field of court administration (e.g. responsible for the case assignment among the clerks).\(^{43}\) They are sometimes also a member of the management body of a court.\(^{44}\)

Legal assistants are not exceptional at courts in European countries.\(^{45}\) However, in comparison with many other countries in Europe, in Switzerland law clerks fulfill a wider range of tasks and have more influence on the jurisdiction. They support judges in their judicial function in a more substantial manner.\(^{46}\) In particular, law clerks write the reasoning of a judgment whereas in other countries this is typically the task of the judge.\(^{47}\) This peculiarity has historical reasons: In the past, many judges used to be laypersons that needed legal support and advice in the decision-making process.\(^{48}\) A judge must be able to deal adequately with the concerns and arguments of the parties. Therefore, the parties’ right to an independent judge and to a fair trial may be affected if inexperienced lay judges would decide without the possibility of asking an independent expert.\(^{49}\) Therefore, namely at courts with lay judges, law clerks traditionally hold an important position. But also at courts, where judges for a long time are well experienced and highly qualified lawyers (e.g. the Federal Supreme Court), the traditional division of work between law clerks and judges takes place.\(^{50}\)

### 4. Development and Legal Issues

The role of law clerks has become more and more important in the recent years. On the one hand, due to the increasing caseload their number has disproportionately risen compared to the number of judges.\(^{51}\) On the other hand, law clerks have taken over functions that used to be those of judges.\(^{52}\) A caseload-study in the canton of Basel-Stadt showed that law clerks have to bear the brunt of the case processing. This is because the writing of the reasoning takes a lot of time.\(^{53}\) According to Peter Uebersax, at the Federal Supreme Court law clerks prepare 9 out of 10 proposals of a judgment.\(^{54}\) To conclude, law clerks are crucial for the proper functioning of the courts in Switzerland – especially in order to cope with the caseload.

Such trends can be ascertained in other countries as well. New public management perspectives often focus on efficient division of labor. Thereto, additional tasks are delegated to the assisting judicial staff (e.g. in the Netherlands or in the US).\(^{55}\) Several European countries created a new judicial function similar to the German “Rechtspfleger.” A Rechtspfleger can be described as a quasi-judge, that does not assist the judge but works alongside him or her and is responsible for

---

\(^{38}\) Leuenberger, p. 106.

\(^{39}\) See section 2 above.

\(^{40}\) Kiener (2012), p. 420.

\(^{41}\) For variations of judicial assistants in relation of their age and their term of employment see also Holvast (2016).

\(^{42}\) See Kiener (2012), p. 412. The author is not aware of some research on the personal characteristics of law clerks; the statement above is based on the information of law clerks.


\(^{44}\) See for instance Article 9 section 1 of the regulations of organization and operation of the regional court Bern-Mittelland (Geschäftsreglement des Regionalgerichts Bern-Mittelland [GeschR RG BM; BSG 163.23J]).

\(^{45}\) See CEPEJ, p. 174 ff.


\(^{48}\) Uebersax (2004), p. 79.

\(^{49}\) BGE 134 I 16 E. 4.3 p. 19.

\(^{50}\) Uebersax (2011), N. 11.

\(^{51}\) Beusch, N. 4; Donzallaz, p. 208; Felber, p. 436; Nay, p. 568; Reiter, N. 561 f.; Wurzburger (2014), N. 5.

\(^{52}\) Donzallaz, p. 208.

\(^{53}\) See Lienhard, Kettiger, Uster, Winkler, p. 11 ff.

\(^{54}\) Uebersax (2011), N. 52.

making independent judicial decisions on specific matters. Nevertheless, a law clerk in Switzerland cannot be compared to a Rechtspfleger. He or she remains an assistant of the judges and is not involved in the decision-making process. The function of Rechtspfleger is rarely known in Switzerland.

In soft law, the issue of "legal assistants" can be found as well. For instance, the Consultative Council of European Judges (CCJE) points out the need that a genuine reduction of inappropriate tasks performed by judges can only take place by providing judges with assistants, with substantial qualifications in the legal field ("clerks" or "referendars"), to whom the judge may delegate, under the same judge's supervision and responsibility, the performance of specific activities such as research of legislation and case-law, drafting of easy or standardized documents, and liaising with lawyers and/or the public. Contrary to that recommendation he Committee of Ministers warns against entrusting legal assistants with judicial functions. It would endanger judicial independence.

The professional images of judges and law clerks are linked. Their areas of responsibility are closely connected as well. Therefore, the development relating to law clerks has also changed the image of a judge. Judges have got a different role than in the past. Nowadays, judges and law clerks work together as team players. Judges need to perform more and more management tasks. Judges lead, delegate and supervise, but do not fulfil the traditional judicial activities. This development is only one part of the general professionalization of judges’ activities in Switzerland. There are also major changes, e.g. in the fields of selection, training, ethical standards, and assessments.

There are three legal issues that are linked to the importance of the role of law clerks: the right to a lawful judge, the judicial independence and the performance assessment of judges.

The main criticism relating to the crucial role of law clerks is that they de facto fulfil tasks that should actually be accomplished by the judges themselves. In German, this issue is known as "Gerichtsschreiberjustiz". Indeed, the question arises which judicial functions are allowed to be delegated.

Art. 30 section 1 of the Federal Constitution of the Swiss Confederation states that any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited. The right to the lawful judge ("Recht auf den gesetzlichen Richter", see also Art. 6 ECHR) is violated when a court secretary takes a decision instead of a judge. It is, however, compatible with the European Convention on Human Rights and the Federal Constitution that a law clerk prepares the draft or the reasoning of a judgment, even if thereby the law clerk has an influence on the content of the decision. The responsibility must remain with the judge.

In order to be able to exercise this responsibility, judges need to study the case files themselves and form their own opinion; they have to weigh up alternatives and find equitable decisions. Thereto, judges need enough time. These tasks – the actual ultimate decision-making – belong to the non-delegable core of judicial activities. Therefore, a sole plausibility check of the drafts would be insufficient. In this context, according to the right to the lawful judge, there is an upper limit to increasing the amount of law clerks per judge. In the Ordinance of the Cantonal Court Organization of the Canton of Luzern (Justizverordnung) is defined, that the ratio of full-time positions between judgeships and law clerks at district courts should, in principle, be one to one.

57 See CEPEJ, p. 184.
58 See Tschirky, p. 126 ff.
59 CCJE, Opinion No. 6 (2004), N. 65.
60 Tschirky, p. 128
61 Reiter, N. 557.
63 See Klopfer, N. 16 ff.; see also Felber, p. 440; Grütter, N. 1; Heimgartner, p. 304 f.
64 See Gass, pp. 1143 ff.
68 See also Kiener, Kälin, pp. 521 ff.
69 BGE 134 I 184 E. 3 ff. (a German translation of the judgment is in: Praxis 2008 Nr. 138).
70 ECHR, Case Pedro Ramos v. Switzerland, N. 10111/06 (2010), § 50; BGE 138 V 154 E. 3.3 S. 158.
71 See Hauser, Schweri, Lieber, § 133 N. 23; Müller, Schefer, p. 927.
72 Feller, p. 302.
Markus Felber takes an opposing view. According to him, reality is different. A judge no longer has to take the responsibility for each case. In the contrary, he or she primarily has to make the judgmental decisions. Furthermore, the judge has to choose, motivate and supervise his assistants. Therefore, social skills and leadership are more important than professional knowledge. The main responsibility of the judge is the good functioning of the team. However, in order to implement this vision of Felber the law would have to be amended.\(^{74}\)

As a matter of fact, the question arises in which manner a judge must assume his or her responsibility. It seems reasonable to differentiate between routine and leading cases. In terms of routine cases it is sufficient, if the judges define a policy and delegate the settlement of the cases to experienced law clerks.\(^{75}\)

Another issue is \textit{judicial independence}. On the one hand, it is important to know how independent a law clerk must be. On the other hand, the question arises whether a law clerk can influence a judge in an improper way.\(^{76}\)

According to Article 30 section 1 Federal constitution, the parties to a case have the right to an independent and impartial judge.\(^{77}\) Judges often meet higher requirements as to their independence than court staff.\(^{78}\) Still, law clerks must be independent from the litigants and can be recused for the same reasons as judges when they participate in the decision-making process.\(^{79}\) Furthermore, in carrying out the advisory vote, they are bound by any instructions. They shall form their own opinion independently and they are obliged to point out legal inconsistencies or possible errors.\(^{80}\)

Within a collegiate judging body, a judge has to be independent from his or her colleagues and has to form his or her own opinion.\(^{81}\) Especially when a judge has a backlog of files, there is the risk that he or she accepts a draft of a judgment of another judge without a thorough appraisal. In this situation, the support of a law clerk can strengthen the independence of a judge.\(^{82}\) However, a judge must also be independent from a law clerk that prepares the proposal of a judgment. A judge must be able to take a decision on his or her own after considering the arguments/reasonings of the law clerk.\(^{83}\)

Research in the field of decision-making processes shows that most (judicial) decisions result from a combination of reflexive (automatic, rapid and unconscious) and reflective (deliberative, slow and conscious) processes.\(^{84}\) Judges tend to evaluate first ideas on the basis of intuition. After that, a deliberative process takes place in which judges monitor the intuitively derived judgement to decide whether it needs to be endorsed, corrected or overridden. Among other things, this process needs time and effort.\(^{85}\) Therefore, it is a problem if a judge has too little time for a critical examination of the matter.\(^{86}\) Hence, judicial independence is jeopardized if a judge has to supervise too many law clerks. When a large percentage of the judicial work is performed by legal assistants, certain cognitive biases may occur more easily to judges. Especially, a memorandum or a judgment proposal of a law clerk can affect the outcome of a decision and function as an anchor.\(^{87}\) Furthermore, a judge that has too many judicial assistants, has to concentrate too much on management tasks and cannot care enough about the jurisdiction.

Three constellations can be problematic: Firstly, presumably single judges will be more dependent on the legal advice of their assistants than judges in a collegiate judging body. Secondly, problems for judicial independence may result when a judge frequently changes the court or the chamber, whereas law clerks remain in their positions. Thirdly, lay judges may be particularly dependent on the legal advice of their assistants, because they may lack legal knowledge and experience. Lay judges frequently require judicial assistance to enhance their legal knowledge and to ensure that they fulfil their tasks

\(^{75}\) Aeschlimann, p. 413.
\(^{76}\) See Kiener (2001), p. 78; p. 222.
\(^{77}\) See Kiener (2012), p. 424.
\(^{79}\) See Kiener (2001), pp. 80 f.; BGE 140 I 271 E. 8.4.1 p. 273 f.
\(^{80}\) See Uebersax (2004), pp. 89 f.
\(^{81}\) See Müller/Schefer, pp. 936 ff.
\(^{82}\) See Leuenberger, p. 110.
\(^{83}\) Kiener (2001), p. 222.
\(^{84}\) Casey, Burke, Leben, p. 45, 48.
\(^{86}\) See Hauser, Schweri, Lieber, § 133 N. 23.
\(^{87}\) Holvast (2014), p. 52 f. Different studies found that judges’ decisions were influenced by different heuristics (Casey, Burke, Leben, p. 47, with further references).
dutifully and lawfully. Therefore, it can be difficult for them to assess the proposals of law clerks critically and to form their own opinion.88

Summing up, depending on the situation, a law clerk can be a protector or a threat to judicial independence. In a collegiate judging body a law clerk can support a judge and strengthen his or her independence from the colleagues. However, if a judge has to supervise too many law clerks, he or she can become dependent of them.

In Switzerland, formal individual assessments of judges are unusual.89 The performance of a judge is closely connected to that of a law clerk and, from the outside, the tasks of a law clerk and such of a judge can often not be clearly distinguished.90 This close relationship is one reason amongst others why some authors reject the use of indicators to appraise the performance of judges.91 In order to express it provocatively: A lazy judge can hide behind an excellent law clerk, and a good performance appraisal would be based on the work of the law clerk.92 Such an argumentation, however, cannot be accepted. A judge is responsible for his or her staff and for the performance of the whole team. Therefore, performance evaluations for judges cannot be declined only because they are supported by law clerks. Nevertheless, in order to implement an appropriate system of performance assessment for judges, it would be necessary to consider that judges are supported by law clerks in different ways.

5. Performance Targets for Law Clerks

Another important issue is the setting of performance targets for law clerks. Law clerks are important for the good functioning of the courts. Therefore, it is crucial to know how law clerks can be promoted in an effective way. Of course, there are other and more important management tools (e.g. a caseload-management system) in order to cope with the increasing caseload. Nevertheless, the setting of performance goals and performance assessments of law clerks are issues that should be discussed in practice and science, because the proper functioning of the courts depends substantially on the non-judge members (e.g. their motivation). Judicial reforms have to consider this fact.93

Inter alia to answer the question, how the setting of performance target for law clerks concretely is designed at Swiss courts, an empirical research was conducted in 2013. Both quantitative and qualitative data were generated using what were mainly closed but in some cases open questions, together with the opportunity to provide further details and comments.94 The questionnaire was sent to 45 courts. 27 courts completed the questionnaire (response rate of 60 %). The results are from 18 cantons and from the Federal Supreme Court and the Federal Patent Court.

One finding of the survey is that performance goals for law clerks are very common in Switzerland. In 14 (out of 18) cantons and at the Federal Supreme Court and Federal Patent Court, performance targets do exist for law clerks. Furthermore, the results show the heterogeneity of the Swiss judicial system. Sometimes, within a single canton, there exist different practices (for example there can be differences between the administrative, the civil and the criminal courts). Especially the empirical study demonstrates that performance targets are set differently: At some courts, performance goals are formulated in a general way. Other courts, however, use individual targets for each law clerk (see chart 1).

---

91 See Raselli, N. 20.
92 Felber, p. 437 f.
93 See Hoffmann-Riem, pp. 272 ff.
94 See Lienhard, Kettiger, Winkler, p. 45.
Chart 1

Performance targets for law clerks

General performance targets for all law clerks*

Individual performance targets...

... for all law clerks**

... for individual law clerks***

The Federal Supreme Court sets general performance targets for its law clerks. The performance objectives are regarded as benchmarks. 60 cases per year is considered to be a normal performance target. 40 cases per year is the minimum performance target for cases that are considered "medium-difficult". As the Federal Personnel Act\(^\text{95}\) is applicable for law clerks, their wage is performance-related. Inter alia their professional competence, the quantity of settled cases, as well as the work organization contribute to the calculation of the wage increase.

For example, in the cantons of Solothurn and Waadt, the individual targets are set at the annual appraisal interview for each clerk.

Often law clerks are personal assistants to a judge. That is the reason why at some courts the judges decide on their own, whether or not they want to set performance targets.

These differences are probably due to the varying forms of internal organization and the different sizes of Swiss courts. This variety is also reflected in the different organizational inclusion of the law clerks in the courts.\(^\text{96}\) It is difficult to assess which way of setting performance targets is the best. Probably, different models can be accurate for different courts and different cultures. In this field, there is need for further research.

6. Conclusion and Research Needs

Law clerks have a role of great importance in the Swiss judicial system. They are key-players helping to cope with the growing caseload. In general, it is lawful to increase the ratio of law clerks to judgeships. However, from a constitutional point of view, there is an upper limit to the number of additional law clerks a court should establish. Otherwise, a judge can no longer assume his or her responsibility and would become dependent of his or her law clerks.\(^\text{97}\).

Despite the crucial role of law clerks, empirical research has given little attention to their function so far. There is need for further research (e.g. on the relation between judges and law clerks and on their division of work). Especially, the best practice to set performance targets and the assessment of law clerks need to be discussed. Furthermore, in an international context it would be of major interest to differentiate between the different types of assistants, their responsibilities and their fields of activity.

\(^{95}\) Bundespersonalgesetz vom 24. März 2000 (BPG; SR 172.220.1).

\(^{96}\) See section 2 and 3 above.

\(^{97}\) See also Hauser, Schweri, Lieber, § 133 N. 23.
References


P. Bieri, Die Gerichte der Schweiz – eine Übersicht. «Justice - Justiz - Giustizia» 2014 (2)


A. Lienhard (2009), Supervisory Control and Court Management. *International Journal for Court Administration* 2 (1) pp. 30-45.


Book Review: The High Court, the Constitution and Australian Politics
By Greg Reinhardt and Liz Porter

Edited by Rosalind Dixon and George Williams, The High Court, the Constitution and Australian Politics, Cambridge University Press 2015
ISBN 978-1-107-04366-4

The High Court, the Constitution and Australian Politics sets the decisions of the High Court against the background of Australian political trends and attitudes in which they were made, thereby providing an important and scholarly contribution to the academic areas of politics and law, as well as to the area of comparative constitutional law.

Edited by Rosalind Dixon, Professor of Law at the University of New South Wales, and George Williams, AO, one of Australia’s most eminent constitutional lawyers and the Anthony Mason Professor at the same university, its contributors comprise a roll call of Australia’s leading constitutional lawyers and political scientists.

In their introduction, the editors consciously place their work in the considerable body of scholarship about the relationship between the High Court and Australian federal politics, acknowledging a series of important works on the subject, from Geoffrey Sawer’s two-volume seminal work Australian Federal Politics and The Law, the first book of which appeared in 1956, to Jason Pierce’s Inside the Mason Court Revolution: The High Court of Australia Transformed, published in 2006.

The book’s second chapter, by Monash University economists Russell Smyth and Vinod Mishra, entitled “Judicial Review, Invalidation and Federal Politics” sets out the rates at which the Court, at different periods, invalidated federal and state legislation and takes in the intervals of time between the enactment of the legislation in question and the decision to invalidate it. The authors were even ambitious enough to attempt to calculate a “Chief Justice Variable”, in an attempt to measure the likelihood that the Court, under its various Chief Justices, striking down legislation, using such factors as the political color of the government in power and its length of time in power in relation to the calculation.

The focus of Chapter Four, by University of New South Wales Law Professor Andrew Lynch, is on key dissenting judges and judgments, with the author examining the link between dissent and various internal and external political dynamics. Here Professor Lynch draws attention to “the obvious fact that dissent is primarily a relational concept and that the individual’s place in the decision-making of the Court is ultimately determined by those around him or her”. He quotes the so-called “Great Dissenter” Justice Michael Kirby himself here and points out that Kirby himself noted that his reputation for dissent would never have been made, had he been appointed several years earlier, and been a member of the “Mason Court” (1986-1995). The author also tackles the tantalizing question of “Dissent and Audience”, asking the question “For whom are dissenting opinions written?” and analyzing several episodes in Kirby’s time on the High Court, including Al-Kateb v Godwin, in which a majority of four justices upheld the constitutionality of the indefinite detention of asylum seekers. Professor Lynch compares Kirby’s opinion to the “far less exuberant” dissent of Chief Justice Gleeson, pointing out that the latter, far more than Kirby, potentially holds the key to the decision being reconsidered.

The subsequent twelve chapters look at the twelve periods in the Court’s history that correspond to the eras of each of the twelve Chief Justices, beginning with an analysis of the “foundational era” of the Griffith Court, written by John M Williams, Dean of Law at the Adelaide University Law School.

Some of the authors in these chapters make the point that, in some eras, there appeared to be little reflection of political currents to be seen in the constitutional jurisprudence of the High Court. If anything, they note, the dynamics at play were more “internal”. In his chapter on the Isaacs Court, for example, Macquarie University Emeritus Professor Tony Blackshield notes that the most significant factor shaping jurisprudence in this period was the appointment of Sir Owen Dixon, the “intellectual leader” of the court from the first day of his appointment.
As might be expected, the chapters on the Mason Court and the Gleeson Court look outwards to the politics of their day. John M Williams and the University of New South Wales’ Paul Kildea, for example, suggest that the Mason Court may very well have developed the law in conformity with community attitudes. Meanwhile, authors Rosalind Dixon and the University of New South Wales’ Sean Lau argue that the Gleeson Court, was in “a very immediate sense, a court of the Howard (the Australian Liberal (Conservative) Prime Minister) era”, with its chief justice a ‘small c’ legal conservative. The book’s final chapter, on the French Court, by Anika Gauja of the University of Sydney and University of Queensland Professor of Politics and Public Policy, Katharine Gelber, undertakes the difficult task of reviewing an era that is still ongoing.

Clearly this final chapter met the approval of its subject well enough for him to launch the book, which he did last February, making a point in his launch speech of praising the book’s editors for having engaged both legal academics and political scientists as contributors.

Chief Justice French declined to review that chapter’s verdict on him as “an institutionalist with progressive tendencies”, arguing that “nobody should be a judge about his or her own Court” However, he praised the book as “full of history and personalities and their interaction with the political events of 115 years of the Australian Federation” and declared it “a good read” – a judgment that is heartily endorsed.

This book will be of interest to those with an interest in jurisprudence and the development of the law, particularly the interaction of supreme courts with the governments of which they are an integral part. The book will be of interest not just to Australians but to all with an interest in the way in which court work, particularly in federations. It will be a particularly valuable resource for students of the law and the role of courts in the body politic.

Reviewed by Greg Reinhardt and Liz Porter
Australasian Institute for Judicial Administration
Book Review: International Courts and the Performance of International Agreements
By Giacomo Di Federico, Associate Professor at the Law Department of the University of Bologna, Italy


1. A General Theory on Courts and Compliance In International Law

Compliance with international agreements is among the most debated topics in legal literature. By and large it is assumed that international courts have no direct control over national governments, but can nevertheless facilitate cooperation, albeit with some important political constraints. Building upon relatively recent studies, Carrubba and Gabel propose a formal theory of international court influence and test it against the European Union, as a regional, sui generis, international organization. After a general introduction regarding the ongoing debate on international agreements and courts from a liberal institutional perspective and a rational design perspective, in Chapter 1 the authors present their theoretical approach. Most notably, they “want a model that is general (i.e., not tailored to a specific regime) that explicitly endogenizes each step of the adjudication process” (p. 26). Regardless of the specific regulatory regime created under the relevant international agreement (trade, environment, human rights, etc.) national governments must be driven by the need to pursue a collective action. In this sense, international courts contribute to upholding the law and ensuring cooperation, but noncompliance is believed to be physiological and accepted to a certain extent, even in national (federal) systems.

Chapter 2 clarifies the theory put forward by Carrubba and Gabel. Their model rests on the assumption that: “cooperation is sustainable as long as the long-run benefits from cooperation exceed the short-run cost of complying” (p. 31) And yet: “deeper agreements lead to more variable costs, and the more variable the costs, the more likely a government will face a situation when the short-run cost of compliance is simply too severe, and the government will defect, even knowing that doing so will lead to punishment at a minimum and the end of cooperation entirely in the worst-case scenario” (p. 31). This also explains why exceptions are normally included in these agreements. On the other hand, only individual governments are able to determine the actual costs of compliance. Thus, the need for an institutionalized court. In this regard, the dispute-generation and -resolution processes in place are considered pivotal. While the former must be designed to allow for effective standing to those actors that can be hindered by the relevant breach, the latter must ensure that third-party governments may intervene. Especially in advanced multilateral treaties (e.g., trade) that provide for adequate procedures and third-party participation, the competent courts can act as a fire alarm and information clearinghouse. International courts tend to “maximize government compliance with adverse rulings” (p. 38), but at the same time bear a legitimacy cost if their rulings are not observed. In light of the above, the authors argue, firstly, that “the court is more likely to rule against a defendant government the more briefs filed against the government and the fewer briefs filed in support of it” (p. 47) (the Political Sensitivity Hypothesis) and, secondly, that “court rulings against defendant governments are more likely to change government behavior the more briefs filed in support of the ruling and the fewer filed against it (the Conditional Effectiveness Hypothesis) (p. 47). Of course, this does not prevent international courts from innovating the existent regulatory regime; it simply implies that progress will be possible only insofar as national governments do not perceive them as mutually costly.

2. Testing the Theory in the European Union

In Chapter 3, Carrubba and Gabel test the viability of their two main propositions in the European Union. They do so by analyzing an original data set covering all the judgments of the Court of Justice in annulment and infringement proceedings, as well as in preliminary references, between 1960 and 1999. The EU legal order appears to be particularly well suited: it pursues economic integration; it foresees a central dispute settlement mechanism administered by the Court of Justice; it recognizes standing to institutions, Member States and, albeit to a limited extent, individuals, and it offers third-party governments the option to intervene in support of or against the defendant or the plaintiff. Moreover notwithstanding the lack of an autonomous enforcement mechanism, the Court of Justice (ECJ) is known to follow an
‘integrationist agenda’, which increases the risk of noncompliance. The authors thoroughly examine the distribution of litigants in annulment proceedings and preliminary rulings; indicate the number of annulment and infringement rulings by decade (60s, 70s, 80s and 90s); offer a breakdown of the preliminary rulings by the referring nation and decade; capture the distribution of third-party briefs by country and decade and reveal the percentage of favorable rulings for the plaintiff.

The risk of noncompliance is common to all three types of actions under scrutiny, and the gathered data suggests that there is indeed a relation between third-party government briefs (in support or against the defendant or plaintiff) and the finding of the Court.

In Chapter 4 the authors measure the legal quality of the arguments based on the analysis of the Advocate General (AG) (as opposed to those advanced by the parties and interveners) in order to discard the possibility that the Court actually rules according to the balance of the legal merits in the case. The AG, in fact, is believed to offer all the relevant guarantees: legal expertise and motivation to assess the case on the merits, and the merits alone. Of course, political influence cannot be excluded, but the instances in which the opinion can be said to be ‘suspect’ are very limited. The analysis of the relevant data confirms that there is a wide correspondence between the opinions and the judgments by the ECJ and, by consequence, the position of the AG does in fact reflect the legal merits of a case.

The prediction that a ruling against a defendant government is related to the number of (net) briefs submitted against it (the Political Sensitivity Hypothesis) is measured and tested in Chapter 5. The baseline analysis covers an impressive 1,098 rulings with a defendant government and 1,808 rulings with a litigant government. The first set of rulings is tested more narrowly (taking into consideration rulings in which the government was a defendant), whilst the second set of rulings is tested more broadly (taking into consideration also annulment proceedings and preliminary rulings in which the government was a plaintiff). In both cases the results are consistent with the expectations, although the Court appeared to be “much more sensitive to government briefs when governments were litigants (when threats of noncompliance would be most present) than otherwise” (p. 155).

The prediction that “European Court of Justice rulings against governments are more likely to change the behavior (i.e., change policy) when the briefs filed by third-party governments are (net) against the government” (p. 156), in turn, is gauged in Chapter 6 by analyzing how the ECJ rulings impact on EU interstate commerce. The authors examine preliminary rulings and infringement rulings, distinguishing them based on the risk of noncompliance. They estimate their separate and combined effect on trade in the six original Member States from 1970 to 1993 and consider both their short and long-run effects on intra-EU imports, weighting third-party briefs in support of the plaintiff in light of the political and economic importance of the interested country calculated through logged GDP. The analysis shows, “that trade-liberalizing rulings that attract the net support of third-party government briefs should be more likely to enjoy government compliance and thereby have a policy impact than would trade-liberalizing rulings that lack such third-party support” (p. 188). And interestingly enough, the major difference between preliminary rulings and infringement rulings appears to be one of quantity as the former seem to have a greater impact. On the other hand, intra EU-imports in the Member States are not affected in the absence of net third-party government supporting briefs.

In their concluding remarks, Carrubba and Gabel contest the (still) predominant neofunctionalistic view that integration occurs independently of government preferences. Resuming the most salient aspects of the investigation, the authors suggest that: “we need to move past asking whether international institutions are effective at changing government behavior to asking under what conditions international institutions are effective!” (p. 194). Indeed, their findings indicate that the Court is responsive, and more deferential, to governments’ positions when noncompliance is perceived as a realistic consequence of a ruling.

3. Final Remarks

Through formal modeling, or game-theory, the book offers a fascinating portrayal of the dynamics that govern judicial adjudication vis à vis market integration in the European Union. The methodological rigor that characterizes the work - in particular the consistent search for alternative explanations – supports the validity of the theory and stimulates further reflection on its practical implications. The tables reflecting the extensive and in-depth study favor clarity and accessibility by students, academics and practitioners, even those not familiar with regressive analysis.

 Nonetheless, perhaps because of their background, the authors appear to overlook a number of events and legal developments that occurred after 1999 that could impact on the reliability, today, of results of their research. Firstly, the reform of the Statute approved on the occasion of the signature of the Nice Treaty cases can be (and routinely are) decided without the contribution of the AG, which makes it now impossible to measure the legal quality of the arguments based on the analysis of the opinion, as opposed to those advanced by the parties and interveners. Secondly, the 2004 and 2007 enlargements have deeply affected the functioning of the Court and the weight of, and balance between,
Member States. Thirdly, the Lisbon Treaty has empowered the Commission to immediately request the payment of a penalty whenever a Member State fails to notify measures transposing a directive adopted under a legislative procedure (Art. 260(3) TFEU). This inevitably enhances the deterrent effect of infringement actions and possibly impinges on the soundness of the theoretical model.

That being said, the book by Carrubba and Gabel remains a well-conceived and intriguing volume on the role of the Court of Justice in the European integration process. Indeed, despite the many contributions to legal literature on the adjudication process and the impact of its rulings in the Member States, none address the role of the Luxembourg judges pursuant to the predictions posited by the authors. The complexity of the topic and the innovative approach followed by the authors make this volume a valuable learning instrument for graduate students of political sciences and law, in particular PhD candidates working with regressive analysis, but also for judges and lawyers interested in the enforcement of international agreements.
Book Review: Judicial Governance in Europe, Edições Almedina, 2015

By Markus Zimmer, IJCA Executive Editor


In June 1985, a group of European judges and prosecutors jointly created the MEDEL Association. MEDEL is an acronym for Magistrats européens pour la démocratie et les libertés (European Judges for Democracy and Liberties). MEDEL functions as a Europe-wide professional trade association that represents the interests of its member groups, currently 20 groups in 13 countries ranging from Germany, France and Italy to Romania and Serbia to Turkey and Cyprus. MEDEL’s members function as advocacy groups or modern-day guilds, representing the interests of their judicial and prosecutorial members. They are not official agencies or bureaus of the judicial systems by whom their member judges and prosecutors are employed. Left unstated is what proportion of the active judges and prosecutors in each of the 13 countries belong to the associations. The richness of the European Union’s 28 diverse member states features a variety of judicial and/or prosecutorial trade groups; some states have more than one. For example, Serbia has a judges’ association and a prosecutors’ association. To that extent, MEDEL, represents fewer than half of the total number.

This book, available in e-book format, summarizes the content of a 2014 survey MEDEL conducted among its member associations. The survey targeted judicial independence from the institutional perspective, focusing primarily on the supreme governance structure of the judicial power and the comparative independence of that structure from the other powers of government such as the executive and legislative. The volume begins with brief introductions by MEDEL’s current and immediate past presidents and by the current president of the Associação Sindical dos Juízes Portugueses.

The survey form is not included, although each country response includes all of the questions in numerical order. To what extent, if any, experienced professional researchers were utilized to design the survey instrument or interpret and process the results is not discussed. Moreover, the text does not mention the methodology utilized in administering the survey and identifying the actual responders. The reader learns only that 14 of MEDEL’s 20 members responded; for Serbia, the text includes separate responses for the judges and prosecutors associations. The textual responses vary in length from ten to over 30 pages, questions included. Extracting comparative data as to how the responses differ is time-consuming because the book includes neither tables nor spreadsheets of summary responses, thus diminishing its potential usefulness as a reference tool. All of the responses except that of the French association are in English. Finally, the book contains no index. Unaddressed is why nearly one-third of MEDEL’s members did not respond.

These various shortcomings notwithstanding, the book is useful as a compilation of relatively detailed information on the primary judicial power governance organ – alternatively referred to as supreme judicial council, high judicial council, judicial council, magistracy higher council, etc. – for the eleven European countries and Turkey. The 12th country, the Czech Republic, has no council or equivalent, and it’s unclear why it was included in the responses. The information solicited includes descriptions for each country of council structure; council member appointing authorities; council member elections, functions and responsibilities; allocation of membership slots by profession (judge, prosecutor, lawyer, professor, civil society representative, legislator, minister, etc.); HR-related powers the council exercises over individual judges and prosecutors – and the relevant procedures – such as recruitment, selection, performance assessment, salary administration, promotions, transfers, disciplinary proceedings, administrative appeals procedures, initial and continuing training; and the extent to which council functions are formally enshrined in a public law.

Although most of the survey questions request factual and descriptive information, some request judgment calls such as listing positive/negative aspects and strengths/weaknesses of the effectiveness of particular council functions; why and to what extent judges and prosecutors pursue or avoid council membership. Several survey items follow such questions with requests for suggestions.

*Turkey is not an official member of the European Union.