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TEAM FRANCE 4
Daphné AMOUNA
Etamine NOLLET
Lauriane VALLUY
Tutor: Mathilde LACROIX

JUDICIAL ASSISTANTS :

ETHICAL AND MANAGERIAL CONCERNS

A comparative study



Nota bene: As part of our research, we interviewed judges and judicial assistants across Europe. Some of our discussions are mentioned in this paper. These conversations significantly contributed to our reflection. We thank all those interviewed for their participation and insight. We also thank our tutor for her availability and support.

There was a time when the loneliness and isolation of judges was a major concern to many judiciaries.¹ Henceforth, recent efforts to modernize public institutions across Europe have redefined the working environment of the judge. Now head of a team that includes judicial assistants, this change has raised new fundamental concerns with regards to judicial ethics and professional conduct. Western societies have entrusted judges with the responsibility to adjudicate on the basis of standards believed to guarantee judicial independence, now enshrined in Article 6 of the European Convention on Human Rights, which upholds the right to an independent and impartial tribunal established by law.

Relying on the responses to a questionnaire sent out by the Consultative Council of European Judges of the Council of Europe in preparation for Opinion No. 22 (2019) on judicial assistants, it is safe to say that a large majority of European countries employ judicial assistants.² Indeed, with the exception of Liechtenstein, all replied that their judges have the support of judicial assistants.³ Increasing caseloads and delays in the administration of justice, the search for efficiency and qualitative judgments, as well as the need for judges to focus on their core mission of adjudicating, are some of the main reasons given for employing judicial assistants. However, despite these honorable objectives, a large proportion of judicial duties are now susceptible to being performed by judicial assistants, thus raising important concerns.

This paper understands “judicial assistants” as being persons with a legal education contractually recruited to assist judges in their adjudicative work. Beyond the traditional duo of judge and administrative assistant, this new figure has appeared through the creation of a new position or by assigning additional duties to existing positions. The scope of this paper is European countries, understood as Member States of the Council of Europe. Across European countries, judicial assistants can be referred to under different names, such as *judicial assistants* in Ireland, *law clerks* in the United Kingdom, *assistants de justice*, *juristes assistants* or *assistants spécialisés* in France,⁴ *Referendaris* in Belgium and Finland, *Wissenschaftliche*

¹ European Commission for the Efficiency of Justice, Council of Europe, Breaking up judges’ isolation, CEPEJ(2019)15

² CCJE, Summary of responses to the questionnaire for preparation of Opinion No 22 (2019) on “The role of court clerks and legal assistants within the courts and their relationships with judges”, available at <https://rm.coe.int/summary-of-the-responses-to-the-questionnaire-for-the-preparation-of-o/168093f579>

³ Albania, Andorra, Austria, Azerbaijan, Bosnia and Herzegovina, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Georgia, Germany, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Romania, Russia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom handed in responses.

⁴ Frédéric Charlon and Clément Cousin, Les juristes assistants nouveaux venus dans l’équipe autour du magistrat, *Recueil Dalloz*, February 2018.

Mitarbeiter in Germany, *Letrados del Gabinete Técnico del Tribunal Supremo* in Spain, and *Référéndaires* or legal officers in some international organizations.

The term ‘ethics’ derives from the ancient Greek word *ethos* and is defined as the moral principles that control or influence a person’s behavior.⁵ In working environments, professional ethics govern the standards and moral conduct of a profession and its members. Professional ethics provide guidelines and norms that govern a professional’s responsibilities to colleagues and the public. While competence and integrity are ensured by technical training coupled with an institutional means of validating knowledge, associations made up of these professionals have set standards to monitor their conduct in the public interest.⁶

Threats to the judicial ethics and expected professional conduct of judges are expressed in different ways. As judicial assistants are not held to the same ethical standards as judges, their influence on the decision-making process raises the question of the effectiveness of the right to an independent and impartial judge and to a fair trial. Indeed, excessive reliance on the work of judicial assistants may lead to the dilution of a judge’s sense of responsibility and authority over his or her cases. Judges might be influenced by the work provided upstream by a judicial assistant, thus infringing on their impartiality. The status and safeguards around judicial assistants might prove inadequate when faced with the reality of their duties. Lastly, there is a risk of distrust in the judicial process. Public trust stems from the confidence and expectations placed in a judicial system, which should be transparent and accountable, as well as from the image of judges and judiciaries and the ensuing respect for their authority, independence and impartiality.⁷ If “justice must not only be done: it must also be seen to be done”⁸, the realization that judicial decision-making might stem from judicial assistants could have serious consequences. Finally, the redefinition of the way judges work poses challenges. From a somewhat isolated adjudicator, the judge is increasingly required to become a manager, expected to allocate work, supervise and train judicial assistants.

Thus, the increased employment of judicial assistants in European countries makes a comparative study meaningful. Though research remains scarce, this paper aims at presenting

⁵ “Ethics” in the Oxford Advanced American Dictionary, 25 Apr. 2022.

⁶ “Professional Ethics” in the New Catholic Encyclopedia, 25 Apr. 2022

⁷ Ms Julia Laffranque, Securing public trust in the Judicial process, in Strengthening judicial independence and impartiality as a pre-condition for the rule of law in Council of Europe Member States, Opening and Concluding Remarks, Key Speeches and General Rapporteur’s Report, presented at the High-Level Conference of Ministers of Justice and representatives of the Judiciary (Sofia, Bulgaria, 21-22 April 2016), at 37.

⁸ As quoted in ECHR, Case of *Delcourt v. Belgium*, application n 2689/65, 17 January 1970, para. 31.

and comparing the different European schemes of judicial assistants' involvement in the judicial process, their status, duties and ethical safeguards. It also delves into the influence of judicial assistants on judicial decision-making and on the adjudicative process as a whole, thereby addressing the following question: **to what extent can the influence of judicial assistants on decision-making lead to a dilution of judicial ethics?**

After a comparative overview of judicial assistants in European countries (part I), answering the above question will involve identifying the ethical and practical issues raised by the vast recruitment of such personnel (part II). Finally, pointing out the ethical issues at stake, this paper will further formulate proposals in order to combine the search for efficiency in the judicial system with the fundamental ethical principles expected by the rule of law (part III).

I – Comparative Analysis of Judicial Assistants in Europe

A – Different Systems of Judicial Assistants

1- The Rationale Behind the Emergence of Judicial Assistants

Judicial assistants or clerks may now be found in almost all judicial systems across Europe⁹ and a comparative analysis of the different legal systems reveals that their numbers are growing. Judges no longer work alone but are assisted in their adjudicative duties by judicial assistants. For example, in Norway, the Norwegian Supreme Court formally created its clerk unit in 1989. It was originally comprised of six clerks but their numbers doubled in the same year. The two largest Courts of Appeal, Gulating and Borgarting, started experimenting with the use of clerks in around 2010 and formalized their clerk units in 2015 and 2018 respectively. Since then, the number of clerks in these units has increased rapidly.¹⁰ In France, the position of *assistant de justice* was created in 1995 as a form of part-time temporary employment for young graduates and a new category of *juriste assistant* appeared in 2016 for more specialized or experienced candidates.¹¹

This rather recent phenomenon may be explained by the driving force of different rationales. Three main reasons for creating or increasing the number of judicial assistants may be

⁹ CCJE, Summary of responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 2

¹⁰ Gunnar Grendstad, William R. Shaffer, Jørn Øyrehaugen Sunde and Eric N. Waltenburg, 'From Backlogs to Quality Assurance. The Development of Law Clerk Units at Norwegian Courts' (2020), 11(3) *International Journal for Court Administration* 3

¹¹ François Melin, 'Le statut des juristes assistants', *Dalloz actualité* (2022)

identified: helping judges cope with increasing backlogs, coupled with the idea of an apprentice model where future or young judges can gain experience, and improving the quality of adjudication. Increasing backlogs seem to be a frequent justification for resorting to judicial assistants and stepping up the tasks they perform. The introduction of judicial assistants in Slovenia was linked directly to a ‘serious problem of backlogs’¹². Similarly, adding clerks in the Norwegian Supreme Court was an answer to the rapid increase in cases that was overstressing its capacity.¹³ However, the use of this pretext to create the first clerk units was later overshadowed by a growing ambition to see them contribute to a higher quality of adjudication.¹⁴ Behind these reasons emerges the idea of increasing efficiency in judicial organization based on managerial concepts.¹⁵ The judge and the judiciary should be efficient, and surrounding them with a team to relieve them of non-core tasks may be a solution. However, in Opinion No 22 (2019), the CCJE points out that very few countries actually collected data on how useful judicial assistants really are to the judicial system.¹⁶ An attempt to apply the rational choice theory to judges and judicial assistants has shown that judges tend to sacrifice leisure or the quality of their decisions when faced with increasing backlogs. However, while increasing the number of judges would lead to a higher proportion of resolved cases, a rise in the number of assistants would not necessarily have the same impact. Judges would nevertheless spend more time on improving the quality of their decisions.¹⁷ There is no straight answer as to whether judicial assistants contribute to reducing backlogs, thus avoiding unreasonable delays for litigants, or improving the quality of adjudication. They probably do both to varying degrees depending on the organization and extent of their duties in each judicial system. Either way, their presence is beneficial with regards to the rights of litigants enshrined Article 6 of the ECHR.

Incidentally, delegating tasks to competent subordinates allows judges to focus on the heart of their role – decision-making – and reduces stress.¹⁸ Studies in social sciences show that even

¹² Slovenian response to the questionnaire for preparation of Opinion No 22 (2019) on “The role of court clerks and legal assistants within the courts and their relationships with judges”, available at <https://rm.coe.int/compilation-all-replies-/16809463ff>

¹³ Gunnar Grendstad, *supra* note 10, at 4

¹⁴ *Ibid*, at 11

¹⁵ Holvast, N. L., *In the shadow of the judge: The involvement of judicial assistants in Dutch district courts*, (2017) Eleven International Publishing.

¹⁶ CCJE, Opinion 22 on the role of judicial assistants (2019), available at <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta>, at 4

¹⁷ Fatih Deyneli and Peter Mascini, ‘Utility Maximizing Judges and Judicial Assistants: Testing Rational Choice Theory in 22 EU Countries’ (2020) 11(3) *International Journal for Court Administration* 6

¹⁸ *Ibid*, at 2

though judges consider the nature of their work and the associated intellectual challenge as a major source of satisfaction, judicial professionals are amongst the most vulnerable to occupational stress.¹⁹ This stress not only exposes them to a variety of signs and effects but also increases the risk of a dysfunctional judicial system delivering poor decisions due to improper working conditions.²⁰ In practice, this occupational stress stems from the ever-increasing volume of work, which requires judicial professionals to work at high speed and outside regular hours, especially in lower courts, as they fear backlogs, overbooking of cases and expired deadlines. The recruitment of judicial assistants is therefore beneficial in this respect. This is particularly true where the appointment of qualified judicial assistants has been an institutional response to the insufficient funding available for the recruitment of judges. However, the CCJE warns that ‘judicial assistants should not be employed at the expense of appointing judges in adequate numbers. If the workload of judges is too high, this might increase the pressure to delegate more duties to judicial assistants than is desirable.’²¹

Finally, employing judicial assistants may be a way to contribute to the training of future or young judges. Indeed, it is often seen as a stepping-stone to gain experience ‘behind the bench’²². For example, Germany employs young judges as judicial assistants in the higher courts to gain experience and qualify for promotion. The same is true in Albania and Spain.²³ This rationale for employing judicial assistants is very often reflected directly in the type of organization that is chosen by the states.

2- *The Institution of Judicial Assistants*

Judicial systems in Europe originate from different models. While the influence of a common law or civil law system may be found, the responses to the questionnaire on judicial assistants sent out by the CCJE in preparation for Opinion No. 22 (2019) show a vast variety in types of organization. However, at second glance, it is possible to highlight some main features of interest.

¹⁹ Three-quarters of UK salaried judges are satisfied with the challenge of their job (77%) and the variety of their work (73%) ; Paula Casaleiro, et al., ‘A Critical Review of Judicial Professionals Working Conditions’ Studies’ (2021)12(1) *International Journal for Court Administration*, at 20.

²⁰ Paula Casaleiro, et al., ‘A Critical Review of Judicial Professionals Working Conditions’ Studies’ (2021)12(1) *International Journal for Court Administration*.

²¹ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 4

²² British and Irish responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

²³ German, Albanian and Spanish responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

First, judicial assistants may be employed on a temporary basis or as career assistants. Temporary assistants correspond to the apprentice model discussed above. They only serve as such for a short period of time, usually for a maximum of five years depending on the system, on fixed term contracts for future judges or judges on secondment. Resorting to temporary assistants might also be seen as a way to minimize the risk of judicial assistants gaining too much influence.²⁴ Employing young and inexperienced assistants is sometimes considered as a safeguard against allocating them too many duties and therefore undue influence on the adjudicative process that is inherent to the judge. On the other hand, this is detrimental to the efficiency and quality that the judicial assistant can provide to the judicial system. Another model is to employ career assistants. In this case, opportunities for promotion should be offered, although this is not systematic.²⁵ This model is usually found in civil law systems that have a tradition of court scribes: the Swiss *Gerichtsschreiber* and the Dutch *Griffers*, for example. However, not all civil law systems follow this model. The Belgian *Greffier* or the Spanish *Letrado de la Administración de Justicia* only perform administrative duties while other judicial assistants are employed to support the judge in his or her adjudicative work. Career judicial assistants offer advantages and disadvantages that mirror those of their temporary counterparts. However, in some states, a model that provides for career assistants may in effect become a system with temporary assistants. The goal of young assistants is not always to stay in such a career. This common feeling is expressed by a young Slovenian judicial assistant: “I think there comes a day when you want to get some extra responsibility and want to be in charge. Because here we are just helping judges do their work. For me, actually, personally, this will be a problem someday.”²⁶

A second distinguishing criterion is the method of organization where judges are concerned. Judicial assistants may be assigned to one judge specifically, to a panel of judges or be placed in a pool available on a needs basis to all the judges in a court. When assigned to one judge, the latter is usually involved in the selection process, thus making for a closer relationship. The judge then becomes a sort of mentor, which might in turn lead to increased influence on decision-making. This method of organization tends to be chosen most often in apprentice models like those in Germany or France. In the pool system, judicial assistants form a pool

²⁴ Nina Holvast, *supra* note 15, at 73

²⁵ In Slovenia for example, where the role can constitute a career but was designed as a stepping stone to becoming a judge

²⁶ In Anne Sanders, ‘Judicial Assistants in Europe – A Comparative Analysis’ (2020) 11(3) *International Journal for Court Administration* 12, at 5-6

available to the whole court and they will work with different judges. This type of organization is found mostly in countries with career assistants such as Switzerland or the Netherlands for example.²⁷

Judicial assistants need to complete studies in law in all European states. In some countries, they also need to have practical experience after their legal education.²⁸ However, few states provide training, whether it be initial or continuous, for their judicial assistants. The Irish judiciary, for instance, does provide its judicial assistants with initial training, which consists of guidelines on their role and ethical obligations, but the process differs significantly from that of judges. Additionally, the Irish judicial authority enables its judicial assistants to attend the continuous training made available to judges.

Finally, the standards of professional conduct expected of assistants are usually minimal and limited to confidentiality. For example, French judicial assistants swear an oath to keep any information they may acquire during their duties secret. Other states like Austria and Belgium have similar oaths. However, swearing an oath is not a common feature for European judicial assistants.²⁹ Some states require their judicial assistants to follow the same standards of ethical conduct as other civil servants³⁰, but these standards are not specific to judicial assistants and do not reflect their particular involvement in the adjudicating process. Only a few states said they had rules imposing guarantees of impartiality, such as the obligation to reveal conflicts of interest or recusal.³¹ However, many informal rules or the attitude of judicial assistants who aspire to become judges can compensate to some extent for this lack of textual framework. A young Irish judicial assistant expressed his view on his impartiality in these terms: ‘With regards to impartiality, we must not try to mislead or exercise influence on our judges – in a common law system where case law is a fundamental source of law, we cannot seek to exercise mala fides influence on our judge’s work.... It’s a very well-understood principle – we, as JAs, understand why we are there and what we are there to do.’³²

Even so, the ethical and professional conduct standards of judicial assistants around Europe seem a bit thin, especially with regards their involvement, which can be substantial.

²⁷ *Ibid*, at 7-8

²⁸ CCJE, Summary of responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 2

²⁹ *Ibid*.

³⁰ Cyprus, Moldova

³¹ Responses to the questionnaire for preparation of Opinion No 22 (2019) : Denmark, Finland, Norway, Croatia, Slovenia, Sweden, Switzerland, *supra* note 12

³² Response to our questionnaire on the role of judicial assistants by an Irish judicial assistant

B – The Involvement of Judicial Assistants in the Adjudicative Process

1- Different Degrees of Involvement

‘The role of the judicial assistant follows from the role of the judge. Judicial assistants must support judges in their role, not replace them.’³³ Duties of judicial assistants vary considerably from one country to another. Indeed, their ‘assistance to judges can reach from acting as a “sounding board” for the judge’s ideas, to conducting research and performing administrative duties to the drafting of decisions and participating in deliberations.’³⁴ For the purpose of clarity, judicial assistants’ duties may be divided into three stages: prior to, during and after a ruling.

Prior to a ruling, judicial assistants may undertake legal research. Indeed, in their responses to the CCJE questionnaire in preparation for Opinion No 22, all countries declared that judicial assistants undertake research, including rules and jurisprudence, often summarized in a memo, in order to provide the judge with the necessary information. In Bulgaria, for instance, ‘judicial assistants are prevalingly involved in the stage when preparation of the decision-making is conducted – as far as the main part of their work consists in research and finding relevant case law/preparing memos and summaries.’³⁵ In Ireland, research skills of judicial assistants are particularly valued in the recruitment process. They are required to have ‘a good knowledge of modern online research methods, materials and databases and some experience in conducting legal research.’³⁶

During the decision-making process, judicial assistants are involved in the drafting stage in the majority of European states, yet at varying intensity from one country to the next. The task may be restricted to the facts of the case or go as far as drafting complete judgments. However, in some common law countries, writing the judgment is the personal responsibility of the judge who cannot delegate to anyone. Thus, in Ireland and the United Kingdom, judicial assistants are excluded from the drafting process. In other countries, the involvement of judicial assistants in the drafting process raises a concern as to how much leeway the judge has in his or her decision. In an ideal world, the judge could rewrite the entire decision if he or she disagreed

³³ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 19

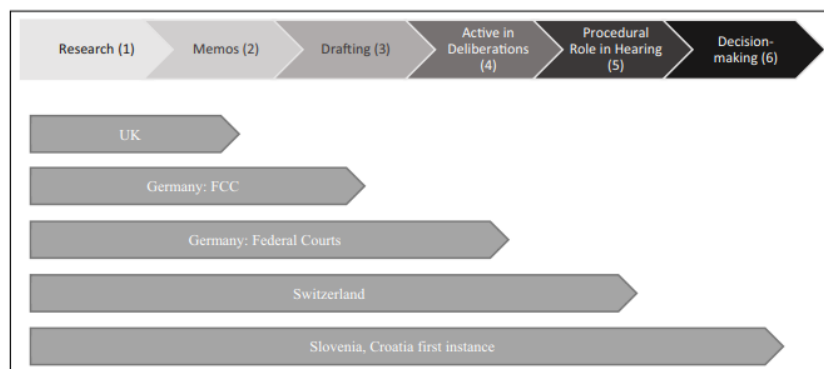
³⁴ Anne Sanders, and Nina Holvast, ‘Empirical Studies on the Role and Influence of Judicial Assistants and Tribunal Secretaries’ (2020) 11(3) *International Journal for Court Administration*, p. 1.

³⁵ Responses to the CCJE questionnaire for preparation of Opinion No 22 (2019) : Bulgaria, *supra* note 12

³⁶ *Ibid* : Ireland.

with the draft provided by a judicial assistant, but given the time available and the material constraints of the judiciary, this is unlikely to happen. As a result, the dilution of the judge's involvement in the drafting of a judgment raises an immense ethical difficulty. Aware of the implications of such involvement, drafting in many countries is only open to judicial assistants in precise parts of the judgment under the sole authority of the judge. However, there are systems, such as Austria and the Czech Republic, in which judicial assistants can autonomously draft and make procedural decisions.³⁷ Furthermore, some judicial assistants may be present or even active in deliberations.³⁸ This takes them a step further in their involvement in the adjudication process itself. Conscious of this, most European states do not allow judicial assistants to be present during deliberations.³⁹

Following the decision-making process, judicial assistants perform diverse missions such as proofreading decisions, cross-checking references or preparing decisions for publication with respect to the rights of the parties cited in the judgment. Thus, judicial assistants' duties are characterized by their diversity and varying degrees of involvement in the judicial process. Anne Sanders used these differences to develop a scale of involvement and studied five examples.⁴⁰



2- The Largely Informal Role of Judicial Assistants

An analysis of the different judicial assistant systems reveals that the role and responsibilities of judicial assistants are 'rather scarcely mentioned in legislation and official policy

³⁷ *Ibid* : Austria, Czech Republic

³⁸ They may be invited in Lithuania or Malta, they are present but do not participate in Belgium or Denmark, they are present and may be invited to participate in Austria and the UK Court of Appeal: Anne Sanders, *supra* note 25, at 12

³⁹ Responses to the CCJE questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

⁴⁰ Anne Sanders, *supra* note 25, at 15

documents⁴¹. This appears to be true for all models in Europe. One consequence is a certain discrepancy between the texts creating and organizing the role and what is actually happening in courts across a country. The texts, when they exist, are most often short and terse which inevitably leads to an informal definition of duties, blurred lines and local interpretations by judges. For example, the Slovenian response to the CCJE questionnaire in preparation for Opinion No 22 explains that:

‘As already described, they have a wide range of duties, from very routine ... to highly intellectual tasks... There is an informal consensus among judges that the final decision has to be made by the judge who also bears the responsibility for the decision made. In practice, the duties of judicial assistants vary per court. Moreover, it can be argued that the duties of judicial assistants are heavily influenced by factors such as their knowledge and experience. The level of trust established between the judicial assistant and the judge he/she works for is equally important.’⁴²

In the Netherlands, the text providing for judicial assistants bestows only administrative tasks upon them. The role they have today in the adjudication process, which can be extensive, has developed in practice outside any textual framework. As a result, the duties they actually perform “differ to some degree based on the court (division), and are largely informally outlined”.⁴³ In other states, such as the United Kingdom or Ireland, judicial assistants appeared when the Courts decided to hire them of their own accord. An Irish judicial assistant commented: ‘My only feedback would be that judges should be told to what extent they can rely on their JAs. Some judges will engage with their JAs minimally, especially those who are newly appointed, as they are somewhat unclear as to what we can do.’⁴⁴

British or Irish judicial assistants have less potential influence as they do not draft decisions or sit in hearings. This is not the case for Norwegian clerks who were also created by an administrative decision of the courts themselves.⁴⁵ French judicial assistants all derive from legislative texts. However, the texts are terse and the multiplicity of different judicial assistants

⁴¹ Holvast, *supra* note 15, at 72-73.

⁴² Slovenian response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

⁴³ Nina Holvast, ‘The Power Of The Judicial Assistant/Law Clerk: Looking Behind The Scenes At Courts in the United States, England And Wales, And The Netherlands’ (2016) 7(2) *International Journal for Court Administration*, at 16

⁴⁴ Response to our questionnaire on the role of judicial assistants by an Irish judicial assistant

⁴⁵ Gunnar Grendstad, *supra* note 10

with similar duties (*assistants de justice, juristes assistants, assistants spécialisés*) creates blurred lines that can confuse judges and lead to local interpretations of the roles.⁴⁶

Furthermore, in the model where judicial assistants are assigned to a specific judge, a personal relationship is created between the judge and the judicial assistant. As the relationship grows, this may lead to an allocation of duties that increases beyond official regulations and therefore varies from one judge-judicial assistant duo to another. This clearly transpires in the different responses to the questionnaire sent out in preparation for Opinion No 22, e.g. ‘this depends on the individual judge’s discretion’⁴⁷, ‘the concrete delegation of preparatory (drafting) work very much depends on the respective judge and the respective assistant.’⁴⁸, ‘yes, it is possible for the *Référendaire* to be entrusted with such work. The reality of such a practice depends on the concrete situation and the way the *Référendaire* and the judge work together.’⁴⁹

The approach taken by the Czech Republic to define the duties of judicial assistants in legislation is worth noting. Instead of explaining vaguely what a judicial assistant should do, legislation chose to set out what they could not do.⁵⁰ This negative definition is interesting because it draws a line that seems to aim at protecting the adjudicative duty of the judge and creating core responsibilities that cannot be delegated. This shortage of official regulations and the development of local informal rules might be related to the sensitivity of the subject of the involvement of judicial assistants in the adjudication process, as will be discussed below.

II. Repercussions on Ethics and Professional Conduct

A. Ethical Implications

1. Ethical Standards and Article 6.1 of the ECHR

Every judicial authority draws its legitimacy from the law, which is the pillar on which public confidence lies. Article 6 of the European Convention on Human Rights guarantees the right to an independent and impartial tribunal established by law. Aside from this legal standard, judges

⁴⁶ Ludovic Belfanti, ‘La création des juristes assistants : Entre utilité et questionnements’ (2018), 20 *Gazette du Palais*, at 11.

⁴⁷ Lithuanian response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

⁴⁸ Austrian response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

⁴⁹ Belgian response (translated from French to English) to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

⁵⁰ Czech Republic response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12

are bound by codes of ethics that their respective national judicial councils safeguard through the adjudication of any ethical question that arises in the exercise of their judicial duties.

These values may differ from state to state but, as an illustration, the French Superior Council for the Judiciary has listed integrity and probity, fairness, professional conscience, dignity and respect for and attention to others as the values that French judges and prosecutors must uphold.⁵¹ Judges face disciplinary sanctions should they disregard these ethical standards, as well as criminal and civil liability. The European Court of Human Rights can also condemn States for a violation of the principles of independence and impartiality.

Independence consists of the need to protect the judiciary from partisan interference and is understood to have both an institutional and an individual aspect.⁵² At the institutional level, it is guaranteed by the separation of powers and by the means provided to the judiciary.⁵³ At the individual level, it is attained through rigorous appointment methods and comprehensive and effective training. To this end, the Council of Europe recommends that States allocate sufficient resources to guarantee that such training programs meet the requirements of competence, openness and impartiality inherent to judicial office.⁵⁴ Furthermore, training programs should be reviewed periodically to ensure their effectiveness, and be coupled with practical training opportunities, assisting judges in office.⁵⁵

Impartiality is also two-fold: the European Court of Human Rights has ruled that it encompasses both a subjective and an objective approach that consists of ‘the personal conviction or interest of a particular judge in a given case’, and ‘whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.’⁵⁶ Impartiality is the key to public trust in the institution and judges are required to rid themselves of any prejudice, which allows them to uphold the principle of equality of all persons before the law.

⁵¹ Superior Council for the Judiciary, Compendium of the Judiciary’s Ethical Obligations, available at http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_compendium.pdf

⁵² Opinion no.3 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behavior and impartiality (2002), at 16

⁵³ *Ibid*; Superior Council for the Judiciary, Compendium of the Judiciary’s Ethical Obligations.

⁵⁴ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, para. 19

⁵⁵ Council of Europe, 2016 Action Plan on Strengthening Judicial Independence and Impartiality, available at <https://rm.coe.int/1680700125>

⁵⁶ *Piersack v. Belgium*, judgment of 1 October 1982, para 30. See also *De Cubber*, judgment of 26 October 1984 para 24 and *Demicoli*, judgment of 27 August 1991, para. 40

The role of judicial assistant was created to provide support to the judiciary and removes the burden of non-judicial tasks from judges, thus helping them to deliver decisions of the highest caliber in a timely manner.⁵⁷ Indeed, Article 6 of the ECHR also guarantees the right to a speedy judicial process. With European judiciaries facing the issue of court backlogs, the ability to deliver cases in a timely and cost-efficient way has become a fundamental goal. The support offered by judicial assistants therefore works to strengthen the rights of litigants in light of Article 6 ECHR. The same is true when it comes to their ability to directly or indirectly improve the quality of adjudication. Specialized assistants can provide knowledge to better a judicial decision and even the support of a young graduate assistant can unburden a judge.

Judicial assistants, as contractual subordinates, are protected by the status of the judge, as their duties derive directly from the judge's responsibility to adjudicate. As such, their role should not raise any ethical dilemma, as they do not officially partake in the decision-making process. However, there has been concern over the extent to which their work may influence the final decision.

2. *The Influence of Judicial Assistants in the Decision-Making Process*

Researchers point out that by delegating some of their work, judges will by default sacrifice a part of the autonomy that lies at the heart of a fully independent and impartial decision.⁵⁸ As an example, studying case files enables judges to form an opinion and judge equitably.⁵⁹ Suggestions made by the judicial assistant, as constructive as they may be, might steer the judge's thinking, especially if the judicial assistant is asked to prepare a draft including proposals on the legal outcome of the case:⁶⁰ 'People, including judges, are inevitably influenced by the manner in which information is presented to them.'⁶¹ Such is the case in Switzerland, where judicial assistants, who are highly qualified lawyers, have considerable influence as they often write the reasoning for judgments.⁶² As the CCJE recalls in its 2019 Opinion, 'judges are not simply case managers but must command the law and the facts in a

⁵⁷ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 3

⁵⁸ Peter Mascini and Nina L. Holvast, 'Explaining Judicial Assistants' Influence on Adjudication with Principal-Agent Theory and Contextual Factors' (2020) 11(3) *International Journal for Court Administration* 5, at 8

⁵⁹ Peter Bieri, 'Law Clerks in Switzerland – A solution to cope with the caseload?' *International Journal for Court Administration*, Vol. 7 No.2 March 2016, at 33

⁶⁰ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 6

⁶¹ Nina Holvast, *supra* note 15, at 202

⁶² Peter Bieri, *supra* note 58, at 32

way that judicial decisions remain fully theirs.⁶³ Even when judicial assistants are limited to drafting memos or part of the decision on the facts of a case, they bear influence on the judge's decision if he or she cannot or will not make time to take ownership of those facts.

This could also be the case if a judge relies heavily on the work of a judicial assistant due to the trust placed in the latter. Social scientists worry that the surge in the recruitment of judicial assistants might diminish judges' sense of personal responsibility for judgments and lead them to abdicate their fundamental duties. To this end, studies based on principal-agent theory and contextual factors, i.e. the circumstances under which an actor (the agent) is able to make decisions on behalf of, or that impact another actor (the principal), were used to measure judicial assistants' influence on the adjudication process. The system relies on the trusting relationship between the superior and the subordinate.⁶⁴ Trust emanates from competence, benevolence and integrity.

An ethnographic study conducted in Dutch district courts has shown that out of these three components, competence is the main factor that judges look at, which explains the competitiveness surrounding the recruitment of judicial assistants in most jurisdictions. Competence is what will determine the influence that the judicial assistant will have on the decision-making process. The study concludes that the trust placed in judicial assistants positively correlates with the judge's perception that the benefits of involving them in the adjudication process outweigh the risks.⁶⁵ However, contextual factors do also show that regular collaboration allows the judge to acknowledge which duties they can or cannot delegate safely, in light of the potential effect on the decision-making process,⁶⁶ but also on whether their experience would make it more efficient to conduct the task themselves.⁶⁷

Another factor that may weigh in on the influence of judicial assistants is the duration of employment. As mentioned in the first part of this paper, the judicial assistant position may constitute a permanent career in many European countries. This may aid efficiency, as there is no need to train incoming judicial assistants. However, this may also increase their influence in

⁶³ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 5

⁶⁴ Nina Holvast, *supra* note 15, at 12

⁶⁵ Peter Mascini and Nina L. Holvast, *supra* note 57, at 17

⁶⁶ *Ibid*, at 17

⁶⁷ We also found that social scientists stress the need for further research on these matters. See *ibid*, at 17

the adjudicative process.⁶⁸ The CCJE advises that States find a proper balance so that judicial assistants can be of valuable assistance whilst mitigating the risks of influencing judges in the decision-making process.⁶⁹ Indeed, undue influence by an assistant not possessing sufficient safeguards may deprive the adjudicative process of its own.

B. Repercussions on the organization of labor

1. Judicial Assistants, New Public Management and the Judiciary

The novel role and duties attributed to judicial assistants also raises more pragmatic questions, such as the managerial skills of judicial professionals. It is fundamental to note that the rationale underlying the provision of judicial assistance to judges is not specific to the legal field.⁷⁰ Nina Holvast recalls the influence that the New Public Management movement of the 1980s had on public service organizations. Other public bodies such as hospitals, government agencies or universities began adopting private-sector principles and practices that include the delegation of duties to subordinates. In practice, the subordinate performs most of the work, under the final supervision – and responsibility – of the superior. The reasoning behind this new system is economical, and includes an acute concern for how public administrations are funded, in order to save costs. To this end, public agencies were restructured around a strict hierarchy, which also allows for increased productivity.⁷¹

Delegating tasks to subordinates is seen as a key to increasing efficiency and allowing the superior, the highly qualified professional, to focus on the core of his or her work. The experience gained by the subordinate may also serve as training, ahead of his or her promotion, even though this could also be a source of tension.⁷² The work conducted by the subordinate might also contribute to the increased quality of the final product, if they have expertise that the judge lacks. Nevertheless, this new organizational model presents practical difficulties. On a symbolic level, the public is often aware of the role played by subordinates, and will expect to deal with the professional. This is particularly true in judicial systems where traditionally, when thinking of the judge, one will picture a lone figure. Judicial assistants rarely attend trial and

⁶⁸ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 9

⁶⁹ *Ibid*, at 9

⁷⁰ Nina Holvast, *supra* note 15, at 11

⁷¹ *Ibid*, at 92

⁷² A Swiss judicial assistant declared : « You must live with the fact that you may have influence but not the last word. That's not easy for all. » in Anne Sanders, *supra* note 25, at 12

will remain in the background, invisible to the public, despite playing an important role in the adjudicative process. The realization that most of the work of these professionals is carried out by assistants who do not possess the same skills might considerably undermine the trust placed in the organization.⁷³

On the other hand, this transformation might be welcomed as a modernization of an institution that used to be portrayed as archaic, inefficient and fragmented; an adaptation effort that increases its legitimacy.⁷⁴ However, perhaps one of the biggest practical challenges is that the mass recruitment of judicial assistants could have an impact on the effectiveness of the work of the judge. For Posner, the judge transforms ‘from a draftsman to an editor’⁷⁵. Indeed, when a judge delegates the drafting of a judgment to a judicial assistant, the former will conversely have to supervise and edit the final product.

2. *The Judge as a Manager*

As mentioned above, judges must demonstrate a plethora of personal qualities whilst rendering decisions of the highest legal caliber, in a timely manner. Additionally, they must now train and manage their team, which comprises judicial assistants. In Switzerland, one author feels that ‘judges lead, delegate and supervise, but do not fulfill the traditional judicial activities’.⁷⁶

Therefore, the judiciary must develop novel skills, which include maximizing efficiency, and effective allocation of labor, leadership and communication. Such tasks require advanced planning. The higher the number of judicial assistants, the greater the role becomes⁷⁷. To this end, managerial rules have come to the forefront of judicial principles in countries such as the Netherlands and are sometimes even codified in official acts⁷⁸. While some countries have regulated the profession of judicial assistant by drafting statutes or internal regulations, judicial assistants must in practice be trained and managed in order to fulfill their role effectively.⁷⁹ The CCJE considers that ‘if Member States aim to support speedy decision-making with judicial

⁷³ Nina Holvast, *supra* note 15, at 14

⁷⁴ *Ibid*, at 17

⁷⁵ Posner, R. A., ‘*The federal courts: Crisis and reform*’, Harvard University Press, (1985), quoted in Nina Holvast, ‘In the shadow of the Judge : The involvement of judicial assistants in Dutch district courts’, Eleven International Publishing, (2017), at 19

⁷⁶ Peter Bieri, *supra* note 58, at 33

⁷⁷ *Ibid*, at 34

⁷⁸ Nina Holvast, *supra* note 15, at 91

⁷⁹ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 8

assistants, this purpose cannot be achieved by employing judicial assistants for purely educational purposes because that burdens judges with mentoring and teaching.’⁸⁰

This is especially true when judicial assistants only stay for a limited time. The turnover in such cases is so high that the judge continuously has to train an assistant who then leaves just as he or she is truly able to provide effective support to the judge.

A small number of Member States allow judicial assistants to conduct hearings and work on minor cases. Judges are expected to approve the decision and to closely supervise the assistant.⁸¹ This very process is time-consuming, and may affect the time judges allocate to critical examination of cases.⁸² The process can be confrontational, as the involvement of the judge might sometimes prevent the judicial assistant from having a role in the final product by providing detailed instructions on how to draft the judgment, extensively modifying their draft or redacting the judgment themselves. A judicial assistant commented ‘I sometimes get irritated by a judge. There are a few judges who you really do not want to have a hearing with because they rebuild your entire judgment (...) I mean, of course you might write it very differently yourself, but then you should write it yourself.’⁸³

This highlights the need for good communication skills and constructive feedback, especially in common law systems where the hierarchy is strict. The US system, which has largely inspired European common law judiciaries, is an interesting illustration. In *Olivia v. Heller*, the United States Court of Appeals for the Second Circuit stated that ‘The work done by law clerks is supervised, approved, and adopted by the judges who initially authorized it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.’⁸⁴

Judges as managers will also become involved in the necessary evaluation process of their judicial assistants. Regular assessment of judicial assistants is both an important aspect of the effective communication needed for a fruitful working relationship and important for career prospects, as providing feedback will help the judicial assistant in his or her professional development. The CCJE has recommended that assessment be carried out according to

⁸⁰ *Ibid*, at 4

⁸¹ *Ibid*, at 6

⁸² Peter Bieri, *supra* note 58, at 34

⁸³ Nina Holvast, *supra* note 15, at 155

⁸⁴ 839 F.2d 37 (2d Cir. 1988), at 40

objective criteria; for example by using the principles developed for the evaluation of judges as guidelines. Judicial assistants, like judges, should be heard in the process.

An interesting case study is that of the training program implemented in the State Court of Minas Gerais, one of the 26 Brazilian States.⁸⁵ The Judicial School of the Court of Appeals provided judges with a judicial training program on management, as judges were believed not to be adequately prepared for the mission. The program had three phases: training, practical implementation and an online course in judicial administration. First, a select number of judges were involved in a 3-day course on the information and skills needed to develop and deliver effective judicial administration. Training included courses on leadership, communication, team management, climate at work and motivation and conflict management.⁸⁶ The second phase involved conceptual group discussions and monitoring of the implementation of the management model in the 6 participating district courts. Results were impressive: from 1,316 new pending cases recorded for the year 2016 in the Juvenile and Domestic Relations District Court, the number of pending cases was at -4,572 by the end of 2017.⁸⁷ The final stage consisted in online training in judicial administration, which permitted judges in geographically dispersed jurisdictions to follow courses, as most would face difficulties attending courses at a central location.⁸⁸ The majority of participants found a significant or moderate improvement in their professional conduct and data showed that the training led to a systematic gain in productivity.⁸⁹ As such, this experiment enhanced judges' competence as well as the administration of justice. It might also have strengthened confidence in the justice system.⁹⁰

III. Proposals

In the light of the challenges raised by the growing involvement of assistants in the judicial process, we believe that additional safeguards should be put into place. Our proposals are structured around three key ideas: selection, training and prevention.

⁸⁵ Carlos H. B. Haddad, 'Developing Management Skills for Judges', *International Journal for Court Administration* (2020) 11(1)

⁸⁶ *Ibid*, at 6

⁸⁷ Carlos H. B. Haddad, 'Developing Management Skills for Judges', *International Journal for Court Administration*, (2020) 11(1), at 4.

⁸⁸ *Ibid*, at 5

⁸⁹ *Ibid*, at 7

⁹⁰ *Ibid*, at 8

First, we found a **thorough and equitable selection process** to be the guarantee of independence and impartiality. It is key that the independence of the judicial assistant be assessed at recruitment to reduce the risk of external pressure on judges. Judicial assistants should not be selected by the executive but by the judiciary, insisting on their ‘trustworthiness, competence and motivation.’⁹¹ To this extent, the judge should have a say in their selection and assessment and, in order to ensure equal treatment, judicial assistants should be recruited according to a transparent and uniform chart across all national jurisdictions.

Second, we found that **systematic initial and continuous training** is a guarantee of competence, for both judges and judicial assistants. Mandatory courses could be administered on recruitment by the body charged with the training of incoming judges. In addition, states, especially those with long-term judicial assistants, should provide continuous training opportunities, which would also enable them to keep abreast of new legal developments.

For judges, **team management and human resources methods courses** should be delivered. Indeed, while many states provide judges with management courses, we found that most concern stress management, workload management or conflict prevention.⁹² Beyond training, judges should be able to discuss problems they might encounter in their relationship with judicial assistants. All the while, they should still be afforded the time to consult with their peers on legal principles and cases, as intervision allows for feedback, the exchange of working methods and an overall improvement in the administration of justice.⁹³

Finally, we found **preventing ethical infringements** to be key in addressing the threats posed by increasing recruitment policies. States could provide **ethical guidelines** to judicial assistants along the lines of the standards for judges, and include integrity and discretion. As an example, judicial assistants should be required to perform their duties diligently and with a high degree of competence.⁹⁴ Additionally, for judicial assistants, introducing **guidelines on their role and duties** would clarify what type of work may be delegated. **Rules for transparency** could also be set in order to identify those involved in the drafting of a judgment⁹⁵ and mechanisms could

⁹¹ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 9

⁹² European Commission for the Efficiency of Justice, ‘Breaking up judges’ isolation, Guidelines to improve the judge’s skills and competences, strengthen knowledge sharing and collaboration, and move beyond a culture of judicial isolation’ (2019), at 31

⁹³ *Ibid*, at 15

⁹⁴ *Ibid*, at 12

⁹⁵ Stephen J. Choi and G. Mitu Gulati, ‘Which judges write their opinions (and should we care)?’, *Florida State University Law Review*, Vol:32, at 1077-1078

be implemented **to ensure impartiality**.⁹⁶ We endorse the recommendation of the CCJE for judicial assistants to have the duty to reveal conflicts of interest and request authorization to engage in external activities.⁹⁷ This is already the case for *Référendaires*, the judicial assistants at the European Court of Justice.⁹⁸ It follows that they be asked, like judges, to recuse themselves should this be necessary. Parties should also be informed of and be able to challenge their participation. Finally, there could be a **list of incompatibilities and restrictions** on the extrajudicial functions allowed for judicial assistants.

CONCLUSION

Although frequently promoted as a means to unburden the judge and improve the efficiency of judicial systems, the increasing recourse to judicial assistants should be regarded with caution. Judicial assistants undeniably contribute to the efficiency and quality of decision-making, through their skill as well as their additional or contradictory viewpoints that may challenge a judge's biases. Their status also reduces the cost of administering justice.

Nevertheless, the growing recruitment of judicial assistants across Europe is a double-edged sword. On the one hand, it helps judges cope with backlogs, contributes to the training of aspiring judges and improves the quality of adjudication. On the other hand, in the absence of adequate safeguards, the influence that assistants may have on a decision threatens the independence and impartiality of judges and may jeopardize the fairness and transparency of the procedure. The increasing reliance on judicial assistants also has an undeniable impact on the role of judges themselves who need to adapt. Implementing new ethical safeguards and providing adequate training for judges will mitigate these risks.

⁹⁶ Nina Holvast, 'The Power of the judicial assistant/law clerk : looking behind the scenes at courts in the United States, England and Wales, and The Netherlands', *International Journal for Court Administration*, at 10

⁹⁷ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 12

⁹⁸ Article 2, Décision du 12 novembre 2018 portant adoption de règles de bonne conduite des référendaires, available at https://www.amicuria.com/files/ugd/0d5b40_990b6123f941efa0ce9e88dd2c930f.pdf