Klungkung Court of Justice
Kertha Gosa Pavilion
Bali, Indonesia

Photo courtesy of Ben Hsu
**International Journal For Court Administration**

IJCA is an electronic journal published on the IACA website (www.iaca.ws). As its name suggests, IJCA focuses on contemporary court administration and management. Its scope is international, and 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.

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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 choose IACA Journal.

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From the Executive Editor
By Markus Zimmer

On behalf of IACA, I extend from Jakarta warm greetings to IACA’s members and friends throughout the world. This past month, in cooperation and with generous support from the Supreme Court of Indonesia and the Federal Family Court of Australia, IACA co-sponsored its first Asia-Pacific regional conference in Bogor, Indonesia. All conferees were honored by the Republic of Indonesia’s President, the Honorable Susilo Bambang Yudhoyono, who graciously opened the Conference at Bogor Palace. Conferees included more than 200 participants from 19 Asia-Pacific countries, representing 40 jurisdictions, who met to exchange information and experience in how to maximize public access to courts and the services they provide.

The Republic of Indonesia declared its independence after three and a half centuries of Dutch colonialist rule based on a two-tiered supremacist government framework. During World War II, the Japanese invaded, ending Dutch domination and instituting a short-lived repressive wartime regime. Eventually, both invading powers withdrew, and in 1945, the independent Republic of Indonesia was born.

From the perspectives of sheer geographic complexity as well as cultural and linguistic diversity, Indonesia represents a difficult constellation of challenges in the disciplines of economic development, political governance and civil society. Its archipelago of 17,508 islands, large and small, of which circa 6,000 are inhabited, stretches from the Pacific to the Indian Oceans with 55,000 kilometers of coastline. Combined, the islands reflect a land mass of nearly two-million square kilometers supporting a population of 245 million speaking hundreds of local dialects. Indonesia is the world’s largest Islamic country; its civil-law based court system embraces 343 trial- and intermediate-level appellate religious courts exercising jurisdiction that includes elements of civil and Shari’ah law. Unique among Islamic countries, judges in the network of religious courts include men and women. Indonesia’s Supreme Court adjudicates final appeals.

Indonesia’s islands include Bali whose population is predominantly Hindu and whose social culture is reflected in Kertha Gosa, the Hall of Justice which graces this IJCA Issue’s cover. Located in Klungkung, the Hall served as a forum to address issues relating to security, prosperity, and justice in the island Kingdom of Bali. The Candra Sengkala at the main entrance dates the Hall to 1700 A.D. During the feudal era, every year on the fourth full moon of Balinese Caka calendar, regional kings convened to take direction and guidance from Klungkung’s King. The Hall also welcomed foreigners intent on meeting the King. In 1908, Dutch soldiers conquered and instituted European rule in Klungkung, converting Kertha Gosa into court of justice utilizing a blend of European-based jurisprudence and local practice and culture.
From the Managing Editor
By Philip Langbroek

Courts and Judges and the Media
A recurring issue for courts is their public credibility and the trust the general public vests in the courts. Justice administration managers occasionally hold on to the idea that trust of the general public in the courts is something that can be steered by the courts and the courts’ management by organization development, and that public trust in the court will follow automatically as a consequence of those efforts. National and local organization development programs like in France and the Netherlands have been set up in order to make the people believe that courts are good and delivering their state bound services well enough. This assumption has been proven wrong repeatedly again in different countries.

Public trust in organizations fulfilling a state function can be an incredibly complex concept. What the courts do is of some importance, but what others say or report about courts is also relevant. Newspapers and television programs sometimes magnify single issues to radical proportions. Miscarriages of justice are amongst the most important issues to be reported upon, but so are auxiliary functions of judges (like a judge being a member of a school board or on an advisory hospital board), and efforts to have a certain judge disqualified by some party. Thus, incidents become the image of the judiciary as a whole. This happens wherever a free and not always completely accountable press reports on the judiciary, for example in France, the Netherlands, Italy, Switzerland and the USA. In some countries, where judges are not appointed but elected directly or indirectly by voters, political affiliation and sponsorship of judges for election are part of the debate about the judiciary.

Four issues dominate the image of the courts and the judiciary in the media:

- judicial impartiality and appearance of bias related to case allocation, auxiliary functions of judges and published judicial views that are regarded as prejudicial in relation to a particular case. Judges risk being perceived as prejudice who belong to a political elite concerned predominantly with protecting their own interests.

- the adequacy of judicial skills and knowledge, related to miscarriages of justice and judges’ ability to adequately comprehend and appreciate special expertise and sophisticated forensic evidence. Judges who fail to remain current on such matters risk being perceived as ‘alphas’ with limited understanding and knowledge of the technical sciences.

- the perceived separation of judges from ordinary everyday life, often related to complaints about judges imposing sentences that are too lenient or lacking familiarity with the specialized terminology and complexity of specific fields of trade (e.g. diamonds, shipping) or modern business transactions in obscure areas of the law such as international trade and commerce. Judges who fail to acknowledge their adjudicative role as one in which the authority they exercise ultimately belongs to the people and must be exercised with great caution, broad understanding, and hard work may be perceived as ivory tower inhabitants who have forfeited their connection to the real world.

- the professional character of judicial work. Judgments – especially in civil-law countries- are often no easy reading. Where courts and judges rely on advocates and legal academics to interpret and explain judicial reasoning set forth in judgments to the parties, that model is increasingly becoming antiquated and inadequate. As court judgments are increasingly being made available for public review and consumption on judicial websites, judges are increasingly challenged to include in their judgments how they arrived at their decisions and to justify the arguments on which they relied in language that is accessible to a literate public. Otherwise, they risk being perceived as out of touch with their role as public servants whose obligations include informing public knowledge and understanding about the law and its application.

Also assuming that these different images of courts and judges are not true in general, in countries with a representative democracy, the way the general public is informed about the functioning of the judiciary and the courts is of great importance for the trust of the general public in the courts.

For that reason, effective court administration comprises meeting the challenge of creating and managing positive and trustworthy images of courts and judges in the media. This involves informing the public about the role and function of courts and judges and about programs and evaluations to keep courts and judges informed and skilled regarding developments in law, crime, technology, forensics and other fields of interest. This will create and help maintain the necessary space and peace of mind of judges to work according to the best possible professional and legal standards in conducting hearings and writing judgments.
Daring to be transparent and open about the functioning of courts and judges, and providing useful and instructive information to the general public may help to support and maintain public trust in the judiciary. And on those occasions when unintentional but grave mistakes are made that are attributable to the judiciary, they should be publicly addressed and fully disclosed in a manner that is both prompt and thorough.

**This Issue**  
For this sixth Issue of the international Journal for Court Administration, we are most happy to have four articles submitted from Europe reviewed and accepted.

Gavin Drewry – *United Kingdom*, on the newly established UK supreme court  
Dory Reiling – *the Netherlands*, on understanding Information Technology for dispute resolution.  
Natasa Pelivanova and Branko Dimeski, – *Macedonia*, about renewing the administrative court system.  
Katarina Zajc and Mitja Kovač, – *Slovenia*, on: career motives of judges in Europe

I am most grateful for those contributions.

We also hope to receive submissions from elsewhere for the November issue for this year.
What Do the European Judges Strive for - An Empirical Assessment
By Katarina Zajc and Mitja Kočič

Abstract:
Caseload backlogs and the quality of judicial decision-making have attracted worldwide scholarly attention for quite some time. The puzzle lies in explaining the observed persistence of backlogs alongside the quest for improvement in judicial decision-making. This is especially true since many countries, while trying to cope with this challenging issue, continue to enact regulatory provisions to seemingly improve the judiciary.

The principal and agent theory suggests that the incentives of the agent (courts) and the principal (citizens) are going to be aligned under certain circumstances. This article analyzes the incentive mechanisms of continental judicial administration in view of traditional principal-agent theory and provides additional insights into the current legal, behavioral and economic discussion. Specifically, the article analyzes whether the current incentives for judges are in line with theoretical predictions. If one takes for granted that the European-continental judicial systems can be treated as bureaucratic systems, then discussion should, apart from judicial salary increases, focus upon interpretation of the observed differences in evaluation of judges in different countries, and upon the main incentives for judges’ good performance and promotion. This article offers a multidisciplinary analysis of current European and most recent Finnish guidelines on effectiveness and quality of judicial administration, and provides a law and economics assessment of proposed guidelines. Moreover, the identified multiplication effect of sticks in judiciary setting offer an additional argument for cautious application or even complete abolishment of such an inducement mechanism.

1. Introduction
Caseload backlogs and the quality of judicial decision-making have attracted worldwide scholarly attention for quite some time. The triggering issue is the observed persistence of backlogs alongside the quest for improvement in judicial decision-making. This is especially true since many countries, while trying to cope with this challenging issue, continue to enact regulatory provisions that seemingly improve the judiciary. This article offers an economic analysis of the incentive stream of the continental judiciary, suggests several alternative inducement mechanisms to improve continental judicial performance and effectiveness, and provides an economic assessment of the proposed Finnish Quality Benchmarks and related provisions in several other continental countries.

However, two caveats related to the scope of this article should be made. First, since it is not possible to cover all aspects of judicial performance, effectiveness and the quality of rulings, this article merely focuses on the judicial incentive stream and omits economic comment on the types of salary, quality standards, the exact time of promotions, the question of judicial independence and so on – issues which go well beyond the scope of this article.

The second caveat is related to the scientific authority that should be attributed to our findings. Law and economics is strictly speaking not theory, but a method for facilitating discussions on the law. Hence, what we do is summarize the most striking results that have been produced with the law and economics method. The principles we draw from the literature only express a personal opinion on what should be concluded, rather than on what is generally concluded.

Scholarly literature and related economic models of judicial behavior and court organization identify several inducement mechanisms concerning the motivation of judges to work efficiently. This motivation presents the central challenge to the economic analysis of courts. However, it should be stressed that the law and economics literature has focused primarily

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1 Prepared for the 32 Annual EGPA Conference 2010 Temporalities, Public Administration and Public Policy, September 8-10, Toulouse, France - Study group on Law and Public Administration, University of Ljubljana, Faculty of Law and Faculty of Economics, Poljanski nasip 2, 1000 Ljubljana, e-mail: katarina.zajc@pf.uni-lj.si, mmitja.kovac@ef.uni-lj.si

Section 2 of this article outlines the general findings of law and economics scholarship regarding the effectiveness of judicial performance, identifies several additional principles on judicial performance, and then compresses these findings and principles into a unified set of recommendations and evaluation criteria. In Section 3 some attention will be paid to the proposed Finnish quality benchmarks, with related economic assessment. Section 3 continues with a survey, an economic assessment of several other continental judiciary systems, and offers additional insights into employed incentive mechanisms. Section 4 concludes and offers final thoughts and remarks.

2. Synthesis of law and economics scholarship on judicial performance
This section identifies several law and economics principles on judicial performance and tries to compress them into a unified set of recommendations and evaluation criteria. Law and economics is regarded as one of the most successful research programs of the last fifty years and its purpose is to find out what “good law” is by analyzing the incentive, risk and transaction cost effects of legal rules, jurisprudence/decisions, regulations, and performance with the related behavior of all legal stakeholders (judges, attorneys, legislators, public prosecutors etc.). As already advanced, law and economics literature and related economic models of judicial behavior and court organization offer several different explanations for what influences the behavior and motivation structure of judges. As commentators note, this motivation and behavior puzzle also presents the central challenge to the economic analysis of courts.

In this respect, law and economics literature has identified three main explanations to the questions of judicial incentive structure. First, judges follow the law – they simply meet their obligations as articulated in the jurisprudential theory of adjudication. Second, there is the political motivation - judges seek to implement their own policy preferences (also political) subject to constraints such as review by other judges or by legislatures. Third, there is the self-interested judge – where judicial motivation derives from the structure of incentives within which the judge works. This third approach, which has been developed from Judge Posner’s seminal article on judicial behavior and performance, is in the law and economics’ scholarship regarded as the one upon which consensus has been reached. Therefore, our discussion summarizes the most striking results of this third approach and, while providing additional insights, assesses the proposed CEPEJ and Finnish Quality Benchmarks for enhancement of judicial performance.

5 See Kornhauser, supra note 2.
7 Id.
8 Id.
9 See also Aranson’s competing views on rule-governed, rent distribution and wealth maximization types of judicial motivation which actually describe systemic tendencies rather than motivation of a particular judge. Yet those three “competing” views may be understood as consistent with the presented one. See Aranson, H. Peter, “Models of Judicial Choices as Allocation and Distribution in Constitutional Law,” Brigham Young University Law Review 794, 1994.
10 CEPEJ stands for The European Commission for the Efficiency of Judges, see: http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp
Posner’s article shifted conventional thinking regarding judges away from the mélange of glorification, celebration, and adoration that pervaded the majority of academic thinking about the judiciary, towards a more economically-inspired analysis of judicial incentives and judicial behavior.\textsuperscript{11} Posner assumes that judges are self-interested, rational, utility-maximizing individuals and that their behavior is hence best understood as a function of the incentives and constraints that particular legal systems place on their judges.\textsuperscript{12} Hence, the criteria of judicial performance are relative to the incentives and constraints that determine judicial behavior\textsuperscript{13} and it would be a mistake to suppose that one performance criterion or set of criteria should be applicable to all judges.\textsuperscript{14} The crucial starting point of Posner’s analysis is thus the observation that judges are maximizers of their utility,\textsuperscript{15} where every judge has, as also pointed out by Higgins and Rubin, a utility function and tries to maximize the weighted utility of the arguments in the function.\textsuperscript{16} As Posner states, the judge’s utility function is likely to be quite similar (different weights) to the utility function of the average person.\textsuperscript{17} Judges would thus prefer higher salaries, less crowded dockets, recognition within their legal and judicial circles, and freedom to make decisions without outside interference.\textsuperscript{18}

One of the valuable insights, which follow from this argument, is the observation that lawyers who seek or accept a judgeship derive more utility from leisure and public recognition relative to income than the average practicing lawyer does.\textsuperscript{19} Moreover, according to Posner, judges are also likely to be more risk-averse, since judicial incomes are lower but also more stable than those of practicing lawyers.\textsuperscript{20} In other words, a set of given incentives (e.g. income, appointment and promotion) and constraints creates in legal systems, including continental, a self-selection mechanism where a certain, risk-averse type of lawyer self-selects into the career judiciary. This self-selection mechanism results in the adverse situation where the majority of the best, most productive, inventive fresh young law school graduates are often driven away from the judiciary towards other, more appealing legal professions. Consequently, since no one is forced to become a judge, the incentives and constraints imposed by the structure and rules of a judicial career\textsuperscript{21} influence the judges’ productivity and motivation structure.

2.1 The economics of continental career judiciaries: the principal-agent perspective

A typical continental career judiciary is a part of the civil service, where appointment and promotion are part of an elaborate system of rules and acknowledged characteristics\textsuperscript{22} In this system a fresh law school graduate applies for a clerk’s position (for a certain period of time – several years) and occupies the lowest rung of the judicial ladder. During his


\textsuperscript{12} An important implication of this finding is that judicial behavior is likely to differ across national legal systems to the extent that components of the system differ in the incentives and constraints that they impose on judges; Posner, supra note 7.

\textsuperscript{13} E.g. in some judicial systems a judge’s reversal rate might be a critical performance criterion, while in others more weight should be placed upon the citation rate.

\textsuperscript{14} Posner, supra note 8.

\textsuperscript{15} Id.


\textsuperscript{17} This function is dominated by income, leisure, family relationships, work satisfaction, and a concern for personal integrity, reputation and felt achievement; Posner, A. Richard, “Judicial Behavior and Performance: An Economic Approach,” 32 Florida State University Law Review 1259, 2005.


\textsuperscript{19}Posner, supra note 8.

\textsuperscript{20} Posner, supra note 8. See also Higgins, Rubin, supra note 13; Schauer, supra note 10.

\textsuperscript{21} E.g. by inducing a greater pursuit of leisure or intellectual satisfaction relative to income; Id.

\textsuperscript{22} In fact, Judge Posner argues that there is no substantial difference between career judiciary and any other professional civil service; Posner, supra note 8.
career he expects to rise through the judicial system as he gains experience, years of service, positive opinions of his superiors and so on. Obviously, the assessment of civil-continental law judiciary should be essentially the same as the assessment of a typical bureaucratic system. Moreover, it may be argued that the problem of effectiveness of the continental judiciary (persistent backlogs etc.) is essentially, in law and economics theory, known to be a sort of principal-agent problem, where courts with judges represent agents and where citizens (society at large) act as principals. Principal-agent theory suggests that the incentives of the agent (courts) and the principal (citizens) are going to be aligned under certain circumstances. Hence, if one takes for granted the fact that continental judicial systems are bureaucratic systems, then our discussion should focus on non-salary incentive mechanisms for effective judicial performance.

In this principal-agent setting, one party (the agent, i.e. the court) takes an action on behalf of “citizens” (the principal), where the authority relation is a type of contractual arrangement and where the principal assigns limited powers to an agent in order to increase efficiency. Due to the problem of asymmetric information and prohibitive monitoring costs (transaction costs) the principal cannot control perfectly the behavior and the performance (valuation of the quality of decisions) of judges. This informational asymmetry and high monitoring costs, coupled with the rational self-interested utility-maximizing agent (judge), creates opportunities (incentives) for courts (agents) to shirk, extract rents or even to sabotage principals’ goals. In other words, due to this principal-agent problem, judges might engage in shirking effort and in behavior designed to mislead or disguise their real output. As stated, a rational wealth-maximizing, self-interested judge will behave in an opportunistic manner (pure waste of resources) to achieve his self-interested objectives.

In addition, the theory describes this as a problem of agency costs where the judge (court) is induced to shirk if the cost to the principal (citizens) of detecting some amount of shirking, Cd, is greater than the benefit of preventing that shirking, Bp. Since the costs of detecting, Cd, generally exceed the benefits of prevention, Bp, judges will be induced to behave opportunistically and will seek to maximize their utility function. In order to mitigate adverse selection, opportunism, and informational asymmetries, certain monitoring devices and incentive structures must be developed. A set of such efficient mitigation mechanisms will be offered in the following section, but we should first mention some further striking law and economics insights into the related features of the continental judiciary. As Posner has stressed, the detailed rules which are laid down for the continental judges to follow could be one of the most important devices for minimizing agency costs. Posner develops this idea further by arguing that this mitigation device can also explain the fact that career judiciaries are found in legal systems that rely heavily on detailed codes and not on the looser common law standards. Moreover, it is argued that a career judiciary is methodologically conservative, since a judge’s promotion depends on the

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23 Moreover, it could also be similar to the behavior of employees in a large business firm; Posner, supra note 8.
24 Here, we are referring to a particular paradigm developed in economics and political science that examines the relationship of individuals with related authority but conflicting interest. See e.g. Moe, M. Terry, “The New Economics of Organization,” 28 Am. J. Pol. Sci. 739, 1984.
25 Of course, one should regard the agent (the citizens or society at large) as the governmental body which regulates and is responsible for the effective and quality function of the judiciary.
28 Additionally, in line with this argument Schneider considers the continental judiciary employment system as an internal labor market system, where career opportunities are the only economic incentive and where tenured judges with fixed pay compete for promotions to the next rank; Schneider, R. Martin, “Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal,” 20 European Journal of Law and Economics 127, 2005.
31 Conformity to such detailed rules is much easier to determine than whether a judge is creative, innovative, imaginative and so forth: Posner, supra note 29.
32 Posner continues by arguing that when a code sets forth a legal rule with great specificity, it is relatively easy to determine whether the judge is applying the code correctly – minimization of judicial agency costs; Posner, supra note 29.
ability to perform to the satisfaction of superiors who want benefit from having such experimentally-minded subordinates. Hence, law and economics literature predicts that the output of a career judiciary will display low variance, will be of uniformly professional quality, and will also be uncreative.

2.2 Incentive stream and the behavior of judges

Law and economics literature has identified several efficient incentive mechanisms to mitigate the observed principal-agent problem, to reduce the agency costs of the career judiciary, and to solve the adverse selection problem. Since judges are self-interested, wealth-maximizing, rational individuals, financial incentives (salary) might be the first appropriate mitigation mechanism. Yet, if judges (as is the case in the continental judiciary) of the same rank get paid the same amount and given that there are often sizeable differences in output across judges, then the wages do not have a positive causative effect on their marginal product. Hence, the compensation of continental judges does not depend on the quality of their rulings (or vice versa) and thus potential quality does not result in any direct benefit, and there is also little economic payoff for judges from their quality judging. Obviously, low financial compensation will also result in the ex ante adverse selection problem (where the best fresh graduates are driven away) and will influence retirement decisions. Thus, an increase in financial rewards for judges might be an intuitive and straightforward remedy.

However, the literature questions whether there is much scope to improve judicial performance of already employed judges through improved financial rewards. The intuitive idea would be to increase the financial awards (salaries), and consequently judges would increase and improve (quality) their output. Yet, due to the asymmetric information problem, high costs of monitoring (human capital issue) and related agency costs, such an incentive mechanism might not work. As stated, judges will be induced to shirk since the cost to the principal (citizens) of detecting some amount of shirking, Cd, is greater than the benefit of preventing that shirking, Bp. The costs of detecting, Cd, may, due to asymmetries of information, exceed the benefits of prevention, Cd > Bp, and judges may consequently be induced to behave opportunistically and will seek to maximize their utility function. Judges may hence reap increased financial awards but might, due to the fact that Cd > Bp, not improve their productivity, since the identified agency problem might prevent efficient monitoring. This cost of detecting, Cd, actually reflects two problems: 1) it might be costly to evaluate exactly the real value and quality of judicial performance (decisions); and 2) judicial activity is not a labor-intensive profession where costs of monitoring will actually be low (as it would be, for example, in the case of farmers), but is classified under so-called human capital intensive professions where the work is almost entirely done by mental activity, which is hard to measure. Hence, the increase in financial reward and related incentives for enhancing productivity and quality of judgments would be wasted and might not result in an increase of judicial productivity. Furthermore, as literature advances, monetary compensation represents only a small portion of the returns to judging and it is of diminishing proportion once we move up the judicial hierarchy, since in higher courts the non-monetary returns are higher. Many judges in continental legal systems would have been earning considerably more in private practice, and, as such, give up substantial monetary incomes to join the judiciary (high opportunity costs). Hence, as literature suggests, most judges

33 Posner, supra note 29.
35 Smyth, supra note 28.
38 See e.g. Baker, A. Scott, “Should we Pay Federal Circuit Judges more?,” 87 B.U.L.Rev. 63, 2008. To stress it again, those are the judges who already occupy one of the ladders in the judicial hierarchy.
40 Baker in his recent article on the payment of circuit judges actually found no empirical evidence for the notion that the increase in payment induces higher judicial productivity and hence provides an empirical confirmation for our argument. See Baker, supra note 37.
41 Smyth, supra note 28.
43 Smyth, supra note 28.
could earn more by resigning from the bench and returning to private practice or even acting as consultants to law firms.\textsuperscript{44} The examples of such judges having to linger in office because of inadequate financial rewards or having to return to private practice occurred long ago and it is not common nowadays.\textsuperscript{45} Yet, if such lingering of judges does become a daily pattern, then this is a straightforward and inexpensive signaling mechanism that the financial rewards in continental legal systems are too low and that such incentives have to be increased in order to avoid declining productivity and quality of judicial outputs.

However, increased financial remuneration might be an effective mechanism to mitigate the identified adverse selection problem, where the majority of the best, most productive, inventive fresh young law school graduates are, due the comparatively low financial rewards, often driven away from the judiciary towards other, more appealing legal professions. Increased initial financial compensation - one comparatively closer to the starting rewards in other legal professions - in the probation period might then attract better, more productive and inventive, fresh young law school graduates. An understanding of the way that fresh young law school graduates sort themselves across legal professions is essential for constructing effective hiring policies, which will then help to mitigate the adverse selection problem. Besides increased initial financial compensation and screening,\textsuperscript{46} Lazear suggests contingent contracts as one of the most effective ways to induce the appropriate fresh law graduates to apply for a job. Obviously, contingent contracts could be seen as an extended version of increased financial compensation, where piece-rate pay is the most basic form of such contingent contracts.\textsuperscript{47} Under such a contract, a fresh young law graduate will be compensated on the basis of output during his probation period. However, since the evaluation of such output is, as noted, very costly, the sporadic, qualitatively-based evaluation is recommended.\textsuperscript{48}

Yet, as soon as these graduates are employed, the incentive effect of increased financial rewards is lost. Namely, as previously discussed, the asymmetric information problem and high monitoring costs (coupled with the rational, self-interested utility-maximizing judges) create, in instances of increased financial rewards, incentives for judges to shirk and extract rents. Hence, the increased financial reward incentive mechanism should be applied \emph{ex ante} to attract better young law graduates and thus solve the adverse selection problem, but it loses its merit once young lawyers become judges. Here, as already stated, the incentive effect for increasing productivity and effectiveness is lost and alternative incentive mechanisms (carrots and sticks) should be developed and applied.

The promotion prospect could be offered as a first such carrot and is a very powerful alternative to the incentive mechanism, although judges would rarely admit that a desire for promotion is a motivating factor.\textsuperscript{49} Literature offers, however, significant empirical evidence that judges in the USA and Japan are motivated by prospects of promotion.\textsuperscript{50} Ramseyer and Rasmusen in their series of articles convincingly show that promotion prospects influence the behavior of lower courts judges in Japan – they induce them to work effectively and increase their productivity and effectiveness.\textsuperscript{51} The desire to be promoted is also a motivating factor in the United Kingdom, New Zealand\textsuperscript{52} and even in Germany. Schneider, in a recent study on judicial career incentives, has shown that career opportunities (promotion) are the only


\textsuperscript{45} See Smyth, supra note 28.

\textsuperscript{46} Where credentials are used to weed out the undesired law school graduates; O’Flaherty, Brendan and Aloysius Siow, “Up-or-Out Rules in the Market for Lawyers,” 13 Journal of Labor Economics 709, 1996.


\textsuperscript{48} If the fresh law school graduate’s output exceeds some fixed standard, then he should be given a particular reward; \emph{Id}.

\textsuperscript{49} See Schauer, supra note 10. However, the tournament theory was introduced in Lazear, P. Edward, Rosen, Sherwin, “Rank-Order Tournaments as Optimum Labor Contracts,” 89 Journal of Political Economy 841, 1981.


\textsuperscript{52} Smyth, supra note 28.
economic incentive which might influence the observed performance of the German courts. Fabel, Choi and Gulati support these findings and suggest tournament-competition among judges as an effective mechanism to improve judicial performance. In such a tournament system, judges compete against each other to achieve the highest score in the hopes of either winning promotion or enhancing their reputation vis-à-vis their colleagues. Among the criteria that could be used, Choi and Gulati propose opinion publication rates, citations by academics, dissent rates, citations of opinions by other courts, citations by the Supreme court and speed of disposition of cases. Hence the promotion prospect, coupled with a sort of competition-tournament among judges, is a powerful incentive mechanism and can be used in order to improve judicial performance. Different versions of the promotion prospect (e.g. irregular promotion, not depending on the passing of a certain number of years but on the judge’s performance) should thus be designed and applied as inducement mechanisms.

Moreover, the respect (reputation effect) of other colleagues can be seen as another incentive mechanism. Law and economics literature suggest that reputation among one’s peers is a powerful non-pecuniary inducement factor for many market actors. Since judges are the same as all other rational, wealth-maximizing persons, Miceli and Cosgel suggest that “how a judge is viewed by his or her colleagues, by law professors, law students and the general public” is an incentive mechanism to perform effectively. Moreover, as Cooter points out, judges generally seek prestige among the lawyers and litigants who bring cases before them. Furthermore, there could be a special yearly prize for “the best judge of the year,” a list of top 10% judges, or a black-list of the worst 5% judges as additional reputation-respect tools. Such awards and lists could then be made public and paid attention to by society at large (or awarded by the bar, president or prime minister, for example).

Last but not least, one of the factors which induce judges to behave productively is the power to influence outcomes through voting and the evolution of the law (creation of precedents). In other words, they might be motivated by the prospect of leaving a legacy. Landes and Posner suggest that judges derive utility from imposing their policy preferences on the community at large, whereas Schauer stresses that “judges could plausibly select outcomes, or select substantive or methodological trademarks, for the purpose of maximizing their own influence."

2.3. Carrots, sticks and the multiplication effect

The prospect of leaving a legacy, gaining respect among colleagues (society) and promotion prospects have been discussed as additional mechanisms for inducing judicial productivity and effectiveness. In contrast, the traditional increase in financial rewards might, as noted, not be the most appropriate incentive mechanism due to the identified asymmetries of information/high monitoring costs/agency problem. All of the presented mechanisms could be regarded as carrots which are offered to judges in order to induce their productivity and effectiveness. However, theory suggests that judicial behavior can be induced either by means of carrots (rewards, e.g. reward, prize, respect, promotion) or sticks (threats to punish, e.g. a decrease in salary or position, layoffs, unilateral termination of employment, black-lists, criminal
prosecution). Yet, until now the use of sticks has been exempted from our discussion of alternative inducement mechanisms. But as we all know, sticks can be an extremely powerful method to induce behavior in a certain desired way, and they have been the object of some scholarly attention (together with carrots they were considered as two sides of the same coin). Coase and Whitman, for example, even show that at the individual level a carrot and a stick have an equivalent marginal effect on the incentives. 64 Hence, if they are such a powerful inducement mechanism and if they have an equivalent marginal effect, why are they not also employed as an alternative mechanism to induce judicial performance? Why do we not employ them as inducement mechanisms more regularly? Would not the application of sticks then be a novelty, an inventive contribution, a super-incentive mechanism which could finally effectively improve judicial quality and performance?

We argue that the sole use of sticks, regardless of how appealing it might be, is an inefficient, socially undesirable option and may also endanger judicial independence. In this respect we offer several significant arguments against the employment of sticks as sole judicial inducement mechanisms. First, Lazear considers the effect of drafting difficulties, arguing that carrots are superior when it is not clear what the maximum level of performance is, and sticks are superior when the minimum is unclear. 65

Second, as we have already pointed out, the quality and the effectiveness of judicial performance is, due to the asymmetric information problem and related high monitoring costs, extremely costly to measure effectively (non-verifiable performance). 66 Thus, we argue that the application of sticks would be, if not completely impossible, at least highly costly and thus inefficient (transaction costs). To illustrate, suppose the principal, A (a certain governmental office), were to monitor and assess the performance of all judges, B, in a certain country and punish them in the case of shirking. The costs of monitoring, Cm, may actually - due to the fact that judicial performance is extremely hard to measure (identify) and that A would have, hypothetically speaking, to “look into the state of mind of every single judge” - exceed the benefits, Bp, of achieved improvement of performance, Cm > Bp. In other words, the costs of monitoring, Cm, might be prohibitive due to the asymmetric information problem, and may prevent the application of the sticks remedy (otherwise creating uncertainty, arbitrariness and abusive/moral hazard problems on the principal’s side). If we also introduce Lazear’s point on the unclear maximum level of performance, then the employment of carrots as an inducement mechanism becomes straightforward.

Third, the extension of Dari-Mattiacci and De Geest’s multiplication effect may be offered as a significant additional argument against the use of sticks as judicial inducement mechanisms. 67 In this respect one should firstly note that although punishments and rewards are symmetrical ways to induce compliance with a single command, they differ fundamentally when it comes to multiple commands. Dari-Mattiacci and De Geest suggest that the threat to punish (a stick) is more powerful than the promise to reward (a carrot) because, when parties comply, the former is not carried out and thus can be reiterated all over again (the multiplication effect), whereas rewards will have to be paid and thus are consumed with use. 68 In other words, sticks are used up in the case of violation, whereas carrots are used up in the case of compliance. One should also note that sticks are only multipliable if agents behave non-cooperatively, which is not, as we argue, the case in judiciary settings where judges cooperate, coordinate and communicate among each other. 69

66 We define non-verifiable performance as one where the third party ex-post has extreme difficulties establishing whether they performed effectively since there is generally no accepted exact definition of what effective performance means or entails.
68 This also implies that the use of carrots (i.e. salaries) requires an enormous amount of resources (since carrots are consumed with use) allocated to judiciary rewards (payment) which might be, due to the high monitoring costs, in this instance of judicial performance entirely wasted (pure waste of resources); Id.
69 The multiplication effect is based on the exploitation of non-cooperative behavior in the population and is a tool that makes sticks more powerful and enforcement based on sticks cheaper; id.
However, the use of sticks might be a source of possible abuses and may endanger the judicial independence which is a fundamental aspect of the rule of law (and consequent social welfare). In this respect, the application of Dari-Mattiacchi and De Geest's argument may explain the “dark” period of German judiciary during WWII and the related collapse of the rule of law. In a judicial setting where judges have made substantial relation-specific investments and where their performance is non-verifiable, sticks might carry an implicit danger of exploitation. The principal (the state/society at large) might threaten to stop cooperating (uncertainty) by using, for example, termination of employment, sanctions, or imprisonment, unless the judge (agent) behaves and performs as requested. Since the judge is a rational, wealth-maximizing person he simply starts to act in accordance with the principal’s wishes. The threat of the principal to stop cooperation actually represents the costs of not behaving in accordance with the principal's goals, Cc, and where they obviously exceed the possible expected benefits, p Bs, of not doing so, Cc > p Bs. In this setting Cc consists of the lost relation-specific investment, Ri, lost income, I, costs of imprisonment, opportunity costs and so forth which the judge must bear with certainty, whereas the possible benefits of disobeying the principal's wishes should be discounted by the future prospect of such benefits (expected benefits). As also advanced by Dari-Mattiacchi and De Geest, the multiplication effect makes it easier not only for a benevolent enforcer (principal) to make society better but also for a selfish tyrant to make society worse off. Since the multiplication effect makes exploitation through sticks easier, there is thus in a judiciary setting a greater need for strict regulation, cautious application or even complete abolishment of such an inducement mechanism.

This consideration may also help to explain why the use of sticks in a judiciary setting is generally absent, undesirable, unnecessary and dangerous or, if applied, subject to extremely strict procedural requirements and safeguards, which should prevent possible abuses and retain judicial independence as a fundamental aspect of the rule of law. Hence, the use of carrots, combined with highly regulated application of sticks, appears as the only possible inducement mechanism to improve judicial performance, quality and effectiveness.

2.4 Empirical findings
There is a wealth of empirical evidence for Posner's predictions. For example, Tabarrok and Helland investigate why trial awards differ across the US. They examined the states in which judges are elected (23) and another ten states in which judges are elected via partisan elections. They found that since most plaintiffs are in-state voters and many defendants are out-of-state voters, elected judges have an incentive to service their constituencies by aiding plaintiffs. A particular low-cost method of aiding plaintiffs is to transfer wealth from out-of-state business defendants to in-state plaintiffs. They also have strong evidence that in the cases with out-of-state defendants, awards were much higher in partisan-elected states than in other types of judicial systems. They showed that the expected total award in partisan-elected states with out-of-state defendants is approximately 240,000,00 USD higher than in other states.

Looking at judges' behavior from another point of view and at the federal courts, Cohen researched whether the judges acted as utility maximizers and therefore examined how the 200 district court judges during a six-month period between January and July 1988 decided about the constitutionality of the U.S. Sentencing Commission. He found that the judges who have crowded dockets tend to rule the Sentencing Commission unconstitutional, as do judges who face the prospect

70 The detailed discussion on the judicial independence and its role as a fundamental aspect of the rule of law (with related implications on the functioning of economic system and social-welfare) is beyond the scope of this article. However, the substantive negative impacts which the multiplication effect may have on such a role are briefly addressed and will be accurately assessed elsewhere. For law and economics analysis of the judicial independence see e.g. Cabrillo, F., Fitzpatrick, F., “The Economics of Courts and Litigation,” Edward Elgar Publishing, 2008.
71 This is exactly what happened to the judiciary in Nazi Germany and in the ex-communist states.
72 Dari-Mattiacchi, De Geest, supra note 66.
73 Yet carrots should not be seen only as an increase in financial rewards (their major drawback is the needed amount of financial resources) but should encompass the whole system of previously identified carrots (prizes, top 10% lists of judges, legacy, reputation etc.).
75 Id.
76 Cohen, supra note 17.
of being appointed to a vacant appeals court position.\textsuperscript{77} In addition, Choi and Gulati, while examining the behavior of the federal judges, (whose wages are set for the duration of their judgeship, but could be promoted either to Supreme Court or to Appellate court), deciding whether U.S. Sentencing Commission is constitutional or not, offer further evidence that judges are utility maximizers.\textsuperscript{78} The article concludes that judges were more likely to use written opinions to communicate their rulings in Sentencing Guidelines cases where the potential for promotion to the circuit court of appeal was greater.\textsuperscript{79}


As already noted, the main goal of the principal-agent theory is to align the goals of the principal and the agent in order to maximize the utility of the principal, of course subject to certain constraints. Even though the current CEPEJ European guidelines on the quality of judicial administration were the initial focus of our investigation, the most recent Finnish model of Quality Benchmarks\textsuperscript{80} soon appeared as a focal point of our attention.\textsuperscript{81} This was due to the novelty of the Quality Benchmarks and their advanced elaborated stage (as advanced as the U.S. one). Once we know what the utility function of the principal looks like, we can assess the incentives needed to align the utilities of the agents with the principals.

The Finnish model was developed in the 1990s to improve the quality of Finnish adjudication.\textsuperscript{82} It was first launched in the courts of the jurisdiction of the appeal court of Rovaniemi (hereinafter called Quality project). The purpose was to achieve fair trials, well-reasoned and correct decisions, and accessible court services (including financial services). In 2003, a working group was established which was to come up with the quality benchmarks based on the pilot project. The impetus for the Quality project came from the realization that the public (principals) want the courts (agents) to be efficient, cost-effective and produce quality decisions. The Quality project goals were to produce information about the development needs of the courts; act as a tool for training and development of judges; act as a means to “opening” the courts to outsiders; and serve as a means of evaluation of the courts from time to time. It should be mentioned that the Quality project was not meant to be an evaluating tool for individual judges (see page 11 of the Quality Benchmarks), but do so for the courts in general. The goals were set by the courts themselves and have been evaluated just once in a few years (3-5 years). The evaluations of the courts were intended to disclose their weaknesses and open the path to improvement.

As of now, each court in Finland has its own evaluation system. Depending on the budget, courts negotiate each year with the Ministry of Justice and predict the number of incoming cases and the necessary money and personnel. The success of the previous year is discussed during the negotiations for the following year. The goals for the next year are set, as is the average number of input, number of decided cases, productivity and efficiency. Also, each court might have its own statistics. More traditional means of overview are inspectional visits that Courts of Appeals pay to the individual courts from time to time.

\textbf{Quality Benchmarks}

The Quality Benchmarks consist of six aspects, which contain forty quality criteria:

\begin{enumerate}
\item \textit{the process}
\end{enumerate}

\textsuperscript{77} Judges on average said that they expected that the sentencing rules would increase their workload. Also, it seems that the promotions were biased towards judges that did not proclaim certain rules unconstitutional; Cohen \textit{supra} note 17.


\textsuperscript{79} \textit{Id}.

\textsuperscript{80} For detailed explanation see: “Evaluation of the Quality of Adjudication in the Court of Law, Principles and Proposed Quality Benchmarks, A Quality Project of the Courts of Jurisdiction of the Court of Appeal of Rovaniemi,” Finland, March, 2006 (herein: Quality Benchmarks).

\textsuperscript{81} We should point out that we are not going to compare the USA model and the Finnish (a.k.a. European model) since the literature distinguished between the Anglo-Saxon and the continental judiciary system with regards to the promotion and election/appointment of the judges. For an excellent overview see Posner, A. Richard, “Overcoming Law,” Harvard University Press, 1995. We should also mention the Dutch and the Swedish models, see \textit{ibid}.

\textsuperscript{82} See \textit{supra} note 69.
1. the proceedings
   a. the proceedings have been open and transparent vis-à-vis the parties
   b. the judge has acted independently and impartially
   c. proceedings have been organized in an expedient manner
   d. active measures have been taken to encourage the parties to settle
   e. process must be managed effectively and actively (both procedurally and substantively)
   f. the proceedings have to be arranged and carried out so that minimum expenses are incurred by the parties and others involved in the proceedings
   g. the proceedings have been organized in a flexible manner
   h. the proceedings are as open to the public as possible

2. the decision
   a. the decision is just and lawful
   b. the reasons for the decisions should convince the parties, legal professionals and legal scholars of the justness and lawfulness of the decision
   c. the reasons are transparent
   d. the reasons are detailed and systematic
   e. the reasons for the decision must be comprehensible
   f. the decision should have a clear structure and be linguistically and typographically correct
   g. the decision should first and foremost be pronounced so that it can be, and is, understood

3. treatment of the parties and the public
   a. the participants in the proceedings and the public must at all times be treated with respect to their human dignity
   b. appropriate advice is provided to the participants in the proceedings, while still maintaining the impartiality and equitability of the court
   c. the advising and other services of those coming to courts begins as soon as they arrive at the venue
   d. the participants in the proceedings are provided with all necessary information about the proceedings
   e. the communications and public relations of the court are in order, where necessary
   f. the lobby arrangements at the court are in accordance with the particular needs of various customer groups

4. promptness of the proceedings
   a. cases should be dealt with within the optimum processing times established for the organization of judicial work
   b. the importance of the case to the parties and the duration of the proceedings at earlier stages have been taken into account when setting the case schedule
   c. also the parties feel that the proceedings have been prompt
   d. time limits that have been set or agreed are also adhered to

5. competence and professional skills of the judge
   a. judges should take care of the maintenance of their skills and competence
   b. judges should attend continued training sessions
   c. judges’ participation in training is subject to agreement in the annual personal development talks
   d. court has specialized judges
   e. the parties and the attorneys should get the impression that the judge has prepared for the case with care and understands it well
   f. judges participate regularly and actively in judges’ meetings, in quality improvement conferences and also in other work of the Quality Working Group

6. organization and management of the adjudication
   a. the organization and management of adjudication are taken care of with professionalism and support the discharge of the judicial duties of the court
   b. the assignment of new cases to the judges is methodical and carried out in a credible manner
   c. the specialized competence of the judges is also utilized in the processing of cases
   d. adjudication has been organized so that the use of reinforced compositions is de facto possible
   e. personal development talks are held with every judge every year
f. the courts should have a methodical system for the active monitoring of case progress and for taking measures to speed up delayed cases

g. it is the responsibility of the management and the court that the judges and other staff are not being overloaded with work.83

3.1 Economic assessment of Finnish quality benchmarks

As can be seen from the above benchmark criteria, they set the elements of the utility function of the users and stakeholders of the courts – the principals. In other words, this set of elements presents the principal’s goals or features of what the effective, productive and quality-based performance of judges should look like. Yet the incentive structure for the judges (agents) to perform the requested tasks and to fulfill the presented criteria is completely missing. As the law and economics literature suggests, in order to achieve such benchmark performance criteria the judges should be induced to do so through the employment of incentive mechanisms. As noted, several different mechanisms are applicable (carrots), whereas certain (sticks) should be avoided or applied with extreme caution.

First, to solve the adverse selection problem and the problem of judges leaving their offices, the financial rewards should be increased. Also, if it is observed that the intensity of judges is low or falling then this is, as noted, a straightforward and inexpensive signaling mechanism that the financial rewards are too low and that they have to be increased in order to avoid declining productivity and quality of judicial outputs.

Second, promotion prospects, coupled with a sort of competition-tournament among judges, are the next powerful incentive mechanism to improve judicial performance. Different versions of promotion prospects (e.g. irregular promotion, not depending on the passing of a certain number of years but on the judge’s performance) should be thus designed and applied as inducement mechanisms.

Third, respect among peers and the related reputation effect may be employed as another inducement mechanism to achieve the proposed quality benchmarks. For example, special yearly prizes for “the best judge of the year,” a list of top 10% judges, or a black list of worst 5% judges might be used as such inducements. These instruments would be made public and paid attention to by society at large, especially if they were awarded by the bar, president or prime minister.

Fourth, the quest for legacy is one the carrots, which induce judges to behave productively - the power to influence outcomes through voting and the evolution of the law (creation of precedents). Namely, the judges derive utility from imposing their policy preferences on the community at large, from the prospect of leaving legacy and from selecting outcomes, or selecting substantive or methodological trademarks, for the purpose of maximizing their own influence.

Of course, one can think of several other versions of carrot incentive mechanisms, which could be applicable to improving judicial performance. However, they should only be used as long as they do not cross the border and become inefficient and abusive stick mechanisms.

Unless the assessed quality benchmarks are supported by a corresponding system of incentive mechanisms, the achievement of targeted goals and performance remains uncertain and doubtful. The surveyed law and economics literature offer several alternative mechanisms to mitigate the identified asymmetries of information, high monitoring costs, and agency problems where the employment of such mechanisms is needed for the fulfillment of the presented policy goals.

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83 Just to compare, National Center for State Courts in USA promulgated Trial Court Performance Standards promulgated by the National Center for State Courts. They set five performance standards: (1) Access to Justice, (2) Expedition and Timeliness, (3) Equality, Fairness, and Integrity, (4) Independence and Accountability, and (5) Public Trust and Confidence. Each comprises more standards and all in all there are 22 standards. As can be seen, the standards are very much like quality benchmarks in the Quality project. For more information see www.ncsconline.org.
3.2 Economic assessment of reported incentive mechanisms in continental countries

As we have seen above, the principals and agents have different utility functions. Therefore, there should be an incentive structure put in place, which would align the utility of the agent with the principal. There are many incentives that could be put in place; however, existing continental judicial systems cut out some of them. Examples include incentive bonuses for judges who solve more cases, fast-track promotion, and extra judicial training. Further research is needed to analyze the structure of incentives in particular EU countries, but much is already known about several judicial systems.

In Finland, an incentive for judges to work harder could be that the courts each year negotiate with the Ministry of Justice for their budgets, and a higher budget usually brings more personnel, additional education, maybe plusher offices, better-stocked libraries, and so on. It could be that courts compete among each other in order to get the biggest budget. However, it needs to be found out how particular courts deal with potential shirkers – free-riders that weigh down the efficiency and effectiveness of their courts, since all of the performance criteria are aimed at the court, and not at the judge level. As for sticks, there are some disciplinary measures in place in Finland; however, in 2006 only two disciplinary proceedings were instigated, which ended with reprimands.84

In Germany, wages do not depend on the productivity of particular judges and they do not get any bonuses for handling additional cases. However, the presidents of the courts, who promote judges, look at the number of cases handled and some other aspects of the judges’ work, even though there are no set performance indicators for individual judges, only for the courts. As for sticks, judges can be reprimanded and even recalled for professional inadequacy, criminal offences, and for breach of professional ethics. As of 2006, there were 20 proceedings for professional inadequacy, 22 for criminal offenses and approximately 10 for breach of professional ethics (out of 20138 judges).85

Sweden has a similar system to Finland, with performance indicators at the court and not judge level, and targets for courts are set each year after a discussion between the courts and the National Courts' administration. The main target is the processing-time length of cases. There are no bonuses for hard-working judges. There were two disciplinary procedures instituted in 2006 and both ended up with a reprimand.86 87

In the Netherlands performance indicators are set at the court level. There are no bonuses for hard work and disciplinary procedures rarely occur (though exact disciplinary data do not exist). The authority to dismiss judges lies with the Supreme Court and it usually handles one to two cases per year.88

In Slovenia, on the other hand, promotion depends on many different criteria:
- professional knowledge, whereby consideration shall be taken of:
  (i) the judge’s professional activities,
  (ii) the judge's specialist and postgraduate studies and the reputation achieved by the judge in the legal profession,
  (iii) working capabilities, whereby consideration shall be taken of the ratio of the volume of judicial work,
  (iv) the ability to resolve legal questions, whereby consideration shall be taken of the level of correctness and legality achieved in the judge’s decision-making as determined primarily by the reversal rate,
  (v) the safeguarding of the reputation of the judge and the court as determined from the way in which procedures are conducted, communication with parties and other bodies, the upholding of independence, impartiality, reliability and uprightness, and behavior inside and outside the service,
  (vi) the verbal and written skills,

84 There were 901 judges in Finland in 2006 (see: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/finland_en.pdf, 2.4.2010).
87 There were 1039 professional judges in Sweden in 2008 (22.03.2011).
(vii) additional work undertaken in holding judicial office especially within the framework of mentorship, and involvement in legislative procedures and in education and professional training,
(viii) the attitude towards colleagues in performing judicial work and
(ix) the ability to perform the functions of a managerial position, if the judge is appointed to such a position, as shown by the work results in the area entrusted to the judge.

When judges are promoted, they also get a higher wage. One of the interesting things in Slovenia was that the Ministry of Justice offered additional payment to judges in 2009/10 who were ready to deal with more cases. However, a lot of judges, did not participate in the scheme, claiming that it encroached on their independence.89,90

4. Conclusion
Increasing backlogs and the quality of judicial decision making is making headlines and attracts scholarly attention for quite some time. The aim of this article was to shed light on the problem from a law & economics perspective. The article focuses on the incentive stream of the continental judiciary, suggests several alternative inducement mechanisms to improve continental judicial performance and effectiveness, and provides an economic assessment of the proposed Finnish Quality Benchmarks and related provisions in several other continental countries. Therefore, beside salary, the prospect of leaving a legacy, gaining respect among colleagues (society), and promotion prospects have been discussed, as additional mechanisms for inducing judicial productivity and effectiveness since traditional increases in financial rewards might not be an appropriate incentive mechanism due to the identified asymmetries of information (high monitoring costs-agency problem). The eventual employment of sticks (unilateral termination of employment contracts, lay-offs, sanctions, prosecutions etc.) is discussed as such an additional inducement mechanism. The introduction of such a mechanism becomes even more appealing if one notes that they are much more powerful inducement mechanism than a promise to reward (carrots). However, the application of the multiplication effect provides a significant argument against the sole use of sticks, regardless of how appealing they might be. Employment of sticks in a judiciary setting is, as we argue, an inefficient, socially undesirable option, endangering judicial independence and diminishing social welfare. This consideration may also help to explain why the use of sticks in a judiciary setting is generally absent, undesirable, unnecessary and dangerous or, if applied, subject to extremely strict procedural requirements and safeguards, which should prevent possible abuses and retain judicial independence as a fundamental aspect of the rule of law.

The governments in continental systems do not have a lot of maneuvering space to align the utility functions of judges and the public. This is true since the salary is strictly set and judges have an increase in salary only when they are promoted, which occurs infrequently. Since there are not many degrees of freedom, it seems that judges behave as in rank-tournaments and their careers are the outcome of a succession of rank-ordered tournaments for promotion. Judges therefore compete in the decision-making performance for the fixed price of promotion to the next level. The prospects of leaving a legacy, and gaining respect and reputation among colleagues (society) appear as additional inducement mechanisms, beside the fear of being reprimanded or impeached. However, our survey shows that continental countries rarely resort to such additional incentive mechanisms. Therefore, there is room for improvement, not so much in the sticks but in reward mechanisms, which result in the enhancement of judicial performance, effectiveness and quality of judicial decisions. Further research is required in order to examine what precisely are the salient driving forces behind judicial decision-making.

5. References

89 Just on the side, in the 1980s, Slovenian courts also had a lot of backlogs. They instituted a similar incentive scheme and cleared the backlogs. It was interesting that none of the judges claimed that the scheme encroached on their independence (interview with a Minister of Justice of the Republic of Slovenia). See: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/slovenia_en.pdf (2.4.2010)
90 Unfortunately, the exact numbers are not at our disposal. Also, since the article in general does not discuss the independence of judges, we will not delve in the further explanation of the matter.


The UK Supreme Court – A Fine New Vintage, or Just a Smart New Label on a Dusty Old Bottle?
By Gavin Drewry

Abstract
The machinery of UK governance, including many aspects of the legal system, has undergone a lot of important changes in the last decade or so. Some of these changes have been driven by ‘New Public Management’ ideas about the need to increase ‘efficiency, effectiveness and economy’, to sharpen public accountability and to improve the quality of customer service in the administration of justice - as has been happening with other parts of the public service sector. Some important reforms (notably devolution of functions to elected administrations in Scotland, Wales and Northern Ireland and the passing of the Human Rights Act 1998) have been parts of a wider political agenda of modernising Britain’s antiquated ‘unwritten’ constitution. Some of the most senior judges themselves, a category of office holder once regarded as doctrinally opposed to any kind of radical change, have become articulate champions of reform and have carved out new, high profile managerial roles for themselves, as well as becoming markedly more ‘activist’ in the public law and human rights arena when sitting on the Bench.

One particularly important landmark in the long list of recent legal reform initiatives was the passing of the Constitutional Reform Act 2005 which (among other things) paved the way for the establishment of a United Kingdom Supreme Court. The new Court, which took over the appellate jurisdiction formerly exercised by the House of Lords, began work – in a location on the opposite side of Parliament Square from the Palace of Westminster – on 1 October 2009. The Judicial Committee of the Privy Council, staffed mainly by the same judges as those who sit in the Supreme Court but having a separate jurisdiction, has also moved into the same building. This article considers the background to and rationale of this development and reflects upon how radical a constitutional innovation it really is. It concludes by suggesting that, even though the new court has almost an identical jurisdiction to that of its predecessor, the adoption of the evocative appellation of a ‘supreme court’ may prove to be much more than a cosmetic exercise of relabeling.

‘Supreme Court’ – what’s in a name?
The term ‘Supreme Court’ has a particular historic resonance with the institution that bears that name in the United States, and acts as custodian of the US Constitution through the judicial review of legislation. But what can be the role of a Supreme Court, in the United Kingdom - a country that still has no codified constitution and in which the primacy of Acts of Parliament remains strongly embedded in enduring notions of parliamentary sovereignty? Before looking at the nature, functions and prospective development of the UK’s new Supreme Court, which was launched in 2009, let us begin with some scene-setting reflections on what any newly-created institution called a ‘supreme court’ might be expected to look like. Does international experience offer any relevant pointers?

The first formal usage of the name, ‘supreme court’ dates back to Article III of the US Constitution of 1787, which provided that: 'The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.'

Article VI affirmed that 'This Constitution and the Laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land.'

The succinct and deceptively low-key formulation in Article III was of course just a scene-setter to the well-known saga of how the US Supreme Court was to evolve into a powerful arena for resolving constitutional disputes, frequently concerning matters which are politically highly contentious and often involving Bill of Rights issues. Although Alexander

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Hamilton in *Federalist 58* had characterised the judiciary as guardians of the Constitution, the Founding Fathers who signed up to those apparently anodyne words at the Philadelphia Convention can surely have had little idea of what a potentially formidable constitutional weapon they had invented for posterity. Sixteen years later, the huge significance of this innovation began to manifest itself – with Chief Justice John Marshall, in *Marbury v Madison*, breathing life into the skeletal language of Articles III and VI, laying the foundations for judicial review of the constitutionality of legislation - and the eventual emergence of top judges as key actors in the American governmental process.²

The American model, as it grew towards maturity from its 18th century embryo, was destined subsequently to influence judicial developments in many other countries, particularly in the common law world. American influence on some of the new constitutions that emerged in the twentieth century, particularly in the aftermath of the Second World War was important in this context. Many of the new, independent nation states that were created by the collapse of the former European empires in the second half of the century gave birth to a proliferation of new constitutions, often featuring provisions designed to hold governments in check through some kind of judicial review. The collapse of the Soviet empire in the 1990s created yet more such new states with yet more constitutions and often ‘supreme courts’ and/or ‘constitutional courts’ of their own.

But of course the American version of a Supreme Court, influential though it has been, was far from being a universal template. Even the most cursory glance at the worldwide picture reveals huge variations in function, status and nomenclature both in the nature and configuration of top judicial institutions and in the arrangements for judicial review of constitutional issues. A current ‘wiki’ website³ listing national supreme courts includes 53 in Africa; 37 in the Americas (including six countries who have signed up to the Eastern Caribbean Supreme Court); 48 in Asia; 45 in Europe; 14 from Oceania; and five supranational supreme courts (the Eastern Caribbean Supreme Court; the European Court of Justice; the UN International Court of Justice; the UN International Court of Justice; the UN International Criminal Court; and the UK’s Judicial Committee of the Privy Council.

A lot of the institutions listed are called supreme courts, but many are not. Some are high courts; others are (in the French tradition) courts of cassation. Some of the top courts have the word ‘constitutional’ in their title; but in many countries, particularly ones with civil/Roman law rather than common law jurisprudential inheritances, constitutional courts are quite separate and distinct from the supreme courts (however titled) at the apex of the ordinary court hierarchy - or hierarchies. The latter characteristic is another point of departure from the common law pattern: in some countries administrative law and/or criminal courts have their own hierarchies and appellate systems, separate from the trial and appellate courts dealing with civil litigation. So some of the countries listed in the above web site are shown as having three ‘supreme courts’. For instance, the entry for the Czech Republic includes a Constitutional Court and a Supreme Administrative Court, alongside the national Supreme Court. France has the Court of Cassation, the Council of State and the Constitutional Council – the latter not being, strictly speaking, a ‘court’ at all. Germany perhaps provides an even better illustration given the existence of several supreme courts at federal level for different fields of law (civil, administrative, criminal, labour, tax, etc) alongside the Federal Constitutional Court.

Some top courts have been modelled, explicitly or implicitly on the United States prototype, operating in a constitutional framework based on a separation of powers, and acting (in federal countries) as umpires in disputes about the respective powers of national and sub-national levels of government. But supreme courts are also to be found in unitary states and in former British colonies that retain variants of the ‘Westminster’ constitutional model, with a degree of fusion (rather than a strict separation) between the executive and legislative branches of government. Supreme courts, and the constitutionalist idea that over-mighty governments need to be kept in check by judicial review, are seen by many jurists and political theorists as bulwarks of liberal democracy. But, as the above-mentioned list indicates, supreme courts are also to be found in non-democratic polities – particularly in some countries in Asia and Africa - where free elections and party

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² An interesting recent account of the debates surrounding the foundation of the US Supreme Court and of the subsequent development of judicial review can be found in L. Goldstone, *The Activist*, New York, Walker and Co., 2008.

competition are almost or wholly non-existent and where Western ideals of judicial independence and the rule of law barely exist.

Cross-national comparison reveals a few obvious isomorphic clusters and over the years many countries (particularly ones in constitutional transition) have borrowed or inherited some of their ideas from elsewhere. But the overall picture is one of great diversity, reflecting the enormous variety of local histories, cultures, traditions and levels of economic and political development. So there was no common template, even within the common law world, that can have offered much guidance to the creators of a new ‘Supreme Court’ in the UK – even assuming that they might have been seeking such guidance. And, even though European law has had a significant recent and continuing impact on UK jurisprudence, the judicial systems of Britain’s European neighbours can have provided even less inspiration. As one commentator has noted, in 2001 one French ‘supreme court’, the cour de cassation, decided 20,613 civil cases and 9,581 criminal cases; in the same year the UK House of Lords decided just 85 cases and four points of law. Clearly we are looking here at two completely different institutional species.

Judicial Review, in the absence of a Constitution?

And one further point should be borne in mind. A major raison d’etre of the US Supreme Court is constitutional judicial review (though this only constitutes one part of its federal jurisdiction) – and the spread of this function, whether entrusted to supreme courts at the apex of a judicial hierarchy or to separate constitutional courts, has been a growth industry in the modern democratic world. Tom Ginsberg notes that, whereas before the Second World War (when of course the number of free-standing nation states was much smaller than it is today) very few constitutions provided for judicial review; at the time of his writing (c. 2007), 158 out of 191 constitutional systems included formal provision for constitutional review. By his calculation, 79 constitutions included provisions for constitutional courts or councils; 60 provided for judicial review by the ordinary courts or by supreme courts; while China, Burma and Vietnam entrusted the task of reviewing constitutionality to the legislature. A recent comparative study of constitutional courts adopts a definition of such courts as not meaning ‘merely a court acting in constitutional mode by interpreting a constitution or determining a constitutional issue, but a specialist court having only “constitutional” jurisdiction.’ Their analysis is therefore focussed on ‘centralised’ or ‘European’ systems in which the legal system is divided typically into two parts, one under the authority of a constitutional court, the other under the authority of a supreme court – ‘the latter being finally responsible for all matters of judicial determination not falling within the jurisdiction of the constitutional court.’ The prototype of such courts is generally taken to be that established in Austria in 1920, under the influence of Hans Kelsen. The definition expressly excludes the US Supreme Court and other systems that have emulated the ‘American’ model.

The UK Supreme Court is manifestly not and cannot be a constitutional court in the ‘European’ sense. Indeed, given the absence of a codified constitution in the UK – coupled with the traditional doctrine of parliamentary sovereignty - one might anticipate that the role of its new Supreme Court will never have anything to do with determining the constitutionality of executive or legislative actions in the manner of its US namesake. But we need to look a little more closely at this assumption in the light of recent experience before jumping unthinkingly to such a conclusion.

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Prehistory of the UK Supreme Court

At the end of the 18th century, at the time when the newly liberated former American colonies were launching their new Constitution – retaining some aspects of their British and common law inheritance, but firmly rejecting many others – the British legal system had nothing resembling a Supreme Court. The judicial system was fragmented, slow and inaccessible to all but the very rich: the appellate system was virtually non-existent. However, at the apex of this ramshackle structure sat the House of Lords – the non-elected second chamber of Parliament, a feudal relic (though still powerful in those days) historically representing the interests of the great aristocratic landowners.

It should be noted that the judicial House of Lords was the final appellate court (in civil cases) not only for England, Wales and Ireland, but also for Scotland whose legal system is significantly different from that of the rest of the UK. The modern House of Lords, and now the UK Supreme Court retains this geographical jurisdiction (save that, since the partition of Ireland after the First World War, the Irish jurisdiction is confined to the North of the island, the Irish Republic having a quite separate judicial system). Subsequently, the House of Lords acquired an appellate role in criminal cases (excluding Scottish ones) – but in practice nearly all of its case-load has comprised civil matters.

The constitutionally anomalous feature of the judicial functions of the House of Lords was that, since feudal times until the abolition of its appellate jurisdiction in 2009, they remained part and parcel of the second chamber of the legislature. As Robert Stevens has observed:

By the thirteenth century, the development of the common law had led to the delegation of judicial work at the trial level (and by the Tudor period even to the establishment of a hierarchy of judicial appeals), but the idea that a final appeal from the regular courts lay to Parliament was not seriously questioned after the fourteenth century. Parliament recognized no subtle distinction among its judicial, executive, and legislative functions. As the laws and customs of Parliament had developed, the appellate function was seen as no more and no less a part of the work of the political sovereign [the King in Parliament] than those original (trial) aspects of its judicial work – impeachment and the hearing of felony charges against peers.

Until the latter part of the nineteenth century, the appellate business of the House was effectively in the hands of a legally qualified Lord Chancellor (a senior ministerial member of the government), usually sitting with two non-legally qualified peers. Judicial sittings took place in the legislative chamber of the House and until the 1850s it was not unknown for other peers to wander in and out and sometimes try to ‘vote’ on the determination of appeals. With hindsight, this looks ludicrous – and even then there were critics who recognised its absurdity. The Victorian essayist, Walter Bagehot, writing in 1867, opined that: ‘the supreme court of the English people ought to be a great conspicuous tribunal, ought to rule all other courts, ought to have no competitor, ought to bring our law into unity, ought not to be hidden beneath the robes of a legislative assembly.’

However, even in Bagehot’s day, this aspect of the work of the House had increasingly been separated from the mainstream of political and legislative activity. This process was carried substantially forward, nine years later, by the passing of the Appellate Jurisdiction Act 1876. The rather complicated story surrounding these changes has been told elsewhere. Suffice it to say, that the original plan (adopted by Gladstone’s Liberal Government) had been to abolish the Lords’ appellate jurisdiction altogether, and the Judicature Act of 1873 had begun that process – placing a newly created Court of Appeal at the apex of the UK civil courts. However, partly because of the objections of Scottish lawyers to the

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8 Parts of this section and the section that follows it are adapted from Gavin Drewry, Louis Blom-Cooper and Charles Blake, The Court of Appeal, Hart Publishing, 2007, pp. 153-156
9 There was a provision in the Government of Ireland Act 1920 for appeals to the House of Lords from the courts of Northern Ireland in matters relating to the constitutionality of legislation passed by the devolved Northern Ireland legislature. This provision was subsequently repealed. See Louis Blom-Cooper and Gavin Drewry, Final Appeal, Oxford, Clarendon Press, 1972, p. 36.
idea of appeals from their courts being decided by an exclusively English court, Disraeli’s Conservative Government, that came to office in 1874, rescued the judicial House of Lords from oblivion. The 1876 Act (above) put the judicial function of the House onto a proper statutory footing and created the first life peers – judicially qualified Lords of Appeal in Ordinary – to hear appeals.

One relic of the previous steps towards abolition was to leave the Court of Appeal and the High Court with the rather misleading statutory title, ‘the Supreme Court of Judicature’. Section 59 of the Constitutional Reform Act 2005 avoids any potential confusion between that body and the new UK Supreme Court by re-naming the High Court and the Court of Appeal as the Senior Court of England and Wales; their counterparts in Northern Ireland became the Court of Judicature (rather than the Supreme Court of Judicature) of Northern Ireland.

Genesis of the UK Supreme Court

And so, with various reforms to its workings along the way (e.g. the introduction in the 1930s of a requirement of obtaining leave to appeal in English civil appeals) the House of Lords continued in its rather strange role as the final appellate court – albeit with the judicial functions effectively detached from the legislative functions. In 1948, as an indirect consequence of wartime bomb damage to the Palace of Westminster, the House began to hold its judicial hearings in an Appellate Committee, away from the legislative chamber.13 Intermittent moves in the 20th century to reform the powers and functions of the second chamber for the most part ignored any reference to the judicial functions.

However, in 1997 Tony Blair’s ‘New Labour’ Government embarked upon a series of steps to ‘modernise’ the constitution – including Parliament. In 2000, the report of a Royal Commission on Reform of the House of Lords (chaired by Lord Wakeham), quoted Bagehot’s observation that ‘no one, indeed, would venture really to place the judicial function in the chance majorities of a fluctuating assembly: it is so by a sleepy theory; it is not so in living fact.’ But the Commission went on to note that the doctrine of separation of powers has never strictly applied in the United Kingdom, and concluded that ‘there is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords’.14 In its White Paper, responding to the Wakeham Report, the government – while cautiously in favour of modernising other aspects of the composition of the second chamber - declared itself to be ‘committed to maintaining judicial membership within the House of Lords’.15

But the Blair Government’s commitment to retaining the status quo proved to be short-lived. On 12 June 2003 there was press release from Downing Street (coinciding with Lord Irvine of Lairg’s resignation as Lord Chancellor) announcing that the office of Lord Chancellor was to be abolished and replaced by a new office of Secretary of State for Constitutional Affairs; that there was to be a new judicial appointments commission for England and Wales; and that the judicial functions of the House of Lords would be transferred to a new UK supreme court.

The announcement came out of the blue – not least to Mr Blair’s cabinet colleagues and to the judiciary, who, it transpired, had not been consulted.16 Consultation papers on the government’s proposals were published by the newly established Department for Constitutional Affairs.17 The document concerning the proposed Supreme Court indicated one reason for the Government’s change of mind, when it referred to the Human Rights Act and Article 6(1) of the European Convention on Human Rights, which now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so. So the

15 The House of Lords – Completing the Reform, Cm 5291, 2001, para. 81.
17 This Department replaced the Lord Chancellor’s Department in June 2003. It was replaced by the Ministry of Justice (responsible mainly for the prison system and the courts) in May 2007.
18 Constitutional Reform: A Supreme Court for the United Kingdom, July 2003. There were separate consultation documents relating to the proposed independent judicial appointments commission and to the future of Queen’s Counsel.
fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature.\textsuperscript{19}

In the background of this concern were decisions of the Strasbourg court in \textit{Procola v Luxembourg}\textsuperscript{20} and, closer to home, \textit{McGonnell v United Kingdom}\textsuperscript{21}, which had strongly affirmed the need for ‘objective impartiality’ in judicial proceedings.

In the period between the Wakeham Report and the prime minister’s announcement, Parliament had produced two divergent select committee reports on the subject. In a report published in February 2002, the House of Commons Select Committee on Public Administration, responding to the Government’s white paper on reform, had supported the establishment of an independent Supreme Court.\textsuperscript{22} However, in December 2002, the Joint (i.e. Lords and Commons) Committee on House of Lords Reform had noted that opinion, including judicial opinion, was divided on the issue, and called for an independent inquiry into the judicial function of the Lords.\textsuperscript{23}

Continuing discussion and negotiation following the Blair announcement and the publication of the above-mentioned consultation exercises – accompanied by a fair amount of controversy, and some government compromises - culminated in the enactment of the Constitutional Reform Act 2005. The new Supreme Court came into operation in October 2009. It is located in refurbished crown court accommodation on the north side of Parliament Square, in the old Middlesex Guildhall.\textsuperscript{24} The Law Lords in post at the time of the changeover retained their life peerages and their membership of the House of Lords, but subsequent appointees to the Supreme Court do not hold peerages by virtue of their membership of the Court.\textsuperscript{25} Thus one of the first new Justices\textsuperscript{26} to be appointed, in the summer of 2010, was Sir John Dyson, a former judge of the Court of Appeal of England and Wales: Sir John does not have a peerage, but in December 2010 he was granted honorific title of ‘Lord’ like that already given to senior judges in Scotland.

**From House of Lords to Supreme Court – An Emerging Constitutional Role?**

We have already noted that the constitutional role of the US Supreme Court is replicated in some countries (albeit with many local variations) but not in others. The absence in the UK of a codified constitution might be taken to mean that the UK Supreme Court simply cannot exercise a significant ‘constitutional’ role. However, there were some interesting trends in the subject-matter of appellate business in the House of Lords in the last few years of its existence that prompt us to take a more critical look at this assumption.

Back in the 1950s and ‘60s, more than 30 percent of all House of Lords appeals related to tax law tax litigation.\textsuperscript{27} By the early 21\textsuperscript{st} century, in the run-up to the transfer of its jurisdiction to the Supreme Court, the proportion of revenue appeals had dwindled to about 7 percent. But the shrinkage of the House’s engagement in tax-related matters was offset by a substantial growth in the number of judicial review\textsuperscript{28} and (since 2000, when the Human Rights Act 1998 came into effect) human rights appeals. In that earlier period there were only 14 appeals in the subject-categories of administrative and

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\textsuperscript{20} (1995) 22 EHRR. 193: concerned members of the Judicial Committee of Luxembourg’s Conseil d’Etat, who had previously given a pre-legislative opinion on a legislative instrument that was at issue in an administrative law case.

\textsuperscript{21} (2000) 30 EHRR 289: concerned the Bailiff of Guernsey, who presided over the hearing of a planning appeal, having previously presided over the passage of the development plan on which the decision in question was based.

\textsuperscript{22} \textit{The Second Chamber: Continuing the Reform}, HC 494, 2001-02

\textsuperscript{23} \textit{House of Lords Reform: First Report}, HL17, HC 171, 2002-03; this view was reiterated in the Committee’s \textit{Second Report}, HL 97, HC 668, 2002-03.

\textsuperscript{24} An account of the history and architecture of the new Supreme Court building can be found in Chris Miele (ed), \textit{The Supreme Court of the United Kingdom: History, Art, Architecture}, London: Merrell, 2010.

\textsuperscript{25} But see the concerns expressed by Masterman, note 17 above.

\textsuperscript{26} The first was Lord Clarke, appointed on 1 October 2009. But he already held membership of the House of Lords through being Master of the Rolls (head of the Civil Division of the Court of Appeal).

\textsuperscript{27} Blom-Cooper and Drewry, \textit{op. cit.}, note 7 above, p. 145, Table 11.

\textsuperscript{28} In a UK context, ‘judicial review’ is confined to review of the legality or fairness of administrative action, rather than a review of constitutionality so central to the role of the US Supreme Court.
constitutional law, out of 349 appeals heard by the House in the period 1952-68 – just 4 percent. The **Judicial Statistics** for the two years, 2003 and 2004 (by which time the first human rights appeals under the 1998 Act were beginning to reach the House), showed that, of the 107 appeals determined, 21 were in the field of administrative law and 19 involved human rights – a percentage, adding the two categories together, of 37 percent.\(^{29}\)

And the growing volume of such business tells only part of the story. Many of the cases in these subject categories have been high profile events that brought the House of Lords into an unaccustomed media spotlight, and sometimes gave rise to interesting tensions between the Judiciary and the Executive. The landmark decision of a nine-judge (the usual number is five) House of Lords in December 2004, in a human rights case involving the detention of suspected Al-Qa’ida terrorists on the orders of the Home Secretary, exercising powers conferred by the Anti-terrorism, Crime and Security Act 2001, is just one of many instances that could be cited in this context.\(^{30}\)

David Blunkett, Labour’s notoriously illiberal\(^{31}\) Home Secretary 2001-2004, and ministerially responsible for human rights-sensitive issues like prisons, immigration and asylum, frequently and angrily complained about the ‘interference’ of the courts in the decisions of elected government. In his post-resignation autobiography he wrote that: ‘Bishops and judges are some of the best politicians in the world. They know how to manipulate the political process’ and said that he was ‘against the judiciary believing that they are another arm of government and that they can therefore say they dislike what parliament has done and overturn it.’\(^{32}\) His views received a good deal of support from the tabloid press. However, his successors, even when at the receiving-end of adverse rulings, have, in public at least, generally been more polite towards the courts – though ministerial criticisms (sometimes political knee-jerk reactions to misleading media headlines) have continued to be heard from time to time subsequently and there is a continuing debate, particularly among Conservative politicians, about the UK’s future relationship with the ECHR and the Strasbourg Court.

In the transitional year, 2009, the ‘top court’ decided 62 cases – 45 by the Appellate Committee of the House of Lords and 17 by the new Supreme Court. Of the latter, 11 had been argued before the Lords of Appeal in the House of Lords and were carried over for judgment before the same judges, now rebranded as Justices, in the Supreme Court when it opened for business in the autumn. As in the recently preceding years, most of these cases were in public law (a broader category, of course, than constitutional law, but including several cases in the latter category). As Brice Dickson has observed:

As in other recent years, most of the cases decided by the top court involved issues of public law: of the 62 decisions in all, only 18 (13 by the House of Lords, 5 by the Supreme Court) could be described as private law cases, all the others being disputes about criminal law or procedure, judicial review applications, or human rights claims brought against public authorities. Some 15 of the cases (24%) were mainly concerned with European Convention rights, ten (16%) with criminal law or procedure (including three relating to extradition), eight (13%) with property law (including two on intellectual property law), five each (8%) with child law and employment law (the latter including three cases on discrimination), and four each (6.5%) with housing law, contract law and the law of negligence. There were only two cases involving tax law, one of which … was abandoned.\(^{33}\)

If it was only a slight exaggeration to suggest that the House of Lords in the 1950s and ‘60s functioned substantially as a specialist tax tribunal, it is surely no more of an exaggeration to suggest that, by the time that its jurisdiction was transferred to the Supreme Court in 2009, it had become a court specialising substantially in public law cases – a

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\(^{29}\) Some caution must be exercised in comparing statistics in *Final Appeal* (note 7 above) with those in the *Judicial Statistics*, because they are compiled and presented somewhat differently.

\(^{30}\) *A v Secretary of State for the Home Department* [2005] 3 All ER, 169.

\(^{31}\) In a radio interview he once famously attacked those who support civil liberties as ‘airy fairy’: ‘Airy fairy libertarians: Attack of the muesli-eaters?’, *BBC*, 20 November 2001


category that had featured hardly at all in the case-load of the House of Lords a generation earlier. Analysis of the cases decided in the first full year of the Supreme Court confirms that this interesting pattern has been maintained.\(^{34}\)

We should also note that appellants (other than ones appealing from the Scottish civil courts) required leave to appeal from the House of Lords itself\(^{35}\) (as they now require permission to appeal to the Supreme Court). The criterion for the granting of leave was that in the opinion of the House the case raises ‘an arguable point of law of general public importance which ought to be considered by the House at this time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.’ So the process by which the House of Lords became a court substantially specialising in public law cases came about by choice of the Law Lords themselves. They apparently came increasingly to regard big judicial review and human rights cases as particularly suited to their role – while most other categories of case have tended to go no further than the Court of Appeal.

**A New British Constitution?**

In considering whether the Supreme Court – building upon recent trends in the House of Lords – might gradually be moving towards embracing some semblance of constitutional judicial review, we need also to bear in mind that the traditional interpretation of the British Constitution itself, built around the doctrine of parliamentary sovereignty, as expounded by Professor A.V. Dicey at the end of the 19th century, has not stood still in recent years. The very title of the piece of legislation establishing the Supreme Court, the Constitutional Reform Act 2005\(^{36}\) bears testimony to this. If judicial review in the UK is beginning to acquire a ‘constitutional’ dimension this may be because wider changes in the British Constitution itself have facilitated and perhaps encouraged such a tendency. The establishment of the Supreme Court is an important constitutional landmark, and it would be surprising if the Court itself were to stand completely aside from the ongoing process of constitutional development.

One important area of change has been the growing engagement of the UK courts in the last few decades with European law – both in the European Union context and in the jurisprudence of the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998, which came into effect in 2000. With reference to the huge constitutional implications of EU law, this writer has commented elsewhere (in an article that originated in a paper delivered to this study group\(^{37}\) on the significance of cases like *Factortame*,\(^{38}\) *EOC*\(^{39}\) and *Thoburn*\(^{40}\) (the so-called ‘metric martyrs’ case) in signalling the growing willingness of the courts to qualify their traditional deference to parliamentary sovereignty when considering challenges to UK primary legislation that breaches European treaty obligations. In that context, reference was made to a judgement of Lord Justice Laws in the Court of Appeal in the *Thoburn* case as distinguishing between ‘ordinary’ statutes and ‘constitutional’ statutes:

In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA [European Communities Act 1972] clearly belongs in this family. It incorporated the whole corpus of substantive Community rights


\(^{35}\) In theory, leave to appeal to the Lords could be granted by the Court of Appeal, but in recent years this very rarely happened. See Drewry, Blom-Cooper and Blake, *op. cit.*, (note 6, above) pp. 148-50.

\(^{36}\) And a more recent piece of legislation, covering quite different ‘constitutional’ subject-matter, enacted in 2010, bears the title The Constitutional Reform and Governance Act.


\(^{40}\) *Thoburn v Sunderland City Council* [2002] 4 All ER 156.
and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.41

The idea of some statutes being recognised by the courts as having a special ‘constitutional’ status, might go a bit further than some of the judges might feel comfortable with, but it does reflect the fact that, particularly when it comes to European law, some established constitutional certainties have become a little less certain.

One particularly vivid instance of the judicial House of Lords moving into constitutional territory (though in a non-EU-related case) was Jackson v Attorney General.42 This much discussed case43 revolved around a challenge to the validity of the Hunting Act 2004, which had prohibited fox hunting with dogs. Because of political opposition to this legislation in the (legislative) House of Lords the Act had been forced through using the provisions of the Parliament Act 1949, which limits the power of the Lords to delay legislation that has been passed three times by the Commons to a period of one year. However, the 1949 Act itself had also been passed without the Lords’ consent under the provisions of the Parliament Act 1911, section 2(1) of which had said that the Act could not be used to pass an Act to ‘extend the maximum duration of Parliament beyond five years.’ Among other things, the appellant argued that because legislation passed under the 1911 Act had not been passed by both Houses of Parliament it was, in effect, delegated legislation. It was also argued that Section 2(1) contained an unwritten provision based on the principle that a ‘delegated’ body cannot extend its own powers unless expressly granted the power to do so.

The case was argued exceptionally before a nine-judge House of Lords (it usually sat with five judges44) which rejected the appellant’s arguments and affirmed the validity of the Hunting Act. However, some of the Law Lords commented, obiter, that there might be some constitutional limits on what laws Parliament could pass. In particular, Lord Steyn (see below) said that because parliamentary sovereignty was a common law construct, created by the judges, the judges could also qualify its extent.

If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a compliant House of Commons cannot abolish.45

The enactment of the Human Rights Act 1998, incorporating the European Convention on Human Rights into UK law has, as we have already noted, provided further opportunities for the courts – particularly the UK’s top appellate court - to address constitutional questions. The political scientist and constitutional historian, Vernon Bogdanor, has averred that ‘the Human Rights Act makes the European Convention in effect part of the fundamental law of the land. It brings the modalities of legal argument into the politics of the British state.’46 He goes on to quote from a public lecture given by the former Lord of Appeal, Lord Steyn,47 in which he said that:

41 Thoburn, ibid., at 185.
42 [2005] UKHL 56
44 The UK Supreme Court still sits in most cases in panels of five Justices, but seven and nine judge panels are not uncommon – particularly where the Court is reviewing a precedent set by one of its (or the House of Lords’) previous decisions.
47 He sat as a judge in the House of Lords from 1995 to 2005.
‘By the Human Rights Act Parliament transformed our country into a rights-based democracy. By the 1998 Act Parliament made the judiciary the guardians of the ethical values of our bill of rights.’

Lord Steyn defined ‘a true constitutional state’ as one which has ‘a wholly separate and independent Supreme Court which is the ultimate guardian of the fundamental law of the community.’ Bogdanor notes the novelty in UK experience of the idea of ‘fundamental law’ (cf. Lord Justice Laws, above) and suggests that Lord Steyn’s reference to it is ‘a first step on what may prove a long and tortuous journey to a codified constitution.’

In the end, Bogdanor himself, apparently having come quite close to advocating codification of the constitution, draws back from doing so, essentially because of what he sees as the absence of a consensus about what such a document should contain and which constitutional conventions should be justiciable and which not. At least one commentator has found this conclusion unconvincing and a bit of an anticlimax to what is, in other respects, a substantial and persuasive commentary.

**Law and Administration – The New Public Management of the UK Supreme Court**

Apart from the transfer to it of the ‘devolution’ jurisdiction (adjudicating on disputes about the powers of the devolved administrations in Scotland, Wales and Northern Ireland) formerly exercised by the Judicial Committee of the Privy Council, the Supreme Court has the same remit as its predecessor. So, in the first year of its existence, the substantive judicial work of the Court has pretty well carried on where the House of Lords left off. But the arrangements and processes by which it is managed are, in many respects, strikingly different.

The most obvious source of difference lies in the fact that, to borrow a phrase used by a distinguished former Clerk of the House of Lords Judicial Office, the work of the judicial House of Lords ‘had to be filtered through the prism of parliamentary procedure.’ The essay from which this quotation is taken provides a fascinating account of the developing role of the Judicial Office since the late 19th century in supporting the appellate function its rather incongruous parliamentary setting; and parts of the story, particularly some of the earlier parts, have a rather quaint flavour, reminiscent perhaps of some of the novels of Charles Dickens, set in the Victorian era. The Clerk of the Judicial Office and his staff were parliamentary officials rather than civil servants; the Registrar of the court was the Clerk of the Parliaments (the top official in the House of Lords); the procedures followed were governed both by the Practice Directions issued from time to time by the Law Lords and by the judicial Standing Orders of the House. Although, since the establishment of the Appellate Committee in 1948, judicial hearings had been detached from the general legislative business of the House of Lords, parliamentary protocols, and the vocabulary associated with them, were faithfully preserved – ‘petitions’ rather than ‘applications’, ‘speeches’ (rather than judgments) handed down in the chamber of the House. In recent years, quite a lot of significant changes had occurred to modernise the way in which judicial business was managed, as well as in the accommodation and resources available to the Law Lords, but at the point of transition to the Supreme Court, the final appeal court still retained much of the style and ambience of a parliamentary institution.

So, given that part of the rationale for establishing the UK Supreme Court was that the location of the final appeal within Parliament was increasingly seen to be constitutionally anomalous, it is not surprising to find that, while some judicial procedures remain much the same, and the scope of the jurisdiction is more or less identical, the status of the Court and the infrastructure that supports it are markedly different.

The Constitutional Reform Act 2005 specifies in some detail the qualifications and methods and terms of appointment of the Justices; it defines the jurisdiction of the Court, its composition for proceedings and its rules of practice and procedure. Sections 45 and 46 empower the President of the Court to make Supreme Court Rules, to be submitted to the Lord

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Chancellor and subject to approval by statutory instrument. These Rules\textsuperscript{51}, together with various Practice Directions\textsuperscript{52} have replaced the Civil, Criminal and Taxation Practice Directions and standing orders of the Appellate Committee of the House of Lords, and regulate how the Court conducts its judicial business.

The 2005 Act also puts the administration of the Court – which has the status of a ‘non-ministerial department’\textsuperscript{53} - onto a statutory basis. Section 48 provides for a Chief Executive to be appointed by the Lord Chancellor, after consulting the President of the Court. The Chief Executive is subject to any directions given by the President, who may delegate to him or her any non-judicial functions of the Court and his responsibilities, set out in section 49, for the appointment of staff and officers – including the numbers of such personnel and their terms of appointment The first Annual Report (below) confirms that the first President of the Court, Lord Phillips of Worth Matravers has chosen to delegate these functions By section 51, the chief executive ‘must ensure that the Court’s resources are used to provide an efficient and effective system to support the Court in carrying on its business.’ Section 54 requires the Chief Executive to prepare an Annual Report at the end of each financial year. This of course is very much the modern language of public management – efficiency, effectiveness and economy - rather than that of parliamentary proceedings.

In January 2008, the then Lord Chancellor announced the appointment of Jenny Rowe as the first Chief Executive of the Court and its accounting officer, answerable for its budget to the House of Commons Public Accounts Committee. She is a career civil servant, who held several posts in the former Lord Chancellor’s Department and, immediately prior to her appointment as Chief Executive, was Director of Policy and Administration in the Office of the Attorney General. In the period before the Supreme Court opened for business, she divided her working life between the Judicial Office of the House of Lords and the Supreme Court implementation team in the Ministry of Justice, overseeing and managing the transition process. The first Annual Report, covering the first six months of the Supreme Court’s existence was published in July 2010 and can be found on the Court’s web site.\textsuperscript{54}

The report - particularly section 7 (‘corporate services’) and section 8 (‘management commentary’). – contains a wealth of interesting material on the management of the new Court and on the challenges that have faced the Chief Executive and her colleagues in the first few months. This can be read in conjunction with the useful organization chart of the administrative personnel of the court, also published on the Supreme Court’s web site,\textsuperscript{55} which illustrates the bifurcation of functions below the level of the Chief Executive. On the one hand there are various support services of the kind found in most organisations, headed by a Director of Corporate Resources and covering such aspects as communications management, human resources, finance, records management and health and safety And, on the other side of the organization chart, we find the legal and judicial support functions specific to the needs of a top court; these are headed by a legally qualified Registrar, and include listing, judicial assistants and the secretaries to the President and the Justices. The internal governance structure also includes a Management Board (with two Non-Executive Directors); an Audit Committee (chaired by one of the Non-Executive Directors, and including representatives from Scotland and Northern Ireland) and a Health and Safety Committee.

The Report indicates that the Court employed 38.4 FTE of staff, including seven judicial assistants on fixed-term contracts. Some staff (11 in total) transferred from the House of Lords, thus metamorphosing from parliamentary officials into civil servants; some came from the Ministry of Justice or from other government departments. Six staff, in addition, came with the Judicial Committee of the Privy Council, which transferred from 9 Downing Street. Although the

\textsuperscript{51} Supreme Court Rules, 2009, \url{http://www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf}
\textsuperscript{52} Listed at \url{http://www.supremecourt.gov.uk/procedures/practice-directions.html}
\textsuperscript{53} A device commonly used to emphasise the independence of a government function from political interference. Among many other examples of non ministerial departments are The Office of Parliamentary Counsel, the Treasury Solicitor’s Department, the Charity Commission, the Land Registry, HM Revenue and Customs and the Crown Prosecution Service.
\textsuperscript{54} \url{http://www.supremecourt.gov.uk/docs/ar_2009_10.pdf} Rather curiously, although, by section 54(2) the Reports must be laid before ‘each House of Parliament’, the first such Report was published only as a House of Commons paper. At the time writing, the management of the Judicial Committee of the Privy Council remains constitutionally separate from that of the Supreme Court, and the Annual Report covers only the latter institution – though both court occupy the same building and there is in practice a great deal of overlap between the management of the two courts.
\textsuperscript{55} \url{http://www.supremecourt.gov.uk/docs/hr_organogram.pdf}
administration of the Court is not part of the Courts Service executive agency which manages the rest of the court system, its staff have initially adopted the pay and employment conditions of civil servants employed by the Ministry of Justice. The Report notes that, ‘for some staff (who had been providing direct support to the Law Lords in the House of Lords) this involved a significant change to their terms and conditions and a new way of working.’

Having mentioned the status of the staff, we should note one paragraph of the Report that is of particular significance in relation to the public law functions that have featured so prominently in both the recent history of the Appellate Committee and, now, in the early work of the Supreme Court, as noted above. It reads as follows:

The justices regarded achieving tangible independence from both the Legislature and the Executive (in the shape of the Ministry of Justice) as a key constitutional objective. This was particularly important because the Government is in practice a party in slightly more than half the cases in which an application is made or a hearing takes place before the Court. The Chief Executive is therefore also an Accounting Officer in her own right, accountable directly to the House of Commons Public Accounts Committee. [italics supplied].

Thus the Court’s status as a free-standing non-ministerial department, detached not only from its former parliamentary status but also from the Executive branch of government, clearly signals the fact that it is a very special part of the machinery of justice. The fact that its jurisdiction embraces the whole of the United Kingdom (a role inherited, of course, from its predecessor) further underlines its constitutional uniqueness. These were recurrent themes in the discussions leading up to the establishment of the Court, and the need both to maintain its constitutional independence (not least, from the Ministry of Justice) and to embrace all the countries of the United Kingdom are clear and robust subthemes of its first Annual Report.

The Report was published a few weeks after the May 2010 General Election, against the background of political statements suggesting that the new coalition Government was looking for public expenditure cuts of around 40% to alleviate the economic crisis. Under the heading, ‘Principal risks and uncertainties’ the Report suggests that ‘the key risk facing the organization is that the current funding arrangement could be perceived as compromising the independence and effectiveness of the Court.’ At the press conference to launch the Report, the Chief Executive was quoted as saying: ‘as 62% of our costs are genuinely fixed, a 40% cut causes us some problems. We couldn’t actually deal with any casework, in fact, with a 40% cut.’ At the same press conference, Deputy President, Lord Hope, appeared to echo her sentiments: ‘It’s a quite different operation from what we had before [i.e. in the House of Lords]. It’s one which can’t be maintained without resources.’

The contents, and indeed the very existence, of the Annual Report, signals that the Supreme Court has begun its life as a twenty-first century institution, steeped in the businesslike culture of ‘new public management’ – effectiveness, efficiency and economy, etc. It was unlucky to have been born into a harsh world of economic crisis, where it faces similar challenges to the ones facing other parts of the public sector. It is hard to imagine that it will be stunted in its infancy by denial of necessary resources, though the Ministry of Justice, which has responsibility both for prisons and for the courts, seems to have admitted that as there is little scope for cutting the cost of running prisons, the main burden will have to fall on court administration and on publicly funded legal aid. The outcome of these budgetary issues remain under discussion at the time of writing.

Some may regret the passing of an era in which the final appellate court was cocooned in the comfortable archaism of parliamentary procedure (and the protective blanket of unlimited parliamentary funding), while others will regards the advent of this modern Supreme Court as a positive and probably inevitable development. The effective working of the Court in the modern era of public management depends and will continue to depend on constructive partnership between the Justices and the administrators who provide them with essential backup. And this is increasingly true of courts throughout the developed world.

57 ‘Clarke hopes pleas bargains will help balance books’, The Times, 24 August 2010.
Conclusion
We have noted that Supreme Courts (whether or not they actually bear that name) around the world vary enormously in character and function – and the UK Supreme Court adds another variant to the picture of diversity. This new Court, having, at the time of writing, completed its first year, is in many respects not so very new at all – its Justices at the point of transition were the same Lords of Appeal who sat in the House of Lords; the Court’s jurisdiction is more or less exactly the same as that of the House of Lords. The substance of its judicial work, building upon recent tendencies already becoming apparent in the House of Lords, has shifted markedly towards public law, with some high profile cases having a distinctly ‘constitutional’ flavor.

But when we look at the new Court from a public administration perspective some of the real differences become much more apparent. The constitutionally unsatisfactory anachronism of a top court being a parliamentary committee, administered in accordance with parliamentary standing orders, has given way to a modern, businesslike non-ministerial department, not only detached from Parliament, but also asserting – albeit with some difficulty, given recent and continuing cutbacks in departmental budgets - its distance from the Executive (the Ministry of Justice) and functioning very much as a UK-wide tribunal rather than as just an English one.

And then there is the name of the Institution. At one level the creation of an entity called a Supreme Court may be seen merely as a cosmetic ‘relabeling’ or perhaps as a ‘rebranding’ exercise, undertaken in response to growing recognition that continuing to situate the top court in Parliament is an anachronism, out of tune with the image of a modern legal system and out of line with even the most rudimentary interpretation of separation of powers. And once the decision had been taken in principle to extract the court from its parliamentary setting it needed a new name – and calling it a supreme court seemed an entirely logical step. Sitting as it does at the apex of the legal hierarchy (or hierarchies, if we take account of the non-English jurisdictions) a ‘supreme court’ is exactly what it is. And this international brand name seems, as our earlier brief survey of the worldwide scene would appear to confirm, to accommodate quite comfortably a very wide variety of different products.

But this writer has a hunch that the new name may turn out to be quite significant in the future development of the UK Supreme Court. Although the law and constitution of the United States have evolved in ways which bear very little resemblance to the pattern of British legal and constitutional history, the work and status of the US Supreme Court are key parts of the intellectual fabric of the common law world. Other developed and developing common law countries, such as Canada and Australia and, more recently, post-apartheid South Africa have top courts that exercise a significant role in constitutional judicial review.

The judicial House of Lords was an egregious constitutional oddity – a one-off in the amorphous universe of top courts. The UK Supreme Court has joined a fraternity of institutions with which it shares both a common name and a lot of characteristics – though not so far including responsibility for enforcing and interpreting a codified constitution. The arrival of such a constitution may still be a long way off but, even so, one can perhaps detect in the recent pattern of House of Lords and Supreme Court decisions, a growing appetite on the part of the Justices – encouraged by some continuing developments in EU and human rights law - to begin to get to grips with constitutional issues that previous generation of judges would have regarded as completely off limits.

Books and Articles Cited


Digital Technology Leading the Way in Court Recording

More and more courts all over the world are embracing digital recording systems to ensure that an accurate, accessible and reliable court record of proceedings is captured.

The court record may include the transcript, audio or audio and video recordings of any hearings, appearances and courtroom proceedings. Making the court record available to the general public is seen as one of the best ways to show open and fair justice to all. Further, enabling the record to be more easily accessible, and in broader forms, to judges and judicial practitioners can also result in expedited and fairer administration of justice.

The use of electronic recording (ER) is becoming commonplace in the modern courtroom. Over the last 15 years, more than 30,000 courtrooms have adopted digital audio and video recording technology to capture, store and manage the record of proceedings. Compared to alternative methods of record capture, digital recording technology offers significant, tangible benefits both immediately and in the long term.

Most digital recording systems today are comprised of at least four (4) components: recording, note-taking, playback and storage. For best clarity and to facilitate the creation of verbatim transcripts, typical courtroom venues require four (4) independent audio channels (from a minimum of four microphones – one each for the judge, prosecution, defense and witness) are recorded. An increasing number of courts are finding tangible value in recording video as well as the audio.

Through the use of companion software programs, some digital systems provide participants (e.g., clerks, judges, attorneys) with the ability to enter electronic notes in real-time against the recordings. These notes are automatically time-stamped to the exact point in the recording when they were entered. During review, users can simply click the hyper-linked notes which will cause the recordings to play back at those exact points. Hence, it becomes extremely quick and easy to locate specific points within a court proceeding.

As for playback, digital recordings can be played on virtually any computer, which is one of their primary benefits. They can also be stored for future use either on optical media and/or on the network. Considering that official court records are often required to be stored for lengthy periods, courts benefit from significant savings in storage space and cost by going digital.

Once the court has a digital recording system installed, there are many benefits that judicial administrators can take advantage of to speed up the administration of justice. Two of the most tangible benefits are:

1. Rapid access to recordings of past proceedings and the ability to see and hear what actually happened during the proceeding, as opposed to relying on one’s memory and notes only.
2. The latest technologies enable all courtrooms, including those that are geographically dispersed, to be connected to a unified system that has a central repository for all audio/video recordings proceedings and associated linked notes. Thus, a simple search across all the notes in the repository for specific keywords (e.g. Case Number) can be conducted in order to locate the relevant notes and corresponding recordings.

An example of the application of the technology can be best realized through some typical scenarios. For example, during a courtroom proceeding, a person on the court’s staff (Clerk, Electronic Court Reporter etc) will usually start and stop the recorder and take a few log notes that will both aid the court in quickly locating and retrieving the hearing recording, as well as aid the transcribers during the transcription process. Additionally, if appropriate, courts can choose to deploy a centralized monitoring setup, whereby monitors are stationed outside of the courtrooms and each will electronically control and monitor up to four courtrooms concurrently. This approach, if deemed suitable for the particular environment, can result in even greater cost savings.

Court proceedings are often transcribed such that they can be reviewed by attorneys during the appeals process. When a transcript is requested, the relevant recording can be quickly retrieved and either copied to optical media and provided to a transcription entity, or distributed to them via a secure Internet portal.

Some digital systems enable the transcript to also include hyper-links as additional value-add for the attorneys. For example, with these time-stamped links, attorneys can quickly refer to the relevant portions of the recording when reviewing the transcript. This capability is especially useful when reviewing a case in preparation for trial.

Installation of digital recording systems represents one of the easiest ways to utilize state-of-the-art courtroom technology that delivers real cost savings, without causing disruptive change to current work practices. The digital system can be adapted to suit the way that administrative staff carry out their day to day functions in the courtroom.

Digital recording can provide short- and long-term benefits, regardless of the type or size of court. It can deliver a proven return on investment that is in line with current and future demands on operational expenditure for judicial administration.

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Additionally, judges can also benefit through immediate access to courtroom recordings on the network, rather than having to wait for a transcript. They can also take their own private notes on their own computer, either during or after a proceeding, to assist with review at a later time.

Digital solutions can be customized in a myriad of ways to suit the infrastructure, operating environment, workflows and requirements of a particular court, and can be implemented in as basic or as sophisticated a manner as necessary. With increasing pressure on operational budgets and the demand for faster throughput, digital recording systems offer a clear advantage over alternative methods of capturing court proceedings.

For courts that have never recorded their proceedings, just the thought of going down that path can be a daunting one. However, the good news is that digital courtroom recording technology and processes have evolved over the years to the point where their deployment is straight-forward and they have become ubiquitous. Thousands of judicial venues across the world are realizing the value of having a high quality, reproducible, permanent and easily accessible court record. This realization, coupled with the time and cost savings associated with increased workflow efficiency and employee productivity, is only serving to increase the rate of adoption of digital court recording.

Installation of digital recording systems represents one of the easiest ways to utilize state-of-the-art courtroom technology that delivers real cost savings, without causing disruptive change to current work practices. The digital system can be adapted to suit the way that administrative staff carry out their day to day functions in the courtroom.

Digital recording can provide short- and long-term benefits, regardless of the type or size of court. It can deliver a proven return on investment that is in line with current and future demands on operational expenditure for judicial administration.
Understanding IT for Dispute Resolution
By Dory Reiling Mag. Iur., Dr. Iur., Judge, 1st Instance Court of Amsterdam

Judges and judiciaries do not understand information technology (IT). This idea crops up quite often in discussions about IT for courts. The perceived slow rate of IT adoption in courts is explained by this lack of understanding. To my mind, this is not the main issue. What needs to be understood first is at the other end of the spectrum: how courts process information.

Therefore, I have studied the way courts process information and what this means for IT. I have studied IT for courts since the early 1990s. This article presents some of the findings from my 2009 book Technology for Justice (Reiling 2009)¹. It uses a conceptual framework developed to (1) help IT specialists understand more about court processes, and to (2) help judges and court staff grasp what IT can do in their case processing. It has become a nifty tool showing how IT functionalities can help to implement improved case processing. It also shows innovative ways of handling information, towards more timely and adequate judicial decisions and increased access to justice.

This article does not provide a systematic overview of technology in use by courts², or a general theory of processing information across the board. However, it does present a fresh look at how knowledge about what goes on in a court can help us to understand what can be improved. Traditional approaches to improving court performance and reducing case delay have turned out to be of limited usefulness. Besides, most court systems have not changed their traditional processes under the influence of information technology. The model I use helps judiciaries, court managers and other with insights on case management, standardizing processes, information service to court users and the general public, and IT policy making. The examples I use are all from civil justice. I make no claims as to their applicability to administrative or criminal justice, but I do think the reader can find some more general lessons in my story.

This article shows four ways to use the model. There is, of course, much more in my book. Before looking at the model itself, we need to set out some concepts related to what courts do.

1 Court roles, processes, products and outputs
The role of courts in general is to produce enforceable decisions, in other words: to provide title. The enforceable decision, therefore, is their product. The first question we explore is, how the enforceable decisions produced by the court are of value to the court users.

The framework used here explores how what courts do is useful for their users. It was first introduced by Blankenburg in a comparative study of German and Dutch courts in the light of access to justice and alternatives to courts (Blankenburg 1995). I have adapted it somewhat, but the roles allocated to the court remain the same (Blankenburg p. 188). Four specific roles fulfilled by courts can be identified: (1) title provision, (2) notarial role, (3) settlement, and (4) judgment. Each of these roles brings with it a specific product and output. The products affect the way information is used in the primary judicial process. That makes them relevant for our discussion.

Two factors affect court processes in a major way:

- the uncertainty of the outcome
- the relationship between the parties.

The outcome is the content of the decision: the divorce arrangement is in keeping with regulations, the claim is unfounded.

² That overview is in Part 2 of my book.
The outcome of a process can be completely certain and certain from the outset, or it can be more or less uncertain at the outset. In that case, events happening along the way can affect the outcome. In terms of information: the information available at the outset of the process can be either sufficient or insufficient to produce the outcome.

In terms of game theory, the outcome is either zero-sum or win-win. Zero-sum describes a situation in which a participant’s gain or loss is exactly balanced by the losses or gains of the other participant. The relationship between the parties is irrelevant to the outcome. In win-win, parties can achieve the best result by cooperating. In this case, cooperation can affect the quality of the outcome. Figure 1 shows how these factors relate to each other.

**Figure 1 Matrix of Judicial Roles**

<table>
<thead>
<tr>
<th>Certain Outcome</th>
<th>Uncertain Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 title</td>
<td>4 judgment</td>
</tr>
<tr>
<td>2 notarial</td>
<td>3 settlement</td>
</tr>
</tbody>
</table>

Figure 1 shows roles and factors in a matrix. In this matrix, the role of the court and the ensuing products are arranged along two axes: the relative uncertainty of the outcome from left to right, and the parties’ relationship in terms of zero sum and win-win from top to bottom. Individual cases are on a continuum, both vertically and horizontally. A case or a decision can be mostly notarial with a little judgment, or mostly judgment with a little settlement. The next step explores how court cases fit into the groups in our model.

**Introducing the groups and their characteristics**

*Providing title* is the role in the first group. The product of the judicial process is always a title. However, it is the output of this group in particular. Here, we deal with a process that does no more than producing that title. The case is "cut and dried" (Galanter 1983b). The outcome is zero-sum because one party gains and the other party loses. The process in this group is characterized by a very low level of uncertainty. Undefended money claims come to mind as an example.

The *notarial role*, group 2, produces an affirmation, a formal declaration that the arrangement proposed by the parties is legal. It also entails little uncertainty. The outcome is win-win. By cooperating, the parties can achieve an optimum result. This process is also characterized by low uncertainty. Ideally, parties propose an arrangement they have worked out among themselves. The arrangement is examined by the court only marginally. Family cases and plea bargaining are some of the examples for this group.

The *settlement role*, group 3: here, the overriding objective is for the parties to reach agreement. This agreement is the output. The outcome is win-win. The process is characterized by uncertainty about the outcome, and by communication.
and negotiation. Very complex information, needed to help the parties to reach agreement, can be the object in this process.

The judgment role, group 4, is widely regarded as the judiciary’s main function. The outcome of the process is dependent on all sorts of events that may occur during the process. The parties are in opposition. The court decides. This process may involve large amounts of complex information. It should be noted here that the difference between groups 1 and 4 is relative, in the sense that the outcome is more or less uncertain. If no or almost no legal issues need to be decided, the case is regarded as a title group case. As the number of legal issues to be decided increases, the case moves in the direction of the judgment group.

In the next section, I have taken the actual caseload of civil justice in the Netherlands and sorted the cases into the groups according to the model developed above. We can determine the relative share of each group in the total caseload. The resulting picture is primarily important to determine where efforts at implementing IT can be most effective.

2 Cases into groups
The next step in our exploration is to apply the matrix to civil justice in the Netherlands. The purpose of this section is to learn how different processes use information in order to understand what they need by way of specific IT functionality.

A case study of civil justice in the Netherlands
The Dutch court system has some of the characteristics of the classic Napoleonic civil justice (as opposed to common law) system. It has three tiers of jurisdiction. The Netherlands has a legal culture in which settlement plays a substantial role. Civil procedural law instructs judges to attempt settlement before deciding a case on its merits. It will be interesting to see whether other legal cultures have demonstrably different patterns, and whether those patterns show up in the matrix. However, in 2007, all instances together disposed more than 900,000 civil and family cases. Statistically, appeal and Supreme Court figures do not influence the distribution in the groups we will be looking at below. That is why, from here on, only the statistics for the first instance of civil justice in the Netherlands are taken as our object of study. The first step is to find out which case types are in each group, relative to the total caseload.

The counts were done, based on disposed case statistics, as follows:

3 Settlement appears to be a very old Dutch custom. Here is a quote from Voltaire in which he praises enlightened court practice in Holland in the 18th century:

« La meilleure loi » selon Voltaire
Voltaire évoquait dans une lettre en 1745, une pratique judiciaire des Pays-Bas, de magistrats dits « faiseurs de paix » : « La meilleure loi, le plus excellent usage, le plus utile que j’ai vu, c’est en Hollande. Quand deux hommes veulent plaider l’un contre l’autre, ils sont obligés d’aller d’abord au tribunal des juges conciliateurs, appelés faiseurs de paix. Si les parties arrivent avec un avocat ou un procureur, on fait d’abord retirer ces derniers, comme on ôte le bois d’un feu qu’on veut éteindre. Les faiseurs de paix disent aux parties : vous êtes de grands fous de vouloir manger votre argent à vous rendre mutuellement malheureux. Nous allons vous accommoder sans qu’il vous coûte rien. Si la rage des chicanes est trop forte dans ces pledeurs, on les remet à un autre jour, afin que le temps adoucisse les symptômes de leur maladie. Ensuite les juges les renvoient chercher une seconde, une troisième fois. Si leur folie est incurable, on leur permet de plaider, comme on abandonne à l’amputation des chirurgiens des membres gangrenés ; alors la justice fait sa main.

« The best law » according to Voltaire
Voltaire, in a letter in 1745, recalled a judicial practice in the Netherlands, of magistrates called « peace makers »: The best law, the most excellent custom, the most useful I have seen, is in Holland. When two men want to plead one against the other, they are obliged to first go to the tribunal of the judge conciliators, called peace makers. If the parties come with a lawyer or an attorney, the latter are made to leave, like one draws the wood from a fire one wants to extinguish. The peace makers say to the parties: you are great fools to want to eat your money by making each other mutually unhappy. We are going to help you and it will not cost you anything. If the rage of chicanery is too strong in the pleaders, they are deferred to another day so time can soften the symptoms of their illness. Then the judges refer them a second and a third time. If their folly is incurable, they are allowed to plead, just as limbs with gangrene are left for amputation by surgeons; thus, justice takes its course.

4 For statistic tables for the years 2002-2007, see D.Reiling, Technology for Justice, p.119.

5 In many countries, courts also keep various registers, like the commercial register or the land register. It is safe to assume that the register role is an area in which use of information technology can be of great help to improve performance. However, case processing, not the register function, is our subject here, so this category of court work is not discussed here.
Group 1: Final dispositions and summary dispositions of undefended money claims, both for the local court and the district court.

Group 2: Dispositions in parental authority, supervision and settled employment termination cases in the local courts, and dispositions in divorce related family cases in the district courts.

Group 3: Cases withdrawn at the parties’ request or struck off the record.

Group 4: Final dispositions of contested civil claims, including those going through a phase of fact-finding by hearing witnesses and viewing locations, for both local and civil courts.

Figure 2 Matrix of Judicial Roles and Caseloads

<table>
<thead>
<tr>
<th></th>
<th>zero–sum</th>
<th>1 title</th>
<th>4 judgment</th>
<th>2 notarial</th>
<th>3 settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>certain outcome</td>
<td>35 %</td>
<td>8 %</td>
<td>30 %</td>
<td>9 %</td>
<td></td>
</tr>
<tr>
<td>uncertain outcome</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure 2 shows the matrix with the distribution of cases over groups, as a percentage of total civil case dispositions in 2007. The numbers vary slightly over the years, but the variation in distribution is not significant.

Group 1 is the largest with 35 percent of the total case production. Group 2 is only somewhat smaller at 30 percent. Groups 3 and 4 are much smaller. Group 3 is 9 percent of the total caseload and group 4 is the smallest, at 8 percent. Group 4, in which defended cases are decided by the court, is normally considered judicial work *par excellence*. Yet, it is only 8 percent of the case production.

Relatively few cases, less than 20 percent, need more information during the court procedure in order to bring a resolution of the dispute closer. Half of those cases are most probably resolved with a settlement (role 3). What is left after that is a small fraction of the total caseload in which disputes are decided by a judicial decision (role 4).

The title group is the largest group, and its outcome is zero-sum and certain. That makes this a good candidate to start automation, that is, developing routines for electronic processing. The notarial group comes in a close second because of its certain outcome.

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6 The full table is in the book on page 120.
7 The remaining 23 percent cannot be categorized meaningfully for the purpose of this study. It includes supervision of bankruptcies, juvenile justice, other case groups that are very small but very diverse, and various supervision activities. Most of them are not dispute resolution in any sense of the word.
Starting from this information about Dutch court practice in each group, the next section examines each of them to understand the implications of its characteristics. How do their characteristics affect handling the information involved? What are the consequences for supporting and improving the process with IT? Examples of proven technology and of changes in business processes that enable new technological solutions are analyzed. Each discussion of a group wraps up with conclusions for information technology support for that group.

Group 1 – Title role
The outcome of the cases in this group is both zero-sum as well as highly certain. Because the outcome is certain and zero-sum, generally speaking the information that is available at the outset is sufficient to decide the case. It seems reasonable to assume that this process should be the easiest one to automate. Automation means: creating a process that can be handled by a machine without human intervention, translating policies and routines into programs for electronic processing. The other opportunity is in the interaction with the parties submitting cases. If the parties file their cases by submitting structured data electronically, and the internal court process receives those data, manual data entry by court staff is avoided. If court routines are translated into programs to handle those data, the titles that are the product of this process can be produced (almost) without human intervention.

Example 1: Online claims in the United Kingdom
The first example that is relevant for group 1 cases comes from the United Kingdom (Timms 2002 and 2003\(^8\)). It consists of three online systems: the Claims Production Centre (CPC), Money Claim On Line (MCOL) and Possession Claim On Line (PCOL). These systems are the best known examples of online title provision. makes claiming far simpler and faster: fees are paid electronically, claims issued straight away and hearing dates scheduled automatically. Entering a defense online has been possible via the MCOL system for all claims issued via either MCOL or the CPC since December 2002. If claims are defended, they are automatically transferred to the court that is competent according to the normal rules.

There are some particular features in civil procedural law in England and Wales that enable, or at least facilitate, the use of online claim processing: No summons, no obligatory court competence, and no lump sum court fees.

Example 2: The Mahnverfahren in Germany
The Mahnverfahren in Germany is a procedure to acquire an order of payment online. This procedure was introduced successively from state to state, and is now available in all the länder or states of the German federation. This procedure produces a title, but without a judicial procedure. Apart from the classical application in writing, there are various ways available for filing an application for a Mahnbescheid, the title for execution of payment. In 2003, more than 90 percent of nearly 9.5 million orders for payment in Germany were processed automatically (Šijanski and Barber p. 1).

Example 3: A pilot in the Netherlands
In the Amsterdam local court, the largest local court in the country, a pilot was done with data transmission in a specialized case stream. The pilot was an initiative of an Amsterdam bailiffs’ office. This considerably shortened both disposition time (the time a case is in the court register) and processing time (the time someone actually performs an activity related to the case) for undefended cases. The functionality tested in this pilot was never implemented widely. The bailiffs in the Netherlands say they can supply processing information to the courts electronically, provided an interface for supplying the data is set up (Struiksma p. 202).

IT for the title group
In these zero-sum, low unpredictability cases, there is no dispute. Consequently, there is also not much judicial dispute resolution activity in this group. Judicial activity in individual cases is very limited. The case volume in this group can be quite a large part of the total caseload. For small claims courts, it is a group worthy of attention.

The information that is available at the outset is usually sufficient for producing the final product. The IT processing activity in this group is mostly merging data with text to produce decisions. That activity is supported by office automation, such as word processing and case registration databases.

\(^8\) Presentation by Perry Timms of the U.K. Court Service in 2002 at the Netherlands judiciary IT conference, and at the 2003 NCSC Court Technology Conference, CTC8. A copy of the Power Point presentation is in my possession. The information was updated with the contents of the Court Service web site [http://www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk) in March 2008.
The information opportunities for such zero-sum, low unpredictability cases are in:
- Online case filing and/or data entry by court users, including data transfer from frequent users,
- Internal processes processing data without the need for human intervention.

If users fill the case database, time consuming data entry work is reduced. Moreover, when standardized, parts of case processing can be automated. Consequently, cases will move to the left in the matrix. The opportunities were developed in different ways. The Mahnverfahren was piloted in one land (state), and then implemented gradually in the other states. MCOL was developed in stages.

**Group 2 - Notarial role**
The outcome of the cases in this group is both highly certain and mostly win-win. The notarial group includes dispositions in parental authority, supervision and settled employment dissolution cases in the local courts and dispositions in family cases in the district courts. The win-win aspect points to a new opportunity: guidance for the parties to help them achieve the best result in working out the terms of the request to the court.

**Example: Employment contract dissolution in the Netherlands**
This example shows an effort to increase legal consistency by the labor judges. They simplified issues and procedures, including a formula for calculating severance pay.

The most important intended impact was to create a much-needed legal standard for the judges themselves. A expected, but not intended, impact was to have more negotiated and settled dissolutions, through this improved legal unity. The most striking finding is that a significant number of judgment group (group 4) cases moved to the notarial group (group 2) as a result of this reform. In 1997, 24 percent of cases settled, in 2007 it was 82 percent.

Most organizations involved in providing legal information on labor issues to the public have the guideline on their web sites. The formula is quite straightforward and easy to use.

**IT for the notarial group**
In the notarial group, there are two main opportunities for applying IT. The first already emerged in the title group. The second opportunity is in web functionality to inform parties on bringing cases to court, and on the information the court needs to deal with the case expeditiously. The Internet is a vehicle for this information. Courts can help parties by specifying the information they need, and what criteria they use to judge incoming requests. Parties may also use this information to settle their differences.

A more advanced opportunity for this group combines both data entry and guidance in online forms for filing both data and substance.

**Group 3 – Settlement role**
In the settlement group, the outcome is relatively uncertain as well as largely win-win. There is a dispute, but if the parties cooperate to settle it, they may be able to produce an outcome that is beneficial for both, and their relationship may be saved. The dispute need not necessarily be resolved exactly according to the rules of the law.

This group comprises about 9 percent of the total civil caseload. It consists of very diverse cases that are either withdrawn or struck off the record before or after a hearing.

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9 Technically, users do not have direct access to the live case registration database. Data entry is done through an extranet where data are checked before they are allowed to populate the database itself.
10 Full description of this example in Reiling 2009 pp 135-142.
The Netherlands have a long tradition of settlement. The civil procedural code instructs judges to try settling a case before resolving it in the legal manner. In recent years, court practice has focused on less formal ways of dispute resolution. The gap between dispute resolution by courts and informal mechanisms like mediation is narrowing.

Internationally, various informal and formal ways of court-supported dispute settlement are in practice, for example conciliation, mediation, and neutral case evaluation. In The Future or Law, Richard Susskind suggests that publishing general rules of thumb as to how things can be arranged and resolved in general may prevent disputes from breaking out (Susskind 1998 p. xlviii). It can also guide solutions in case of settlement.

**Example 1: Australia – Adelaide Magistrate’s Court**
An example of the use of prelodgement notices comes from Australia (Cannon 2002). The procedure described here was introduced in 1999. The Magistrate’s Court (in this example that of Adelaide) provides forms available on its web site. The final notice and an Enforceable Payment Agreement (EAP) can be downloaded from the court’s web site. The ability to have mediation and expert advice prior to a formal claim being lodged with the court means that an ADR process can occur earlier than the involvement of the court in a conference/ directions hearing phase.

**Example 2: Singapore’s e@dr negotiation**
The Singapore subordinate courts offer the possibility of electronic alternative dispute resolution: an amicable, cost-free avenue to initiate negotiations with the other disputing party.

**Example 3: Online dispute resolution mechanisms outside courts**
In e-commerce, new online forms of dispute solution come up where parties can negotiate supported by a computer program. This facilitates participants’ independent resolution of the problem with the other side. Since 2004, the City of New York has piloted using www.cybersettle.com for settling claims filed against it.

**IT for the settlement group**
The Singapore example shows support for negotiation, where parties themselves resolve their dispute. It uses email, asynchronous communication, between the parties. The court acts as a go-between. Asynchronous communication may give parties time to think. However, it does not particularly favor cooperative behavior.

The Adelaide example shows another way of preventing cases from coming to court. This example uses the court’s web site and online forms. These examples show how, using the functionalities of email and a web site with information and online forms, a potential dispute is moved down, as well as to the left in the matrix. The result contains costs and avoids a complex, lengthy procedure. These opportunities do have a limit: communication over distance may not be enough, so face-to-face contact may still be necessary to broker an agreement.

Another potential opportunity, guidance for parties negotiating a settlement, already came up in the notarial group.

**Group 4 – Judgment role**
In the judgment group, the outcome is uncertain as well as zero-sum. There is a dispute. The parties are in opposition. Events during the process influence the outcome. The case is decided on legal merit. The court decides. In this group, both processes and substance can be complex. Cases in this group, although relatively few in relation to the total case load, take up the most judicial time. Time to disposition is considerable.

**IT for the judgment group**
Judgment group cases are complex to very complex. There is an expressed need for structuring complex information. Electronic case files are a functionality that could be helpful in this group. They can be used to structure large quantities of information using electronic search capability. Electronic case files also support multimedia evidence. Some U.S. courts have introduced electronic case files for difficult, complex cases involving many parties or large amounts of information. Their experience shows results such as increased efficiency and accuracy of information.
The other functionality for this group is knowledge management systems. Increasingly, courts already have experience with jurisprudence databases and decision support systems. They help judges take legally correct, consistent decisions.

**Case processing as information management**
Looking at case processing as a process of information management helps to see opportunities for information technology applications in order to improve case processing. We have uncovered some actions that will result in cases moving to the left and/or down in the matrix.

*Simplification:* Creating routines and standards will move cases to the left. This reduces unpredictability through reducing the number of individual decisions that have to be taken in each case. In the example of the labor cases, a majority of cases moved from the judgment group to the notarial group. Therefore, cases may even be moved out of court entirely when the parties are given enough information to resolve their dispute by settlement. Thus, problem solving by the parties is encouraged. If, like the Dutch peacemakers in Voltaire’s letter in the footnote above, we think this is a useful and socially desirable objective, these are ways to move cases down in the matrix.

*Early intervention:* Early intervention in individual cases can have two effects: reduced complexity moves a case to the left; facilitating settlement moves the case down. The example of the online pre-action protocols illustrates how a complex, lengthy process is avoided. A potential dispute is moved down, as well as to the left in the matrix to such an extent that it never gets to court.

**3 IT needs and opportunities**
The matrix demonstrates how a court caseload can be grouped into four distinct categories. For each group, the matrix brings up specific IT opportunities and needs. For all groups, but particularly for the *title* group, electronic filing is an opportunity that will save processing time. Most claimants are firms, and most claims are filed by either law firms or bailiffs. Most of them mostly have an automated client administration. If they could supply those data to the courts, like in the bulk claim center in the United Kingdom, data entry in courts can be avoided.

In the *notarial* group, the main opportunity is web functionality. Information on the court web site, online forms and information for settlements can be ways of stimulating the parties to work together to resolve their own disputes.

In the *settlement* group, communication technology, either email or dedicated software, can help parties settle disputes with a less certain outcome.

In the *judgment* group, the foremost need is for managing complex information. The opportunity of electronic case files presents itself here. Electronic files open up new opportunities themselves with multimedia storage of evidence and hearing recordings.

**Figure 3 – IT for the groups**

<table>
<thead>
<tr>
<th></th>
<th>1 title</th>
<th>2 notarial</th>
<th>3 settlement</th>
<th>4 judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data filing</td>
<td>Data filing</td>
<td>Data filing</td>
<td>Data filing</td>
<td>Data filing</td>
</tr>
<tr>
<td>Automated case processing</td>
<td>Automated case processing</td>
<td>Automated case processing</td>
<td>Automated case processing</td>
<td>Automated case processing</td>
</tr>
<tr>
<td>Web guidance</td>
<td>Web guidance</td>
<td>Web guidance</td>
<td>Web guidance</td>
<td>Web guidance</td>
</tr>
<tr>
<td>Knowledge management</td>
<td>Knowledge management</td>
<td>Knowledge management</td>
<td>Knowledge management</td>
<td>Knowledge management</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>certain outcome</th>
<th>uncertain outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>win-win</td>
<td>zero – sum</td>
</tr>
</tbody>
</table>
The matrix predicts that electronic filing of claims, online data entry and electronic case files will reduce processing time, and possibly disposition time, for all cases. Automating routines can speed up processing for the title group. Internet functionality for public information and electronic forms supports the notarial group. Likewise, public information and software supporting negotiations can support processing specifically for the settlement group. Electronic files and knowledge management are the main tools specifically for the judgment group.

4 Interaction with the parties
Electronic interaction between courts and their users emerges as an opportunity for improving the administration of justice. It may prevent disputes from coming to court and improve handling the cases that are filed. How can information technology support the role of the courts in what is broadly called providing access to justice?

From Hazel Genns Paths to Justice research and its Dutch counterpart the Dispute Resolution Delta, on how people resolve their justiciable problems (Genn 1999, Van Velthoven 2004), we know that they need information on (1) settling and staying out of court, and on (2) bringing cases to court.

Keeping cases out of court
For the relatively complex problems that come to court, potential court users usually seek and find information. The notarial and settlement group cases present a landscape of resolving justiciable problems in different phases of their development, aided by court jurisprudence and policies. The information people actually need is on:
(1) how to resolve problems
(2) rights and duties
(3) taking a case to court.

They also always need advice, and they may also need assistance with resolving their problem. Information about norms that are applied by the court can help the parties. This kind of information rings of what Richard Susskind called the golden legal nuggets: punchy, jargon-free practical points, rather than detailed legal analysis (Susskind p. xlviii). Their basis may be in tendencies in decisions by lower courts, as well as in established case law or jurisprudence. For justiciable problems for which the golden nuggets are not available, generating information on general trends is an option, possibly with technological support. Court decision support systems help judges and courts to reach decisions. If public, they can also guide out-of-court solutions.

Bringing cases to court
How can information technology help those who need to take their case to court? Correct, adequate information can give one-shotters, those who do not use the courts on a regular basis, a better chance of a just and fair outcome of their case by enhancing their procedural position. Moreover, a modern government organization - courts included - should inform the public clearly about its procedures. Thirdly, most one-shotters come to court after having first received advice and/or assistance (Genn, 1999, Van Velthoven 2004). Bailiffs, legal service providers, clerks and ushers all give information. The information service is fairly random. There is room for improvement.

This section examines what courts can do with information technology to meet the information needs that one-shotters when they need to come to court. In order to answer that question, it looks at:
- The cases for which one-shotters come to court
- Their related information needs
- How information technology can help to meet those needs.

The information needs are primarily individual information needs, related to the dispute's problems. However, there are also more general or collective information needs. They are not the topic of this article, but they are discussed in Part 4 of the book.
In order to identify litigants' information needs, we take up Marc Galanter's matrix on party configurations in litigation between the one-shotters and repeat players, those who are engaged in many similar procedures over time (Galanter 1974 p. 14-15). Figure 4 translates Galanter’s party configurations to the case matrix from the earlier sections.

**Figure 4 Matrix of Party Configurations**

<table>
<thead>
<tr>
<th>certain outcome</th>
<th>zero –sum</th>
<th>uncertain outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 title</td>
<td>Claimants repeat players</td>
<td>Defendants one-shotters</td>
</tr>
<tr>
<td>4 judgment</td>
<td>Claimants repeat players</td>
<td>Defendants repeat players or one-shotters</td>
</tr>
<tr>
<td>2 notarial</td>
<td>Claimants + defendants one-shotters</td>
<td></td>
</tr>
<tr>
<td>3 settlement</td>
<td>Any configuration</td>
<td></td>
</tr>
</tbody>
</table>

Figure 4 shows the most common party configurations in the case processing matrix. Title group claimants are mostly repeat players. Most one-shotters in this group will be potential respondents who choose not to contest the claim. One-shotters who may have a defense will be helped with information on how to defend themselves or on finding help with it. The notarial group comprises what Galanter calls pseudo-litigation, family and labor matters between one-shotters. Courts are addressed ad hoc. Parties come to court because the law requires a judicial decision. Cases involving relationships can be difficult to resolve.

Settlement group matters can be any party configuration. Court help with settlement may well be most needed in unequal party configurations. This will prevent these matters from becoming group 4 cases.

The judgment group’s party configurations are similar to those of the title group, but now with a defendant. Information needs in this group will be diverse.

**Conclusion: Modeling civil justice and IT**

Judicial decision making can be an extraordinarily complex process. Different models were developed to capture this complexity: Shapiro’s triangle of dispute resolution, the continuum of dispute resolution modes, Zuckerman’s triangle of time, cost and truth (Shapiro p. 2; Zuckerman p. 48). I have developed my matrix to capture how judicial roles, court case loads and party configurations relate to using information technology.

The matrix is a useful tool. It visualizes first and foremost, by looking for similarities, how court cases actually differ. Using court statistics where available, it presents a picture of the case load. For IT policy, it makes clear how case handling in the title group is a good candidate for automation. Notarial cases can also benefit from information service to court users. In the same vein, parties wanting to settle their dispute can benefit from information on court policies and on general trends in judicial decision making. Thus, it not only points the way for internal process support, but also for electronic interaction with the users. Electronic interaction also provides courts with an opportunity to support access to justice and fulfill their shadow function of the law (Galanter 1983a). The matrix can help set priorities for judiciaries wanting to improve their performance using information technology.
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11 All web sites were last visited on January 23, 2011.
Efficiency of the Judicial System in Protecting Citizens against Administrative Judicial Acts: The Case of Macedonia

By Natasa Pelivanova and Branko Dimeski

Abstract

In 2006, the Republic of Macedonia changed the model for judicial control of specific administrative actions. The government replaced the Anglo-Saxon Model with the European-Continental Model. However, the functioning of this model fails to efficiently protect the rights, legal interests and citizen’s freedoms in the Republic of Macedonia.

Key words: citizens, efficiency, administrative judicial system, judicial system organization, Administrative Court

1. Introduction

Currently, there are two basic models that provide for the judicial control over administrative acts: European-continental and Anglo-Saxon. The former is characterized by the creation of special jurisdiction for control of administrative acts; the latter provides for control of administrative acts within the existing general jurisdiction of the judiciary.

Both systems have positive and negative sides. When determining the appropriate model for judicial oversight of administrative actions by the government, a country must take into consideration its own specific characteristics, its needs and the goals that it intends to achieve (Schwarze 1992, p. 6; Breban 2002, p. 24; Brown and Bell 1992, pp. 34-38).

Pending adoption of the new Law on Administrative Disputes, the competent authority for administrative dispute resolution, according to the Macedonian Constitution (as of 1991) and the Law on Courts (as of 1995) was the Supreme Court of the Republic of Macedonia. This is the highest court of general jurisdiction in the country. Within the court, a specialized administrative department or chamber was fully responsible for administrative dispute resolution.

The existing legislation on administrative dispute resolution includes many elements of the Anglo-Saxon and French Models of administrative-judicial control. Judicial review of the legality of administrative acts was implemented in a special administrative-judicial procedure (an element of the French Model of administrative-judicial control) under the jurisdiction of the Supreme Court, highest instance general court in the country. This special jurisdiction can be considered an element of the Anglo-Saxon Model of administrative-judicial control over administrative acts of the state (Pelivanova 2009, p.192).

The literature in the field of administrative justice in the Republic of Macedonia features strong proponents for both: the Anglo-Saxon Model (Gelevski, 1997, pp. 73-4; Gelevski 2003, pp. 242, 252, 254) and the European-continental Model (Davitkovski, Pavlova-Daneva 2006, p. 114; Hristov 1981, p. 449). Both justify their recommendations on the grounds of efficiency, effectiveness, specialization and professionalism of the judges involved to ensure quality administrative judicial review.

The impetus for changing the model of the administrative adjudication in the Republic of Macedonia was systematic delay in the resolution of appeals of state administrative agency decisions by the Macedonian Supreme Court, the consequences of which were expensive, protracted and exhausting administrative-judicial procedures; (Draft Law on Administrative Disputes, April 2006). The delay resulted from (i) inefficient procedural and administrative processing requirements, and (ii) the requirements for specialization, professionalism and knowledge of the judges appointed as well as elected in charge of administrative disputes (Davitkovski and Pavlovsk-Daneva, 2006, p. 114).

As a result, public confidence in the administrative judicial system began to erode. The time from filing to final resolution and issuance of the judgment in administrative appeals ranged from six months to several years. Current public discussions express increasing concern over the functioning of the judicial system’s ability to effectively review
administrative actions taken by state agencies. There is general agreement that the problems are caused by a lack of professionalism on the part both of the judges and of court administration and management. Other contributing causes are lack of modern information technology solutions and deplorable spatial conditions in the courts. Until today, those problems have remained unaddressed. We have undertaken an empirical analysis of the efficiency of the administrative justice system in Macedonia and report the results in this paper. Our analysis incorporates the following elements:

1. the work indicators of the Administrative Department of the Supreme Court;
2. the Court’s efficiency in deciding administrative suits;
3. the duration of court procedures in administrative disputes over a seven-year period (2000-06); and
4. data on the total number of judges and judge assistants.

The quantitative approach used in this research intends to add valuable information to current theoretical and practical knowledge in the field.

We begin the analysis by describing the legal design of the administrative justice system. From there we cite statistical data on the number of cases processed and on the number of appeals to higher courts, followed by an analysis of the efficiency of the administrative justice system. We finish with an explanation of the causes of delay and provide a general conclusion.

2. Organization of the Administrative Jurisdictions in the Republic of Macedonia – Legal Solutions

A couple of years ago, the Republic of Macedonia applied the European Continental Model of the administrative judicial control over administrative acts. Establishment of a new Administrative Court in the judicial system sought to address ongoing and unacceptable delay at the Supreme Court level in resolving administrative appeals and the consequential expense and inefficiencies (Davitkovski 2005, pp.1-3). But, what brought the application of this model of judicial intervention to the Republic of Macedonia?

Amendment 15 of the Constitution of the Republic of Macedonia declares that the judicial power is exercised by independent courts that function according to the Constitution and the laws and international agreements ratified pursuant to Constitutional authority. The same Amendment provides for the types, jurisdiction, establishment, abolition, organization and structure of the courts as well as the procedures to be regulated by law adopted by two-thirds (a qualified) majority of the Parliament (The Constitution of the Republic of Macedonia 1991, Amendment 15). Amendment 101 provides that the Supreme Court of the Republic of Macedonia is the highest court in the country’s judicial system. The primary responsibility of this Court is to ensure uniform implementation of laws by all the courts (Klimovski 2005, p. 505).

In addition, Article 50, paragraph 2, provides for court control of the legality of particular acts of the state administration and other institutions that exercise public authority. On the other hand, Amendment 21 provides citizens the right to appeal against first-instance decisions issued by the courts. The Law on Courts (Article 22) states that in the court system, the judicial power is executed by basic courts, intermediate appellate courts, the Administrative Court, the Higher Administrative Court and the Supreme Court of the Republic of Macedonia. The competence of the Administrative Court is defined by the Law on Courts and the Law on Administrative Disputes.

The Law on Courts (Article 34) states that the Administrative Court is competent for the assessment of:
- The legality of particular acts adopted for elections, and for appointments and dismissals of public office holders, if prescribed by law as well as for acts of appointment, nomination and dismissal of public office holders, if not prescribed by law otherwise;
- Disputes accruing from the implementation and enforcement of the provisions of concession agreements, public procurement contracts concluded for any public interest or for performing a public services and for any other agreement in which one of the parties is a state authority, another organization established by public law, public enterprises, municipalities and the City of Skopje; and
• Appeals against particular acts adopted by the state administration bodies, the Government, other state authorities, municipalities and the City of Skopje, organizations instituted by public law and legal entities when executing competences under public law (public office holders), in cases where other kinds of legal protection is not provided.

The Higher Administrative Court has jurisdiction over the total territory of the Republic of Macedonia. It is competent to; 1) decide on appeals against decisions of the Administrative Court; 2) decide on any conflict of interest between the state authorities, between municipalities and the City of Skopje, between the municipalities of the City of Skopje, and in disputes relating to conflicts of interest between municipalities and the City of Skopje and public office holders, if determined by law, in the case where another court protection is not provided by the Constitution and laws; and, 3) perform other activities determined by law.

The Law on Administrative Disputes states that the Administrative Court is the first-instance court for suits, challenging certain decisions taken by administrative agencies pursuant to the authority set forth in administrative acts. By contrast, the legality of general administrative acts is under jurisdiction of the Constitutional Court of the Republic of Macedonia.

The Law on Administrative Disputes, in addition to the jurisdiction prescribed by Article 2, provides in Article 1 for the competence of the Supreme Court to decide disputes on the legality of acts of administration bodies, the Government and other state authorities, municipalities and the City of Skopje, organizations established by law, and legal entities and other persons in exercising public authorities, when they make decisions on the rights and obligations of citizens in specific administrative cases as well as in disputes caused by the acts of those authorities brought in misdemeanour proceedings. The Law Amending the Law on Administrative Disputes of 2010, which takes effect after establishment of the Higher Administrative Court, by 30.06.2011 (Article 4), states: “Administrative disputes in the Republic of Macedonia shall be resolved by:

the Administrative Court, as a first-instance court; the Higher Administrative Court as a second-instance court; and, 3) the Constitutional Court of the Republic of Macedonia that shall decide upon extraordinary legal instruments in the cases where it is stipulated by the Law on Administrative Disputes. In administrative proceedings the Administrative Court reviews appeals challenging administrative actions. The Higher Administrative Court hears appeals of the Administrative Court decisions. Finally, the Supreme Court hears appeals of the decisions of the Higher Administrative Court and on any conflicts of laws between the Higher Administrative Court and any other court (Law Amending the Law on Courts, Official Gazette of the Republic of Macedonia No 150 / 2010).

The organizational structure of the administrative judiciary for purposes of appellate review of administrative cases is shown in the Figure 1 below.

**Figure 1.** The organizational hierarchy of administrative adjudication according appeal procedures
3. Efficiency of administrative adjudication in the Republic of Macedonia when operating in accordance with the Anglo-Saxon Model

The presented data in the Tables 1, 2, and 3 below shows valuable information on the work of the Supreme and Administrative Courts for the available period from 2000 until 2006.

Table 1. Indicators of the work of the Administrative Department of the Supreme Court of RM for the period 2000-2006

<table>
<thead>
<tr>
<th>Year</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of suits to the Administrative Department of the Supreme Court</td>
<td>5636</td>
<td>5379</td>
<td>5169</td>
<td>6299</td>
<td>6793</td>
<td>7556</td>
<td>7506</td>
</tr>
<tr>
<td>Not resolved from the previous year</td>
<td>3273</td>
<td>3063</td>
<td>2634</td>
<td>3156</td>
<td>4139</td>
<td>4240</td>
<td>4067</td>
</tr>
<tr>
<td>Suits filed in the current year</td>
<td>2363</td>
<td>2316</td>
<td>2535</td>
<td>3143</td>
<td>2654</td>
<td>3316</td>
<td>3439</td>
</tr>
<tr>
<td>Resolved</td>
<td>3573</td>
<td>2745</td>
<td>2013</td>
<td>2160</td>
<td>2553</td>
<td>3490</td>
<td>4105</td>
</tr>
<tr>
<td>Not resolved</td>
<td>2063</td>
<td>2634</td>
<td>3156</td>
<td>4139</td>
<td>4240</td>
<td>4066</td>
<td>3401</td>
</tr>
</tbody>
</table>

Source: The Supreme Court of the Republic of Macedonia, Annual Reports, 2000 - 2006

Table 2. Indicators of the work of the Supreme Court of RM upon administrative suits

<table>
<thead>
<tr>
<th>Year</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of administrative cases</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>6167</td>
<td>N/A</td>
<td>N/A</td>
<td>7354</td>
</tr>
<tr>
<td>Resolved</td>
<td>2409</td>
<td>2659</td>
<td>1922</td>
<td>2092</td>
<td>2460</td>
<td>2460</td>
<td>3899</td>
</tr>
<tr>
<td>Not resolved</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>4075</td>
<td>N/A</td>
<td>N/A</td>
<td>3455</td>
</tr>
<tr>
<td>New filed cases</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>3086</td>
<td>N/A</td>
<td>N/A</td>
<td>3322</td>
</tr>
<tr>
<td>Not resolved cases from the previous year</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>3081</td>
<td>N/A</td>
<td>N/A</td>
<td>4032</td>
</tr>
</tbody>
</table>

Source: The Supreme Court of the Republic of Macedonia, Annual Reports, 2000 – 2006

Table 3. The duration of court procedure in administrative dispute

<table>
<thead>
<tr>
<th>Year</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resolved cases in 3 months</td>
<td>124</td>
<td>89</td>
<td>139</td>
<td>125</td>
<td>90</td>
<td>80</td>
<td>744</td>
</tr>
<tr>
<td>Resolved case in 3-6 months</td>
<td>216</td>
<td>226</td>
<td>153</td>
<td>169</td>
<td>70</td>
<td>189</td>
<td>1585</td>
</tr>
<tr>
<td>Resolved cases in more than 6 months</td>
<td>2069</td>
<td>2430</td>
<td>1630</td>
<td>1798</td>
<td>2300</td>
<td>2987</td>
<td>1570</td>
</tr>
</tbody>
</table>

Source: The Supreme Court of the Republic of Macedonia, Annual Reports, 2000 – 2006

The data presented in these tables show that each year from 2000 to 2006, the number of unresolved cases transferred to the next year was very high. From the data it can be confirmed that in most cases the overall time of the administrative dispute procedures is more than 6 months (Pelivanova 2007, pp. 844-55). In first-instance administrative disputes, the Supreme Court decided in two administrative chambers each comprising three judges.
The first chamber decided cases involving urban matters, building construction, residential matters, survey and cadastre, legal property, agriculture, forestry, water management, veterinary, economy, customs, taxes, voter-registration lists, internal affairs, defence, jurisdiction and administration and industrial property.

The second chamber decided upon suits involving pension and disability insurance, labour, employment, child protection, social security, health, taxes, education, science, culture, archive activity information and transformation of the social capital.

When an appeal was approved as a remedy, the Supreme Court decided in a chamber comprising five judges, from among which three judges of the first-instance chamber that had not decided upon the case in first instance and two judges of the Criminal and Civil Departments within the Supreme Court.

4. Efficiency of administrative adjudication in the Republic of Macedonia when operating in accordance with the European Continental Model

The practice of the European Continental model of administrative judicial control in the Republic of Macedonia will be presented by using indicators of the work of the Administrative Court published in its annual reports for the period 2008-2009 (Administrative Court Annual Reports for 2008-2009).

Almost a year after the adoption of the new legal solutions on administrative disputes in 2006, the Supreme Court received only legal instruments for the purpose of initiating judicial control of specific administrative acts. It did not decide any cases in this legal area as it had been waiting for the establishment of the new Administrative Court. The new Administrative Court of the Republic of Macedonia commenced functioning on 05.12.2007. In 2008 it employed 22 judges, including the President of the Court and a selection procedure for three additional judges was underway. During 2008, 8,497 legal cases were filed with the Court for decision on different basis. In addition, 5,804 legal cases were pending from the previous year for a total of 14,301 legal cases, 5,147 of which were resolved in 2008 and 9,154 still remained pending as of 31 December 2008 (Administrative Court Annual Reports 2008, p. 4).

During 2009, new 9,043 legal cases were filled with the Administrative Court on different bases; added to the 9,154 unresolved cases from 2008, the 2009 caseload comprised 18,197 administrative cases in total, 7,857 of which were resolved and 10,340 remained unresolved during the course of 2009. During that year, three additional judges were elected bringing the total number of judges to 25.

Processing of the legal cases in this court was organized in eight chambers established within six specialized court departments:

I. Department for Real-Estate, Cadastre, and Education;
II. Department for Denationalization, Expropriation, De-expropriation and Transformation;
III. Department for Urbanism and Construction, Water Management, Agriculture, Economy, Transport and Communications, Lottery and Broadcasting;
IV. Department for Pensions and other Pension and Disability Insurance Rights, Social Welfare Rights, Health Insurance Rights, Health-Sanitary Supervision and Control Rights, Inspectorate Control and Labour Rights;
V. Department for Public Procurement, Unemployment Rights, Taxes, Contributions, Employment Relations, Excise Taxes, Dismissal, Lawyers, Economy, Competitiveness, Central Registry, Access to Public Information; and
Two Councils functioned in the frame of the second Department (Chamber II and VII). Also, within the sixth Department two Councils functioned (the Chamber VI and VIII). Finally, within the remaining four Departments one Chamber functioned respectively (Chamber I, III, IV and V) (Supreme Court Annual Reports 2009, p. 6).

5. Analysis: Causes of delays
Indicators of the work of the Supreme Court pose a number of questions and suggest certain conclusions. Even though the indicators pertain to the two-years (2008 and 2009), the large number of unresolved or pending administrative cases added to the caseload for the succeeding year, not withstanding this court’s administrative jurisdiction and the addition of new judges. In addition the number of judges and the Judge Councils in the Administrative Court was extended several times in legal cases in the administrative legal area. Today, the number is 25 judges. In 2008, the number of unresolved cases of the administrative legal area was 9,154, and in 2009 it was 10,340. The large number of unresolved legal administrative cases inevitably imposes the conclusion that in the Republic of Macedonia the practice of slow protection of the rights, private interests and citizen’s freedoms continues in case of a violation when they are violated by specific acts of the administration in the Republic of Macedonia (Supreme Court Evaluations and Recommendations on the Reports on the Work of Courts in 2009, pp. 4-6).

What are the causes for those problems? Are they a result of inappropriate spatial and technical conditions for normal work of the Administrative Court as is indicated in the annual reports of the Court? Is it the insufficient number of the technical personnel and judicial assistants employed in the court in question? Or are elected judges not sufficiently specialized or experienced to deal with these types of cases in a more efficient and effective manner? Or, is it again the model of administrative-judicial protection? Is it an implementation problem or are there other causes?

Certainly, the spatial constraints and outdated technical equipment and software influence the efficiency of the work of the Court: this cannot be ignored when seeking the causes for the numerous unsolved cases. An influential factor concerning the effectiveness of the work of the Court has been the insufficient number of judicial assistants responsible for providing professional help for judges in processing the cases. As an example, in 2008 there was no such type of personnel employed at the Administrative Court (Administrative Court Annual Report 2008, p. 4), while the number of employed personnel was only 18 administrative judicial assistants in 2009. This means less than one administrative judicial assistant per judge (Administrative Court Annual Report 2009, pp. 3-5). One must, however also pose the question: what is the influence of the professional experience of the judges elected in the Administrative Court on the large number of unresolved administrative legal cases in the Republic of Macedonia?

At this point, there is no methodology that can measure that influence, but the indicator of a large number of unresolved administrative legal cases, certainly, is one of them. If we look at the professional biographies of the judges elected in the Administrative Court it can be concluded that, besides the fact that they fulfill all the legal requirements for their election in the Administrative Court (according to the Law on Courts) prior to their appointment to the Administrative Court, most had no practical experience in the administrative legal field. They were involved in resolving private sector disputes, worked as lawyers or as professional judicial assistants whose intention and development, mainly, was directed to the criminal or civil sector. Arguably, experience in the administrative legal area, accrued knowledge and permanent tracking of this large, different and very often variable legal matter in the Republic of Macedonia is a requirement for quality and fast resolution of legal cases in this area.

The French model for a specialized administrative judiciary, which is applied in the Republic of Macedonia, offers certain characteristics that focus on establishing direct multi-directional relations between the Administrative Court and the administration. These are reflected, first of all in the composition of the administrative courts’ personnel who have received broad administrative training roughly equivalent to the administrative personnel in the Ecole Nationale de l’Administration. Members of administrative courts have the right, if they want to be transferred to another active administrative job position, wherefrom they can return to work in the court. Moreover, it is possible, on higher administrative judiciary levels, to have judges appointed from outside the judiciary. Consequently, high-level administrative officials can be nominated to work as judges in the administrative courts. These direct relations exist even
during administrative court proceedings. In other words, the so-called consultative jurisdiction keeps together the judge and court administration in performing particular activities, especially during the process of preparing written documents. It is true that these close relations between the judges and the administration can be very dangerous because of political or corruptive reasons, but without any doubt, the direct link between the judiciary and administration has contributed to higher efficiency of the French administrative judiciary (Breban 2002, pp. 381-82).

It is certain that the French Model of the administrative judiciary has its specifics that might not be practicable in our administrative judiciary, but it is indisputable that the persons elected for administrative judges must be appropriately educated and have sufficient experience in these matters.

The Ministry of Justice of the Republic of Macedonia in July 2010, drafted and processed amendments to the Law on Administrative Disputes (adopted in the Parliament of the Republic of Macedonia in November 2010), which among others, pertain to the organization of the administrative judiciary in the Republic of Macedonia (Draft Law Amending the Law on Administrative Disputes, July 2010). The proposed amendment (Article 4), in addition to the introduction of an Administrative Court that is to make first-instance decisions, provides for constituting a new Higher Administrative Court, and the Supreme Court shall be competent to use extraordinary legal instruments. The newly proposed solutions on the plan of organizing administrative judiciary in the Republic of Macedonia raised reactions with the politicians, juridical professions and scholars. However, a public debate concerning this issue has not, to date, been organized. Most comments pertained to the proposed organization of the administrative judiciary or the need to establish a new Higher Administrative Court. The initiator of the amendments to the Law neither provided any rationales or any explanatory arguments about the reasons for this nor any data about the work of the Administrative Court up to now to support this proposal. The question remains why the Macedonian government suspended the possibility of the resolution of appeals against the decisions of the first-instance Administrative Court by the Supreme Court. This took place only one year after this competence was created for the Supreme Court as a consequence of the Constitutional Court decision on organizing (according to the Constitution) a second-instance administrative judicial protection for the first-instance decisions brought by the Administrative Court (Constitutional Court Decision of 2009, pp. 1-6).

Unfortunately, the public in the Republic of Macedonia faces the reality of lengthy administrative adjudication proceedings in protection of their rights, legal interests and civil liberties. The average time from filling the suit until releasing the final court decision for a concrete administrative dispute is several years. Generally, this situation undermines public confidence in the justice system which, according the Constitution (Article 50 paragraph 2), exists to protect citizens’ rights, legal interest and civil liberties against administrative acts of public institutions. In addition, there is a huge influence coming from the citizen’s knowledge about the problems that pertain to the issues of independency and professionalism of the administrative adjudication in the Republic of Macedonia.

Therefore, the following questions still remain open: Does the Republic of Macedonia have a strategy for the effective organization of the administrative judiciary system? What are the plans for the future? Until now, this question remains without response by the political, administrative and judicial authorities in the Republic of Macedonia.

From the public perspective it is a court administration and management issue that entails implementing good management practices in planning, organizing, coordinating and controlling. Without good court management and administration we cannot speak about an efficient, effective and productive administrative court system in the Republic of Macedonia. In order to renew the public confidence in public institutions and administrative court system among them, there still has to be done a lot of work in the field of administrative adjudication.

6. Conclusions
The citizens in the Republic of Macedonia are facing inefficient administrative judicial protection against particular administrative actions by agencies of the state. From a public perspective, the overall administrative adjudication remains poorly organized and somewhat messy. The high rate of appeals of first-instance court decisions is one of the main indicators for the increased level of negative public confidence in the effectiveness and trustworthiness of administrative adjudication. In overcoming those situations, there is an urgent need for further education and training of the elected and
appointed judges in the administrative adjudication, employment of a greater number of professional judge assistants, appropriating more financial resources from the government for this types of courts, as well as minimum involvement by the political party authorities during the process of election and appointment of the judges in the administrative adjudication in the Republic of Macedonia.

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