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From the Executive Editor:
The Role Of Judicial Accountability In Achieving Institutional Independence
By Markus Zimmer

The successful pursuit of institutional independence by judicial systems worldwide is contingent on how effectively and persuasively their cause is articulated in the political corridors of government. There the veiled processes of formulating law and allocating resources often play themselves out behind closed doors. The consequences, as often as not in today’s uncertain times, seek to aggrandize executive or legislative power at the cost of judicial authority, frequently under the presumptive claim that elected representatives more accurately reflect the will and intent of the people and are more responsible. A critical element that factors into the success of these processes is judicial accountability and the extent to which negative public sentiment, national partisan campaigns, local political opportunism and media skepticism question its viability.

Judges in many countries share the burden of operating in a public and increasingly shrink-wrapped, social-media-driven environment. That environment may dwell on lingering perceptions of them as government officials for whom the distribution of justice as a social value is driven more by personal ideology, compromise, intimidation, and comparative deal-making than by the objective, disinterested, and informed interpretation and application of the law. Such perceptions undermine judges’ professional status, cast doubt on assertions about the importance of an independent judiciary, and spawn cynicism about the achievement of justice as a bedrock civil society objective. Such perceptions are frequently nourished by histrionic media dispensing sound-bytes anchored in fragmentary evidence which become ammunition for political assaults on judges and judicial systems. In developing countries, as the sophistication and professionalism of the media evolve, the reporting increasingly is based on legitimate investigations into allegations of corruption that range from accepting bribes to serious ethical lapses, from questionable asset gains to multiple standards of justice based on variances in wealth or social or political standing, from influencing decision-making by younger colleagues to launching into judicial careers the children of relatives and acquaintances. In developed countries, responsible media certainly play an important role. What is alarming, however, is the extent to which ideological polarization in legislative chambers and in political campaign cycles has spawned partisan campaigns to intimidate and to unseat judges. Such campaigns, fueled by enormous contributions from extraordinarily wealthy magnates in sectors such as gambling, energy, building products, etc., skillfully orchestrate national agendas designed to undermine and dispense with term-service judges whose judgments fail to mimic the ideological model those campaigns have embraced. Those campaigns are particularly potent in countries like the United States, currently plagued by an embittered polarization, where dual systems of legislatures on the state and federal levels enable well-oiled partisan stealth crusades. Legions of zealous behind-the-scenes attorneys draft reams of model legislative initiatives and distribute them to key players in state legislatures where they are tailored to local requirements and introduced into law-making sessions.

...Continued
in state after state, creating partisan tsunamis that sweep the country. Frequently, federal judges serve as the sole guardians who review and stem the impact of such excesses whose range and audacity often astonish. Here are examples taken from the National Center’s 2014 issues of Gavel to Gavel that reviews state legislation affecting courts.

- Missouri Senate committee approves bill that nullifies federal gun laws and prohibits state courts from enforcing them; allows for suits against state judges who enforce such laws
- Bans on court use of sharia/international law introduced in Ohio, Pennsylvania and Florida
- Kansas Senate approves more funding for courts provided they don’t find laws unconstitutional
- Bills to prohibit state court enforcement of federal laws/executive orders introduced in Louisiana, advanced in Missouri
- Plans to drug test judges making a comeback; Pennsylvania and Missouri bills would specify impeachment and/or bar judges from ballot for positive tests
- Missouri constitutional amendment would require state judges use originalist approach to interpreting the U.S. Constitution
- Arizona bill would let city/town governments decide when to close municipal courts

Similar examples exist in other countries where executive power rather than ideology-driven funding fuel judicial intimidation and control initiatives. Judicial leaders do not always acknowledge the institutional stake they have in these battles and, where appropriate, to police their members and proactively rebuild damaged reputations in the minds of citizens. Such leaders frequently wax indignant in public appearances about allegedly gratuitous attacks by the media, politicians, political commentators, anonymous social-media addicts and others in the public arena on the judiciary, inferring that they are unprovoked and undeserved. Such defenses often strike the media and the public as contrived and artificial because they invoke excuse, pretext, and ruse to evade accountability. In recent decades, judicial independence has become the rallying mantra for cadres of judges in all countries. Public criticism of judges frequently is deflected by judicial leadership as assaults on and efforts to undermine that hallowed status. What rarely is infused into these heated exchanges by the judicial leadership is the acknowledgement that achieving judicial independence depends on demonstrating judicial accountability and professionalism that, collectively, are above reproach.

The equation for achieving judicial independence and self-governance begins with the value of judicial accountability. The public and the government cannot be expected to grant to the judicial power the self-governance authority it seeks until that power categorically demonstrates the compulsory maturity, individual character, moral courage, and professional accountability. Far too often, judicial leadership proceeds with deliberate sluggishness when instituting meaningful reforms in the pursuit of judicial accountability, reforms that would merit the esteem of the media and the public. Such reforms and the speed with which they are undertaken more typically are externally imposed either by executive order, legislative mandate, media exposure, or public outcry. Codes of judicial conduct are accepted and implemented as aspirational, lacking coercive enforcement or disciplinary sanctions attached to violations of their canons and/or effective protocols for enforcing such sanctions when allegations are confirmed.

Although many judges endorse, support, and help to initiate such reforms within their sphere of influence, far too frequently judicial leadership balks at the prospect of advancing the type of systematic and progressive innovation at the institutional level that would serve to transform public perceptions of the machinery of justice. Often this reluctance reflects a failure of moral courage by the judicial leadership to acknowledge its role and to follow through with the difficult initiatives that such institutional change entails.
From The Managing Editor
By Philip M. Langbroek

This Issue
The journal has a professional and an academic section. We have good articles from the ICC, about the use of ICT’s, and one from the USA about the use of social media by courts. The Synergia Justizmanagement project from Switzerland again has resulted in several interesting articles on ADR, the way management and judges perceive the core values in their courts. There is also an article about the effects of justice policies on the prevalence of crime in Switzerland. Next to that we have an article about the performance of the judiciary in the Netherlands, and about the rhetoric aspects of sentencing hearings in an English Crown court. Last but not least we have an article about selection of probation officers. The first two submissions for the next issue are being processed already, so we are growing content-wise.

Please Submit Reviews of Books or Reports in Our Field
I also would like to draw your attention to the possibility of submitting the review of a book or an interesting report. Please contact me or Markus when there is a publication you want to draw our attention to.

A Personal Note about Socially Proactive Courts and Judges
This afternoon, I was present at a research seminar in Utrecht considering the possibilities of judges and courts functioning more proactively in society. This is not an exclusive European affair, of course, considering for example drugs courts in the USA and problem solving courts in Australia. We have been considering divorce and youth care, the so called New Case Management in administrative court proceedings, and projects developing the ‘neighbor judge’.

New Case Management in administrative proceedings leads parties away from a juridification of the conflict, demanding that administrative bodies send someone with the mandate to negotiate during the court hearing. It is a kind of mediation during the court session. Instead of a possible reversal of the contested administrative decision, parties may reach an agreement that is sealed by the court. Neighbor judges can be called when a police officer or a social worker cannot effectively mediate a quarrel between neighbors. They, for example, can make judgment on the legal state of affairs between them, so that the mediation can be more effectively continued afterwards.

We think what they have in common is that the judge is moved to a frontline position from where a judicial intervention may be considered. That is of course very different from judges who work on cases that have been brought to the courts and where judges lean back to consider the case, looking back in time. Some of the participants suggested that judges should accept more responsibility and take a coordinating role in prevention of neighborhood crime, youth protection, and relations between administrative bodies and citizens. They demanded that judges adopt an orientation on the future of the parties. Of course judges are not social workers. But they have a role to play if it comes to administering societal peace. European judges in general do not have a democratic mandate, and therefore they cannot act as executive policymakers. And that would put their impartiality at risk. So, one of the research questions we ask is what role judges can play in those different contexts and how they can contribute to maintaining societal peace without overstretching their office. A key in answering that question probably is the answer to the question, how judges and courts for those specific situations can cooperate with and make themselves available in the work of e.g. the police, youth care agencies, and administrative bodies. It requires a lot of organizational and judicial flexibility; it is most likely that not the juridical skills of judges will be tested, but other skills. The advantage for society is that judgments can be given quickly and to the point and sometimes even on the spot. Justice will be seen to be done. Probably that will be a good advertisement for the judiciary. That will not be such a bad sign in times where cut backs in government expenses make politicians question what use those expensive judges actually have for “us.”
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24 – 26 September 2014
Social Media and the Courts: Innovative Tools or Dangerous Fad?  
A Practical Guide for Court Administrators

By Norman H. Meyer, Jr.

Abstract:

This article gives a comprehensive overview of what social media are, why social media are important in society and the courts, how social media can be used effectively, what social media platforms are well-suited to the courts, what problems can arise, and how to proactively deal with such problems. In the early years of social media use in the courts there was a lot of skepticism. As we have gained experience most problems have been shown to be less severe or have been solved. Meanwhile, many usage advantages have become apparent. Research in the United States has shown that judges are increasingly supporting social media use by themselves and their courts, and are less concerned about problems and compromising ethics.

The courts hold a special place in government as impartial arbiters of legal disputes. We, as court leaders, must fulfill the public’s trust in us to achieve the highest level of service while upholding the rule of law. As we have seen, social media are excellent tools to make this a reality—the challenge is to securely and effectively leverage these tools in the court setting.

Keywords: social media, court administration, ICT’s, courts and the public

1. Introduction

Overheard at a recent court conference:

Court Administrator 1: “I can’t wait to have my court start using social media! Think of all the great things we can do to engage citizens and provide better service.”

Court Administrator 2: “What a terrible idea! Social media are just another fad that will expose your court to hackers, ethical problems, and be a big drain on resources.”

Who is right here? Actually, both of these administrators have good points. This article will explore the subject and recommend a practical course of action for courts using social media.

2. Why are social media important?

The world is in the middle of a technological and communications revolution. Virtually all courts are engaged with technology, even if the only technological tools in use are telephones. As the world increases its use of, and dependence on, technological tools, so will the courts. For example, in 2011 it was noted in this Journal that the CCJE (Conseil Consultatif de Juges Européens /Consultative Council of European Judges) “…welcomes IT as a means to improve the

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1 This article is substantially based on the author’s extensive research, writing, and experience using social media (personally and professionally), as well as presentations on the subject made at the U.S. Federal Judicial Center’s conference for U.S. District & Bankruptcy Courts’ Clerks and Chief Deputies (May, 2013), the IACA international conference held in The Hague (June, 2012), and the NACM annual conference held in Las Vegas (2011). However, this article does not fully address legal questions and analysis, for which the reader should look elsewhere. Special thanks go to Professor Anne Wallace in Australia for providing excellent advice as well as sharing her research and publications, and to Nora Sydow of the National Center for State Courts in the U.S. for her collaboration on the FJC program and continued work in the area of social media (http://www.ncsc.org/Information-and-Resources/Social-Media/Managing-Social-Media.aspx).

administration of justice, for its contribution to the improvement of access to justice, case-management and the evaluation of the justice system and for its central role in providing information to judges, lawyers and other stakeholders in the justice system as well as to the public and the media. The CCJE encourages the use of all aspects of IT to promote the important role of the judiciary in guaranteeing the rule of law (the supremacy of law) in a democratic state.”

At present there are several major technological trends to which all courts must respond:

1. Mobile computing
2. Cloud computing
3. Big data and analysis
4. Electronic records management systems (ERMS)
5. Social media

Mirroring this list, the influential Gartner Group has identified the convergence and mutual reinforcement of four interdependent trends: social interaction, mobility, cloud, and information, and labeled these the “Nexus of Forces.”

We see that social (“new”) media use is one of several critical factors, and which continues to explode worldwide. For instance, Facebook now has 1.23 billion monthly active users, and over 80% are outside of Canada and the United States. Google may be the #1 Internet search engine, but YouTube is #2, and every minute 72 hours of video are uploaded to this platform. At the same time, legacy media (e.g., newspapers, magazines, television, and radio) are in decline. Clearly, there is a massive shift in how people access, share, and otherwise use information in the digital age – and governmental entities, including the courts, must adapt to this reality. “The benefits of social media have been well documented in the public sector. From soliciting new ideas and opinions on Facebook to sending out key announcements through Twitter, social networks have become vital communication mediums for government agencies.” In addition, in an age where courts may be increasingly subject to scrutiny and, at times, unjustified criticism, social media can play an important role in ensuring the dissemination of accurate and effective information. “There was a time when the work of

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4 Written correspondence, March 2014, between the author and Jim McMillan, Principal Court Management Consultant and editor of the “Court Technology Bulletin” blog (http://courttechbulletin.blogspot.com/), the National Center for State Courts, Williamsburg, VA, USA (http://www.ncsc.org/).
5 http://www.gartner.com/technology/research/nexus-of-forces
6 “The Internet Then and Now Infographic,” by Marianne Gallano, Socialnomics, February 2014; http://www.socialnomics.net/2014/02/04/infographic-the-internet-then-and-now/; see also the “Social Media Revolution 2013” video cited in note 8 below.
7 http://newsroom.fb.com/Key-Facts
8 A very entertaining video about the explosion of social media around the world (with many eye-opening statistics) can be found at: http://www.socialnomics.net/2013/01/01/social-media-video-2013/
courts was accepted without substantial criticism and the Attorneys-General of modern democratic states would speak up for and defend the courts. Those times are long past.”

It is apparent that in this context social media are, in fact, a powerful technological trend for the courts to consider. How so? Social media can be a powerful tool that saves money and time while increasing public accessibility, accountability, and transparency. Garrett Graff, editor of the Washingtonian Magazine, advises court leaders that they “must not only learn how to communicate with new tools; they must also envision new means of judicial engagement with the public through the new social media that can further advance the legitimacy of courts in a democratic society.” And the Hon. Marilyn Warren, Chief Justice of the Victoria Supreme Court, Australia, also urges courts to embrace social media: “Technology and social media provide an exhilarating opportunity for the Courts to tell the public we serve who we are, what we do, how we do it and why the rule of law matters.”

3. What are Social Media?
However, what exactly do we mean by social media? Social media are:

- Internet-based tools that **enhance the sharing of information**.
- Software whose goal is to **maximize user accessibility and self-publication**.
- A blending of technology and social interaction for the **co-creation of value**.
- Examples include Facebook, LinkedIn, Twitter, Wikipedia, YouTube, and Yelp.

Social media applications can be categorized into several main zones: social and professional networking (e.g., Facebook & LinkedIn); publishing of information via blogs (short for “web log”), micro-blogging (e.g., Twitter), and wikis (e.g., Wikipedia); sharing of information via social bookmarking (e.g., Digg) and multimedia, including photos and videos (e.g., Flickr, Instagram, and YouTube); and discussing topics of interest (e.g., Quora), including threaded discussions (chronological message exchanges in a hosted online discussion group).

An essential factor to consider regarding social media is how and where we access the various formats. First, because of the growing ubiquity of Internet availability (estimated to be 66% of the world’s population at present) and the explosion of mobile devices capable of accessing the Internet (see Trend #1 above), in essence people can and do use social media

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13 Remarks of the Hon. Marilyn Warren AC, Chief Justice of Victoria, Australia, on the occasion of the 2013 Redmond Barry Lecture on Open Justice in the Technological Age, 21 October 2013


The links below provide basic information about social media platforms which may be helpful:

- A portal that links to one page descriptions of a variety of social media platforms. [http://www.nyu.edu/life/student-life/hashtagNYU/social-media-explained.html](http://www.nyu.edu/life/student-life/hashtagNYU/social-media-explained.html)
- Brief explanations about some of the big sites: [http://webtrends.about.com/od/socialnetworking/a/social_network.htm](http://webtrends.about.com/od/socialnetworking/a/social_network.htm)
- This page uses analogies to explain 6 major social media platforms. [http://blog.firebrandtalent.com/2011/06/at-last-how-to-describe-social-media-to-your-mum/](http://blog.firebrandtalent.com/2011/06/at-last-how-to-describe-social-media-to-your-mum/)

Modern life moves at a faster pace than ever before. This leads to the public’s expectation that interactions with businesses, government, and other entities will be quick and achieve a fast resolution—and be available in a mobile manner, 24x7. This is sometimes called the “drive-through” mentality (using a label for not having to get out of one’s automobile at many businesses, including restaurants and banks, thus saving time). Similarly, the public increasingly has a DIY (“do it yourself”) approach to life. At least in the United States courts, DIY may be reflected, at least in part, in the high rates of self-represented (pro se) litigants in a wide range of case types. These include domestic relations/divorce (it is estimated that over 60% of such cases have at least one party who is self-represented), landlord-tenant, petty offense, and personal bankruptcy cases. Many courts in the U.S. have established successful “self-help centers” in response to

There are several societal forces and expectations that are driving factors behind the extensive use of social media:

- Digital natives.
- “Millennials” who primarily communicate via social media.
- E-mail and static websites are becoming outdated.
- The public has a speed of service, or “drive-through” mentality.
- The public has a self-service approach to life (including self-represented litigants).

The first two bullet points not only reflect the accelerating penetration of technology in the world, but also the fact that over 50% of the world’s population is under 30 years old. In developed countries, this group has grown up not knowing a world without personal computers, and the youngest cohort cannot remember anything before the Internet. “To the children of this connected era, the world is one giant social network. They are not bound—as were previous generations of humans—by what they were taught. They are limited by their curiosity and ambition.”

That leads to the third point, wherein the younger generation is abandoning the routine use of e-mail and traditional websites (which are usually very non-interactive, with static information), and embracing social media to share information, keep up with current events/news, etc. So, what do the younger population use instead? Text messaging, electronic chat, Facebook, Twitter, and beyond! This trend has been going on for several years now.

Modern life moves at a faster pace than ever before. This leads to the public’s expectation that interactions with businesses, government, and other entities will be quick and achieve a fast resolution—and be available in a mobile manner, 24x7. This is sometimes called the “drive-through” mentality (using a label for not having to get out of one’s automobile at many businesses, including restaurants and banks, thus saving time). Similarly, the public increasingly has a DIY (“do it yourself”) approach to life. At least in the United States courts, DIY may be reflected, at least in part, in the high rates of self-represented (pro se) litigants in a wide range of case types. These include domestic relations/divorce (it is estimated that over 60% of such cases have at least one party who is self-represented), landlord-tenant, petty offense, and personal bankruptcy cases. Many courts in the U.S. have established successful “self-help centers” in response to

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18 “Millennials” refers to a demographic group of persons who were born between the early 1980’s and early 2000’s; http://en.wikipedia.org/wiki/Generation_y.


20 For an interesting analysis there is a new book, The App Generation, by Howard Gardner and Katie Davis, October 2013, Yale University Press; http://appgen.yupnet.org/


this rise. In addition, DIY-litigants will likely expect the judiciary to offer social media to them as part of their interactions with the courts (descriptions of such uses are described in depth later in this article).

A recent global development is the use of social media to communicate when traditional means are not available. Examples are where a country’s communication infrastructure (e.g., land-line telephones) is not reliable, or when a government restricts access to traditional infrastructure. Under these circumstances, the public, along with both private and public sector entities, will do their best to find alternate means to communicate. The solution is often social media accessed through cellular phone systems and Wi-Fi Internet connections. Another global phenomenon is the use of social media to rapidly mobilize a constituency, such as during mass public protests in countries like Nigeria, Egypt, Turkey, and Ukraine. The recent Winter Olympics in Sochi, Russia were a good demonstration of how people used mobile communication devices and social networking platforms to bring world-wide attention to a wide range of content. From serious topics to highlighting amusing situations, the lesson we take from this is the public is watching everything around them and publishing information that they think is valuable. Courts must realize that this spotlight can be shined on them at any time, and often when it is least expected. At a minimum, courts must proactively prepare for such scrutiny – the “Trial by Tweet” article in the February 2013 edition of this Journal is highly recommended reading on this subject.

The widespread use of, and expectations regarding, mobile computing and social media by the public make it increasingly imperative that courts not only pay attention to these phenomena, but also take advantage of social media opportunities to better meet the needs of the consumers of court services (litigants, attorneys, witnesses, jurors, news media, other government agencies, etc.). All of this can be seen as an extension of the ongoing conversion to electronic filing and access to court records.

4. Social Media and the Courts—a Cultural Clash?
It is important to understand how social media fit into the traditional nature of how courts function. In 2010, the Conference of Court Public Information Officers (CCPIO) in the United States published the first of what have become excellent annual reports on the use of “New Media” in the courts. In the first report, the CCPIO observed that there are “three characteristics of new media that contrast sharply with basic characteristics of the judiciary.”

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Decentralized and multidirectional. One of the defining characteristics of the new media is that they are multidirectional and decentralized. In more theoretical terms, new media are described as the third and most recent of what are essentially only three possible communications media: (i) interpersonal media as “one to one,” (ii) mass media as “one to many” and, finally, (iii) new media or “many to many.” ...Contrast this with the traditional institutional and unidirectional judicial culture and way courts have operated. ...The essence of their fundamental mission, resolving disputes, requires that courts very often

A good resource on SRL’s can be found at http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx
27 For example, see the services and materials of the author’s court: http://nmb.uscourts.gov/self-rep/understanding-bankruptcy
28 For instance, protestors have been using “Zello,” a walkie-talkie type app, in the Ukraine and Venezuela: “Zello App Gains Popularity With World’s Protesters,” NPR, March 2014; http://www.npr.org/2014/03/05/286126479/zello-app-gains-popularity-with-worlds-protesters
29 http://www.nytimes.com/2014/03/20/opinion/after-the-protests.html?emc=edit_tnt_20140319&nlid=19284303&tntemail0=y&_r=0
30 Here’s a video looking at the top 12 social media moments from the 2014 Olympics: http://www.washingtonpost.com/posttv/business/technology/social-media-recap-from-the-sochi-games/2014/02/22/ba49ec76-9c03-11e3-8112-522f64d9027b_video.html
32 “New Media and the Courts Reports/2010-2011-2012-2013,” Conference of Court Public Information Officers; http://ccpio.org/publications/reports/
communicate one way. Courts issue orders, and parties comply. One of the challenges of courts responding to the reality of new media will be resolving this inherent incompatibility between the two cultures.

**New media are personal and intimate while the courts are separate and distant.** Another inherent characteristic of new media is that they facilitate personal communication and intimacy of communication that previously were possible only through one-on-one channels. ...The social media that lie at the heart of the new media revolution are strikingly personal and intimate. ...This stands in sharp contrast to the way courts communicate. The bar that separates attorneys and judges on one side and the public on the other, the elevated bench, the black robe, the practice of formal address ("your honor") — all of these are practices that have evolved for centuries in the judicial culture and play an important role in symbolizing and reinforcing the independence necessary to achieve impartiality. ...The way the new media culture is redefining cultural expectations and practices regarding personal information-sharing raises unique and interesting questions for courts. There is an incompatibility between the judicial culture and the new media culture.

**New media are multimedia, incorporating video and still images, audio and text, while the courts are highly textual.** Probably the most basic characteristic of new media is that they are multimedia in nature. More than anything else, the digital revolution allows for the sharing of information and knowledge and the telling of stories through multimedia methods. With more and more of the public consuming more news and information online, the new media environment now includes a substantial proportion of the citizenry that approaches institutions with the strongly held expectation that communication will include video and audio clips, text and still images wound into a matrix of information and knowledge that tells compelling stories. ...The law is an inherently verbal enterprise. It is concerned with precise definition of terms, interpretation of statutory and judicial language, and the precise parsing of speech. The multimedia nature of new media challenges courts to tell their inherently textual stories through multimedia techniques.33

Understanding these differences help us to understand what social media mean in the court setting. Further, it is essential that courts take these differences into account when crafting social media strategies.

5. **Why and how are social media important to achieving the court goals of transparency, accessibility, accountability, and efficiency?**

Given the decline of traditional media, with their dedicated, coherent, and professional coverage of court proceedings and justice sector matters, and the rise of citizen “reporters” and pundits (e.g., via blogs and tweets from the courthouse) who may not adhere to such standards (and in fact use social media as a platform to launch often scurrilous attacks against courts and judges), it is imperative that courts proactively step into the new technological world to effectively inform the public about the justice system. “The current media climate is different from that of only a decade or more ago. The concept of mass media where a passive audience would receive and respond to messages whether from news or from marketers has been overshadowed by the interactive form ...The new media offers many practical opportunities for court communication with staff and users, challenges and opportunities in presentation of evidence and in making outcomes and reasons available to the broader public. When controversies erupt around a court decision it offers opportunities to engage in, or inform that discussion.”34 As Chief Justice Marilyn Warren of the Victoria, Australia Supreme Court recently stated:

The Internet and social media are here to stay. The courts must develop constructive strategies to engage with the new technologies. Open justice in the technological age means the ability of the community to view or access information about court proceedings through the Internet or social media as well as through traditional print and electronic mediums.

Because of the highly interactive nature of new media, the public have access to and can contribute to the public debate in ways that were previously impossible.

There is now an expectation that open justice involves the judiciary adopting new media technologies and engaging in a direct dialogue with the community. The judiciary must find a way to meet these expectations whilst at the same time preserve the fundamental aspects of the rule of law – fairness and judicial impartiality.35

Now that we have a fundamental understanding of what social media are and how they relate to the courts, we can explore the purposes for which courts are already using social media. There are several main categories:

- Community outreach and interaction
  - Access to court services
  - Special projects
  - Soliciting input (e.g., surveys)
  - Publicizing special events and awards
  - Volunteer opportunities
  - Public information about the court, such as locations, hours, parking, mass transit, etc.
- Self-help (forms and programs beyond general information)
- Training (both internally for judges and staff, and externally for the legal community, self-represented litigants, etc.)
- Publishing information to, and interacting with
  - News media & public at large
  - Court participants (lawyers, litigants, witnesses, jurors, etc.)
  - Other governmental agencies
- Internal communications within the court or court system; this may be quite extensive, such as blogs and wikis that document procedures, project team forums, discussion/chat forums, training videos, online directories, etc.36 The use of such applications can be very beneficial with mobile and teleworking staff, involving them more directly in court operations (unfortunately, employees may not participate as much as expected.)37
- Human resources, primarily recruitment of employees

Courts around the world use a variety of social media platforms for these purposes.

In the United States federal courts (ranging from the U.S. Supreme Court to the Circuit Courts of Appeals, District Courts, and Bankruptcy Courts), as of mid-2013 approximately 25% of these 200 courts use some form of social media, as shown below (vertical scale = number of courts).38

For example, the U.S. Supreme Court has a very active Twitter account and a relatively inactive Facebook page,39 and the U.S. Bankruptcy Court for the District of New Mexico has an active Facebook page and a YouTube channel.40 The U.S. federal courts use these social media platforms for these purposes:

35 Remarks of the Hon. Marilyn Warren AC, Chief Justice of Victoria, Australia, on the occasion of the 2013 Redmond Barry Lecture on Open Justice in the Technological Age, 21 October 2013
36 Commercial products in wide use for these internal purposes include IBM-Lotus Connections, and Microsoft SharePoint.
38 2013 survey conducted by the author.
The state appellate and trial courts in the United States have also made wide use of social media. A great source of information, plus other excellent material about social media and the courts, is maintained by the National Center for State Courts on its website.\(^4\) Approximately 50% of the states’ highest appellate courts (and their administrative offices of the courts) use one or more of these platforms: Facebook, Twitter, YouTube, and Flickr (with Twitter being the most popular).\(^5\)

There are a wide range of trial courts across the U.S. using social media;\(^6\) a prime example of a court that makes extensive use of social media being the Maricopa County Superior Court of Arizona, based in Phoenix.\(^7\)

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\(^4\) http://nmb.uscourts.gov/; https://www.facebook.com/NMBankruptcyCourt; http://www.youtube.com/NewMexicoBankruptcy
Current, comprehensive, and accurate information about the extent of social media use in courts outside of the United States is not available. It is, however, apparent that courts worldwide are using social media for many of the same purposes as in the U.S. The results of a recent survey did show use in a wide range of courts: See Addendum A.

6. Choosing Social Media Tools for Courts

It is apparent that courts primarily use three prominent, popular social media platforms: Twitter, Facebook, and YouTube. Why is this so? These platforms have enabled courts, at low cost, to nimbly and quickly engage the public much more effectively than in the past, and have these advantages:

Twitter

The Twitter micro-blogging platform can be a very effective means to quickly and easily communicate information with appropriate target audiences. Twitter users coalesce around six fundamental ways to interact, including community clusters that form around entities like courts. As of February 2014, Twitter has 243 million active monthly users. Courts are primarily using Twitter to interact with the news media, jurors, and as part of an emergency management and notification system. Twitter affords these opportunities to the court:

- Real-time communication with the news media:
  - Easily and quickly posting court/case updates directly from the court vs. adding content to websites or sending e-mails (which means the court is able to proactively get its accurate message out fast, instead of being reactive to media accounts – this ensures the media gets the information the court wants them to have and can avert distorted coverage);

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45 Personal knowledge of the author, and a 2013 survey conducted by Nora Sydow of the National Center for State Courts, Williamsburg, Virginia, USA.
46 For a good explanation of what Twitter is, go to: http://webtrends.about.com/od/socialnetworking/a/what-is-twitter.htm; and https://about.twitter.com/
Immediate vs. delayed press releases, ensuring the media gets timely information (and, the tweet can embed a link to the full release);
- Fewer phone calls to/from the news media (and public), since the media get the information they seek in a timely manner;
- Tweets direct inquiries to the court’s website for more extensive information; and
- Fewer news reporters need to come to the courthouse or courtrooms, freeing up seats and places in long security lines during high-profile hearings.

- Enhanced communication with jurors (or any similar target audience) in the areas of qualifying and summonsing. For instance, Twitter can be used to quickly notify jurors about whether they are needed in court not only for each day’s service, but also up to the minute as conditions change (e.g., a trial settles and the juror is no longer needed).
- Timely notifications to court staff and outsiders (litigants, attorneys, other governmental agencies, etc.) during emergency situations. This may be a natural disaster (flood, earthquake, etc.) or other circumstances that render the court unable to operate (fire, chemical spill, etc.).

The net result of effective Twitter use in these areas can be enhanced news media relations, more efficient use of jurors’ time, and rapid response to emergency situations (for a good example, including juror notifications, go to the Norfolk Circuit Court Clerk’s Office Twitter feed at https://twitter.com/nccco). All increase court performance and user satisfaction due to the heightened transparency of court functions. In addition, court accessibility and accountability are enhanced because the court can quickly reach a large number of people.

Facebook

With over a billion active users, in just ten years Facebook has become a worldwide social media juggernaut. Recognizing this, courts have created their own Facebook presence to better connect with users (litigants, attorneys, etc.), the news media, the public, etc. Facebook affords courts the ability to do several things well:

- Make available short and long term information about the court in a primary medium that users use to seek such information. This could include notifications of special events, training opportunities, awards, and other information that is time-sensitive;
- Act as a portal to guide users to the court’s regular Internet web site, where more detailed, full information is usually found;
- Much like Twitter or an e-mail listserv, postings to Facebook are easily produced to enable the quick, straightforward dissemination of information; and
- Serve as a more informal medium for the court to interact with users; ideally, this includes allowing users to post curated comments.

All of these abilities serve to increase court transparency, accessibility, and accountability, fulfilling the fundamental goal of “open justice.”

YouTube

The YouTube platform is attractive to the courts for reasons similar to Facebook, and beyond:

- Since YouTube is the second most used Internet search medium, courts can greatly enhance the ability of outsiders to access digital court information with a YouTube presence.
- YouTube acts as a portal to guide users to the court’s regular Internet web site, where more detailed, full information is usually found.
- Enhancing the training of users of court services. Training videos posted to YouTube are a very common use of this medium, helping court users understand not only basic information (where is the court, directions, parking, what to wear to court, court fees, etc.) but also complex procedures (how to e-file a pleading). Videos can also be used internally for court staff.

50 For further information about YouTube, go to: http://www.youtube.com/yt/about/ ; http://en.wikipedia.org/wiki/YouTube
51 For examples, go to: http://www.uscourts.gov/multimedia/videos.aspx (not posted to YouTube, but same result) http://www.youtube.com/NewMexicoBankruptcy
• Provides multimedia content (primarily video) that can be a much more effective communication medium than text - many members of the public prefer, and learn better from, a multimedia experience.
• Provides detailed information in a very accessible, less formal way that less literate (due to low education level, language barriers, etc.) members of the public can understand.
• If done well, the content can be very entertaining, thus increasing usage.

YouTube is a powerful medium (over a billion users)\(^\text{52}\) that also increases transparency and accessibility.

Collectively, these three primary platforms (Twitter, Facebook, and YouTube) exemplify how social media can help courts achieve higher performance while increasing public support for the judiciary. The challenge is to use these and other social media platforms wisely.

### Social Media Profile of the Supreme Court of Victoria, Australia  

- The Supreme Court of Victoria (SCV) has two parts, the Court of Appeal (11 judges) and the Trial Division (30 judges). The Trial Division has civil, criminal, commercial, probate, and appellate (over magistrate courts and administrative decisions) jurisdiction, while the Court of Appeal hears appeals from the Trial Division and County Courts. As a whole, the SCVA has over 7,500 cases initiated per year.
- The SCV has two social media sites:
  - Facebook page established in 2013 as a pilot project, [https://www.facebook.com/SupremeCourtVic](https://www.facebook.com/SupremeCourtVic)
  - Twitter account established in 2011, [https://twitter.com/SCVSupremeCourt](https://twitter.com/SCVSupremeCourt); currently has almost 2,900 followers.
    - “Today it is a vital tool as part of the media communications at SCV. It has proven to be effective as a ‘sign post’ to judgments, sentences, and announcements. In particular, the retweets are huge when judges in the criminal division deliver an audio sentence, and I am able to then post that link to the audio.” For example, regarding a high profile criminal sentencing, 2 of the court’s tweets “…were retweeted some 18 times in that hour, to a total audience of almost 40,000 Twitter followers. Needless to say the spike in web-hits at the time of sentencing was massive.” “In that regards, Twitter is considered to be a positive, and extremely useful means for getting a quick message out. Our followers are wide and varied, from all media, media lawyers, law firms, university students, to general people.”
  - The SCV has developed a Twitter policy. The court’s Strategic Communications Manager has sole responsibility for the account.
- “In the three years SCV has been on Twitter, most other courts in Victoria have come on board, and just in the past couple of months, New South Wales Courts. The most interesting observation made when the other courts came on board, was how quickly they attracted hundreds of followers. Our account took nearly 12 months to gain 1000 followers, whereas Magistrates and County took only a couple of months. People are now looking for information from courts on Twitter and are quick to follow the various handles.”
- The SCV’s efforts were profiled in the “Connected” new media newsletter of the National Center for State Courts & CCPIO in October, 2013: [http://www.ncsc.org/Newsroom/Connected/2013/Oct.aspx](http://www.ncsc.org/Newsroom/Connected/2013/Oct.aspx)

Information is from the SCV’s website and provided by Anne Stanford, SCV Strategic Communication Manager; many thanks go to her and Professor Anne Wallace for their help.

### 7. What is the external perspective of the public and court users?

Moving from inside to outside the courts, keep in mind that a multitude of “outsiders” also use the courts’ social media applications. Outsiders include lawyers, litigants, witnesses, jurors, news media, bloggers (who may be quite critical of the courts), interest groups, university researchers, job applicants, the merely curious, and beyond. The potential audience essentially includes everyone! This demonstrates that courts should use great care in choosing which social media platforms to use, what content will be published, who will represent official court policy, and other key questions. Here is a graphic that helps understand the various “dimensions of access” that courts need to consider in crafting their social media strategy.

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8. What kinds of concerns and problems exist?

A recent Australian survey of 62 judges, court staff (including public information officers), and academics working in the judicial administration field highlights some key concerns many courts have regarding social media.\(^\text{54}\) In ranked order, the concerns were:

1. Juror misuse of social media (and digital media) leading to aborted trials.
2. Sub judice issues/breach of suppression orders (by tweets, Facebook or other social media), that “go viral”, and the difficulties associated with enforcement of restraining orders.
3. Increased risk of cyberstalking/opportunities for invasion of privacy or intimidation/bullying of the private lives of court case participants, including victims, jurors, judges, workers.
4. Misrepresentation of court work and activity to a community that may not understand the processes or issues involved/rapid spread of misinformation about trial processes and courts.
5. Disclosure of information to witnesses or others waiting outside or inside court.
6. Difficulty in testing authenticity and credibility of social media journalism/lack of verification of social media publications.
7. Need to educate judges, court staff, the public and media, risk of disenfranchisement of people and institutions that do not use social media.
8. Using social media to communicate court decisions and engage with the community.
10. Defamatory statements that “go viral” on social media, creating the spectre of increased litigation.
11. Using social media to enhance court procedure (e.g. service via Facebook).
12. The use of social media posts as relevant evidence.
13. Difficulty in ascertaining ownership of information sources on social media.
14. Public expectation that courts will adopt social media quickly/effectively.
15. Impact of social media on court orders, including orders relating to social media use, jury directions, sentencing.
16. Social media can be distracting in court/potential for disruption of court activity.
17. Whether to have central control of court communications.
18. Need for information technology systems/staff to support social media (lack of resources for social media officers).
19. Failure of courts to use social media affects timeliness of news.
20. Locating the origins of the user/tweeter/contributor.

Not all of the responses were negative. The participants in this research exercise recognized the need to educate judges, court staff, the public and the media about the work of the courts, and that social media should be part of that strategy.


Even though this list of issues derives from Australia, the concerns expressed are consistent with those expressed elsewhere, such as in the annual CCPPIO surveys in the United States. It is interesting to note that these concerns are directed primarily at the social media use of "outsiders," and not very much internally by judges and court staff. It is vital, however, to address social media activity by all users to ensure effective communication and the avoidance of serious problems.

What kinds of problems might arise from social media use by external (non-court) users? The Australian list above highlights several kinds of social media posts that compromise the judicial process. The term “Google mistrials” has been used to label this serious problem. “The use of social media has resulted in dozens of mistrials, appeals and overturned verdicts in the past couple of years.” The ability of almost anyone involved in court proceedings to easily (anytime, anywhere) access the Internet and conduct professional and personal research (e.g., a witness or juror trying to corroborate evidence, or attorneys who do background checks on witnesses and potential jurors—which alone presents a challenge to judges “to establish parameters for juror vetting and within the courtroom itself”) is a distinct, and real problem. In response, courts have instituted rules, policies, warning signs, training programs, etc., to set acceptable use requirements – along with sanctions for violations.

Even more forcefully, the British Parliament has passed a new (2014) law which makes it a criminal offense for a juror to use social media sites in violation of the instructions of the court. Courts found that the prior method of using contempt powers was insufficient. “The new law…make(s) it illegal to share website information with other jurors or to decide a case on the basis of evidence not heard in court. The new two year penalty will also apply to jury members who post messages about cases on social media sites or engage in other conduct prohibited by a judge…The reform…has been prompted by concern that modern technology is posing an increasing threat to the fairness of trials. It follows cases in which jurors have caused trials to collapse by researching cases on social media sites.” Juries and social media have received a lot of attention; an excellent, in-depth examination of the issue can be found in a 2013 report to the Victorian Department of Justice, Juries and Social Media, and in a 2014 article in the Duke Law and Technology Review, "More From the Jury Box, the Latest on Juries and Social Media.”

In regards to the news media (or others) using mobile devices to access and transmit to the Internet (e-mail, tweets, etc.) from inside courtrooms, “courts in the UK, USA and Australia are seeking to balance the right to freedom of speech, and transparency and openness in court proceedings, against concerns that this development might also impinge on the right to a fair trial and the due administration of justice.” Several different approaches have been taken, from outright banning of all electronic devices to unfettered use.

The courtroom use of electronic devices has come to a head at the U.S. Supreme Court, which has just experienced a breach of its rules barring media video coverage and electronic device use in its courtroom. Someone smuggled a device
into court and recorded a protester speaking out from the audience, then posted videos to YouTube. The court is adjusting its procedures and security to avert a reoccurrence.

A contrasting example is the U.S. District Court for the District of Rhode Island, which after a pilot experiment has decided to allow approved news media members to use electronic devices inside the courtroom to report on proceedings, as long as they are not disruptive. "This will allow reporters to file blog posts and stories, live tweet, and send email messages from the courtroom. Previously, reporters had to check their cell phones and devices with security upon entering the courthouse. ....Members of the media interested in taking advantage of the new policy must apply via the court's website."63

The Nieman Journalism Lab at Harvard University has posted a nice summary of courtroom/legal issues with "Facebook friend of the court: The complicated relationship between social media and the courts." The article is worth reading and includes links to several recent resources and articles.64

9. Employment Recruitment
A specialized use of social media in the private sector and by courts is in the recruitment of employees. “According to the Society for Human Resource Management, 77 percent of employers now use social networking to recruit candidates, up from 34 percent six years ago.”65 CareerBuilder has published an eBook on the subject: Will Tweet for Talent, A User’s Guide to Talent Recruitment Through Social Media.66 Sites such as Monster, CareerBuilder, and Craigslist have been used by courts in the United States to post job vacancies and screen candidates, for example. Courts have also done Internet searches to gather and verify information about job candidates. These actions track the private sector, where, for example, many employers do on-line background research about candidates, including social media sites like LinkedIn, and employers have rejected candidates because of online information. In fact, “research shows that employers are discriminating based on what they find on social media.”68 Courts must be very careful in the use of such searches and sites, however, as such use is subject to factors which may cause problems ranging from hiring poor employees to expensive employment discrimination lawsuits:

- Online job postings tend to be brief, and may not do a good job of fully and legally representing the recruitment’s parameters;
- Information (including professional credentials) posted or provided by candidates may be false, misleading, or be out of date (e.g., reflecting youthful indiscretion rather than suitability for employment);
- Information may be falsely posted by a third party (maliciously or not); and
- Information may be protected by the laws in the court’s jurisdiction (e.g., in the U.S., information about race, religion, medical condition, sexual orientation, etc.).

So, what should a court do to avoid problems and effectively use the Internet and social media in job recruitments? Here are some key actions to take:

1. Only use reputable job sites for online recruitments;
2. In the vacancy announcement, advise applicants what background checks will be conducted, including Internet searches;
3. Have background checks done by Human Resources staff, not by managers involved in the hiring decision;

67 “Current and potential employers are looking at your social media pages,” The Examiner, February 2013; http://www.examiner.com/article/current-and-potential-employers-are-looking-at-your-social-media-pages
4. Ensure protected information is not disclosed to selecting officials;
5. Conduct background checks only near the end of the process (e.g., after interviews), and then only on the final one or two candidates as necessary;
6. Verify any discovered adverse information to the extent possible; and
7. If a candidate is rejected because of adverse information, document that action.

10. Use by Judges and Court Staff

Another aspect of social media use in the courts is how these platforms are being professionally and personally used not by courts themselves, but by the judges and court staff who work there. This article primarily focuses on court staff; excellent recent treatments of judicial use are contained in the law review article “Why Can't We Be Friends? Judges’ Use of Social Media,” as well as a paper entitled “Technology and Judicial Ethics.”

- Professionally.
  Many judges have created Facebook and LinkedIn pages, have Twitter accounts, and even publish legal/court blogs (either alone or as contributing authors). In jurisdictions which have elected judges, these activities are more common as a means to connect with voters. Unfortunately, there have been many instances of ethical violations by judges using social media in their election campaigns. To avoid this, many judges’ social media election platforms are maintained by campaign staff instead of the judges themselves in the hope of avoiding some of the ethical pitfalls.

A prime reason for judicial social media use is to network with other judges, overcoming to some degree the isolation that many judges feel once they take office. Overall, the purposes overlap those of the courts themselves, as outlined above in this article. In many jurisdictions, however, there are constraints on what judges and staff may do while using social media – this will be discussed more thoroughly below.

Many court administrators participate in LinkedIn to facilitate networking with peers around the globe. IACA has a LinkedIn group, for example (as do other court and justice organizations). The American Bar Association has published a relevant book, *LinkedIn in One Hour*, which has many good tips on how to effectively and properly leverage this platform.

- Personally.
  Judges and staff use social media in their personal lives almost the same as any other citizen. The exception is where employment by the judiciary has constraints which extend to personal use.

Problems may arise from social media use by judges and court staff. “Online tools have made interacting with the public more convenient, but the legal pitfalls associated with social media have also been exposed.” A 2014 survey found that “…71% of the…responding businesses have had to take disciplinary action against an employee for misusing of social media…a tremendous jump from last year’s iteration of the survey, in which only 35% reported they had to take this kind of action.” Inappropriate postings about pending cases, lawyers, witnesses, litigants, and the news media can compromise the integrity of the court and judicial process. Areas of judicial and employee ethics that immediately come into question include: an appearance of, or actual impropriety (such as *ex parte* communication); conflict of interest;

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70 This article is not intended to comprehensively treat the personal (and even professional) use of social media by judges and staff – especially judges. The primary focus here is on social media use by courts themselves.


breach of confidentiality; improper political activity; and the violation of professionalism standards. A fuller treatment of this subject is contained in my article, “Social Media and the Ethical Court Employee.” Of course, these areas are subject to local jurisdictional norms (what might be inappropriate in one jurisdiction may be perfectly acceptable in another).

Court managers should consider these additional examples of potential problems with employee social media activity:

- Waste of official time;
- Consumption of bandwidth on the court’s Internet connection;
- Making inappropriate public statements about the employing office, judges, managers, or colleagues;
- The “friending” of attorneys on Facebook (which may or may not be acceptable, depending on the circumstances);
- Inadvertent/intentional disclosure of confidential information;
- Harassment or other misconduct toward colleagues;
- Political or advocacy activities; and
- Breach of court or judicial security.

Given the potentially severe problems outlined above, courts should take action to prevent the inappropriate use of social media by judges and staff. Some common actions are: controls placed on court computers to block access to the Internet in general or specific websites; appropriating monitoring employee social media use; promulgating policies about acceptable social media use; and banning the use of personal electronic devices at work. Specific, recommended guidance about what courts should do is presented later in this article.

Before taking action vis a vis employees, consideration must be given to the fundamental question of whether employees have unfettered constitutional/legal rights, such as freedom of expression or protection from unwarranted search and seizures, when they use social media at work or in their personal life. This issue has been addressed by the United States Supreme Court:

In applying these canons to use of social media after-hours, do judicial employees retain freedom of expression, privacy rights, and other rights of citizens? The answer is yes. The law is well-established that government employees do not forfeit their Constitutional rights by virtue of their employment. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). However, government employment does require some restrictions that might not be applicable to private citizens. The government, as an employer, must have wide latitude to manage the work to promote the efficiency of the public service it performs through its employees. Id. A balancing of interests of government employees as citizens and of the government as an employer accomplishing its mission must be achieved.

Of course each court jurisdiction must assess its own legal framework in addressing the question of employee rights, as the example above cannot be used as precedent outside of the United States. It is outside the means of this article to cover this topic more thoroughly in this regard.

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76 “Social Media and the Ethical Court Employee,” Norman Meyer, The Court Manager journal of the National Association for Court Management (NACM), vol. 26 no. 1, 2011; www.nacmnet.org. Electronic copy also available from the author.
77 “Are Your Employees Wasting Time on Social Media?,” by Heather Legg, Socialnomics, February 2014; http://www.socialnomics.net/2014/02/21/are-your-employees-wasting-time-on-social-media/
78 The monitoring of employees is a particularly sensitive issue, so great care must be taken before embarking on such an activity. A good debate on the subject: “Should Companies Monitor Their Employees’ Social Media?” The Wall Street Journal, Page R1, May 12, 2014; http://online.wsj.com/news/articles/SB10001424052702303825604579514471793116740#printMode
80. Federal Court Clerks Association (FCCA) Journal, Summer/Fall 2010, “From the Editor” (Pat McNutt), page 4; http://www.fcca.ws/
Overall, what should courts do to ensure the appropriate use of social media by judges and staff?

Here are some key elements of a court's social media strategy regarding usage problems and employee rights:

- Have a clear, understandable, Code of Conduct (also known as a Code of Ethics) which outlines what is acceptable and unacceptable behavior in all areas of work. Besides such a Code, the Ethics Committee of the Judicial Conference of the United States Courts has issued an extensive 2014 Advisory Opinion on “The Use of Electronic Social Media by Judges and Judicial Employees.”
- Enact a court Social Media Policy that specifically addresses the issues raised in this article, with particular attention to these elements:
  - Recognize that policy cannot possibly anticipate all situations, so require employees to self-regulate their conduct;
  - Advise employees that they are responsible to adhere to the court’s Code of Conduct (or equivalent);
  - Where specific rules are impractical, provide broad guidelines;
  - Define social media broadly to cover technology that will be released in future;
  - Make clear whether, and to what extent, the policy can apply to both on duty and off duty conduct;
  - Remind employees that disclosure of confidential information is strictly prohibited;
  - Define whether employees can identify themselves as such, either specifically (law clerk to Judge X) or generically (clerk’s office employee);

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Designate whether an employee may use an official court e-mail address (suggest not, except in officially-sanctioned activities);
State that managers and supervisors—and HR personnel at all—may not “friend” employee subordinates;
State that employees may not “friend” or be “fans” of lawyers or organizations that frequently litigate in court; and
Explain that social media may not be accessed at work except as part of official duties, and whether personal use may be done while on breaks.

- Design and implement an effective employee orientation and training program on the use of social media;
- Pay attention to hiring ethical staff as part of job recruitments, and appropriately monitor staff behaviors;
- Follow through on substantiated violations of policy;
- Enact appropriate and effective I.T. controls—with particular attention to security;
- Have a media relations plan that clearly sets forth expectations and requirements for the news media, and that prepares for newsworthy cases (high-profile) and usage problems (whether by judges, staff, or “outsiders”). For instance, can the news media use portable devices in courtrooms to make real-time social media posts (to Twitter, for example)?

A court cannot totally prevent problems, but by taking these actions the risk will be greatly reduced. A brief outline that reinforces this point appeared in a recent commentary in Government Technology magazine: “How Government Leaders Can Stay Out of Social Media Hell.” Ensure you emphasize training, have a “no-no” content list, do not mix professional and personal content (in fact, if judges and staff do both, they should have separate social media presences for each), and double-check every posting for accurate and appropriate content.

Although the concerns about social media cited above are very real, there are also quite a few myths about social media use in the government setting. Here are a few:

<table>
<thead>
<tr>
<th>Myth</th>
<th>Reality</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Social media is simply another avenue for disseminating content as a function of public affairs.</td>
<td>1. Social media is a dialogue, and can be used internally, between courts, and with targeted users; not just with the public.</td>
</tr>
<tr>
<td>2. All the feedback we receive on social media will be negative and cast our agency in a poor light.</td>
<td>2. A minority of feedback is negative, and often other users defend the agency, correcting mistakes, etc. Negative or corrosive feedback does need to be quickly dealt with, however—the nature of social media can lead to viral spreading of misinformation.</td>
</tr>
<tr>
<td>3. You have to be on the cutting edge of technology to use social media effectively.</td>
<td>3. Facebook and other major social media sites are now quite commonly in use and do not require complex tech know-how.</td>
</tr>
<tr>
<td>4. Most comments on social media are not well thought out or constructive.</td>
<td>4. Most people take the effort to leave thoughtful comments and seek to contribute. Negative comments can offer constructive lessons for improvement.</td>
</tr>
<tr>
<td>5. We will be inundated with responses and feedback, and this will overwhelm our people or systems.</td>
<td>5. Experience has shown that the volume of feedback is usually not overly large. But, resources do have to be dedicated.</td>
</tr>
<tr>
<td>6. No one is interested in the material we would put on social media.</td>
<td>6. Don’t underestimate your audience. It may take time to build a</td>
</tr>
</tbody>
</table>

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84 There are wide differences of opinion about allowing the use of mobile devices in courtrooms. Many believe that the news media should be allowed to do so to enhance the accuracy and timeliness of reporting and increase public interest and awareness, thus increasing public trust and confidence in the courts.


<table>
<thead>
<tr>
<th>Myth</th>
<th>Reality</th>
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<tbody>
<tr>
<td>media. It is simply too boring.</td>
<td>following, though. The news media love social media.</td>
</tr>
<tr>
<td>7. Social media is only for the younger generation. My audience is not going to be on that medium.</td>
<td>7. Social media attracts a wide range of users, including a fast-growing older demographic, many of whom are linked to their grandchildren via social media.</td>
</tr>
<tr>
<td>8. Maintaining a social media presence takes too much money.</td>
<td>8. The use of most social media often is inexpensive or free and can save money spent on other methods for getting the message out.</td>
</tr>
</tbody>
</table>

11. Effective Social Media Implementation Strategies

Once a court decides to use social media, there are many things to keep in mind to ensure an effective social media presence:

- Include a disclaimer and a terms of service statement on all social media platforms;
- Choose the right tool for the job, focusing on your target audience;
- Always consider data privacy in platform settings and postings (see below);
- Decide if you are going to allow public comments and participation and, if so, include parameters in the terms of service (and seriously consider moderating submissions before they go “public”);
- Use plain language online, with good etiquette (be respectful, etc.);
- Make frequent updates of content to engage your audience;
- Publicly define the commenting capability/policy of the court;
- Ensure your platform(s) comply with legal requirements (e.g., accessibility by handicapped persons and public records retention);
- Define and implement organizational responsibility and editorial control (i.e., who approves content and who can make postings/update content) – keep this to a select, trusted group who can represent official court policy, etc.;
- Define your goals and start simply by using only one platform as a pilot project, emulate another court’s successful activity, etc.

Other valuable tips are contained in an excellent book: *Social Media in the Public Sector Field Guide, Designing and Implementing Strategies and Policies.* A wonderful, colorful infographic, “How to Make Awesome Social Media Content,” can also be useful.

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12. An Emerging Issue: Privacy

Privacy is an increasingly important issue that pervades Internet usage, and social media applications are no exception. Nowadays there are routine personal data breaches due to corporate and government errors, along with massive database and transaction hacking. In addition, criminals are using social media to facilitate their activity, in part by accessing user data. All of these activities compromise user information, some of which is quite sensitive (e.g., financial/banking data). The market is responding to the need for greater user privacy with applications and devices that, for instance, automatically encrypt, and delete data.

Courts need to be ever-vigilant to protect court and user information in their custody. This includes confidential case and litigant information as well as information that compromises court security. If a court has a social media presence, extreme care needs to be taken that information posted to social media sites are appropriate, and that privacy settings are

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89 Thus, care must be taken with social media settings (like geotagging). For a quick primer about criminal activity and what one may do to protect oneself, see: “The Shocking Truth About Social Networking & Crime,” by Drew Hendricks, Socialnomics, March 2014; http://www.socialnomics.net/2014/03/04/the-shocking-truth-about-social-networking-crime/

90 For example, “Encrypted Phones Emerge to Keep Prying Eyes Out,” The Wall Street Journal, page B5, March 5, 2014. There are many new apps that “self-destruct” e-messages and photos, such as SnapChat and Kik. See also “Give Me Back My Privacy,” The Wall Street Journal, p.R1, March 24, 2014.
made that protect court and user data. This is not altogether simple, however. For instance, Facebook privacy settings are notoriously complex and are often changed. One must make sure that privacy is a key component of a court social media policy, and then put that policy into action. Failure to do so may lead to a very harmful and embarrassing information breach with the kind of news media attention no court wants.

13. What About The Future?

The social media uses described in this article are innovative and futuristic to many courts around the world. As we have seen, however, many courts are already successfully implementing social media in ways that essentially all courts can benefit. What about the future? How might courts expand the use of social media? Here are a few ideas:

- Many governments struggle with collecting funds that are past due. Courts may have substantial amounts of unpaid fees, fines, restitution, and other court-ordered obligations to collect. Why not use social media platforms to enhance communications by using microblogging (Twitter), sharing collections and compliance information with other courts (Facebook), monitoring and contributing to blogs and wikis with relevant discussion threads (e.g., the at Government Revenue Collection Association; http://www.govcollect.org/), and sharing video training modules on YouTube.

- Search for mentions of the court on social media sites as a means to receive feedback from the public about how the court is performing (are you mentioned/reviewed on Yelp?!?). “…agencies can search for mentions of their departments to collect unsolicited, and potentially brutally honest, feedback from citizens. They aren’t the only source for public opinion, but comments made on social media sites can help capture feedback from individuals who haven’t been engaged by standard communication methods.” Searches can be done manually or there are private companies that will do this for a fee. Another way to monitor the Internet is to set up a “Google Alert” for the name of the court—and for each of the judges’ and other key officials’ names.

- Create an “open innovation platform” that uses crowdsourcing to solicit and analyze citizen input on policy questions, program ideas, etc. An example of this is found at https://challenge.gov/.

- Use social media for legal acts, such as service of process/noticing.

- Leverage multimedia platforms beyond YouTube, such as Flickr and Instagram, to make a visual impact. People “…are being attracted more towards content that they can comprehend within a short time. And this is where the old adage, a picture speaks a thousand words, becomes relevant.”


92 There are a multitude of articles on this subject, here are cites to a few good resources:

- http://www.consumerreports.org/cro/2012/05/profit-your-privacy-on-facebook/index.htm ;
- http://www.npr.org/2014/12/24/399057936/if-you-think-youre-anonymous-online-think-again ; and a recent article about how to protect children’s privacy which has tips that are useful for any social media/Internet user, http://online.wsj.com/news/article_email/SB1000142405270230377504579395262543045176-1MyQjAxMTA0MDIwNDQyWj

93 This correlates to the subject of privacy for court records in general. A source of information on this subject can be found at: Privacy/Public Access to Court Records Resource Guide, National Center for State Courts; http://www.ncsc.org/Topics/Access-and-Fairness/Privacy/Public-Access-to-Court-Records/Resource-Guide.aspx

94 “Court Debt Collection and New Media,” Courts Today, October/November 2013, page 20; www.courstoday.com


As we move forward there undoubtedly will be other, creative ways to leverage social media. Courts should always be looking for such opportunities to improve. An excellent way to stay informed about social media and the courts is to subscribe to the “Connected” newsletter of the National Center for State Courts, http://www.ncsc.org/connected.

14. Conclusion

This article has given a comprehensive overview of what social media are, why social media are important in society and the courts, how social media can be used effectively, what social media platforms are well-suited to the courts, what problems can arise, and how to proactively deal with such problems. In the early years of social media use in the courts there was a lot of skepticism. As we have gained experience most problems have been shown to be less severe or have been solved. Meanwhile, many usage advantages have become apparent. Research in the United States has shown that judges are increasingly supporting social media use by themselves and their courts, and are less concerned about problems and compromising ethics.99

Chief Justice Warren of the Victoria Supreme Court is right, social media is a tremendous opportunity to improve communication with the public and enhance the rule of law. The Partnership for Public Service concurs in a recent report, succinctly summing up where we stand as public servants vis a vis social media:

“While government adoption and use of digital technologies remains uneven across federal agencies, the compelling value of social media to federal agencies has become clear:

- This phenomenon is here to stay. Its immediacy, ease of use and relatively low barrier to entry mean it will continue to displace other forms of communication and will become even more embedded in everyday life.
- Social media is more than just another route for one-time, one-way dissemination of static information. Government agencies can receive information back from populations, iteratively communicate with them about next actions, and reach and organize groups that then communicate with each other.
- Social media can connect large populations and remote groups, and content can be customized and updated almost instantly, at relatively low cost.
- And, most significantly, an entire generation of voters and taxpayers now expects to communicate and conduct transactions through social media. Many citizens do not even remember life without such interaction. This is the new normal.”100

The courts hold a special place in government as impartial arbiters of legal disputes. We, as court leaders, must fulfill the public’s trust in us to achieve the highest level of service while upholding the rule of law. As we have seen, social media are excellent tools to make this a reality—the challenge is to securely and effectively leverage these tools in the court setting.

99 Conference of Court Public Information Officers (CCPIO) annual surveys of U.S. judges; http://ccpio.org/publications/reports/
## ADDENDUM A

### I. Courts, Ministries of Justice, and Court Administrations

**Constitutional Court of Columbia**  
Facebook: [https://www.facebook.com/corteconstitucionaldecolombia](https://www.facebook.com/corteconstitucionaldecolombia)  
Twitter: [https://twitter.com/CConstitucional](https://twitter.com/CConstitucional)  
YouTube: [http://www.youtube.com/user/Cconstitucional/videos?sort=da&view=1](http://www.youtube.com/user/Cconstitucional/videos?sort=da&view=1)

**Dominican Republic’s Supreme Court of Justice**  
Twitter: [https://twitter.com/poderjudicialrd](https://twitter.com/poderjudicialrd)  
YouTube: [http://www.youtube.com/user/poderjudicialrd](http://www.youtube.com/user/poderjudicialrd)

**Supreme Court of El Salvador**  
Facebook: [https://www.facebook.com/CorteSupremaJusticiaSV](https://www.facebook.com/CorteSupremaJusticiaSV)  
Twitter: [https://twitter.com/CorteSupremaSV](https://twitter.com/CorteSupremaSV)

**Courts of Georgia**  
Facebook: [https://www.facebook.com/geocourts](https://www.facebook.com/geocourts)

**Court Service of Ireland**  
Facebook: [https://www.facebook.com/CourtsServiceofIreland?v=wall](https://www.facebook.com/CourtsServiceofIreland?v=wall)

**Court of Appeal of Lithuania**  
Facebook: [https://www.facebook.com/pages/Lietuvos-apeliacinis-teismas/162768620471758](https://www.facebook.com/pages/Lietuvos-apeliacinis-teismas/162768620471758)

**Norwegian Courts Administration**  
Facebook: [https://www.facebook.com/Domstoladministrasjonen](https://www.facebook.com/Domstoladministrasjonen)  
Twitter: [https://twitter.com/Domstolad](https://twitter.com/Domstolad)  

- Oslo District Court is also on Twitter: [https://twitter.com/oslotingrett](https://twitter.com/oslotingrett)

**Supreme Court of Mexico**  
Twitter: [https://twitter.com/scjn](https://twitter.com/scjn)

**Constitutional Court of Peru**  
Facebook: [https://www.facebook.com/tribunalconstitucionalperu](https://www.facebook.com/tribunalconstitucionalperu)  
Twitter: [https://twitter.com/_tc_peru](https://twitter.com/_tc_peru)  
YouTube: [http://www.youtube.com/user/ctusderechos#p/u](http://www.youtube.com/user/ctusderechos#p/u)

**Republic of Serbia, First Basic Court in Belgrade**  
Facebook: [https://www.facebook.com/pages/Prvi-osnovni-sud-u-Beogradu/207551739258879](https://www.facebook.com/pages/Prvi-osnovni-sud-u-Beogradu/207551739258879)

### II. International Courts and Tribunals

**Surveillance Court of Rome**  
Facebook: [https://www.facebook.com/tribunaledisorveglianza.roma](https://www.facebook.com/tribunaledisorveglianza.roma)  
Twitter: [https://twitter.com/tribsory](https://twitter.com/tribsory)

**Constitutional Council of France**  
Twitter: [https://twitter.com/conseil_constit](https://twitter.com/conseil_constit)

**Republic of Turkey Ministry of Justice**  
Facebook: [https://www.facebook.com/lynn.crowley.9#!/tcadaletbakanligi](https://www.facebook.com/lynn.crowley.9#!/tcadaletbakanligi)

**UK Ministry of Justice**  
Twitter: [http://twitter.com/mojgovuk](http://twitter.com/mojgovuk)  
YouTube: [http://www.youtube.com/user/MinistryofJusticeUK](http://www.youtube.com/user/MinistryofJusticeUK)  
Flickr: [http://www.youtube.com/user/MinistryofJusticeUK](http://www.youtube.com/user/MinistryofJusticeUK)

**International Criminal Court**  
Twitter: [https://twitter.com/IntlCrimCourt](https://twitter.com/IntlCrimCourt)  

**International Criminal Tribunal for the Former Yugoslavia**  
Facebook: [https://www.facebook.com/ICTYMKSJ](https://www.facebook.com/ICTYMKSJ)  
Twitter: [https://twitter.com/ICTYnews](https://twitter.com/ICTYnews)  
YouTube: [http://www.youtube.com/ICTYtv](http://www.youtube.com/ICTYtv)

**Special Tribunal of Lebanon**  
Twitter: [https://twitter.com/stlebanon](https://twitter.com/stlebanon)  
YouTube: [http://www.youtube.com/ctlebanon](http://www.youtube.com/ctlebanon)  
Flickr: [http://www.flickr.com/photos/stlebanon](http://www.flickr.com/photos/stlebanon)

**Special Court of Sierra Leone**  
Twitter: [https://twitter.com/SpecialCourt](https://twitter.com/SpecialCourt)

**Dubai International Financial Centre Courts**  
Twitter: [https://twitter.com/DIFCCourts](https://twitter.com/DIFCCourts)

**Special Judicial Tribunal Established to Resolve Disputes Involving Dubai**  
Twitter: [https://twitter.com/DWTribunal](https://twitter.com/DWTribunal)
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May, 2014

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http://ccpio.org/publications/reports/

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• There are a multitude of articles on Privacy, here are URL cites to a few good resources:
  o http://threatblog.org/identity-theft/privacy-settings-in-social-media-how-to-protect-your-profile-on-all-4-major-networks/
  o http://www.consumerreports.org/cro/2012/05/protect-your-privacy-on-facebook/index.htm
  o http://www.npr.org/blogs/alltechconsidered/2014/02/24/282061990/if-you-think-youre-anonymous-online-think-again
  o http://online.wsj.com/news/article/SB10001424052702303775504579395262543045176-IMyQIhxMT0MDIwNDEyNDQyWj
• “Court Debt Collection and New Media,” Courts Today, October/November 2013, page 20; www.courstoday.com
• Connected e-newsletter, National Center for State Courts, http://www.ncsc.org/connected
• Conference of Court Public Information Officers (CCPIO) annual surveys of U.S. judges on new media; http://ccpio.org/publications/reports/
Cisco Connected Justice Connects Law Enforcement, Courts, and Corrections

Cisco® Connected Justice provides a unified network platform to automate the justice workflow, remove the barriers between systems, and facilitate the transfer of information. With rich communications through all the steps of the process, it:

- Increases the pace of justice
- Reduces costs
- Lets courts work beyond the courthouse walls
- Improves public safety

Judge for Yourself
Learn more about Cisco Connected Justice technologies, services and partners at [www.cisco.com/go/connectedjustice](http://www.cisco.com/go/connectedjustice)

Join the Conversation
[21st Century Government Facebook Community](http://www.facebook.com/CiscoGovernment)
Cisco Government Blog
Cisco Government YouTube Channel
Cisco Government Twitter
Electronic Courts And The Challenges In Managing Evidence: A View From Inside The International Criminal Court

By Mark Dillon and David Beresford

Abstract:

Many courts face challenges dealing with large volumes of electronic evidence. Innovative solutions are in place, but challenges remain for those who manage our courts. Some of the international tribunals have embraced new technologies. High staff turnover leads to a knowledge drain and mobile devices which generate a significant amount of meta-data are issues that need to be addressed.

Keywords: eCourt; challenges, big data, meta-data, evidence, electronic evidence, managers, courts, administrators

1. Introduction

This paper introduces the reader to the systems of electronic evidence management, within the International Criminal Court (ICC), based in The Hague. It also highlights some of the technical challenges experienced by court administrators at the ICC during its first eleven years.

Courts do, and should, reflect what is happening in society. Up until quite recently, only large-scale litigation would entail the introduction of vast quantities of documentation as evidence. Although this produced a particular set of challenges, the courts were able to respond by up-scaling existing processes and applying technological solutions. Often, particularly in common law adversarial systems where parties engage in complex and protracted civil litigation, counsel for the parties often agree to jointly fund leasing of an electronic evidence-presentation infrastructure configured in the courtroom for the duration of the trial. Such solutions must include training the judge and key court staff in the operation of the system hardware and software.

Among the diverse global family of courts, the ICC’s procedural framework is unique and its governing legislation, including the Rome Statute and the Rules of Evidence and Procedure, incorporate elements of both the civil law and common law traditions.

Of course, the ICC is not the world’s first “international” court. At the conclusion of the Second World War, when the Allied powers came together in Nuremberg to prosecute the Nazi leaders most responsible for horrendous crimes of the Third Reich, the court managers had to organise a huge volume of documentary evidence. It often required translation

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Mark first became interested in the impact of technology on law when he worked in London on the tobacco litigation in the late 1990’s. Since then, and prior to joining the ICC, he was involved in the setting up of a number of ad hoc Courts in the United Kingdom. Mark is an advocate for access to justice and specifically how technology can advance that access.

David Beresford is a staff member of the Registry of the International Criminal Court. He specializes in e-Court systems and evidence management, but also performs the role of program manager for the ICC’s ERP system and project manager for other e-Court technologies. His background is in ICT, Digital Forensics, Business Analysis and Project Management.

The views and opinions expressed in this publication are those of the authors alone and should not be construed as the views of the International Criminal Court.

2For more details on how the ICC works see the following link: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/how%20the%20court%20works.aspx There are also a number of detailed books available on the Court, including Archibald International Criminal Courts – Practice, Procedure & Evidence, Khan, K.A.A., Dixon, R., Fulford, A (Sir) (QC), Sweet & Maxwell, 2005

3The International Military Tribunal was opened on November 20, 1945, in the Palace of Justice in Nuremberg
and conversion from manuscript to typescript. Without the benefit of technology, the Nuremberg officials managed to organize and present the evidence and to complete the trials within one year4.

As evidence managers, looking back today, theirs was an impressive undertaking. However, the challenges facing courts and court staff in the future are equally staggering. The existence of big data5, including the contents of mobile devices like smartphones and tablet computers, together with social media applications, present court managers with a whole new dimension of effective control and processing challenges complicated by vast increases in quantity in protracted civil and criminal litigation.

It is predicted that courts will struggle to effectively manage and present this type of evidence in the next decade. New procedures will need to be developed by national courts; in common law jurisdictions, where judges tend to be older, court staff will need to find innovative solutions to keep the processes running smoothly.

However, there are many encouraging examples of courts moving ahead and embracing technology to enhance their work practices.7 By sharing some of the experiences at the ICC with other court administrators, the authors hope to engage readers in a conversation about how best to overcome some of the pitfalls surrounding the management of electronic evidence.

2. Historical Overview
In the 1990s, considerable anticipation surfaced about how courts would modernise and take advantage of modern technological tools. The concept of electronic courts, or e-courts, emerged in discussions among innovative court administrators, lawyers and even some judges who could foresee the impact of technology on procedural aspects of the litigation process.

Some large-scale civil litigation, where high volumes of documents were discovered,8 forced the parties on practical and financial grounds to consider how to electronically manage their evidence. Although e-courts were first created on an ad hoc basis, some countries such as Singapore, soon installed litigation-management and support technology in their courtrooms with considerable success. In most existing court systems, however, the costs of investing in such systems are prohibitive for modest budgets, and they have not been able to embrace e-court technologies; their case and court information processing systems remain based on paper records. Most are not in a position to fund the costs of the digital equipment and technical expertise required to support it, although the costs continue to diminish with time.

In keeping with the international court theme of this paper, the International Criminal Tribunal for the former Yugoslavia (ICTY) established in 1993, decided to implement an e-court environment to manage the large quantity of original evidentiary documents submitted by the parties and relating to the various conflicts generated as a consequence of the dissolution of the former Yugoslav federation. Technical staff in the Tribunal, now in its 21st year, successfully managed to design and implement its electronic document management system for its vast archive of evidentiary material, and credit must be given to them who passed on their knowledge to the ICC, established a decade after the ICTY and also based in The Hague.

By 1997, it was estimated that there were as few as 50 high-technology courtrooms in the world.9

In the early years of the ICC, the majority of its documentary evidence was collected in hard copy, just as in the ICTY. To prepare such evidence for use in an e-Court, it had to be scanned or otherwise digitized. A system was created in both tribunals to organise the evidence by applying a Bates stamp numbering system, then scanning the hardcopy to create a digital or ‘softcopy’, which was then disclosed to the defence in an electronic format and duly presented in court electronically on monitors on the desks of the parties, Registry staff, and all judges.

4Held between 20 November 1945 and 1 October 1946
5Defined for the purposes of this article as data-sets which are so large that they are difficult to process using traditional data-processing tools.
6Both authors are from countries which use the common law tradition; Ireland and England
7For example, in the U.S., all federal and some state courts accept filings electronically.
8Also known in some jurisdictions as disclosure
10Called after the inventor, Edwin G. Bates. This is a process to place identifying numbers and/or date/time-marks on images and documents as they are scanned.
The ICC developed its system by applying the basic principles used to implement the ICTY’s system. However, the ICTY has now implemented its completion strategy in anticipation of completing its work. The ICC, by contrast, is a permanent tribunal and must introduce innovations to meet the challenge of collecting evidence in a variety of electronic formats generated by computers, smartphones, servers, internet protocols, and telephone records. This brave new world comprises unknown territory for the ICC, and innovative solutions to adequately manage and secure these types of evidence are expensive.

In the UK, the Bloody Sunday Inquiry, in which oral hearings commenced in 2000, was hailed as the future of courts, but the court had very little capacity to deal with electronic evidence, beyond presenting scanned images. The future as anticipated early in that decade is now very different.

One of the serious challenges for today’s court gurus that differ from a generation ago is the speed of change. It is now very difficult to anticipate needs and respond to them in five-year increments. Eight years ago, for example, no one could have predicted the impact Twitter would have on the electronic world. It did not even exist!

In 1993 in the United States, an innovative project was set up at the William and Mary Law School in Virginia, called the Courtroom 21 Project – later changed to the Center for Legal and Court Technology – with the goal “to improve the world’s legal systems through the appropriate use of technology.” Initiatives such as this began to appear elsewhere in the world, often a joint collaboration between theoretically oriented academics and practically oriented court system officials.

3. Electronic Courtroom – e-Court

The term e-court is already a part of the litigation lexicon. However, not all courts require a full suite of technology-equipped courtrooms in order to function. For example, courts with moderately sized caseloads of relatively simple civil and criminal cases do not require sophisticated electronic evidence presentation technology in order to survive. Indeed, some courts become too enamoured of new technology and end up acquiring systems that are unnecessary to accomplishing their mission. Any electronic technology deployed in the courtroom should respond to specific documented needs.

Although at times defined as a virtual web-based courthouse, the most generic e-court reference is to a courtroom with technology that accommodates trial and other proceedings without the introduction of paper records, whether filings, issuing of judgments, electronic disclosure or the presentation of evidence.

For many, an e-court can mean simply the use of videoconferencing. However, while an e-court might be so equipped, such technology is insufficient of itself to transform a courtroom into an e-court.

An e-court should be all of the above, a virtual web-based courthouse that provides 24/7 remote online access to court services, relevant records and information such as court calendars to all parties; it should include a modern courtroom that offers audio and videoconferencing capabilities, electronic disclosure, and digital presentation features, together with support for the automated electronic processing of high-volume cases.

Many courts now facilitate electronic filings, and back office staff in the vast majority of courts use modern technological solutions to ease their work-load. In New York there is a unified state court system which has a function specifically dedicated to e-courts. Although this refers less to the physical environment and more to the administrative back office processes, it allows parties to file certain documents electronically, receive electronic notifications of deadlines and access to on-going case dockets, filed cases and decisions. The new Supreme Court of England and Wales also has procedures in place for the electronic submission of court filings.

An obvious component in an e-court is the electronic presentation of evidence (see the screens behind the bench and the computer monitor in Picture 1 below). Often, the witness will be able to annotate a piece of electronic evidence, which can be saved by a technician and form part of a party’s evidence.

11 See: http://law.wm.edu/academics/intellectuallife/researchcenters/clct/
12 Many countries are actively looking at the benefits of technology for the courts, including, for example, India. See: http://ecourts.gov.in/
Another common feature is the ability of judges and lawyers to plug-in the stenographer’s feed and receive near real-time transcripts.

In determining whether to invest in e-court technology, the authors submit that there are three key factors to consider:

First, the use of technological support tools in courts must be procedurally compliant. At the ICC, presenting evidence in an electronic form is encouraged: “…in proceedings before the Court, evidence … shall be presented in electronic form wherever possible,” but such presentation is conditional and the “original form of such evidence shall be authoritative” In other words, if a dispute arises over the authenticity of an electronic document, the presiding judge may order the court clerk to retrieve the original and bring it into the courtroom.

Second, the technology should be “fit for purpose.” During the Bloody Sunday Inquiry in Northern Ireland, an expensive replica of the city of Derry was created using virtual reality modelling, allowing users to view the city as it was thirty years previous. Using a touch-screen monitor, a witness could trace his/her movements, which then could be saved. However, many elderly witnesses were confused by the complexity of the simulation, and in the end the court reverted back to relying on hard-copy maps of the city. The virtual reality model was rarely used for the remainder of the proceedings. An e-court system must be shown to provide significantly more value than the perceived difficulty of its use.

The final significant factor is the cost. Once prohibitively expensive for most courts, technology costs are coming down. However, the global economic downturn of the past six years has left budgets decimated, severely limiting courts’ financial capacity to invest in capital infrastructure projects. Going forward, court administrators should always ensure careful cost-benefit analyses that the benefits outweigh the costs.

Any e-court system must function 100% of the time when it is required. To ensure that it does, technicians will ensure that e-court systems include successive levels of redundancy. There is a temptation to have a dual system in place; hard copy and electronic. However, this just adds to the cost. Where a courthouse requires e-court capacity for occasional

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15 Regulation 26 (4)
16 Ibid
17 See: http://news.bbc.co.uk/2/hi/science/nature/1791596.stm
18 Photograph: Copyright © 2004 Mark P Dillon. Used with permission.
cases, it would be technological overkill to fully equip every courtroom in the courthouse with the e-court technology. Alternatively, simply outfitting one of the courtrooms may well suffice to meet the occasional large and complex case. Alternatively, in a major metropolitan area where complex and protracted cases are routine, so equipping all or most of the existing courtrooms may make the best sense to facilitate effective processing of the court’s caseload.

4. Electronic Evidence

Electronic evidence can take a number of forms. It could be, for example, a letter, written in manuscript which is scanned as a .tif or .pdf image; or it could be a document that was born digital, printed and then scanned. This type of record, which contains the same content, has completely different meta-data properties. Other records never exist in hard copy, for example, e-mail.

Within the ICC, all evidence is submitted for safekeeping to the custody of the Registrar, each with a Pre-Registration Form (PRF) completed by the collecting investigator. The information inserted on the form is transferred onto the record in the investigation database as are other classification data about the document, for example, its title and date.

Another type of evidence is data generated by computers. When using the Internet, computers generate data hidden from most users, but such data can be critical for the electronic identification of evidence. What is significant about this type of evidence is that it is both potentially voluminous and difficult to extract.

Electronic documents are also different from conventional documents in that they can be altered and copied more easily. Sometimes it can prove difficult to identify the author of such material.

The Council of Europe (CoE) has published a guide to electronic evidence for police officers, prosecutors and judges. Its most recent revision is May 2013, and we recommend it as essential reading for those interested in understanding this complex subject. Non-CoE court officials, police, and judges should also find it useful. Unfortunately, access to the document is restricted and while the link can be shared, access must be sought from the document creators themselves. Forensic recovery of data from computers is currently being embraced by the ICC, although to date very little such evidence has been used in our trial hearings. This will certainly change in the future, and the Court will look to the experience of others who are utilizing such techniques to extract evidence.

![Figure 1: The evidence management work-flow at the International Criminal Court](image)

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19 Stephen Mason defines electronic evidence as data (comprising the output of analogue devices or data in digital format) that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a communication system that is relevant to the process of adjudication.

5. The International Criminal Court
At the ICC, most evidence is collected and secured by the Office of the Prosecutor (OTP). As the Court has been in operation for over ten years, systems and workflows are in place for the collection, registration and disclosure of evidence in electronic format.

Disclosures between parties are managed by the parties directly; however, evidence to be presented in judicial proceedings must first be submitted to the Registry through an organisational section known as the Court Management Section (CMS).

5.1. E-Court
Two of the three ICC courtrooms are fully configured e-courts. With broadcast quality technology in place, hearings can be broadcast globally via the Internet; we have a thirty-minute delay built into the system as a safeguard.

All documentary evidence is presented as electronic images, and parties have access to all evidence collected for their case using the Ringtail e-Court system. Additionally, parties have e-mail access allowing them to communicate discreetly with their opposing party and with relevant support staff. With a large volume of evidence being submitted and transferred by multiple parties, it is important that secure systems are in place to manage the evidence. One such tool is an e-court protocol determined by the assigned Chamber early in proceedings.

5.2. e-Court Protocol and e-Court User Group
The ICC utilizes an electronic system to support day-to-day judicial proceedings pursuant to the Regulations of the Court\(^2\). The ICC Registry is responsible, taking into account the requirements of the judicial activity, for ensuring the authenticity, accuracy, and confidentiality of the evidence presented and for preserving the verbatim record of all proceedings through the integrated technology in the e-courtroom.\(^3\)

\(^{21}\) Used with permission, provided by Schmidt Hammer Lassen architects,
\(^{22}\) Regulation 26 deals with Electronic Management,
\(^{23}\) Ibid, Reg 26(2)
A technical protocol was created to guide the parties on how to manage their evidence administratively to ensure the seamless and unbroken court proceedings. This protocol is introduced into each case when the judges make a formal decision to include it. In the past, it differed from trial to trial, but we now plan to create and implement a single generic e-court protocol for all future cases.24

Although the majority of the evidence used in trial hearings is collected and secured by the OTP, it is important to ensure both a smooth running of the trial phase, and that the accused has full access to the evidence cache. Additionally, as the victims also have the right to be involved in the case as special parties. To coordinate use of the system by all categories of parties, we created an E-court User Group; managed by the Registry, group meetings enable all users to come together to discuss practical issues. The Group’s scope of activities can be outlined as follows:

1. Propose and decide on technical improvements/enhancements to the systems comprising the Court’s e-court (currently Ringtail and iTranscend);
2. Propose and decide on changes of the data structure of the systems;
3. Propose changes to the e-Court protocol(s) to the relevant Chamber(s) where required; and
4. Follow up on the implementation of the above proposed changes when required.

The User Group has become an important mechanism for sharing views and proposing change. It exists outside of the legal forum and deals directly with specific technical problems in a practical way.

As an example of the current topics being discussed is providing an extra identifying number, in-house it is referred to as an ‘EVD number’25, to an article of evidence. This EVD number has been utilised in the past to indicate a certain status of the evidence. However, in some cases the attribution of an EVD number has been ordered on all disclosed items, creating a heavy workload. Current proposals being considered are to cease EVD numbering in favour of a metadata field that would indicate the required status of the evidence.

5.3. Challenges Going Forward for the ICC

The authors recognise that it is not possible to determine e-court standards and protocols that simultaneously apply to all types of courts. However, there are some generic challenges that court administrators should include in their e-court-related planning.

As mentioned above, the existence of Big Data26 and ESI27 is forcing some courts to develop infrastructures capable of managing large volumes of evidence. New procedures will need to be drafted and tested. Furthermore, because ‘cloud storage’ now means case data can be stored anywhere in the world, access to material may present procedural challenges.

The presence of ESI is not merely an issue for international courts: many white-collar trials produce large volumes of electronic documents and files. These can present challenges for law enforcement officials who conduct investigations and prepare evidence for trial, and it may lead to delays in scheduling trials.

A second challenge is the high cost of sophisticated and advanced technology. Although the increasing use of wireless technology has diminished the complexity and expense of wiring courtrooms, such networks have to be highly secure. Moreover, courtrooms still need high-level specifications, and the rate of obsolescence is also very high.

Although media hype trumpets that the cost of storage is constantly diminishing, the falling costs are often off-set by increasing volume of storage required. The costs of commercial data storage can sometimes be hidden and easily overlooked.

Third, strategic development is also going to be difficult. An e-court typically is not a single solution; rather it requires that a number of disparate individual components be carefully integrated to create a seamless operating environment. As the individual components become obsolete and need to be replaced, the cohesion of the individual parts may not fit easily in future versions.

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25 EVD number is merely a document ID, much like a Bates number. However, it has been applied inconsistently and always in addition to the Evidence Registration Number (ERN)
26 According to IBM, Big Data is being generated by everything around us at all times. Every digital process and social media exchange produces it. Systems, sensors and mobile devices transmit it. Big data is arriving from multiple sources at an alarming velocity, volume and variety. See: http://www.ibm.com/big-data/us/en/
27 ESI is short for Electronically Stored Information; it is data that is created and stored in digital form. It is a term often used in connection with litigation and eDiscovery. It is specifically mentioned in Rule 34 of the Federal Rules of Civil procedure (US).
Fourth, although many universities now offer courses covering law and computers and although there is a growing industry of technologists providing litigation support to the legal profession, scepticism persists in the minds of senior judges and administrators about the viable use of technology in courts. Along with the introduction of any new solution must come the training of both the users and the decision makers.

A final challenge is the institutional knowledge drain that exists in an institution like the ICC. The majority of staff members are internationally recruited, and we experience high turnover in human resources. Many of the staff who first configured the e-courtrooms have moved on, and while there are undoubtedly upsides to having new staff with new ideas and carefully detailed system documentation, much of the institutional memory departs with the people who leave.

6. Conclusion
Access to justice can be achieved by making access to the courts more affordable. The more automated the process, often the cheaper it becomes. However, the recent economic crisis has meant that many governments are still cutting back on capital projects, and courts are likely to continue to feel squeezed.

Enthusiasts can be easily carried away by the idea that all courts would benefit from an upgrade to an e-court; to a certain extent, technology will creep into most courtrooms. However, there is no panacea, and one size does not fit all. In many cases, careful analysis will show that the benefits simply do not justify the cost.

The ICC is in the fortunate position of being at the beginning of the construction of its permanent premises, and therefore will be able to take advantage of new technologies being embedded within the physical infrastructure from day one. In the past ten years there has been an evolution in electronic evidence technology with a dramatic shift away from paper records in favour of digital. The main issue now is to scale the solutions to cope with the increasing volume.

For court administrators generally, our challenge is to support the administration of justice and provide greater access to justice. It is submitted that technology has a large role to play in both ideals.

Going forward, new technologies in the business world will further complicate the task of extracting a multitude of types of electronic data for evidentiary use, presenting challenges for those who manage our courts. It will require new skill-sets, and for many will create new opportunities. As ever, the necessity for strategic planning is critical.
Confidence in Alternative Dispute Resolution: Experience from Switzerland
By Christof Schwenkel, University of Lucerne, MA Public Policy and Management

Abstract:

Alternative Dispute Resolution plays a crucial role in the justice system of Switzerland. With the unified Swiss Code of Civil Procedure, it is required that each litigation session shall be preceded by an attempt at conciliation before a conciliation authority. However, there has been little research on conciliation authorities and the public’s perception of the authorities. This paper looks at public confidence in conciliation authorities and provides results of a survey conducted with more than 3,400 participants. This study found that public confidence in Swiss conciliation authorities is generally high, exceeds the ratings for confidence in cantonal governments and parliaments, but is lower than confidence in courts. Since the institutional models of the conciliation authorities (meaning the organization of the authorities and the selection of the conciliators) differ widely between the 26 Swiss cantons, the influence of the institutional models on public confidence is analyzed. Contrary to assumptions based on New Institutionalism approaches, this study reports that the institutional models do not impact public confidence. Also, the relationship between a participation in an election of justices of the peace or conciliators and public confidence in these authorities is found to be at most very limited (and negative). Similar to common findings on courts, the results show that general contacts with conciliation authorities decrease public confidence in these institutions whereas a positive experience with a conciliation authority leads to more confidence.

The Study was completed as part of the research project 'Basic Research into Court Management in Switzerland', supported by the Swiss National Science Foundation (SNSF). Christof Schwenkel is a PhD student at the University of Lucerne and a research associate and project manager at Interface Policy Studies. A first version of this article was presented at the 2013 European Group for Public Administration (EGPA) Annual Conference in Edinburgh.

Keywords: mediation, conciliation mechanisms, Switzerland, public confidence, public trust

1. Introduction

In the last decades, many European and non-European states have introduced or increased the use of mechanisms of Alternative Dispute Resolution. This has also been the case for Switzerland, where conciliation has a "long and profound tradition" (Meier 2003: 343) and "always has enjoyed a more prominent role than litigation and adjudication" (Meier 2008: 4). While historical examples for conciliation date back to the Middle Ages, the basis for the introduction of conciliation authorities, according to the model of the French juge de paix, was set in the time of the Helvetic Republic around 1800. By 1883, all Swiss cantons (except Basel-Stadt) had installed justices of the peace to settle disputes and to avoid litigation (Schynder 1985: 11). In the following decades, the cantons have developed different models for the process of conciliation and included these in their code of civil procedure (cf. Fischer 2008: 25).

When the unified Swiss Code of Civil Procedure (CCP) was enacted in 2011, the historical importance of conciliation was taken into account. Thus, Art. 197 CCP requires that each litigation shall be preceded by an attempt at conciliation before a conciliation authority. It is the authorities’ responsibility to "reconcile the parties in an informal manner" (Art. 201 Abs. 1 CCP). According to Art. 212 CCP the conciliation authorities are also authorized to render a decision in financial disputes.

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2 See Trenczek (2013: 26 ff). The European Commission for the Efficiency of Justice provides an overview of the types of Alternative Dispute Resolution applied in European States (European Commission for the Efficiency of Justice CEPEJ 2010: 107ff.).
3 In this context, the Federal Charter of 1291 is frequently quoted, which says that in a case of dissension between any of the “Eidgenossen”, the most prudent shall come forth to settle the difficulty between the parties.
4 An overview of the historical development of alternative dispute resolution in Switzerland is provided by Schynder (1985:1ff.), Fischer (2008: 3ff.) and Mertens Senn (2007: 53ff.)
with a value in dispute not exceeding 2,000 francs, if the plaintiff so requests. Mandatory conciliation proceedings were introduced to help the courts reduce their workload and to enable the parties with a low-threshold first access to the legal process (Botschaft CCP: 06.062: 7223).5

In addition, Art. 213 CCP provides the possibility to replace conciliation by mediation if all parties request so. The main difference between mediation and conciliation is that in conciliation procedures, the “conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement” (Sgubini/Prieditis/Marighetto 2004) – or even decides in small value claims.6 This article focusses on mandatory conciliation, as mediation is still a relatively new development in Switzerland (Meyer 2008: 4) and the choice to enter mediation is still voluntary, there is a limited structure that this study is taking into account.

In the context of the research project “basic research into court management in Switzerland”, Lienhard, Kettiger and Winkler (2012: 1) point to “the general dearth of empirical and other theoretical findings on the operations of the justice system and its interaction with society” in Switzerland. This includes the Swiss conciliation authorities, which have been rarely the subject of scientific research.7

Like the courts on a cantonal level, the organization of the conciliation authorities remains under the jurisdiction of the cantons (Art. 3 CCP). While conciliation proceedings are mandatory in every canton, the cantons are free to choose the institutional models of the conciliation authorities and the judicial skills and procedures of the authorities (cf. Fischer 2008: 80). In some cantons, every municipality has its own justice of the peace, selected by popular vote. In other cantons, judges of the cantonal courts are required to conduct the conciliation proceeding (Botschaft CCP 06.062: 7243). Thus, even with the unified CCP, the conciliation authorities vary widely among the 26 cantons. The first part of this paper provides an overview of the different institutional models of conciliation authorities and categorizes the cantons in to three types according to the institutional models of conciliation.

A core factor for successful dispute resolution is illustrated by the public confidence and the legitimation of the conciliation authorities. Similar to the confidence placed in courts (cf. Caldeira 1986), high public confidence in conciliation authorities can influence the parties’ willingness to bring conflicts into the system for resolution, to cooperate and to accept the result of a conciliation process. The relevance of public confidence in conciliation authorities is also emphasized by the fact that conciliation authorities are in many civil law cases the only institution within the justice system that people interact with, considering the relatively high rates of success of pre-trial settlement conferences (cf. Staubli 1999: 189ff.). Although several authors (Schnyder 1985: 28ff, Studler 1998: 2491, Zwicke 2010: 172) indicate that public confidence in Swiss conciliation authorities is high, there is no data available that describes the extent of the population’s support or confidence in these authorities. To fill this gap, a comprehensive survey with the inhabitants of all 26 Swiss cantons was conducted in the framework of the above mentioned research project “basic research into court management” and included questions about the conciliation authorities.8 The findings of this survey will be presented in the second part of this paper.

A third part will be dedicated to the analysis of factors influencing public confidence. In addition to the question of whether institutional differences shape public confidence, other factors and their possible effects on public confidence will be discussed. A quantitative analysis will be used to test the working hypothesis of this paper and to provide insight in possible causes for public confidence in the conciliation authorities. Part four sums up the results and provides some conclusive remarks.

The main questions to be addressed by this paper are the following:
- What factors affect the public’s confidence in the conciliation authorities?

5 The annual report 2012 of the association of justices of the peace in Zurich states that in 70 percent of all cases, a dispute settlement could be achieved. In total, the justices of the peace in Zurich dealt with 3’389 cases in 2012. (Verband der Friedensrichter und Friedensrichterinnen des Bezirks Zürich 2013: 4). The Swiss association of justices of the peace and conciliators also estimates that 50-70 percent of all cases can be resolved on the level of the conciliation authorities, usually within less than two months (Schweizerischer Verband der Friedensrichter und Vermittler 2014).
6 For differences between conciliation and mediation see also Mertens Senn (2007) and Mürner (2005: 126) and Meier (2003).
7 The works of Schnyder (1985), Staubli (1999), Fischer (2008) and Ziegler (2003) provide a good overview on the conciliation authorities and their work (with a focus on the justices of the peace) but are based on the time before the CCP and remain mainly on a descriptive level.
8 For the complete survey results and methods see Schwenkel/Rieder (2014).
Comparative political science frequently makes use of typologies, which provides the opportunity to classify broad empirical diversity into a few categories and thus to reduce complexity (Lauth 2009: 154). This is essential in order to compare a larger number of cases (for example the 26 Swiss cantons). My typology focuses on the conciliation authorities as defined in Art. 197 CCP; which defines all responsible authorities for mandatory conciliation procedures in civil law that do not concern matters of labor law or disputes relating to the tenancy and lease of residential and business property or disputes under the Gender Equality Act (Art. 200 CCP). For these disputes, cantons have installed special authorities. The exclusion of those authorities can be justified by the attempt to keep the typology simple and to put the focus on the "justices of the peace". Nevertheless, future in-depth projects on conciliation authorities should also include those specialized institutions.

The following three types were defined on the basis of the different institutional models in the 26 cantons:

- **Type 1**: This type includes the cantons where the conciliation authorities do not form a stand-alone-institution, but are incorporated into a court of first instance. This is most often the case in those cantons which have lately introduced mandatory conciliation proceedings as a consequence to the unified CCP. Here, the conciliators are principally professional jurists (judges/clerks). The number of cantons in this group is 5.

- **Type 2**: The cantons that are categorized as type 2 cantons have special conciliation authorities that are institutionally independent from the courts (but often share the same facilities as the courts). These conciliators have been elected by either the cantonal parliaments or by members of the courts and are often, but not always, jurists (but not judges at a court). The conciliation authorities are usually responsible for a larger number of municipalities. The number of cantons in this group is 10.

- **Type 3**: The last type comprises the most decentralized form of conciliation authorities. In type 3 cantons, the justices of the peace or conciliators are directly elected by the population. They are mostly laypersons and often work on a community level, where they have their own facilities (or even conduct the hearings in their homes). The number of cantons in this group is 11.

The following table gives an overview of all 26 cantons.

<table>
<thead>
<tr>
<th>Canton</th>
<th>Number of conciliation authorities</th>
<th>Election method</th>
<th>Remarks</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aargau (AG)</td>
<td>Friedensrichter (about 70 in 17 districts)</td>
<td>Popular vote (§14 GOG AG)</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Appenzell Innerrhoden (AI)</td>
<td>Vermittlerämter (6 in 6 districts)</td>
<td>Popular vote (Art. 38 KV AI)</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Appenzell Ausserrhoden (AR)</td>
<td>Vermittlerämter (3 in 3 districts)</td>
<td>Cantonal government (Art. 3 JG AR)</td>
<td>Popular vote before 2011</td>
<td>2</td>
</tr>
<tr>
<td>Bern (BE)</td>
<td>Regionale Schlichtungsbehörden (4 in 4 districts)</td>
<td>Cantonal parliament (Art. 86 GSOG BE)</td>
<td>Conciliation by the courts before 2011</td>
<td>2</td>
</tr>
<tr>
<td>Basel-Landschaft (BL)</td>
<td>Friedensrichter (30 in 15 districts)</td>
<td>Popular vote (§25 KV BL)</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Basel-Stadt (BS)</td>
<td>Conciliation by the presidents and clerks of the cantonal courts</td>
<td>No special election of conciliation authorities</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Freiburg (FR)</td>
<td>Conciliation by the Presidents of the courts of first instance</td>
<td>No special election of conciliation authorities</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Geneva (GE)</td>
<td>Conciliation by the courts of first instance</td>
<td>No special election of conciliation authorities</td>
<td>„Juge de paix&quot; are the guardianship authorities, not conciliation authorities</td>
<td>1</td>
</tr>
<tr>
<td>Glarus (GL)</td>
<td>Vermittlerämter (3 in 3 communities)</td>
<td>Popular vote (Art. 4 GOG GL)</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Graubünden (GR)</td>
<td>Vermittlerämter (11 in 11 districts)</td>
<td>Court of first instance (Art. 46 GOG GR)</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Jura (JU)</td>
<td>Conciliation by the courts of first instance</td>
<td>No special election of conciliation authorities</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Lucerne (LU)</td>
<td>Friedensrichter (4 in 4 districts)</td>
<td>Cantonal parliament</td>
<td>Popular vote in about 70</td>
<td>2</td>
</tr>
<tr>
<td>Canton</td>
<td>Number of authorities</td>
<td>conciliation method</td>
<td>Election method</td>
<td>Remarks</td>
</tr>
<tr>
<td>-----------------</td>
<td>-----------------------</td>
<td>---------------------</td>
<td>-----------------</td>
<td>-------------------------------------------------------</td>
</tr>
<tr>
<td>Neuchâtel (NE)</td>
<td>Conciliation by the courts of first instance</td>
<td>($§38 OGB LU)</td>
<td>districts before 2011</td>
<td></td>
</tr>
<tr>
<td>Nidwalden (NW)</td>
<td>Schlichtungsbehörde (1 per canton)</td>
<td>Cantonal government (Art. 40 GerG NW)</td>
<td>Popular vote in each municipality before 2011</td>
<td></td>
</tr>
<tr>
<td>Obwalden (OW)</td>
<td>Schlichtungsbehörde (1 per canton)</td>
<td>Cantonal government (Art. 6 GOG OW)</td>
<td>Popular vote in each municipality before 2011</td>
<td></td>
</tr>
<tr>
<td>St. Gallen (SG)</td>
<td>Vermittlungsämter in (19 in 7 districts)</td>
<td>Courts of first instance (Art. 22 GerG SG)</td>
<td>Popular vote in each municipality before 2011</td>
<td></td>
</tr>
<tr>
<td>Schaffhausen (SH)</td>
<td>Friedensrichter (4 in 4 districts)</td>
<td>Cantonal parliament (Art. 2 JG SH)</td>
<td>Popular vote in each municipality before 2011</td>
<td></td>
</tr>
<tr>
<td>Solothurn (SO)</td>
<td>Friedensrichter (about 100 in communities and districts)</td>
<td>Popular vote (§4 GO SO)</td>
<td>Mandatory conciliation only when both/all parties live/are based in the same community (§5 GO SO)</td>
<td></td>
</tr>
<tr>
<td>Schwyz (SZ)</td>
<td>Vermittler (31 in communities and districts)</td>
<td>Popular vote (§7 GOG SZ)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thurgau (TG)</td>
<td>Friedensrichter (18 in 18 districts)</td>
<td>Popular vote (§20 KV TG)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ticino (TI)</td>
<td>giudice di pace (38 in 38 districts)</td>
<td>Popular vote (Art. 35 Constituzione TI)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uri (UR)</td>
<td>Schlichtungsbehörde (1 per Kanton)</td>
<td>Cantonal government (Art. 10 GOG UR)</td>
<td>Popular vote in each municipality before 2011</td>
<td></td>
</tr>
<tr>
<td>Vaud (VD)</td>
<td>Justices de paix (9 in 9 districts)</td>
<td>Cantonal court (§24 LOJV VD)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Valais (VS)</td>
<td>Gemeinderichter (more than 100 in the communities)</td>
<td>Popular vote (Art. 63 KV VS)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Zug (ZG)</td>
<td>Friedensrichter (11 in 11 communities)</td>
<td>Popular vote (§ 37 GOG ZG)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Zurich (ZH)</td>
<td>Friedensrichter (148 in the communities)</td>
<td>Popular vote (§ 40 und 41 GPR ZH)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

9 The following table illustrates the categorization of the 26 cantons into the three institutional types.

<table>
<thead>
<tr>
<th>Type 1 cantons</th>
<th>Type 2 cantons</th>
<th>Type 3 cantons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basel-Stadt</td>
<td>Appenzell Ausserrhoden</td>
<td>Aargau</td>
</tr>
<tr>
<td>Freiburg</td>
<td>Bern</td>
<td>Appenzell Innerhoden</td>
</tr>
<tr>
<td>Geneva</td>
<td>Graubünden</td>
<td>Basel-Landschaft</td>
</tr>
<tr>
<td>Jura</td>
<td>Lucerne</td>
<td>Glarus</td>
</tr>
<tr>
<td>Neuchâtel</td>
<td>Nidwalden</td>
<td>Solothurn</td>
</tr>
<tr>
<td></td>
<td>Obwalden</td>
<td>Schwyz</td>
</tr>
<tr>
<td></td>
<td>St. Gallen</td>
<td>Thurgau</td>
</tr>
<tr>
<td></td>
<td>Schaffhausen</td>
<td>Ticino</td>
</tr>
<tr>
<td></td>
<td>Uri</td>
<td>Valais</td>
</tr>
<tr>
<td></td>
<td>Vaud</td>
<td>Zug</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Zurich</td>
</tr>
</tbody>
</table>

9 The main factor for grouping the cantons was the cantonal laws on court organisation. To gain further insight, explorative interviews with the following persons have been conducted: Margaretha Reichlin (former justice of the peace, Luzern), Sandra Bättig (justice of the peace, Willisau), Urs Flury (president „Schweizerischer Verband der Friedensrichter und Vermittler”), Urs Wicki (president „Verband der Friedensrichterinnen und Friedensrichter des Kantons Zürich”). For a similar, but in some aspects differing categorization, see a recently published article by Meier and Scheiwiller (2014: 170).
Apart from a concentration of French speaking cantons among the type 1 cantons (Geneva, Jura, Neuchâtel), there are no obvious structural factors that would correlate with the allocation of the cantons to either one group. All types would include small cantons (Jura, Obwalden, Appenzell Innerhoden), cantons with a large number of inhabitants (Geneva, Berne, Zurich) rural (Jura, Uri, Glarus) and rather urban cantons (Basel-Stadt, Vaud, Zurich).

3. Public Confidence in Conciliation Authorities

Other than the executive or legislative power which can use repressive or financial instruments to enforce their decisions, the judiciary has “no influence over either the sword or the purse” (Hamilton 1788). For this reason, the support of the population is of critical to legitimizing the authority of third power (cf. Caldeira 1986, Hardin 1998: 10), which also incorporates the conciliation authorities. A theoretical basis for my analysis can be found in Easton’s (1957) concepts of support. According to Easton, support is a crucial input to keep a political system operating (Easton 1957: 390ff.). Easton distinguishes between specific and diffuse support. Whereas specific support describes the approval of (short-term) outputs and performances of political authorities (cf. Easton 1975), diffuse support focuses on institutions and consists of a “reservoir of favourable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants” (Easton 1975: 444). This means, that citizens may disagree with what an institution does but continue to concede its authority (Caldeira/Gibson 1995: 357). Empirical research frequently uses public confidence in institutions to measure support in institutions (Benesh 2006; Norris 1999; Wenzel/Bowler/Lanoue 2003; see also Gibson/Caldeira/Spence 2003: 354 and Bühlmann/Kunz 2011: 320).

Measuring public confidence in the conciliation authorities can provide information about both, diffuse and specific support – the latter especially in those cases where outputs are known or people took part in a conciliation process. However, considering that the majority of the people are not directly concerned with the outputs of conciliation authorities, I consider public confidence as an appropriate item to measure mostly diffuse support in the conciliation authorities. The reflections of Bühlmann and Kunz (2011: 320 f.) are also in favor of this approach. Based on Hardin (2002) I define confidence in the conciliation authorities as the public belief that those authorities have the right intentions towards citizens and are competent to act in specific ways in specific conciliation proceeding.

I put the focus of my analysis on the public confidence in institutions, also described as political trust (Newton 2001) which represents a mostly a vertical relationship between citizens and institutions. Public confidence in institutions or political trust differs from concepts of generalized trust and social capital, which focus on the (horizontal) trust amongst citizens (Freitag 2001, Newton 2001). Social capital theory sees in the fact that citizens trust each other a core factor for the functioning of democracies (Putnam 1993, Almond/Verba 1965, Freitag/Bühlmann 2005, cf. Kaina 2004). Generalized trust and public confidence in institutions are assumed to have a reciprocal relationship in which aspects of generalized trust can be regarded as a precondition for political trust and vice-versa (cf. Kaina 2004, Gabriel/Kunz 2002, Kouvo 2011, Newton 2001).

My data on public evaluations of the cantonal courts and conciliation authorities was collected in an online-survey of 3,484 people which was conducted between March and April 2013 in collaboration with the survey institute LINK. The population from which we selected the sample consisted of 120’000 members of the “LINK online-panel” which were actively recruited via telephone. All persons in the online panel were between 18-75 years old, used the internet at least once per week for private purposes and were able to respond in German, French or Italian. To maximize the representativeness of the survey, quotas for canton, gender and age were used when selecting the respondents.

A minimum of 101 respondents from each canton took part in the survey. In the seven most populous cantons, the number of participants amounted to at least 200. Participants were asked to rate several institutions according to the confidence they have in these institutions. The respondents were given an 11-point scale ranging from “no confidence” (0) to “complete confidence” (10). In addition, the participants were asked whether they had ever been in contact with a conciliation authority and whether they took part in an election of justices of the peace or conciliators. All questions that concerned cantonal institutions focused on the respondents’ canton of residence.

10 Specific and diffuse support is not independent from each other. Thus positive experiences with an institution could lead in a longer perspective to an increase of diffuse support (see Loewenberg 1971).
11 LINK institute for market and social research (http://www.internet-panel.com)
12 Given a 95% level of confidence, the margin error is at +/-1.66% for Switzerland and at +/-9.75 % for the cantons with the smallest survey sample (when the distribution of the answers is 50:50).
13 The respondents could choose between a German, French and Italian version of the questionnaire. For “confidence” we used the term Vertrauen, confiance and fiducia.
The following table shows some of the main results of the survey. In order to make general assumptions for the Swiss population, we used weighted data considering the different population size of each canton.

<table>
<thead>
<tr>
<th>Public Confidence in</th>
<th>Mean</th>
<th>SD</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cantonal conciliation authorities</td>
<td>6.81</td>
<td>2.16</td>
<td>3,071</td>
</tr>
<tr>
<td>Cantonal courts</td>
<td>7.04</td>
<td>2.22</td>
<td>3,179</td>
</tr>
<tr>
<td>Federal Supreme Court</td>
<td>7.28</td>
<td>2.24</td>
<td>3,172</td>
</tr>
<tr>
<td>Federal Administrative Court</td>
<td>7.14</td>
<td>2.28</td>
<td>3,086</td>
</tr>
<tr>
<td>Federal Criminal Court</td>
<td>7.14</td>
<td>2.27</td>
<td>3,076</td>
</tr>
<tr>
<td>Cantonal government</td>
<td>6.34</td>
<td>2.11</td>
<td>3,304</td>
</tr>
<tr>
<td>Cantonal parliament</td>
<td>6.16</td>
<td>2.09</td>
<td>3,293</td>
</tr>
</tbody>
</table>

Notes: Confidence is measured based upon the responses to the question: Please tell me on a score of 0-10 how much confidence you have in the following institutions. Zero means no confidence at all, 10 means complete confidence. Calculations were based on weighted data.

The data shows that confidence in institutions is generally high. This has also been shown in recent other surveys as the Swiss Electoral Study (SELECTS) and an analysis of the ETH centers for security studies (Szvircsev Tresch/Wenger 2013: 101). While those studies used a general question on confidence in justice/courts, our survey questions allowed us to distinguish between conciliation authorities and courts at the federal and cantonal level. A remarkable result is that the respondents showed less confidence in conciliation authorities than in courts, but rated their confidence in the conciliation authorities higher than in the canton’s government or parliament.

Does the confidence in the conciliation authorities differ between the 26 Swiss cantons? The following illustration indicates that there is some, though it is a rather small variance between the subnational states, ranging from a value of 6.2 in the canton of Valais to a value of 7.5 in the canton of Zug. Due to the small N for some cantons (minimum of 101 contacts, with non-response), one should be careful not to overestimate the differences at the cantonal level.

Figure 1: Public confidence in conciliation authorities

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14 The results of SELECTS 2011 show a mean value (on an score of 0-10) for trust in Justice/Courts of 6.71 and in cantonal authorities of 6.27. (http://www2.unil.ch/selects/). The ETH Centre for Security Studies (Szvircsev Tresch/Wenger 2013: 101) used the same rating scale and shows a value of 7.1 for the item "trust in courts".

15 The aim of this paper is to analyze the differences in confidence in conciliation authorities. However, finding explanations for the differences between the levels of confidence in the different institutions (with a focus on the conciliation authorities) would be an interesting task of further research.
Notes: N per canton ranges from 101 to 304. Total N is 3'484. The lower n values used to calculate the mean values per canton are due to non-response in certain questions.

With regard to the three institutional types of the conciliation authorities (see Table 2); the combined averages in terms of public confidence show the following small differences:

- **Type 1**: 6.87 (n=459)
- **Type 2**: 6.82 (n=1'152)
- **Type 3**: 6.79 (n=1'460)

The results of the survey also provide information about the interaction of the population with conciliation authorities and courts. The main results are aggregated for Switzerland and illustrated in the following table.

<table>
<thead>
<tr>
<th>Cantonal conciliation authorities / justices of the peace; conciliators</th>
<th>Contact with</th>
<th>Participation in an election of</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>21.0%</td>
<td>24.3%</td>
<td>3,484</td>
</tr>
<tr>
<td>Cantonal courts / judges of cantonal courts</td>
<td>30.9%</td>
<td>25.7%</td>
<td>3,484</td>
</tr>
<tr>
<td>Federal Court</td>
<td>2.0%</td>
<td>-</td>
<td>3,484</td>
</tr>
</tbody>
</table>

Notes: Contacts with institutions is measured using responses (yes, no) to the questions: Did you ever have a contact with a conciliation authority/conciliator/justice of the peace in your canton; did you ever have a contact with a court in your canton? Did you ever have a contact with a federal court? Participation in an election is measured using responses (yes, no) to the questions: Did you ever vote in an election of a justice of the peace/conciliator in your canton? Did you ever vote in an election of judges in your canton? Calculations are based on weighted data.

The findings confirm that conciliation authorities play an important role in the interaction of the Swiss population with the justice system. Twenty-one percent of the Swiss population have once been in contact with a conciliation authority in their canton and a quarter of the population has once taken part in an election of justices of the peace or conciliators. The results however differ strongly between the cantons, as shown in the following chart.

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16 Due to a limited number of questions in the survey, it was only possible to distinguish between positive and negative experiences with those contacts, not between the type/reason for the contact (e.g. as a party in a conciliation, as a person seeking for information, personal contacts with a justice of the peace). The original question in French, German in Italian was formulated as follows: "Vous-même, avez-vous déjà eu affaire une fois...?/Hatten Sie selbst schon einmal ... zu tun?/Lei stesso(a) ha già avuto a che fare con...?".
Notes: The bars show the percentage of positive answers for each canton to the question: “Did you ever have a contact with a conciliation authority/conciliator/justice of the peace in your canton.”

In terms of direct contacts, the largest interaction can be found in the cantons of Vaud and Ticino with 40 and 37, the fewest contacts are made in the canton of Solothurn, where only 7 percent of the population has dealt with such an authority in some way.

As expected the number of persons that claim to have taken part in an election of justices of the peace or conciliators is the lowest in cantons that do not have popular vote (e.g. 0 percent in Jura). The maximum rate of participation in an election can be found in the canton of Valais with 59 percent participation.

If respondents responded that they had been in contact with conciliation authorities, they were asked whether their experience was positive, rather positive, neither positive nor negative, rather negative or negative. The results indicate that fifty-nine percent of the respondents had a positive or rather positive experience with conciliation authorities, 24 percent described their experience as neither positive nor negative and only 17 percent perceived it as negative or rather negative. These results are similar to the findings concerning the experience with cantonal courts, where the ratio between positive/rather positive and negative/rather negative is 56 to 19 percent.

4. Explanations for Public Confidence in Conciliation Authorities
What drives public confidence for the conciliation authorities and what does not? In this chapter I will discuss possible influences, develop my working hypotheses and show what factors may and may not affect public confidence in conciliation authorities by conducting a bivariate and a multivariate analysis.18

4.1. Institutional Model
I assumed that the institutional model of the conciliation authorities (meaning the organization of the authorities and the selection of the conciliators) influences the public confidence in these authorities. The theoretical basis for this assumption is found in approaches of New Institutionalism (cf. Hall/Taylor 1996, DiMaggio/Powell 1991). Norris (1999: 234) concludes in her empirical analysis that institutional arrangements are significantly related to political support. In the case of the courts, it is emphasized by Benesh (2006: 699) that the public may be sensitive to the potential (or even assumed) effects of institutions and therefore view some institutional models of courts more favorably than others. Other scholars also show how institutional models influence confidence in courts (Bühlmann/Kunz 2011, Kelleher/Wolak 2007).

A key element of an institution is the selection of its members. Thus it is assumed that electoral systems play a major role in linking citizens and the state and affect the support of the population for political institutions (cf. Norris 1999: 225 f.). Kiener (2001: 256) emphasizes that the election of judges by the people in Switzerland provides the third power with direct support by the population and thus fosters the connection of the judiciary with the people. Mürner (2005: 19) also states that judges that have been elected by popular vote are more likely regarded as representatives of the population. Mürner (2005: 19) uses the expression “Vertrauensrichtertum” and assumes that citizen-centered aspects of the judicial institutions in Switzerland (such as oral proceedings, proceedings in local dialects, no statutory requirement to be represented by a lawyer) foster public confidence in the judiciary. Schnyder (1985: 28ff.) refers to the relevance of the popular vote of justices of the peace with respect to their democratic legitimation. The author assumes that the population shows a higher level of confidence in a conciliation authority, whose members have been selected by the population on a local level, than when appointed by a higher level institution. (Schnyder 1985: 30). Stadler (1998: 2481) also considers the democratic legitimation of the justices of the peace in Switzerland with strong roots in the municipalities as a reason for a high acceptance of the conciliation authorities. Stadlers assumption is resumed by Zwickel (2010: 172). Kelleher and Wolak (2007: 710) generally point out that confidence in subnational institutions builds on perceptions that they are more accessible and responsive to the public. Bauer et al. (2012) emphasize that people may generally display more trust in decentralized institutions because they are perceived as closer to them and their daily life.20

17 The total number of respondents to this question is 730 (the question was only valid for persons with contacts with conciliation authorities).
18 In the bivariate analysis, the relation between two variables is measured; in the multivariate analysis a regression uses several independent variables to show how values on the dependent variable change due to changes on the independent variables.
19 In contrast to the earlier, classical Institutionalism, which focuses on a – mainly normative – description of different administrative, legal and political structures, New Institutionalism tries to explain other phenomena with institutions as an independent variable (Thelen/Steinmo 1992: 3).
20 Freitag (2013) also emphasizes in an article in the Neue Zürcher Zeitung that direct democracy, decentralization and deliberation provide the basis for the high level of political trust in Switzerland.
In this context I assume that public confidence is higher, if the members of the conciliation authorities have been elected by popular vote (type 3), which can also be seen as a proxy for greater decentralization of the conciliation authorities and the importance of lay persons as justices of the peace. In accordance with the findings of Kelleher and Wolak (2007: 718) about US state institutions, I recognized the existence of a negative influence of more professionalised and less citizen-linked institutions on public confidence. Taking into consideration that conciliation authorities should facilitate a “low-threshold” access to justice, I further assume that this is less easier achieved in cantons where the judges and clerks of cantonal courts act as conciliation authorities (type 1) than in the other cantons.

A possible negative effect of popular vote on confidence is that judges selected by the people may be regarded as less independent (cf. Cann/Yates 2008: 309, Benesh 2006: 702), especially in the case of partisan elections or contested elections where candidates have to prove their accountability and run for re-election. Given the fact that elections of justices of the peace in Switzerland are mostly low key and non-controversial, I consider this to be a negligible factor. However, the independence of conciliation authorities may be jeopardized in those cases where justices of the peace are elected at the small municipality/"local level" and parties may have a personal connection with the person responsible for the conciliation. Justices of the peace or conciliators that work as laypersons could be further regarded as less professional and thus influence public confidence in a negative way. In view of the Swiss system of direct democracy and the importance of common sense in dispute resolution (cf. Ludewig-Kedmi/Angehrn 2008), I think that the positive aspects of popular vote outweigh the negative aspects. This leads me to the following first hypothesis:

**H1:** Confidence in conciliation authorities is enhanced in cantons where the conciliation authorities are a stand-alone institution and members of the conciliation authorities can be elected by popular vote.

### 4.2. Participation in an Election

Weaver and Rockmann (1993: 446) emphasize that, even where institutional arrangements do contribute to overall differences in specific capabilities, moreover, these effects usually are strongly mediated by other institutional and non-institutional factors“. One important institutional factor on the individual level (which is strongly influenced by the institutional models in each canton) is the participation in an election of justices of the peace or conciliator, especially given the fact that almost a quarter of the Swiss population has at least once taken part in an election of justices of the peace or conciliators. Hence I follow the assumption that the participation in an election strengthens the connection between the conciliation authority and the population (cf Norris 1999: 225ff.). This leads me to the following hypothesis:

**H2:** Confidence in conciliation authorities is enhanced by the participation in an election of justices of the peace or conciliators.

### 4.3. Personal Contacts and Positive Experience

As stated above, our survey data shows that more than 20 percent of the population has had a personal contact with a conciliation authority in their canton. This leads me to the question whether or not those contacts influence the confidence in the conciliation authorities.

Several studies indicate that public support in local or state courts is in fact reduced by interaction with or knowledge about them (Benesh/Howell 2001, Wenzel/Bowler/Lanoue 2003, Benesh 2006, Sarat 1977: 439, cf. Rottman 1998). A reason for this can be found in the “adversary nature of the system, (where) defendants and plaintiffs may have a more negative impression of local courts” than people who did not interact with a court (Wenzel/Bowler/Lanoue 2003: 194). Furthermore, direct contacts with courts could erode favorable stereotypes that people had before experienced the court system themselves (cf. Benesh 2006: 699). Experiencing the formal aspects of a procedure or having difficulties in understanding the technical terminology of judges may, for example, lead to a decrease of confidence in the courts.

When it comes to outcomes, it has be shown that the way people and their problems are managed when they are dealing with a court has more impact upon trust and confidence than the actual outcome of an individual’s case (Tyler 2007: 26, van den Bos/Wilek/Lind 1998, Thibaut/Walker 1975, Lind 1995: 11). The evidence for the importance of procedural justice (and the effort to find a way to increase the willingness to accept third-party decisions) is thus regarded by Tyler (2007: 26) as a major motivation for alternative dispute resolution. On the background of the less formal character of alternative dispute resolution, together with the pursuit of the conciliation authorities to acknowledge parties’ positions and to create a positive climate, I assume that contacts with conciliation authorities shapes public confidence in these authorities in a positive way (differently than contacts with courts). This leads me to the following working hypothesis:

**H3:** Confidence in conciliation authorities is enhanced by personal contacts with conciliations authorities.
A second hypothesis puts the evaluation of the contacts people had with the conciliation authorities into consideration and can be connected to the performance of the institutions. I assume that a positive experience with a conciliation authority also shapes confidence in a positive way.

H4: Confidence in conciliation authorities is enhanced by personal contacts with conciliation authorities that have been experienced as positive.

Our data allows us to distinguish between “positive”, “rather positive”, “neither positive nor negative”, “rather negative” and “negative” experiences with conciliation authorities. However, due to the limited number of questions in the questionnaire, no data was collected on the possible outcome of a settlement conference or on the reasons why people were not satisfied with their experience.

4.4. Generalized Trust

A core factor of social capital theory is generalized trust or trust between citizens (cf. Freitag 2004: 91). Freitag and Bauer (2013: 26) describe generalized trust as an “attitude towards people in general, encompassing people beyond one’s immediate familiarity, including strangers”. The theoretical discussion of Kaina (2004: 529) illustrates how generalized trust can be regarded as a crucial precondition for confidence in institutions. Although some empirical research has found that the relationship between generalized trust and institutional confidence to be rather small (Kaase 1999, Newton/ Norris 1999), I agree with the assumption that people who express attitudes of trust toward others are more likely to express a higher confidence in authorities (cf. Cann/Yates 2008: 314, Caldeira/Gibson 1992: 647, Zmerli/Newton 2008). This seems to be even more evident in the case of the conciliation authorities as they should provide a low level connection between citizens and the justice system. To measure generalized trust, we used the following, frequently used survey question: “Generally speaking, would you say that most people can be trusted or that you can’t be too careful in dealing with people? ” (cf. Freitag/Bühlmann 2009).21 This leads to the following hypothesis:

H5: Confidence in conciliation authorities is enhanced by a high level of generalized trust.

4.5. Individual Level Controls

I will use several control variables that are often found to be associated with public confidence in institutions (see, among others, Cann/Yates 2008, Caldeira/Gibson 1992, Kunz 2009, Wenzel/Bowler/Lanoue 2003, Norris 1999, Hetherington 1998, Gambetta 1988). Based on the findings of Norris (1999: 233), I assume that education is positively related to confidence in institutions. A higher level of education (measured by the highest degree achieved) can enable citizens to better understand processes of the legal system and thus can contribute to more confidence in the conciliation authorities. Furthermore, the knowledge about institutions is probably higher among higher educated citizens. Cann and Yates (2008: 307) discuss the influence of citizens’ knowledge about their state courts on public confidence and show that research has found conflicting views on this question. In their analysis about the state courts, they however found a negative effect of court knowledge on diffuse support (Cann/Yates 2008: 314). Since our survey did not include a question on knowledge about the conciliation authorities, I will use the answers to the question “How informed do you consider yourself about courts in your canton” as a proxy to measure information in the justice system in general and also included this variable in my analysis.

Further demographic controls included in my analysis are political views (the respondents were asked to choose their position on a left/right scale), size of the municipality, age and gender. As Switzerland is a multilingual country, I also included language as an important independent variable. Hereby I distinguish between German speaking on the one hand and French/Italian speaking on the other hand (measured by the language in which respondents filled out the questionnaire).

4.6. Quantitative Analysis

To estimate the influence of the different independent variables on the confidence in conciliation authorities, I conducted bi- and multivariate analysis.22 The bivariate correlations were calculated for several variables and the (dependent) variable “confidence in the conciliation authorities” The following table shows the results of the correlation analysis:

21 For a discussion of this measurement and more elaborated ways to measure generalized trust see Newton (2001) and Kouvo (2011).
22 A descriptive analysis has shown that the distribution of the dependent variable (confidence in the conciliation authorities) is nearly normal. Moreover, I regard the level of the dependent variable (rating scale) as interval, which gives me the opportunity to calculate correlations and ordinary least squares (OLS) regressions.
Table 5: Bivariate analysis: Correlation with public confidence in conciliation authorities

<table>
<thead>
<tr>
<th>Variables</th>
<th>Pearson's r</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Institutional type of conciliation authority</td>
<td>-.013</td>
<td>3,046</td>
</tr>
<tr>
<td>- Participation in an election of justices of the peace/conciliators</td>
<td>-.010</td>
<td>3,071</td>
</tr>
<tr>
<td>- Contact with a conciliation authority</td>
<td>-.103*</td>
<td>3,071</td>
</tr>
<tr>
<td>- Positive experience with a conciliation authority</td>
<td>.625*</td>
<td>705</td>
</tr>
<tr>
<td>- Contact with a cantonal court</td>
<td>-.106*</td>
<td>3,071</td>
</tr>
<tr>
<td>- Positive experience with a cantonal court</td>
<td>.497*</td>
<td>1,006</td>
</tr>
<tr>
<td>- Confidence in cantonal courts</td>
<td>.786*</td>
<td>3,010</td>
</tr>
<tr>
<td>- Confidence in cantonal government</td>
<td>.696*</td>
<td>3,060</td>
</tr>
<tr>
<td>- Generalized trust</td>
<td>.200*</td>
<td>3,021</td>
</tr>
<tr>
<td>- Education</td>
<td>.071*</td>
<td>3,042</td>
</tr>
<tr>
<td>- Informed about cantonal courts</td>
<td>.242*</td>
<td>2,870</td>
</tr>
<tr>
<td>- Population size municipality</td>
<td>.065*</td>
<td>3,071</td>
</tr>
<tr>
<td>- Political Views: Left</td>
<td>.109*</td>
<td>2,206</td>
</tr>
<tr>
<td>- Language: German speaking</td>
<td>.000</td>
<td>3,071</td>
</tr>
<tr>
<td>- Age</td>
<td>-.030</td>
<td>3,071</td>
</tr>
<tr>
<td>- Gender: Female</td>
<td>.002</td>
<td>3,071</td>
</tr>
</tbody>
</table>

Notes: *significant at a 0.01 level, a value of +1.0 would stand for a perfect linear relationship between two variables.

The results show that there is no significant relationship between the institutional type of conciliation authority and the confidence in the institutions. The second independent variable (participation in an election of conciliation authorities) was also not significantly related with public confidence. A small and significant negative relationship was found for contact with the conciliation authorities. This indicates that people show in fact less confidence in the conciliation authorities when they have had a personal interaction with them.

Confidence in conciliation authorities was positively related with positive experience with a conciliation authority (value of .625), which supports my fourth hypothesis. Here, one has to take into account that the number of persons that could answer this question (due to the majority of people not having contacts with conciliation authorities) is much lower than for the other results of the correlation (n=705). There was also a correlation (value of .497) between positive experience with cantonal courts and confidence in conciliation authorities, which can lead to the assumption that positive experience with the judiciary in general, enhances the confidence in its institutions. The highest correlation was found for confidence in cantonal courts (.786) and cantonal governments (.696). This can also be also taken as a strong indicator for conciliation authorities being regarded as one institution among others in the political system.

There is a significant correlation between generalized trust and confidence in the conciliation authorities (with a value of .200). Further calculations show that confidence in other institutions also correlates with generalized trust, but the highest value is in fact reached for the conciliation authorities.

The bivariate analysis shows that confidence in the conciliation authorities is higher among the more highly educated, persons that feel themselves informed about cantonal courts, persons that live in larger municipalities and persons that evaluate their political views as rather left than right. Surprisingly there was no correlation between language and our dependent variable. Concerning questions about confidence in other institutions, there are however (small) differences when considering the language. Thus French and Italian speaking persons show more confidence in all three federal courts. Confidence in cantonal courts and governments is slightly lower among French speaking persons.
In a multivariate OLS-regression, I estimated the influence on my dependent variable, taking into account several independent variables that have seemed to be relevant in the bivariate analysis.\textsuperscript{25} I calculated different models. The first (Model 1) using the independent variables (IV) of my H1, H2, H3, and H5 the second (Model 2.1) using the independent variables of H1, H2, H4 and H5. Since contact with a conciliation authority (IV H3) is a necessary condition for the evaluation of the experience with the authority (IV H4), the two variables are not included in the same model. Due to a correlation between positive experience and information about courts (value of .345), another model (Model 2.2) excludes the latter variable.

Table 6: Multiple regression: Estimates for public confidence in conciliation authorities

<table>
<thead>
<tr>
<th>Variables</th>
<th>Model 1</th>
<th>Model 2.1</th>
<th>Model 2.2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>3.861</td>
<td>-0.331</td>
<td>0.594</td>
</tr>
<tr>
<td>(15.92)</td>
<td>(-0.731)</td>
<td>(1.434)</td>
<td></td>
</tr>
<tr>
<td>- Institutional Type of conciliation authority (IV H1)</td>
<td>-0.001</td>
<td>0.049</td>
<td>0.042</td>
</tr>
<tr>
<td>(-0.080)</td>
<td>(1.598)</td>
<td>(1.387)</td>
<td></td>
</tr>
<tr>
<td>- Participation in an election of justices of the peace/conciliators (IV H2)</td>
<td>-0.053*</td>
<td>-0.118*</td>
<td>-0.089*</td>
</tr>
<tr>
<td>(-2.771)</td>
<td>(-3.775)</td>
<td>(-2.894)</td>
<td></td>
</tr>
<tr>
<td>- Contact with a conciliation authority (IV H3)</td>
<td>-0.103*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(-5.620)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Positive Experience with a conciliation authority (IV H4)</td>
<td></td>
<td>0.567*</td>
<td>0.613*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(17.864)</td>
<td>(20.526)</td>
</tr>
<tr>
<td>- Generalized trust (IV H5)</td>
<td>0.184*</td>
<td>0.127*</td>
<td>0.125*</td>
</tr>
<tr>
<td></td>
<td>(10.097)</td>
<td>(4.206)</td>
<td>(4.173)</td>
</tr>
<tr>
<td>- Informed about cantonal courts</td>
<td>0.209*</td>
<td>0.137*</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(11.395)</td>
<td>(4.263)</td>
<td></td>
</tr>
<tr>
<td>- Population size municipality</td>
<td>0.058*</td>
<td>0.026</td>
<td>0.026</td>
</tr>
<tr>
<td></td>
<td>(3.228)</td>
<td>(0.865)</td>
<td>(0.879)</td>
</tr>
<tr>
<td>N</td>
<td>2,814</td>
<td>661</td>
<td>684</td>
</tr>
<tr>
<td>Adjusted R(^2)</td>
<td>0.093</td>
<td>0.434</td>
<td>0.414</td>
</tr>
</tbody>
</table>

Notes: Dependent Variable is confidence in conciliation authorities. Beta values. Numbers in parentheses are t values. \(*\)significant at a 0.01 level.

All models show that the institutional type of conciliation authorities is not related with the population’s level of confidence in the conciliation authorities. This leads me to the rejection of my first hypothesis. Despite broad range of institutional models, the confidence in the conciliation authorities is not affected by this. H2 and H3 can also be rejected: neither the contacts with conciliation authorities, nor the participation in an election of these authorities are related with higher confidence. The influence of these independent variables on the dependent variable leads in fact in the opposite direction, and is smaller than for example the evaluation of information about cantonal courts. In Model 1, the independent variables explain 9.3 percent of the variance in the dependent variable. Thus, the overall prediction by the factors included in Model 1 (with generalized trust and information about courts being the best predictors) is rather small.

When considering the experience, people have had with conciliation authorities (Model 2.1), the adjusted R\(^2\) increases to a value of 43.4 percent. Hence, positive experience explains part of the confidence in the authorities. It is however obvious that in Model 2.1 and 2.2 estimations only include cases where people actually have had an experience with a conciliation authority. The exclusion of the variable “information about cantonal courts” (model 2.1) does not contribute to a relevant difference on the other predictors or the adjusted R\(^2\).\textsuperscript{26}

\textsuperscript{25} Due to a more limited number of responding persons (increase in N) and the absence of an additional contribution to a variance on the dependent variable, I don’t show a regression that includes the variable „political view“.

\textsuperscript{26} The use of grouped aggregate level data (as type of conciliation authorities according to the canton a person lives in) with individual data (as contacts with conciliation authority) can result in a downward bias in the estimated standard errors of OLS estimates (cf. Moulton 1990). The reason for this is that people within the same canton will often be similar to each other. A common strategy to provide more accurate estimates is the use of multilevel modelling (Freitag/Bühlmann 2005: 586; Kelleher/Wolak 2007). With the relationship between my institutional independent variable (type of conciliation authorities) and the dependent variable being already very limited, I however refrain from conducting a multilevel analysis.
5. Summary and Conclusions

Alternative dispute resolution plays an important role in the Swiss judicial system. In civil law, it is mandatory for each litigation session to be preceded by an attempt at conciliation (Art. 197 CCP). Each canton has developed its own model for the conciliation authorities, which leads to a broad range in terms of institutional models. Today, more than 600 justices of the peace or special conciliation authorities deal with the conciliation procedures in the 26 Swiss cantons. In 5 cantons the conciliation proceedings are conducted by courts of first instance, 10 cantons have special conciliation authorities whose members are elected by cantonal parliaments and courts and are usually responsible for a larger number of municipalities. In another 11 cantons, justices of the peace or conciliators mostly work as laypersons on the municipal level and have been elected by popular vote. Our survey results show that 21 percent of the population has been in contact with a conciliation authority in their canton. Twenty-four percent of the population indicated that they have taken part in an election of justices of the peace or conciliators.

Taking into account the importance of the institutionalized alternative dispute resolution by the conciliation authorities in Switzerland, my analysis puts a focus on the population’s confidence in these authorities. I assume that a high confidence in conciliation authorities will influence the willingness to bring conflicts into the system for resolution and to accept the results of a settlement conference. The results of our survey show that public confidence in the Swiss conciliation authorities is generally high (6.81 on a 0-10 scale). It exceeds the ratings for confidence in the cantonal governments and parliament, but is lower than confidence in the cantonal or federal courts.

The main finding of my analysis is that public confidence in the conciliation authorities is not influenced by the institutional factors taken into account. Despite the differences in terms of institutional models, public confidence is not significantly higher (or lower) among people from cantons with direct vote and decentralized conciliation authorities. The quantitative analysis also shows that participation in an election of justices of the peace or conciliators does not foster public confidence in that institution.

Several studies have shown that experience with courts leads to a decrease of public confidence in the courts or the judiciary (e.g. Benesh/Howell 2001, Wenzel/Bowler/Lanoue 2003, cf. Rottman 1998). Given the "alternative" nature of alternative dispute resolution I hypothesized that personal contact with the conciliation authorities contributed to more public confidence in those institutions. However the results show that an experience with conciliation authorities influences public confidence in a negative way. Hence, my analysis doesn’t support the fact that the conciliation authorities are being regarded much different from other institutions within the justice system. This is underlined by the finding that public confidence in courts positively correlates with public confidence in the conciliation authorities.

The results show that public confidence in conciliation authorities is enhanced by a positive experience with these authorities. Taking into consideration that only 17 percent of the respondents with contacts with conciliation authorities deemed their experiences as negative, I assumed that the quality of the settlement conferences and the quality of the involved conciliators contributed highly to the satisfaction with a conciliation. This in turn fosters the confidence in the authorities for the people who have been in contact with a conciliation authority.

Why do the results differ from what I have expected? One explanation can be that if it is not the institutional models of the conciliation authorities, the performance and personal aspects of their incumbents shape public confidence – no matter if they are judges at a court in the canton’s capital or laypersons in each municipality of the canton. Further research should therefore focus on qualitative methods and investigate the mechanisms of settlement conferences or character traits of justices of the peace or conciliators. Such an analysis could also provide additional information for institutional factors and put more emphasis on characteristics that may have been neglected in my analysis (for example if elections for justices of the peace are controversial). It has also been shown that the variables “contacts with conciliation authorities” and “positive experience with a conciliation authority” are probably too comprehensive, as they include all types of contacts and experiences. Thus, a more profound examination should include further distinctions, for example about whether respondents were one of the parties in a settlement conference, if they were in favor of the outcome or if they just considered their experience as positive due to a fair procedure.
Appendix: Variables, hypothesis and Operationalizations

<table>
<thead>
<tr>
<th>Dependent Variable</th>
<th>Hypothesis</th>
<th>Operationalisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidence in conciliation authorities</td>
<td>Measured by survey results: “please tell me on a score of 0-10 how much confidence you have in cantonal conciliation authorities/conciliators/justices of the peace”</td>
<td></td>
</tr>
</tbody>
</table>

### Independent Variables

**Institutional determinants: design**
- Institutional type of conciliation authority  
  H1  
  Categorisation in 3 institutional types, mainly based on cantonal laws on court organisation.
- Participation in an election of justices of the peace/conciliators  
  H2  
  Measured by survey results: “Did you ever vote in an election of a justice of the peace/conciliator in your canton?” (yes; no; I don’t know)
- Contact with a conciliation authority  
  H3  
  Measured by survey results: “Did you ever have a contact with a conciliation authority/conciliator/justice of the peace in your canton?” (yes; no; I don’t know)

**Institutional determinants: performance**
- Positive experience with a conciliation authority  
  H4  
  Measured by survey results: “How would you describe your experience with the conciliation authority/conciliator/justice of the peace?” (positive, rather positive, neither positive nor negative, rather negative, negative, I don’t know)

**Generalized trust**
- Generalized trust  
  H5  
  Measured by survey results: “Generally speaking, would you say that most people can be trusted or that you can’t be too careful in dealing with people?” (most people can be trusted; you can’t be too careful; I don’t know)

### Individual level controls
- Informed about cantonal courts  
  Measured by survey results: “how well are you informed about the courts in your canton?” (Very well; rather well; rather poor; poor; I don’t know)
- Education  
  Measured by survey results: “What is your highest education? (basic education, vocational school, college/university)
- Population size municipality  
  Panel information: number of inhabitants per municipality
- Language  
  Survey results: selected language (German, French, Italian)
- Age  
  Panel information: age of respondent
- Gender  
  Panel information: gender (female; male)

References


Selecting and Hiring Psychologically Fit Probation Officers: A Focused Examination Of The PEPQ / PSR Plus

By D. Scott Herrmann, Ph.D. ABPP and Scott Bedwell, Ph.D.¹

Abstract:

Selecting and hiring the most psychologically fit probation officers is of utmost importance to the judiciary, court administration and the public good. This study examined the predictive validity of the PsychEval Personality Questionnaire / Protective Service Report Plus (PEPQ / PSR Plus) in its ability to predict job performance in a combined cohort of pre-employment and incumbent probation officer candidates. Analyses revealed a statistically significant ability to predict performance problems, demonstrating that the PEPQ / PSR Plus is a valid and clinically useful psychological screening tool for the assessment and selection of probation officer candidates.

Keywords: probation, employment, selection, assessment, mental health

1. Introduction

Court administered probation services are expanding exponentially throughout the world. In the United States, there are more than 2,000 separate probation agencies that fall under the jurisdiction of the courts² and the employment of probation officers is expected to increase by 11% between 2006 and 2016³. In Europe, there has been a crucial development of probation services over the past 10 to 15 years in several countries that previously had none (e.g., Romania, Bulgaria, Moldova, Slovakia, and the Czech Republic). Moreover, other countries that have had well established probation services have also experienced a marked expansion of their systems (e.g., England and Wales, Finland, and the Netherlands)⁴.

With considerable growth and development of probation services, a burgeoning area of practice for police and public safety psychologists is the provision of psychological evaluation services for probation departments. Specifically, conducting psychological evaluations of current and prospective employees is a human resource service that has been used for decades in police agencies, but has only recently begun to emerge within probation departments. Three of the most common types of psychological evaluations performed with law enforcement agency personnel include; pre-employment psychological evaluations (conducted to assist agencies with making informed hiring decisions), fitness for duty psychological evaluations (conducted with an incumbent employee whose behavior has given cause for concern regarding psychological suitability for work), and special duty psychological evaluations (conducted with an incumbent employee who is being considered for a duty assignment requiring specialized psychological traits or characteristics). While such psychological evaluations within probation departments are becoming increasingly common, very little scientific work has been done in this area, and it has been largely ignored by those who work within the realm of police and public safety psychology. For example, an EBSCO Host query of the PsychInfo, PsychArticles and Medline databases conducted in January 2014 for Boolean terms “probation,” ”psychological” and “selection” yielded zero on-point hits regarding psychological evaluation and selection of probation officers. While the psychological literature is replete with empirical studies assessing the efficacy of selection tools for predicting police officer performance⁵, the literature is barren regarding the psychological assessment and selection of probation officer candidates. Nevertheless, the consequences of failing to “select out” psychologically ill-equipped candidates for probation officer positions can be extreme, and can put probation departments, courts and the general community at-risk.

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² Abadinsky, 2009
³ U.S. Department of Labor, 2008
⁴ Van Kalmthout & Durnescu, 2008
2. Similarities and Differences Between Probation and Police Officers

Of importance, psychological evaluations of probation officer candidates should not be construed as being simply synonymous with police psychological evaluations since there are a number of important and noteworthy distinctions between these groups. Namely, there are important differences in essential job functions, in the philosophical orientation of departments, and in the background and training requirements of police versus probation officers. Moreover, in most jurisdictions in the United States, police officers are required to be certified under a state’s Peace Officer Standards & Training Board (P.O.S.T.), while probation officers may or may not be required to be P.O.S.T. certified. Additionally, a police officer’s primary job function is usually defined as “protecting and serving the community,” whereas probation officers’ duties typically entail providing both enforcement and rehabilitative services under the auspices of the courts. Van Kalmthout & Durnescu (2008) note that, in Europe, most probation department mission statements reflect the traditional ethos of protecting the public by effectively enforcing community sanctions, but some jurisdictions have begun to include the victim as a probation service beneficiary (e.g., Austria, Bulgaria, Catalonia, Romania, and Scotland). They also note that others have begun to embrace a restorative justice paradigm (e.g., the Czech Republic, Hungary, Slovakia). Nevertheless, the end result is that each probation department finds itself in the unique position of articulating whether “rehabilitation,” “enforcement,” or some combination thereof is emphasized in its agency’s primary mission statement.

Although important distinctions do exist across job functions, there are also a number of important similarities between police and probation officers. Chief among them is the growing trend within the United States for probation officers to carry firearms, with many probation departments empowering their officers with full arrest authority. As reported by Small & Torres (2001), all but 11 of the 94 federal judicial districts in the United States currently permit U.S. probation officers to carry firearms. As an outgrowth of such changes, probation agencies have found themselves having to adapt by providing firearms tactical training to their officers, and by establishing policies and procedures for the certification and/or decertification of officers who carry firearms. With these enhanced functions come increased risks, not only to probation officers themselves, but also to probation departments and the general community. While a comprehensive review of both similarities and differences between probation and police personnel is beyond the scope of this article, the interested reader is referred to Herrmann & Broderick (2011) for a thorough analysis and review of this topic.

3. Purpose of Study and Research Question

As a result of the multifaceted nature of probation work, and because the consequence of failing to select out unsuitable probation officer candidates can be great, it is imperative that only the best and most aptly suited individuals are selected and hired into probation officer positions. By extension, it is also of utmost importance to know whether psychological screening instruments and procedures historically used and validated with police officer candidates are valid and useful for the screening and selection of probation officer candidates in the 21st century. Because important distinctions exist between these vocational cohorts, it cannot be assumed that assessment devices will have equivalent validity with police and probation officer candidates. Predictive validity must be established and cannot be assumed. The purpose of the present study was therefore to conduct a focused predictive validity analysis of one psychological screening instrument, the PsychEval Personality Questionnaire / Protective Services Report Plus [PEPQ / PSR Plus] (IPAT, 2003), for the assessment and selection of probation office candidates. Specifically, this study sought to determine whether PEPQ / PSR Plus scale scores and/or composite factor scores could be used to predict inadequate performance among a combined sample of new-hire probation officers candidates and veteran “incumbent” probation officers. The specific research question addressed in this study was as follows:

“Is the PEPQ / PSR Plus a valid selection tool for use with probation officer candidates?”

4. Method

4.1. Participants

Participants in this study were a convenience sample of 202 pre-employment and 60 incumbent probation officer candidates who were administered the PEPQ / PSR Plus as part of a psychological screening and selection process. The 202 pre-employment candidates were seeking initial employment as probation officers, while the 60 incumbent officers were seeking departmental authorization to carry a firearm in the commission of their job duties.

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6 see Burton, Latessa & Baker, 1992; and Small & Torres, 2001 for a more thorough discussion of this matter
7 Roscoe, Duffee, Rivera & Smith, 2007; Small & Torres, 2001
4.2 Measures
The PEPQ / PSR Plus is a computer generated report produced by the Institute for Personality and Ability Testing, Inc. (IPAT), and is based upon a test taker’s responses to the 325 item PEPQ test. Part I of the PEPQ contains all 185 “normal” personality items that are derived from the 16PF Fifth Edition\(^9\). Part II of the PEPQ contains 140 items that tap into “pathology oriented” constructs, some of which were drawn from Raymond Cattell’s early work in the 1960s on the Clinical Analysis Questionnaire (CAQ), and some of which were drafted more recently. The PEPQ / PSR Plus report is intended to provide a global view of an individual by assessing 16 “normal” personality dimensions as well as 12 “pathology oriented” dimensions. The PEPQ / PSR Plus report specifically contains information about a test taker’s response style, an interpretive section regarding four Protective Services Dimensions, a profile summary of five global factor scales, 16 primary factor scales, 12 pathology oriented scale scores, and a pathology oriented index providing a snapshot of a test taker’s psychological health in four critical composite dimensions. A summary of the various PEPQ / PSR-Plus test dimensions is presented in Table 1 and Table 2. Because the PEPQ / PSR Plus report includes an assessment of pathology oriented constructs that may convey disability or impairment related information, the PEPQ / PSR Plus is only applicable for use in pre-employment screening contexts in the United States where a “conditional offer” letter of employment has been tendered (see EEOC, 1995, 1997, 2000).

<table>
<thead>
<tr>
<th>Table 1  Complete List of PEPQ / PSR Plus Primary and Composite Scales</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Response Style Indicators</strong></td>
</tr>
<tr>
<td>Impression Management</td>
</tr>
<tr>
<td>Infrequency Index</td>
</tr>
<tr>
<td>Acquiescence Index</td>
</tr>
<tr>
<td><strong>Protective Services Dimensions</strong></td>
</tr>
<tr>
<td>Emotional Adjustment (EA)</td>
</tr>
<tr>
<td>Integrity / Control (IC)</td>
</tr>
<tr>
<td>Intellectual Efficiency (IE)</td>
</tr>
<tr>
<td>Interpersonal Relations (IR)</td>
</tr>
<tr>
<td><strong>Global Factor Patterns</strong></td>
</tr>
<tr>
<td>Extraversion (EX)</td>
</tr>
<tr>
<td>Anxiety (AX)</td>
</tr>
<tr>
<td>Tough-Mindedness (TM)</td>
</tr>
<tr>
<td>Independence (IN)</td>
</tr>
<tr>
<td>Self-Control (SC)</td>
</tr>
<tr>
<td><strong>Pathology Oriented Indices</strong></td>
</tr>
<tr>
<td>QuickEval Index</td>
</tr>
<tr>
<td>Depressive Characteristics Index</td>
</tr>
<tr>
<td>Distorted Thought Patterns Index</td>
</tr>
<tr>
<td>Risk Taking Index</td>
</tr>
<tr>
<td><strong>16PF Primary Factor Scales</strong></td>
</tr>
<tr>
<td>Warmth (A)</td>
</tr>
<tr>
<td>Reasoning (B)</td>
</tr>
<tr>
<td>Emotional Stability (C)</td>
</tr>
<tr>
<td>Dominance (E)</td>
</tr>
<tr>
<td>Liveliness (F)</td>
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<tr>
<td>Rule-Consciousness (G)</td>
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<tr>
<td>Social Boldness (H)</td>
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<tr>
<td>Sensitivity (I)</td>
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<tr>
<td>Vigilance (L)</td>
</tr>
<tr>
<td>Abstractness (M)</td>
</tr>
<tr>
<td>Privateness (N)</td>
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<tr>
<td>Apprehension (O)</td>
</tr>
<tr>
<td>Openness to Change (Q1)</td>
</tr>
<tr>
<td>Self-Reliance (Q2)</td>
</tr>
<tr>
<td>Perfectionism (Q3)</td>
</tr>
<tr>
<td>Tension (Q4)</td>
</tr>
</tbody>
</table>

Table 2  Qualitative Description of PEPQ / PSR Plus Primary Scales, Dimension Scales and Pathology Oriented Scales

\(9\) Cattell, Cattell, & Cattell, 1993
<table>
<thead>
<tr>
<th>Primary Scales</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Warmth (A)</td>
<td>Addresses tendency to be warmly involved with people versus socially reserved</td>
</tr>
<tr>
<td>Reasoning (B)</td>
<td>Assesses ability to problem solve using reasoning</td>
</tr>
<tr>
<td>Emotional Stability (C)</td>
<td>Assesses ability to cope with day-to-day life and its challenges</td>
</tr>
<tr>
<td>Dominance (E)</td>
<td>Assesses tendency to exert one's will over others versus accommodating others' wishes</td>
</tr>
<tr>
<td>Liveliness (F)</td>
<td>Assesses exuberance, enthusiasm and spontaneity versus restraint and decorum</td>
</tr>
<tr>
<td>Rule-Consciousness (G)</td>
<td>Addresses extent to which cultural standards of right and wrong are internalized and used to govern behavior</td>
</tr>
<tr>
<td>Social Boldness (H)</td>
<td>Assesses likelihood of being adventurous versus shy and restrained</td>
</tr>
<tr>
<td>Sensitivity (I)</td>
<td>Assesses degree of emphasis placed on aesthetic values and sentimentality versus a more utilitarian focus</td>
</tr>
<tr>
<td>Vigilance (L)</td>
<td>Assesses tendency to be trusting versus being vigilant about others motives and intentions</td>
</tr>
<tr>
<td>Abstractness (M)</td>
<td>Assesses tendency to be oriented towards internal mental processes and ideas rather than practicalities</td>
</tr>
<tr>
<td>Privateness (N)</td>
<td>Addresses the tendency to be forthright and open versus being non-disclosing</td>
</tr>
<tr>
<td>Apprehension (O)</td>
<td>Assesses tendency to worry about things and feel insecure</td>
</tr>
<tr>
<td>Openness to Change (Q1)</td>
<td>Assesses tendency to embrace experimentation and novel approaches versus opting for the status quo</td>
</tr>
<tr>
<td>Self-Reliance (Q2)</td>
<td>Assesses tendency to maintain contact with others versus enjoying time alone and autonomy</td>
</tr>
<tr>
<td>Perfectionism (Q3)</td>
<td>Assesses tendency to be organized and plan ahead</td>
</tr>
<tr>
<td>Tension (Q4)</td>
<td>Assesses degree of nervous tension and restless energy</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Protective Service Dimensions*</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Emotional Adjustment (EA)</td>
<td>Assesses how the respondent adjusts to challenging situations, and the likelihood of remaining calm and composed under uncertain or stressful situations</td>
</tr>
<tr>
<td>Integrity/Control (IC)</td>
<td>Assesses the degree to which the respondent is dependable, conscientious and self-controlled</td>
</tr>
<tr>
<td>Intellectual Efficiency (IE)</td>
<td>Assesses decision-making style and the ability to reason and solve problems</td>
</tr>
<tr>
<td>Interpersonal Relations (IR)</td>
<td>Assesses respondent’s style of relating to others and typical preferences for solitude and independence versus interaction and cooperation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Pathology Oriented Scales</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health Concerns (HC)</td>
<td>Assesses physical well-being versus sense of poor physical health</td>
</tr>
<tr>
<td>Suicidal Thinking (ST)</td>
<td>Assesses degree of hopelessness, despair, anhedonia and thoughts of self-destruction</td>
</tr>
<tr>
<td>Thrill Seeking (TS)</td>
<td>Assesses risk-taking behaviors, perceived restlessness, and tendency to favor stimulation and excitement</td>
</tr>
<tr>
<td>Anxious Depression (AD)</td>
<td>Assesses degree of nervousness, tension or feeling overwhelmed</td>
</tr>
<tr>
<td>Low Energy State (LE)</td>
<td>Assesses feelings of fatigue and psychomotor retardation</td>
</tr>
<tr>
<td>Self Reproach (SR)</td>
<td>Assesses feelings of guilt, self-condemnation and worthlessness</td>
</tr>
<tr>
<td>Apathetic Withdrawal (AW)</td>
<td>Assesses loss of interest and enjoyment in life, and a tendency to be socially withdrawn and detached</td>
</tr>
<tr>
<td>Paranoid Ideation (PI)</td>
<td>Assesses degree of suspiciousness, sense of injustice and</td>
</tr>
<tr>
<td>Threat Immunity (TI)</td>
<td>Assesses degree of inhibition, sensitivity to social censure, and nonconforming attitude</td>
</tr>
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<td>---------------------</td>
<td>------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Alienation/Perceptual Distortion (AP)</td>
<td>Assesses disordered thinking, impaired reality testing and feelings of alienation</td>
</tr>
<tr>
<td>Obsessive Thinking (OT)</td>
<td>Assesses obsessional types of behavior over which an individual reports little self-control</td>
</tr>
<tr>
<td>Psychological Inadequacy (PS)</td>
<td>Assesses respondents feelings of inadequacy, self-worth and ability to cope</td>
</tr>
</tbody>
</table>

Note: * = Composite Factors

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5. Procedure
Prior to being evaluated, all probation officer candidates read and signed an informed consent document detailing the components of their psychological evaluation, and granted authorization to use data generated from their evaluation process for anonymous and aggregate research purposes. Permission to conduct research was also granted by the adult and juvenile chief probation officers for whom third-party psychological evaluations were being conducted. All probation officer candidates were administered a battery of written psychological tests which included the PEPQ / PSR Plus. Candidates also participated in an approximate 50 minute face-to-face interview with a licensed psychologist as part of their evaluation process. The clinical interview covered 10 topical areas thought to be relevant in the assessment of those who are interested in probation work. The interview was scored and an applicant’s score was combined with information from other sections of the overall psychological assessment battery. As is typical in law enforcement screenings, candidates were not given any direct feedback regarding their scores or interview performance, which was a blind evaluation process to the candidates. While a multimodal assessment battery was used in the evaluation and selection process, only scores generated from the PEPQ / PSR Plus report were examined for the purpose of this study since it was judged to be the most robust component of the assessment battery, and was designed to be a comprehensive, "stand-alone" psychological screening tool.

6. Design and Analysis
For each officer in this study, critical incidents were collected as part of the day to day operations of the department. These critical incidents served as the outcome of interest in the present study (i.e., the criterion variable). Critical incidents were defined as negative incidents in the officer’s work record that could result in extending an initial probationary period, being released prior to completing a probationary period, or incidents of gross misconduct by an officer. Most officers in the sample were not involved in any critical incident and of those that were, even fewer were involved in more than one critical incident. As a result, the critical incidence criterion was coded as a dichotomous variable with a base rate of involvement in one or more critical incidents of 14.9%.

The data for the applicants and incumbents were combined for the current study as the sample size for the incumbent group was too small to allow for meaningful analyses of the relationship between the PEPQ / PSR dimensions and inappropriate behaviors. A total of 262 officers were included in the analyses. A logistic regression model was utilized as the criterion was dichotomous and the scales from the PEPQ / PSR Plus are continuous in nature. Logistic regression is considered more appropriate than linear regression for modeling outcomes with discrete categories. The PEPQ / PSR dimension scales and the 12 pathology oriented scales were entered into the model as the predictor variables and a backward elimination method was used to refine the model. Backward elimination starts with the most complex model, known as the saturated model, and eliminates terms in the model starting with the highest order interactions one at a time based on a comparison of the saturated model to the less complex model. This process continues until the comparison of the model chi-squares are not significantly different. The initial saturated models for critical incidents were comprised of the four PEPQ / PSR dimensions, the 12 pathology oriented scales, and all possible two-way and three-way interactions. Higher-order interactions were not considered both because there was no theoretical rational to include them and the model would have been unnecessarily complex given the current data set. Also, the PEPQ / PSR dimensions were used

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10 IPAT, 2003
11 Agresti, 1996
12 Agresti, 1996
rather than the 16 primary factors as they were the point of focus in the current study, and using these four composite dimensions rather than the 16 primary factors greatly simplified the saturated model.

7. Results
A qualitative description of each of the 16 primary factors, four protective services dimensions and the 12 pathology oriented scales are presented in Table 2. Means and standard deviations for each are presented in Table 3. The final model for critical incidents criterion consisted of an interaction for Interpersonal Relations and Intellectual Efficiency PEPQ / PSR dimensions along with their associated main effects and a main effect of the Alienation and Perceptual Distortion scale. The weights for the model are presented in Table 4. As the weights in Table 4 indicate, both of the PEPQ / PSR dimensions were negatively related to the probability of a critical incident, and the Alienation and Perceptual Distortion scale was positively related to the probability of a critical incident. In other words, as scores on the Interpersonal Relations and Intellectual Efficiency PEPQ / PSR dimensions increased, the likelihood of a critical incident statistically decreased. Conversely, as scores on the Alienation and Perceptual Distortion scale increased, the probability of a critical incident statistically increased.

Interpreting a logistic function, such as the results of a logistic regression model, tends not to be an intuitive process. As a result, the logistic regression model is typically translated into either a probability or an odds ratio. This is done by re-scaling the weights for the predictors and the constant by the inverse of the logarithmic function. Both the original and the re-scaled values for predictors in the model are shown in Table 4. The third column in Table 4 (labeled “Exp (B)”) displays the re-scaled weights, while the last two columns display the lower and upper confidence intervals for the re-scaled weights, respectively.

Interpreting the re-scaled weights revealed that, 1) a one-unit increase on the PEPQ / PSR Plus Alienation/Perceptual Distortion scale resulted in the probability of a critical incident increasing by a 36%, 2) a one-unit increase on the Interpersonal Relations composite resulted in a decrease in the probability of a critical incident by 62%, and 3) a one-unit increase on the Intellectual Efficiency composite resulted in a decrease in the probability of a critical incident by 50%. Similar to multiple linear regressions, the interpretation of a single predictor is only viable when all other variables in the model are held constant.

<table>
<thead>
<tr>
<th>Table 3</th>
<th>Means and Standard Deviations for PEPQ / PSR Plus Primary Scales, Dimension Scales and Pathology Oriented Scales</th>
</tr>
</thead>
<tbody>
<tr>
<td>16PF Primary Factors</td>
<td>Mean</td>
</tr>
<tr>
<td>Warmth (A)</td>
<td>6.20</td>
</tr>
<tr>
<td>Reasoning (B)</td>
<td>5.27</td>
</tr>
<tr>
<td>Emotional Stability (C)</td>
<td>6.85</td>
</tr>
<tr>
<td>Dominance (E)</td>
<td>5.48</td>
</tr>
<tr>
<td>Liveliness (F)</td>
<td>5.47</td>
</tr>
<tr>
<td>Rule-Consciousness (G)</td>
<td>6.86</td>
</tr>
<tr>
<td>Social Boldness (H)</td>
<td>6.17</td>
</tr>
<tr>
<td>Sensitivity (I)</td>
<td>5.05</td>
</tr>
<tr>
<td>Vigilance (L)</td>
<td>4.55</td>
</tr>
<tr>
<td>Abstractness (M)</td>
<td>3.89</td>
</tr>
<tr>
<td>Privateness (N)</td>
<td>5.22</td>
</tr>
<tr>
<td>Apprehension (O)</td>
<td>4.26</td>
</tr>
<tr>
<td>Openness to Change (Q1)</td>
<td>5.29</td>
</tr>
<tr>
<td>Self-Reliance (Q2)</td>
<td>4.77</td>
</tr>
<tr>
<td>Perfectionism (Q3)</td>
<td>6.11</td>
</tr>
<tr>
<td>Tension (Q4)</td>
<td>4.05</td>
</tr>
<tr>
<td>Protective Service Dimensions*</td>
<td></td>
</tr>
<tr>
<td>Emotional Adjustment (EA)</td>
<td>7.57</td>
</tr>
<tr>
<td>Integrity/Control IC</td>
<td>6.90</td>
</tr>
<tr>
<td>Intellectual Efficiency (IE)</td>
<td>5.98</td>
</tr>
<tr>
<td>Interpersonal Relations (IR)</td>
<td>6.10</td>
</tr>
<tr>
<td>Pathology Oriented Scales</td>
<td></td>
</tr>
</tbody>
</table>
Table 4
Logistic Regression Weights for Model Predicting a Critical Incident

<table>
<thead>
<tr>
<th>Predictor Variable</th>
<th>Standardized Weight (B)</th>
<th>Re-Scaled Weight (B)</th>
<th>Lower Confidence Interval for the Re-scaled Weight (B)</th>
<th>Upper Confidence Interval for the Re-scaled Weight (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interpersonal Relations</td>
<td>-1.254</td>
<td>0.285</td>
<td>0.130</td>
<td>0.625</td>
</tr>
<tr>
<td>Intellectual Efficiency</td>
<td>-1.053</td>
<td>0.349</td>
<td>0.164</td>
<td>0.742</td>
</tr>
<tr>
<td>Alienation and Perceptual Distortion</td>
<td>0.425</td>
<td>1.530</td>
<td>1.117</td>
<td>2.096</td>
</tr>
<tr>
<td>Interaction Term</td>
<td>-0.202</td>
<td>0.817</td>
<td>0.725</td>
<td>0.921</td>
</tr>
<tr>
<td>Constant</td>
<td>2.883</td>
<td>17.866</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: * = Composite Factors

Figure 1 presents the results of the regression model as the Alienation and Perceptual Distortion scale and the Intellectual Efficiency dimension increase. Scores on the Interpersonal Relations dimension are held constant in Figure 1 to demonstrate the effect of one-unit score increases while holding other predictors in the model constant. The Y axis in the figure is the probability of a critical incident given a specific score profile on the predictors in the model (i.e., Interpersonal Relations, Intellectual Efficiency, and Alienation and Perceptual Distortion). The X axis reflects scores on the Alienation and Perceptual Distortion Scale. The lines in the figure represent a one unit increase in the Intellectual Efficiency dimension. As Figure 1 shows, when a score on the Intellectual Efficiency dimension is equal to one (line labeled as Sten = 1), and the score on the Alienation and Perceptual Distortion scale is also equal to one, there is a probability of approximately .70 that an applicant will experience a critical incident during the probationary period. This probability increases with each one unit increase for scores on the Alienation and Perceptual Distortion scale until the probability plateaus around .99 for a Sten score of 10.
Setting the Intellectual Efficiency score to 5 (holding the Interpersonal Relations dimension score equal to one) we can trace the probability of a critical incident as the Alienation and Perceptual Distortion scale increases by following the line labeled “Sten = 5” in the figure. In this example, when the Alienation and Perceptual Distortion scale score is equal to one, the probability of a critical incident is approximately zero. As the score on the Alienation and Perceptual Distortion scale increases, so does the probability of a critical incident. With an Alienation and Perception scale score of 5, the probability increases to almost .10. Increasing the Alienation and Perceptual Distortion scale score to 10 results in a probability of approximately .40.

Lines labeled as “Sten = 9” and “Sten = 10” in Figure 1 represent Intellectual Efficiency dimension scores of nine and 10 respectively. As can be seen in Figure 1, when scores on this dimension are high, the probability of a critical incident increases very little, even as the Alienation and Perceptual Distortion scale score increases.

8. Discussion

As probation services continue to expand throughout the world, practice opportunities are also increasing exponentially for police and public safety psychologists to provide employee screenings and assessment services for probation departments. As previously noted, hiring the best and most aptly suited individuals to work as probation officers is of prime importance, and is an area of risk management that should be on the “radar screen” of every probation department and court administrator. Failure to select out unsuitable probation officer candidates can have grave consequences, especially now that many probation officers carry firearms in certain jurisdictions. While there are some obvious similarities between police and probation officer candidates, these vocational cohorts should not be construed as being simply synonymous with one another because important similarities and differences exist between them.13 By extension, psychologists who conduct evaluations on probation officer candidates should not assume that psychological instruments shown to be valid and useful with police candidates will have equivalent validity with probation officer candidates. Psychologists should select and use only those assessment tools that have been demonstrated to have predictive validity with a specific population of interest.

The purpose of the present study was to determine the predictive validity of one psychological instrument, the PEPQ / PSR Plus, as a selection tool for use with probation officer candidates. This study specifically sought to determine whether PEPQ / PSR Plus scale scores and/or composite factor scores could be used to predict inadequate performance among a

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13 see Herrmann & Broderick, 2011
combined sample of new-hire and incumbent probation officers candidates. This study found empirical support indicating that the PEPQ / PSR Plus does indeed possess the ability to make meaningful predictions about probation officer candidate performance. Namely, the Alienation/Perceptual Distortion scale, the Interpersonal Relations composite scale, and the Intellectual Efficiency composite scale were all found to be sensitive predictors of future performance problems in a combined cohort of pre-employment and incumbent probation officers. Therefore, the answer to this study’s research question is “yes,” the PEPQ / PSR Plus does appear to be a valid selection tool for use with probation officer candidates. Because of the blended nature of our sample, the present results suggest that the PEPQ / PSR Plus may have applicability as both a pre-employment screening tool for new-hire probation officer candidates and also as a “fitness for duty” assessment tool for use with incumbent probation officers. However, further analysis is needed with both a larger sample size and a non-blended cohort (i.e., discrete populations of interests) in order to conclusively make this determination. Additionally, replication studies also need to be conducted outside of the United States in order to generalize these findings and, as such, we sound the call for such international replication studies to be initiated. Nevertheless, at present the PEPQ / PSR Plus is the only selection tool to date which has been shown to have predictive validity with probation officer candidates. For this reason, the PEPQ / PSR Plus should be given serious consideration for inclusion in any assessment battery by police and public safety psychologists charged with conducting psychological evaluations of probation officer candidates.

REFERENCES
What Kind Of Justice Today?
Expectations Of ‘Good Justice’, Convergences And Divergences Between Managerial And Judicial Actors And How They Fit Within Management-Oriented Values
By Yves Emery and Lorenzo Gennaro De Santis

Abstract:
This research aims toward a better understanding of the organizational culture(s) of the judiciary in Switzerland by analysing what ‘good justice’ means nowadays in this country. It seeks to clarify whether, and to what extent, expectations of ‘good justice’ of judicial actors (judges without managerial experience) and of managerial actors (court managers) are similar and to describe possible managerial implications that may result from this. As judges are at the heart of the judicial organization and exert a strong influence on other groups of actors (Sullivan, Warren et al. 1994), the congruence of their expectations with those of court managers will be at the centre of the analysis. Additionally, referring to the conceptual worlds of Boltanski and Thévenaut (1991), we analyze how closely these expectations are to management-oriented values. We found that almost half of expectations are common to the two groups examined and the main quoted ones are compatible to new public management (NPM) concepts. On the other hand, those expectations shared exclusively by judges relate to the human side of justice, whereas those specific to court managers focus on the way justice functions.

Keywords: good justice, judges, court managers, Switzerland, expectations, court culture

1. Introduction
Nowadays, organizations within the judicial branch are targets for modernization strategies inspired by the NPM. The new public management (NPM) movement started in the Anglo-Saxon world in the 1970s prior to spreading elsewhere. Its main claim is the superiority of private-sector managerial techniques over those of the more traditional public administration (Osborne 2006).

Its strategies, which consider justice systems as any other public service (Boillat and Leyenberger 2008), do not contest a basic principle of the third power—that judges are constitutionally independent and must be able to work free from any source of influence (Klopfer 2007; Langbroek 2008). However, courts and tribunals are organizations which must be properly managed in order to improve their efficiency, their efficacy and their accountability (Lienhard 2009), as well as the quality of justice and its ‘customer’ orientation. In this regard, management should have a supportive role in the courts to enhance justice quality as there would be no ‘good justice’ without good management of the tribunals. Judicial and organizational work are entangled and the organizational side of the court can guarantee judicial work only if judges are involved in it. According to Mattijs (2006), judges must assume some administrative tasks in both the organic and functional sense but a cultural shock for magistrates is deemed necessary for that to happen. If not, the disconnection between the administrative and judicial worlds may lead to profound misunderstandings between judges and court managers.

In practice, however, the proper interaction between judicial work and court management seems far more complex than expected (Lienhard and Bolz 2001; Amrani-Mekki 2008; Vauchez 2008). The problem comes from an inevitable conflict between goals, values and functions of each group (Cameron, Zimmermann et al. 1987; Langbroek 2008).

As judges are at the heart of the judicial organization and exert a strong influence on other groups of actors (Sullivan, Warren et al. 1994), the congruence of their expectations with those of court managers will be at the centre of our analysis, which focuses on the following research questions:
• What are the divergences and convergences when it comes to the expectations of ‘good justice’ according to judges without managerial responsibilities and court managers?
• How do these expectations fit with management-oriented values?

2. Theoretical Background and Review of the Literature

2.1 The Judiciary and (New) Public Management (NPM)

All public organizations are accountable to the citizens and governments for the way that they spend their money (Langbroek 2005). NPM techniques are aimed at rendering public institutions more efficient and thus, more valuable for the population (so-called ‘value for money’) and consequently are supposed to help politicians achieve good management of public resources by enhancing the legitimacy of public institutions. Not surprisingly, as NPM is the son of two opposites, namely the new institutional economics and the business-type managerialism (Hood, 1991), it created lively debates in both research and practice. As for its methods, Hood (1991) defines seven doctrinal components: professional management in the public sector, the use of measures and standards of performance, emphasis on outputs, disaggregation of units, greater competition, stress on private-sector styles and on greater discipline and parsimony in resource use. Others emphasise the centrality of quantitative measurement together with notions such as efficiency, effectiveness and economy. When applied to the judiciary, this led the chief justice of New South Wales to declare that, ‘there is clearly a trade-off between efficiency and expedition on the one hand, and fair procedures on the other hand’ (Spigelman 2001), p. 7.

This turns out to be valid as the quality of a judicial norm, a trial and a judgement can’t be differentiated from the quality of their elaboration process and thus, from a good organization of the judiciary (Pauliat 2007; Cadet 2011). As a consequence, separating the management of courts from the politics of the judiciary would be hardly possible (Pauliat 2005; Kirat 2010), underpinning that judges and court administrators work closely together to improve the quality of the courts.

Nevertheless, the generalization of NPM is far from evident as ‘different administrative values have different implications for fundamental aspects of administrative design’ (Hood 1991), p. 9, which means the particularities of each organization have to be accounted for. Overall, what Hamel calls the managerial model (Hamel 2011) can’t be imported as a one size fits all but has to be tailored in order to fit with the mission and the culture of the targeted organization. As explained below, this argument is particularly important for the judiciary, an institution with a strong professional and administrative culture mainly inspired by traditional public administration values such as legality, equality, objectivity, impartiality and general interest (see 2.2). NPM encountered many problems when applied to the judiciary in general and to judges in particular. For instance, evaluation standards and indicators are more than instruments because they reflect what is deemed important and valuable for the internal actors of the tribunal. These values, expectations and quality criteria have to be accepted by judges and can’t be imposed from management but by professional experts who are accustomed to the organization of the judiciary and the aspirations of stakeholders (Böttcher 2004; Langbroek 2005). Even those in favour of the introduction of managerial techniques in the judiciary believe that indicators must be chosen with great care and their pertinence should be unanimously recognized in order to be accepted by all (Vicentini 2011).

The underestimated cultural dimension of NPM explains at least partly the difficulties encountered by its implementation in the judiciary (Lienhard 2009), as it can be considered a cultural project (Schedler and Proeller 2007; Bezes 2008) which may fail to consider some central principles of the justice system, such as freedom and equality (Frydman 2011). Values such as efficiency, efficacy, productivity, customer-orientation, or even return on investment are far from being prevalent in the judiciary and may lead to a cultural shock or even an identity crisis, as is the case in other administrative contexts (Giauque and Emery 2008; Rondeaux 2011).

Since managerial knowledge is usually not present in the judiciary, there is also the danger to render magistrates more dependent to court administrators (Schmetz 2008). In many ways, it is very important to determine a commonly accepted definition of an efficient court and in a broader sense, of ‘good justice’ (Wipfl 2006).

2.2. What Do We Know About the Culture of the Judiciary?

2.2.1. General Concepts and Determinants of ‘Culture’

Organizational culture can be defined as ‘a patterned system of perceptions, meanings, and beliefs about the organization which facilitates sense-making amongst a group of people sharing common experiences and guides individual behaviour at work’ (Bloor and Dawson 1994), p. 276. Put differently, culture is central to the understanding of any organization’s functioning.
The determinants of culture are manifold and there is usually no uniform culture in one organization but a mosaic of (sub-)cultures (Matz, Adams et al. 2011). During the seventies and eighties, scholars pointed out the importance of the national level (Hofstede 1980) as well as the organizational level through the concept of organizational or corporate culture (Deal and Kennedy 1982; Schein 1990). More recently, Bouckaert classifies culture from a public administration point of view in four categories: macro (civilisation, place and structure), meso (professional administration), micro (organizational level) and nano (offices, job clusters) (Bouckaert 2007). Others put the emphasis on several levels and describe administrative culture as an aggregate of various elements such as social values, economic and political cultures and other sources of influence (Dwivedi and Gow 1999). Institutions (as the judiciary) strongly contribute to shaping the culture of any organization (as courts), as they represent a continuous sociological interaction process between actors who enact the values, norms and objectives related to their mission (DiMaggio 1991; Bloor and Dawson 1994; Hall and Taylor 1996).

2.2.2. Focusing on Judicial Culture
There is little knowledge about culture within the justice system. Comparative research has been done in several countries (Bell 2006; Vigour 2006), and also focused on specific (court) organizations (Ostrom, Hanson et al. 2005). Most of them try to explain the link between court culture and performance (Ostrom, Ostrom et al. 2007; Matz, Adams et al. 2011), therefore considering culture an antecedent of court performance.

Previous studies researching the culture of the judiciary analyzed the relationships between internal actors of courts (lawyers, judges, attorney, parties etc.) but rarely included external stakeholders (media, citizens etc.). Even though Eisenstein and Flemming mention the idea of a national culture and common values, the core of their research is on county legal culture which they define as the values and perceptions of the principal members of the court community about how they are expected to act and how they believe they act in reality when performing their tasks (Eisenstein, Flemming et al. 1988). Furthermore, others only consider informal relations between judges, lawyers, defence attorneys and prosecutors in their research (Church, Carlson et al. 1978). More recently, some authors focused their conceptualisation of court culture on the importance of cooperation and coordination between judges, prosecutors and defence attorneys in the efficient resolution of criminal affairs (Ostrom, Hanson et al. 1999). This is probably related to the belief that getting the consent of internal stakeholders is more relevant than the one of others (Langbroek 2005). What Church (1985) calls the local legal culture is this mix of attitudes and practices which influence, among others, the pace of litigation and corresponds to Bouckaert’s meso and micro levels. In this regard, the cultural dimension of courts is crucial as it is one of the key factors linked to a successful implementation of managerial values and methods into the judiciary and most of the time, those in charge of introducing changes within tribunals are precisely court administrators. Burke and Broccolina (2005) try to integrate both approaches, saying that court culture as defined by Ostrom (2005) is complementary to local legal culture discovered by Church (Church 1982; Church 1985).

2.2.3. Judges and Court Managers
It is interesting to note that professional standards of judges and managerial expectations of court administrators may contradict each other (Kirkpatrick, Ackroyd et al. 2005; Emery and Giauque 2012; Fortier and Emery 2012), leading to possible value clashes. This is extremely important if we consider that judges, maybe more than any other public servants, have a very strong common identity as they are being educated as members of a group of remarkable professionals (Langbroek 2005). Expanding the influence of new role expectations from different internal (stakeholders) and external actors (e.g., politicians, citizens, lawyers, attorneys, clerical and managerial staff) that potentially conflict with judges’ professional ethos and their vision of ‘good justice’ may gradually transform the culture of the judiciary.

Despite the fact that justice management is seen as being subordinated to the judiciary, management-related expectations of ‘good justice’ may have a non-negligible influence on it (Kirat 2010; Poltier 2012). When it comes to court administrators, if we except the study of Cameron and Zimmermann dated from the pre-NPM era (Cameron, Zimmermann et al. 1987), they are rarely considered as actors who influence court culture to our knowledge, although they are probably those with the best bird’s-eye view of court organization, practices and values.

To the opposite, a flow of literature says that giving more managerial power to certain judges may lead to bad management and cause problems in terms of the independence of some judges towards those who consider the new management as nothing else than a sophisticated way to retain power (Jeuland 2011; Labrusse-Riou 2011). Legendre quoted in Jeuland (2011) even goes further arguing that management is in direct competition with the law. In all cases, the additional problem of the blurring frontiers between judicial and administrative duties has to be considered (Poltier 2012).

Authors put in opposition the efficiency of the tribunal and the institution itself, defending the idea that judicial life is now more focused on the former rather than on the way the organizations of the judiciary and the social relations within them function (Labrusse-Riou 2011).
Similarly Mattijs say that judges will try to please the chiefs of courts in one way or the other when their work is assessed on quantitative standards only (Mattijs 2006) and some drifts can consequently be expected (Piraux and Bernard 2006). Justice should therefore be managed in such a manner that other worlds, such as the economical one, don’t interfere with the judiciary (Rousseau 2011). If those spheres are mixed up, there is a risk that the use of the scarcity of resources’ concept would weaken the rational-legal foundation of the administrative bureaucracy, which guarantees judicial security (Serverin 2011).

This may be the reason why judges tend to appoint court administrators who are ‘non-threatening individuals who will not actively seek reform or disturb the status quo’ (Berkson and Hays 1977), p. 87. More recently, the experience of a Belgian court sent a contradictory but nevertheless promising message. The relationship between the president of the court and the new human resources advisor went from the withdrawal of the former HR advisor, due to the lack of legitimacy of his position, to ‘the shared conviction of the complementarity of the two functions, which together with trust and mutual support, will lead to a true partnership for a common and shared construction’ (Dewart and Leroy 2013), p. 22. Nonetheless, the introduction of NPM-like techniques may eventually lead to cultural resistance by further polarizing the relations between judges and court managers.

3. Contextual background: NPM and Court Management in Switzerland

The NPM movement appeared in the 90s in Switzerland as a reaction to the perceived weaknesses of public sector organizations (input-oriented, rules predominance etc.) and to the excessive political control of operative decisions (Schedler 2003; Lienhard, Ritz et al. 2005) with the aim of increasing the performance of public services and rendering them more efficient and effective (Emery and Martin 2010). The Swiss context is rather receptive to private sector methods and values (Thom and Ritz 2013). The reforms conducted in the country include, among other things, the search for an increased efficiency, a decentralisation process, the flattening of hierarchies together with the introduction of market-type mechanisms (Schedler 2003).

Nonetheless, the implementation of NPM programmes is happening at a much-reduced pace as compared to what was initially anticipated (Emery and Giauque 2012). Many advocates of public sector reforms deeply underestimated the importance of administrative culture and the institutional dimension of reforms in Switzerland (Giauque 2013), considering NPM only as a set of managerial techniques. In that respect, it is not surprising that the judiciary has been one of the latest institutions to have experienced NPM (Wipfli 2006). Nevertheless, a culture shift seems to have happened in Switzerland’s court management practices. In the canton of Vaud, second instance judges (tribunal cantonal) failed to be elected by the political authority as they were believed to lack some of the required competences for the positions to be filled showing a shift toward skills rather than political affiliation and a traditional routinized election. The recent issues of an overloaded justice system in Fribourg brought court administration back into the spotlight. Finally, the management of the justice system in Geneva was heavily criticized by a recent report published by the Court of Auditors.

Notwithstanding, a nascent literature exists when it comes to court management in Switzerland. It focuses on reforms from the perspective of constitutional and administrative law (Lienhard 2011; Poltier 2011), on organizational, structural and leadership aspects of the court (Wipfli 2006; Mosimann 2011; Poltier 2011), on the effects of the recent unification of Swiss procedural laws on the organization of the tribunals (Berne 2011) or on the implementation of NPM instruments into courts following the reorganization of judicial institutions (Berne 2011). Moreover, certain authors investigated the degree of autonomy required for court administration to guarantee the independence of the judiciary (Poltier 2012) or the way courts’ workload is managed (Lienhard and Kettiger 2009). Moral dilemmas and stress experienced by judges were also investigated by some scholars (Ludewig 2009), but we could not find publications comparing the expectations of judges and court managers in Switzerland.

4. Methodology

This research is part of a larger study on the cultural aspects of the judiciary in Switzerland, which is itself performed under the umbrella of an extensive national research project on court management across the country. The larger study involved approximately 80 semi-structured interviews of which more than 70 have already taken place in seven cantons.

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2 Freely translated from the French by the authors.
6 See : www.justizforschung.ch
7 Fribourg, Vaud, Luzern, Valais, Jura, Neuchâtel, Ticino
in the three linguistic regions of the nation with both internal (judges, clerks, court managers, general secretaries, attorneys) and external actors (politicians, lawyers, journalists and researcher) of the courts.

For the present paper, we analyzed 18 in-depth interviews lasting on average one hour. Court managers and judges without any managerial experience from ten Swiss courts in the three linguistic parts of the country were questioned according to the inductive methodology (Strauss and Corbin 2004) to obtain an overview of the main expectations related to a ‘good justice’, until saturation appeared. During the interviews, respondents described and defined the qualities required for ‘good justice’ and whether they think there is a plurality of role expectations from the main stakeholders to be considered.

Due to the relatively small number of interviews taken into account, we decided not to disaggregate the results according to the characteristics of the respondent or the courts in which he works. We will perform this in the next phase of the research when data will be analyzed with a more quantitative approach. At this point, we also investigate the values underlying the expectations found in the present work.

The audio recordings were transcribed and coded with the NVivo 10 software in order to identify the main expectations that came out of the statements of participants. Subsequently, we classified interview sections (phrases or entire paragraphs) in 27 different ‘knots’. Each knot corresponds to one argument that was individualized as important for ‘good justice’ by a respondent. Some expectations formulated by one participant can be competing or complementary, as the interviewees were asked to describe how ‘good justice’ should be according to them first, and then what they believed these expectations were for the other stakeholders. An interviewee could obviously mention several arguments, but one argument mentioned several times by the same respondent was counted only once. We eventually put the knots in an order according to the amount of respondents who mentioned each argument. Since the amount of interviews was somehow modest, we believed that a classification in three different groups of frequency (see Table 2) was sufficient.

We must add that the interviewees did not necessarily mention the exact term as such, but we coded similar ideas in the same ‘knot’. Afterwards, we formulated a definition of the term inspired by the citations of the participants. Finally, we are aware that some expectations are very similar and could be potentially combined but we refrained from doing so as we wanted to analyze the discourse of the interviewees as subtly as possible. In the next phase of the research, a quantitative methodology using factory analysis will allow us to identify similar and competing values.

In order to analyze the management-orientation of these expectations, we used the theoretical approach developed by Boltanski and Thévenot (1991) who classified the reference worlds to which people relate when they justify their actions in collective contexts. Their typology is made of ideal-type reference worlds (civic, commercial/business, domestic, industrial and others, see below), inspired by political philosophies that have marked history (Giauque 2004). NPM-inspired reforms have been analyzed by several scholars as a direct confrontation between the civic world (the classical Weberian administration) and the commercial/business world, the latter being supported by management initiatives (Giauque and Caron 2005; Meyer and Hammerschmid 2006; Rondeaux 2011). This kind of classification will help us determine the spheres of legitimisation to which judges and court managers appeal when they define what ‘good justice’ means for them and whether those are similar or not. Additionally, this will allow us to discover how our results relate to previous analogous studies in the public sector.

More practically, we performed a review of comparable studies before brainstorming among the members of the research team to finally allocate the expectations in the various universes following the methodology of Boltanski and Thévenot (1991).

<table>
<thead>
<tr>
<th>Industrial world</th>
<th>Civic world</th>
<th>Commercial/ Business world</th>
<th>Domestic world</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higher common principle</td>
<td>Efficiency and ‘functional’ performance</td>
<td>Representative collective bodies</td>
<td>Competition and market value</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Personal relationships, hierarchy, tradition</td>
</tr>
</tbody>
</table>

8 This means that interviews were stopped when no new arguments were put forward.
9 For example, if a judge said “good justice has to be quick” and another explained that “celerity is the most important parameter for the users of justice” we would classify both sentences under the knot “fast”.
Table 1: Main reference worlds by Boltanski and Thévenot (1991)
Management-oriented values are obviously related to the industrial and commercial worlds, the industrial one referring to the more classical ‘Taylorist’ approach while the commercial universe has more to do with NPM-inspired techniques.

5. Results and Discussion
The following Table 2 gives an overview of the main expectations mentioned by our interviewees, classified by decreasing frequency:
+++ : frequently mentioned (by at least two-thirds of the interviewees)
++ : mentioned sometimes (by more than 1/4 of the interviewees)
+ : mentioned by one or two interviewees

<table>
<thead>
<tr>
<th>Main expectations related to good justice</th>
<th>Expectations of judges</th>
<th>Expectations of court managers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Fast</td>
<td>+++</td>
<td>+++</td>
</tr>
<tr>
<td>Fast</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice must solve problems as fast as possible in order to avoid troubles to the parties due to lengthy procedures. This is what people call the « celerity » of justice.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Client-oriented</td>
<td>+++</td>
<td>+++</td>
</tr>
<tr>
<td>Client-oriented</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice is a public service whose aim is to satisfy the needs of the citizens.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Open to the public and the media</td>
<td>++</td>
<td>+++</td>
</tr>
<tr>
<td>Open to the public and the media</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice has to explain what she does to the public in a comprehensible manner via the media.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Independent</td>
<td>++</td>
<td>++</td>
</tr>
<tr>
<td>Independent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice has to be independent from any kind of political pressure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Transparent</td>
<td>++</td>
<td>++</td>
</tr>
<tr>
<td>Transparent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice must be transparent when it comes to the way it works. Hiding things to the citizens is not conceivable anymore.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Humane</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Humane</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice is not simply the application of the law. It has to carefully take into account that its raw material is human beings and it may have heavy consequences on their lives.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Main expectations related to good justice</td>
<td>Expectations of judges</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------------------------------------------------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>7</td>
<td>Close to the people</td>
<td>++</td>
</tr>
<tr>
<td></td>
<td>Justice must be close to the citizens it serves. It must try to understand what the &quot;man of street&quot; lives when it deals with him. This is the idea of a &quot;street-level&quot; justice.</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Personalised</td>
<td>++</td>
</tr>
<tr>
<td></td>
<td>Justice should consider as much as possible the particularities of every case and situation. It can’t apply a “one size fits all” solution to all cases.</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Receptive</td>
<td>++</td>
</tr>
<tr>
<td></td>
<td>Justice must be receptive to what the citizens expect from it. It must have its ear open and listen to the requirements addressed to it.</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Fair</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Justice has to be fair both in the way it functions and in the manner it renders judgements.</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Not too formalistic</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Justice shouldn’t be too fussy on the rules. It should apply a flexible system that allows to adapt procedures when necessary.</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Non-jurists, lay people, render judgements</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Even the &quot;lambda citizen&quot; should be permitted to render justice as it represents the &quot;will of the people&quot; as much as jurists do.</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Accountable</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Justice in its ivory tower is not accepted anymore. It is accountable towards society for both its judicial work and for the way it spends the money the State allocates to its functioning.</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Respectful of the procedures</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Procedures must be closely followed in every situation.</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Efficient</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Justice must use its resources with parsimony and take out the most of them.</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Impartial</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Justice has to be freed from any kind of pressures from the parties. It has to judge everyone with the same lenses.</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Look for arbitration</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Justice should try to reconcile the parties instead of favouring trials.</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Global quality</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>A good quality justice is paramount. Attributes such as fairness, celerity and impartiality are parts of it.</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Treatment fairness</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Justice must treat all citizens in an equal mode.</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Pragmatic</td>
<td>++</td>
</tr>
<tr>
<td></td>
<td>A “smart” justice is needed. It has to adapt itself to the various situations it encounters in order to produce the best results.</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Close to people (geographically)</td>
<td>++</td>
</tr>
<tr>
<td></td>
<td>Courts should be located as closely to people as possible.</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Efficacy</td>
<td>++</td>
</tr>
<tr>
<td></td>
<td>Justice has to reach objectives and must be able to improve its effectiveness.</td>
<td></td>
</tr>
</tbody>
</table>
Main expectations related to *good justice*  

<table>
<thead>
<tr>
<th>Expectation</th>
<th>Judges</th>
<th>Court managers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inspiring confidence</td>
<td><strong>++</strong></td>
<td>+</td>
</tr>
<tr>
<td>Access to justice must be easy, without any barriers.</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Justice has to be free from any sort of corruption.</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>The cost related to any procedures must be as low as possible (for the parties)</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Justice should try to solve any kind of conflicts, should give a clear answer to all situations.</td>
<td>+</td>
<td></td>
</tr>
</tbody>
</table>

Table 2: main expectations related to ‘good justice’, as quoted by judges and court managers

5.1 Discussion

A careful analysis of the transcripts showed the issue that is the most frequently (+++) quoted by judges as well as by court managers is the one of celerity (fast justice), followed by the notion of justice as a public service oriented towards clients. We then have a group of arguments mentioned by some interviewees (+++) including: open to the public and the media, independent, and transparent. These five expectations were shared by our two groups of actors, and without considering the frequency of these expectations; about half of the expectations (12 out of 27) were common. Except for the issue of the independence of justice, which is the most frequently quoted when it comes to managerial initiatives within the judiciary (Lienhard 2009; Lienhard 2011), the four remaining items give a picture of a modern public service, customer-oriented and fast; a picture which would perfectly describe agencies properly managed according to NPM principles (Pollitt 2006). These features of good justice uncover a judicial culture which seems to be at least compatible with managerial values and initiatives.

It is interesting to note that other judges’ expectations (++), not shared with court managers, focus more or less on the human side of justice (humane, personalised, receptive), whereas other court managers’ expectations not shared with judges are more or less related to an efficient functioning of justice (pragmatic, geographically close to people, efficacy, inspiring confidence). According to this second category of expectations, the managerial orientation seems to be supported by court managers rather than by judges, who support the humane side of justice. This argument, where judges expressed their apprehension against a strong focus on productivity through workload indicators, is frequently mentioned in the literature (Böttcher 2004).

Finally the last group of statements used to define ‘good justice’ by judges (+), which don’t overlap with those of court managers, are the following: fair, impartial, look for arbitration, and treatment fairness. They are all related to the judicial core process which involves constitutional guarantees (Tophinke 2013) and are frequently incorporated in ethical codes. The same expectations for court managers are: easily accessible, not corrupted, financially affordable and solve all conflicts, which is a mix of different qualities of justice more or less customer-oriented (except not corrupted of course). In that sense, these first results are in line with other evaluations of NPM projects conducted in Switzerland, showing that customer-orientation is one of the main consequences of these reform initiatives (Ritz 2003; Giauque and Emery 2008).

We will now focus on the classification of judges’ and court managers’ expectations according to the worlds of Boltanski and Thévenot (1991).

<table>
<thead>
<tr>
<th>Industrial world</th>
<th>Civic world</th>
<th>Commercial (business) world</th>
<th>Domestic world</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fast</td>
<td>Open to the public and the media</td>
<td>Client-oriented</td>
<td>Humane</td>
</tr>
</tbody>
</table>
Table 3: Classification of judges’ and court managers’ expectations according to the worlds of Boltanski and Thévenot (1991)

<table>
<thead>
<tr>
<th>Industrial world</th>
<th>Civic world</th>
<th>Commercial (business) world</th>
<th>Domestic world</th>
</tr>
</thead>
<tbody>
<tr>
<td>Efficient</td>
<td>Independent</td>
<td>Not too formalistic</td>
<td>Close to the people</td>
</tr>
<tr>
<td>Quality</td>
<td>Transparent</td>
<td>Close to people</td>
<td>Look for arbitration</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(geogr.)</td>
<td></td>
</tr>
<tr>
<td>Fair</td>
<td>Efficacy</td>
<td></td>
<td>Inspiring confidence</td>
</tr>
<tr>
<td>Non-jurists render judgments</td>
<td>Easily accessible</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accountable</td>
<td>Financially affordable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impartial</td>
<td>Personalised</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Respectful of the procedures</td>
<td>Receptive</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Treatment fairness</td>
<td>Solve all conflicts all cases</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Not corrupted</td>
</tr>
</tbody>
</table>

One would expect to find the civic world as the dominant one when it comes to ideas of ‘good justice’ as it is representative of collective bodies and is based on the figure of the citizen. These results are not in line with those of similar research conducted in Switzerland five years ago (Emery, Wyser et al. 2008): the dominant world was the industrial one, followed by the civic and the domestic world. It is therefore very interesting that the dominant worlds of reference from internal actors of the judiciary are civic and commercial, almost well-balanced. This hybrid culture is archetypical for what we call the post-bureaucratic environment (Emery 2013). According to Boltanski and Thévenot, the so-called conventions which may then be used by judges and court managers to sublimate the potential conflicts between these two logics will be decisive for a successful reform agenda in the judiciary. The same proposition is also expressed by many authors dealing with court culture, who emphasise the importance of a shared vision about what ‘good justice’ means (Langer 1994; Klein 2002).

Nonetheless, the expectations mentioned most frequently by judges and court managers (fast and client-oriented) relate respectively to the industrial and commercial worlds. This is significant if we consider that the majority of values embedded in NPM indeed relate to those worlds as well. This seems to confirm the idea of a new managerial logic invading the judiciary expressed earlier and gives interesting clues about the evolution of its culture.

The other world that emerges in this analysis is the domestic one. In this universe, the main principle is based on personal relationships that animate a collective body. It is not by coincidence that this universe is the one where we find the majority of expectations from judges after the civic one, as the underlying image of a ‘caring justice’ has been mentioned by several judges. According to an experienced judge, ‘we should render justice without using any legal argument, without any judicial procedure…’, and just listening to humane feelings. This is probably an enduring feature of good justice supported by judges, which may notably impede management initiatives.

6. Conclusions, Limitations and Further Research
The way judges and court managers define ‘good justice’ is one of the central elements of a court culture, since it will have a strong impact on the particularities of the latter and will legitimate and influence judicial actors in the way they conduct their daily business.

If we accept the idea that judges’ professional culture represents a part of their identity (Bouckaert 2007), we may suppose that the industrial and commercial worlds will be increasingly important for judges in the future compared to expectations focused on the civic universe. This suggests that classical values of the judiciary, inspired by the civic world, are going to be potentially colonized by more private sector-orientated expectations as the former would no longer be in total adequacy with the current society (Emery and Giauque 2012).

Additionally, as the impact of court organization on the reputation of the judiciary has been reinforced (Langbroek 2011), the importance of the industrial and commercial universes go without saying. Still, the importance of the civic world
prevents governments from focusing only on the economical angle (Langbroek 2005). Moreover, the blurring boundaries between administration and judicial work (Poltier 2012), the presence of a public ethos which should guarantee that administrative acts are performed with embedded values such as equity, ethics and justice (du Gay 2009) and the reduced pace to which NPM programs are implemented in Switzerland may reconcile those three worlds and lead to a 'hybridized' court culture.

In this paper, we discovered that court managers and judges have relatively similar expectations when it comes to good justice, uncovering a relatively homogeneous court culture in Switzerland. Nevertheless, some non-surprising divergences have been noticed, with managers focusing more on the 'economical' angle of the judiciary while judges gave more importance to the judicial 'core business' of the institution. When it comes to management-oriented values, we found a judicial culture that seems at least not incompatible with the concepts coming with new public management, although the more traditional civic world which puts the citizen at the centre is still very present in the minds of judicial actors. When compared to other studies in the Swiss public administration, where the industrial world is dominant, it seems that the judiciary is a special case with its focus on the economical and civic worlds, leading to their rapid hybridization. Deeper studies are obviously needed to validate the hypothesis of a Swiss judicial culture somehow 'isolated' from those of other public administration services.

At this stage of our research, some limitations must be considered. We analyzed possible differences between the expectations of professional judges without management responsibilities and those of court managers of the judiciary around the issue of 'good justice'. This is only one aspect of the whole analysis planned in this research, and this paper alone does not pretend to uncover the underlying values of the judicial culture of Switzerland. The expectations and underlying values of other internal and external stakeholders will be considered in the next steps of the research to complete the analysis and to address the lack of court culture studies in Switzerland. In that perspective, the colonization process of management-oriented values may be even stronger than analyzed here.

Another limitation is the representativeness of our sample. This was limited when it comes to the representation of judges and court managers in Switzerland, as we use an inductive approach. Nevertheless, we are confident that the sample is large and varied enough to faithfully depict the idea of 'good justice' among the categories of actors surveyed, because of an emerging qualitative saturation of arguments (Martineau 2005). It also goes without saying that having questioned judges and court managers only once due to limitations of time, it would be valuable to compare the above mentioned results with others at a later point in time, in order to analyze the process of cultural change.

To conclude, we believe that a macro-vision of the judicial institution is required to better understand its culture. This is the reason why, considering the reform agenda of the judiciary, we plead for the development of a new judicial governance, in the vein of new public governance proposed by Osborne (Osborne 2006), which would fully include the perspective of the various internal and external stakeholders and the complexity of today's multi-networked public administration bodies, to further develop 'good justice' for citizens.

References


Sentencing Hearings In English Crown Courts
By Raluca Enescu and Thomas Scheffer

Abstract:
This study investigates the expressive side of the sentencing hearing in three trials dealing respectively with a charge of battery, of indecent assault and of manslaughter. The communication phases of the sentence have been associated with underlying functions of the judge’s speech and with moments of moralization. The specificity of the case appears in the distancing from the defendant and in the moralizing style of the judges. We discuss the implication of this procedure for the administration of justice and for the defendant.

Keywords: judicial speech, court hearing, criminal sentence, moralization, crown court, sentencing hearings, sentencing process, judicial demeanor

1. Introduction - A Note on Research and Theory
The sentencing speech occurs during the last hearing of a trial and consists of a series of ritualistic moves through functions aimed at positioning the judge towards the others (defendant mainly, but also lawyer, prosecutor, family, community). This communication bears the specificity of the criminal case and channels the sentencing hearing like a drift towards the pivotal move, the expression of the sentence. The term function is used here in the sense of a purpose intended by the judge and conveyed by means of his spoken words. These words are also referred to as the expressive side of sentencing, which is concerned with what judges (should) say and what they do not say when punishing the offender (Davis, 1991).

A degradation ceremony is a communicative act transforming a person’s public identity into an identity belonging to a lower status. In his famous article published by the American Journal of Sociology, Harold Garfinkel (1956) presents eight necessary conditions of a successful degradation ceremony. He also points out that every society offers the conditions of an identity’s degradation and therefore focuses merely on which features lead to a successful degradation. In this context, courts have been described as places where degradation ceremonies are performed and used to abase the defendant (Garfinkel, 1956, p. 424): “The court and its officers have something like a fair monopoly over such ceremonies, and there they have become an occupational routine.” Recent studies have shown the relevance of his approach by shedding light on the functions of a trial (Brion, 2003) and brought a distinction between a degradation incident, which doesn’t comply with a structured proceeding, and a proper degradation ceremony (Schoepflin, 2009).

The perpetrator’s shame and guilt are essential components to a successful degradation ceremony. The moralizing of the judge plays a central role in bringing into light these feelings. Furthermore trials are one of the most charged rituals, where feelings threaten to burst in a division of moral expression: defendants manifest feelings, judges do not. Other scholars point out that the courtroom environment doesn’t encourage expression from any party due to the communicative formalities (Szmania & Mangis, 2005).

This study explores the expressive aspect of the sentencing speech and the exchanges on guilt in the last hearing of a criminal trial. The sentencing hearing represents a main site of expression due to the crucial communication of the judgment. We will investigate whether judges moralize defendants in a selection of three criminal cases and if they do so, how would they do it and how could the defendants reply? The questions will shed light on the communication of the judges and on the treatment of defendants in the last hearing of a trial in English Crown Courts.

2. Direct and Indirect Moralization
Moralization denotes more than the normative interpretation of actions, it also constitutes a demand to explain one’s own “wrong” or “problematic” behaviour. In this sense, a moral triangulation takes place: the judge is a moralizing actor who asks for a moral explanation from the moralized defendant towards the court and the morally affected victim(s), her/his family and the community who may experience symbolic amends for the immoral deed through meaningful signs of
remorse (Scheffer, 2010). As a response, the moralized person may (or may not) account for this behaviour and identify with the norms and values implied by the request. Commenting morally on some of her/his own acts denotes a reflection on the past in terms of admission, justification or apology.

Moralizing denotes the initiation of a moral response on the part of the addressee, here the offender who should comment morally on his acts. Self-moralizing denotes a reflection on the biographical past in terms of admission, justification, or apology. This distinction reminds of what Luckmann (2002) called communicative styles of moralizing. Moralizing “may be either direct, in the form of straightforward praise or complaint, injunction, accusation, indignation, etc., or it may be indirect in the form of litotes, questions, if/then formulations, certain kinds of teasing, etc.” (Luckmann, 2002, p. 20). However, this definition identifies the types only by their linguistic forms and does not include the audience of moral communication. In the following, moralizing is used more narrowly and denotes communicative acts that ask somebody for a moral explanation. Moralizing, in other words, demands for a moral standpoint by the addressee, meaning by the one who has been moralized. This demand includes the expectation that the moralized person is going to articulate her/his moral standpoint vis-à-vis the moralizing party (e.g., the judge or the prosecutor) and the morally affected party (e.g. the victim, her/his family, the community).

On the one hand the judge’s message could be criticised for its tendency to expose and to degrade the offender. The conventions leave no opportunity for excuse, self-defence, or relativism. On the other hand, the judge’s “reintegrative shaming” would be praised, because the offender gets the opportunity to distance himself from and condemn the offence (Braithwaite, 1989). The moralization opens the way back into the community. For a restorative justice approach, however, the dialogue in direct moralizing is considered as highly restricted and limited due to an overload of technicalities. The cold procedural atmosphere might leave no room for immediate authentic expressions of pain, remorse, and forgiveness. There might not be sufficient room given to meet the requirements of full confrontation of moral responsibility and moral concernment (Szmania & Mangis, 2005). There is, for instance, no designated speech and recipient position for the victim. Moreover, the offender’s moral account could be overshadowed by legal incentives and ritualistic conventions. The wrongdoer is offered a constricted opportunity to morally account for his deed in open court and by doing so, to fit the court’s mission: the offender realizes that he acted wrongly and addresses the moral feelings of the community.

Such moralizing processes remind of Durkheim’s classical distinction between mechanical and organic solidarity and, here, to a rather mechanical treatment and response to delinquency. Common values and beliefs of a community serve the social integration of its members and emphasize punishment in cases of deviance, while interactions and recognition of interdependent needs would be in the foreground of a response based on organic solidarity. The offender faces the victim’s suffering and injury. In return the community, including the victim, finds the offender in a state of distress and shame. There is a “mechanical” element of public revenge - and an emotionally felt urge for such revenge - attached to this “ordeal of expressing remorse and apologizing” that “even if done initially for the wrong reasons, may in time promote genuine repentance” (Bibas & Bierschbach, 2004, p. 143).

3. Official Transcripts of Sentencing Hearings
This study is part of a five-year international comparative research project, including fieldwork in Germany, England, and the United States of America (Scheffer, Hannken-Illjesm, Holden & Kozin, 2007). In this paper, we focus on official court transcripts of criminal trials held in English Crown Courts in 2003 and 2004. The case study addresses the presentation of the sentence by judges and maps out where and how the offenders are asked to respond morally, meaning here to articulate authentic feelings and emotions that could be ascribed to their personal conscience and character.

English Crown Courts deal with serious criminal offences or appeals against conviction and/or sentence emanating from magistrates' courts. The sentencing hearing procedure does not allow defendants to say “last words”. Therefore this moment is not granted to the moralized person in order to account morally for any wrongdoing. Likewise, the victim, the family and the community can neither express moral feelings nor receive expressions of remorse. In this sense, a procedure may favour or prevent face-to-face confrontations of the moralized one and the ones morally involved. On closer inspection, however, the Crown Court procedure does not lack instances of moralization, but shows another pattern, indirect moralization.

Three cases have been selected for their inter-variability in regard to the type of crime, the judge and the defendant. The material consists of sentencing hearings in a case of indecent assault, of manslaughter and of battery with three defendants. All defendants were male and pled guilty (57% of the cases received for trial in Crown Courts reach this agreement), which led logically to their condemnation. Therefore it is not the verdict but the sentence that will be announced in the last hearing.
Advantages and limits of the case method have been widely discussed in qualitative research (Rangin, 1992; Stake, 2000; Yin, 2009). The case method, despite its obvious limitations in representational terms, allows the researcher to place data in the practical context of its occurrence and here, to investigate the communications of the judge and the treatment of the defendant when the sentence is rendered.

The official transcripts of the sentencing hearings are analysed with a discourse and sequential analysis (Shuy, 1986; Maiwald, 2005), which will take into account the specific situational context of the language beyond the level of a sentence and the sequence of the speaker’s turn-taking. The specific language in which the defendant is addressed, as well as his answers, could be indicators of moral distance, of authority, showing the hierarchical distance between the moralizing and the moralized. After interpreting the meaning of the judge’s communication throughout the sentencing hearing (semantic level), we will connect these results to an investigation of the purpose connected to the communication phases extracted in the previous step (functional level).

The transcripts of the hearings have a similar length of two pages. They are divided into phases of communication, understood as meaningful units of communication conveying a homogeneous message about the defendant or the sentence. Therefore a phase can comprise a few words or several sentences, as long as they support the same message (no words were left out of the analysis). First we compare the phases of each criminal case in order to discover if they are common or unique. Does the sequence of communication differ from case to case and if so, to what feature(s) of the cases could this difference be attributed? In a second step, we study the elements of communication appearing in each phase of the three cases. Do we observe similar phases with different modalities like in experimental studies where variables have several modalities? This question leads to our last step, which will highlight the function at work behind a communication phase (what needs to be done in a phase?). We hypothesize that these functions are modulated by the different elements of communication according to the specificity of the case.

4. Communication Phases and Speech Functions

Seven phases of communication with four underlying functions have been derived from our material. In each criminal case, they cover the whole original transcript by appearing in each sentencing hearing and fulfilling identical functions, while presenting different elements due to the specificity of the case. No phase is found in only one case, which speaks in favour of a common structure of the sentencing hearings. The following presentation takes place in their order of appearance in our cases with selected excerpts to illustrate the phases:

<table>
<thead>
<tr>
<th>Phase</th>
<th>Function</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Distance towards the defendant</td>
<td>1. Individualization of the case</td>
</tr>
<tr>
<td>2. Difficulty of the case</td>
<td>1. Individualization of the case</td>
</tr>
<tr>
<td>3. Framing the decision-making</td>
<td>2. Limitation of the sentence</td>
</tr>
<tr>
<td>4. Exclusion of an alternative sentence</td>
<td>2. Limitation of the sentence</td>
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<td>5. Mitigating and aggravating elements</td>
<td>3. Weighing up the elements</td>
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<tr>
<td>6. Choice of the sentence</td>
<td>4. Announcement of the decision</td>
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<tr>
<td>7. Transition of authority</td>
<td>4. Announcement of the decision</td>
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</table>

1. The first phase of communication also represents the first words of the hearing and indicates to which extent the judge directly addresses the defendant. In other words, it manifests the distance towards him by modulating the use of the second or third person, his name and polite expressions:

- “Well, John Twist you have pleaded guilty to an offence of indecent assault” shows that the judge starts using the first and the last name of the defendant as well as the second person pronoun, which shows limited distance. Throughout the hearing, the judge speaks directly to the accused and uses the active voice for the verbs;
- “It is not necessary for the defendant to stand” presents a maximal distance towards the defendant in the case of manslaughter, which is underlined by the use of the third person singular as subject of the verbs;
- “Can you stand up, please?” in the case of battery demonstrated an intermediary distance in comparison to the two previous examples. The defendants are addressed with the second person pronoun and they are politely asked to stand up, while in the first case no such request has been done, and in the second the defendant is indirectly asked to remain seated.
2. The second phase of communication demonstrates the difficulty of the case, how unique and troubling it is, requiring reflection and presenting a difficult sentencing exercise due to particularities that don't allow guidance by other cases.

- “So this case presents a difficult sentencing problem. I have been referred to such guidance as there is from the Court of Appeal in other cases, but, as has been frequently observed, cases of manslaughter are infinitely variable. Each case necessarily depends upon its own facts, which here I have attempted to identify and outline” for the manslaughter;

- “I have thought very long and hard about this case, it is a troubling case and it has many unusual features, and I have to decide today whether or not I, in effect, affect the rest of your lives by punishing you for what you did on that night” for the battery, with an explicit reminder of the judge’s power.

3. The third phase of communication frames the decision-making of the judge and restricts the sentence he passes, while providing his feeling about the plea entered by the defendants:

- “(...) his inevitable plea to the offence of manslaughter – well, “inevitable”, once he had admitted to the police – as he did – that he pushed her thereby fracturing her ribs”, where the plea is not perceived as a good element because the defendant was forced to enter a guilty plea after admitting certain facts.

4. The fourth phase comes one step closer to the choice of a sentence by excluding an alternative type of sentence. The judge doesn’t deliver his judgment as fast as possible; in our cases he creates tension as a substitute for leniency.

- “I have to say that had the original complaints been substantiated which, of course, were more serious, I would have had no alternative but to pass an immediate prison sentence on you which I’m not proposing now to pass” shows a moment of indirect moralizing for the indecent assault in the way the judge mentions a harsher sentence than the one he will render in the sixth phase;

- “(...) this offence is so serious that only a custodial sentence can be justified and you know very well that to prison you should go. (...) I don’t need to send you into custody today. But I tell you, you come within a whisker of it” excludes a custodial sentence for the battery and directly moralizes the defendants about the severity of their offence. There is no moment during which the moralized could answer, because the moralizing figure replies for them.

Phases 3 and 4 have the function to limit the possible sentence by introducing the plea and by excluding alternative sentences. The ritual of the sentencing hearing follows its unfolding process, before closing on the expression of the sentence. In the fourth phase, the decision appears as being made on that day (present tense). This element contributes to the creation of tension about his choice.

5. The fifth phase presents the mitigating and the aggravating elements of the defendants. In the indecent assault and the battery cases, the judges only refer to the positive features of the defendants (good references, no previous convictions, plea of guilty). In the manslaughter case, the judge presents mainly the aggravating factors even if they do not apply to the case: “Ever since he was a young child, he has presented behavioural problems (...) I should mention his previous convictions very many years ago, for quite different offences. They are, to this sentencing exercise, entirely irrelevant. (...) He is and always will be entirely inadequate.” But the extraordinary feature of this case lies in “His apparent absence of remorse, to which a number of those who have written reports refer, is not, in my judgement, another factor for which he is to be condemned. It is a consequence of the limited capacity he has to feel guilt, which is part and parcel of his condition.” The moralized shows no remorse and the moralizing expresses that he should not be condemned for it. The defendant’s “behavioural problems”, for which he has been addressed with maximal distance during the course of the trial, are considered to be the source of this unsuccessful moralization.

The fifth phase corresponds to a weighing up function, in which judges balance the good and the bad about defendants.

6. The sixth phase announces the judge’s decision along with the help needed to choose the appropriate sentence.

- “His personal circumstances are described in very considerable detail in the many reports that I have read. (...) Prison, no doubt, will bear hard upon him. The sentence of imprisonment, in my judgement, is inevitable.” In the manslaughter case the judge presents his choice as unavoidable - no other type of sentence could be passed – which underlines the ritualized rationality of the legal decision-making process. The sentence could last between three and fifteen years of imprisonment and the judge decides on 3,5 years, which is much less than if the defendant had been sentenced to a hospital placement or a community disposal.
7. The last phase ends the transcript of the hearing and offers a transition of authority from the judge to the execution of the sentence. It attends towards the future of the defendant.

- "I am quite satisfied having heard all that I have heard about you that it’s very unlikely that you're likely to reoffend (...) And, of course, as I say you must report when you're required to by the probation officer and attend any courses and any interviews which they have in mind in dealing with this order. (...) Well, you see the probation officer before you go. That is the sentence of 12 months community rehabilitation order. Thank you" indicates that the judge considered the protection of the society and the risk of reoffending. He addresses directly the defendant until the very end of the hearing and introduces the probation officer for the execution of the sentence;

- "He is, I agree, not a risk to anyone else. (...) Those responsible for his supervision after his discharge will have to make effective arrangements. To that end I direct that the relevant reports in this case, including the pre-sentence report, are submitted to the prison department and I will make the necessary arrangements" shows that a balance had to be found between the condemnation of the society (not its protection as it seems to be a unique offence) and the severity of the offence. The present and the future of the verbs appear with the usual third person address. The judge speaks even about the end of the prison sentence and ends the hearing with "Thank you, very much".

The two last phases deal with the core function of the sentencing hearing – the announcement of the sentence - and with the future of the defendant.

Although the phases appear in each case (indecent assault, manslaughter and battery), the variation of the elements found in a phase enables the judges to give a colour and address the specificity of the case. The communicative turn from one phase to the other is asymmetrical because it is always the judge who initiates a new turn. Whereas the defendant plays a role within each phase by the simple fact that he is (in)directly addressed, there is no place for defendants to initiate a communicative move or even to answer rhetorical questions (van Dijk, 1989). In conclusion, the judge goes through a similar series of functions of the speech by using different elements present in identical phases of communication.

5. Discussion

The distance from the defendant is expressed by the use of the second or third person pronoun and by the request to stand or remain seated. The maximal distance is reached in the manslaughter case where the judge never addresses the defendant directly. He is referred to in the third person and never in the second, as in regular sentencing hearings. The distancing is intentional. This might be explained by the "behavioural problems" and the "very low intelligence" of the defendant, but also by his apparent absence of remorse throughout the proceedings. The introduction of the judge denies the defendant a moral capacity, he is considered as unable to receive the court's moral judgement. This denial cuts off the relation between the judge and the defendant as a fellow citizen. He appears as a person to whom it is useless and/or unwanted to address as a member of the community. In other words, the moralizing figure denies the moralized other a moral standing (Duff, 2003). When mentioning his previous condemnations and his permanent inadequate behaviour, the judge creates a personal continuity. It contributes to the defendant’s degradation, meaning it marks his “former identity as accidental; the new identity is the ‘basic reality’. What he is now is what, ‘after all,’ he was all along” (Garfinkel, 1956, p. 422).

The power of language is used to perform a moral public punishment as part of the sentence. The judge expresses his authority and thinks aloud about what the defendant did. Indirect moralization takes place by presenting a sentence before choosing another one. The uncertainty and tension created about the choice of the sentence before solving it performs an additional punishment. If this intermediary sentence can be found in a larger sample of hearings, the possibility to remove it from the sentencing speech could be discussed with the judges, who would then present the elements serving to adjust the sentence directly followed by the selected punishment.

Objectivism as facts of the case is related to the judge's subjectivism. A dialogue between the judge and the case occurs, where he shows, with his comments and evaluations, how he is affected. He therefore becomes a commentator of the case, inscribing its narration in a dialogical structure ending in the proclamation of the sentence. The function of his speech is going through an idealized thought process. In other words, judges express their feelings and arguments while defendants remain silent and become “bystanders in their own trial” (Szmania & Mangis, 2005, p. 347). This could decrease the defendant's perceived fairness of the sentence, of the court and of the criminal justice system, which in turn influences future law-abiding behaviour. Procedural fairness derives from the courts procedures, while distributive fairness is connected to the case outcome. In forming an opinion about the court, procedural fairness prevails over distributive fairness (Tyler & Huo, 2002).
A recent study has shown that the perception of the judge is by far the most important factor in the perceived fairness of the court, even if the treatment of the defendant by other court actors (court officers, attorneys, prosecutors) also plays a role (Frazer, 2006, p. 19). The communicative style of the judge in each phase of the sentencing hearing is important in this regard, but further investigation is needed to propose concrete solutions. The identification of the phases with their underlying function offers a first step in this direction, by shedding light on the message transferred to the defendant and by showing the pitfalls of such a difficult exercise.

The procedural design of indirect moralization implies a certain rationale that would not apply to direct moralization. Ideally, direct moralization would affect the defendant instantly and enduringly, but would prevent social conflicts or at least their spreading out by keeping the parties at a distance. Ideally, it would resemble a shock therapy by which the personality would be shaken and transformed. As an effect, moral norms would remain like an imprint on the person’s self. Students of moral communication doubt this efficacy for conventional court hearings, their rituals and routines of self-exposure, their legal incentives for showing remorse and their silencing of victims. Indirect moralization, in contrast, adheres to a different rationale. Ideally, it would move the defendant from one stage of reflection to the next. It would entangle her/him in a web of moralizing encounters. It would collect moral reactions of various forms. It would integrate reactions into a moral learning progression. The offender would not pass just one turning point, one moment of conversion, but rather a sequence of moralizing events that would feed, ultimately, into a single educational process. Ideally, this process would move the defendant to permanently reshape her/his self-perception. Indirect moralization, this is the idea, would stimulate further “self-examination” and “self-judgements” (Hepworth & Turner, 1979, p. 232).

Bringing it closer to the French definition of the word sentence, which means either a decision by a court or a moral precept, our case study suggests that sentencing hearings in English Crown Courts could represent an opportunity for indirect moralization. While direct moralization creates powerful moments of confrontation and exposure, indirect moralization involves a series of short moralizing encounters. This expansion facilitates a soft but enduring force of moral education. It facilitates as well, and this seems to parallel a motive in Luckmann’s (2002) communicative exploration of indirect moralization, the protection against confrontational reception. With the defendant’s self-explanations being placed on the procedural backstage, indirect moralization can hardly fail as a performance. Even problematic characters such as the unrepentant defendant in the manslaughter case are integrated in an overly fitting presentation of the matter and its judgement.

In order to gain better understanding of the judges’ communication and the treatment of the defendant in sentencing hearings, official transcripts in lower English courts and in German courts (Amtsgerichte and Landgerichte) could also be explored. Two legal systems and the participation of lay judges in criminal trials will allow a comparison of the potential occurrence of moralization performed by judges, which could in turn contribute to the improvement of the defendant’s experience of a trial. “In many ways, though, what is striking is that sentence received does not, by itself, carry the day. Defendants are not just saying that they find their sentences palatable or unpalatable” (Casper, 1978). In this regard, the procedure followed by a judge plays the most important role and is transferred in the sentencing hearing by means of what is said or kept silent.

References:
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24 – 26 September 2014
Improved Performance Of The Netherlands Judiciary: Assessment Of The Gains For Society
By Frans van Dijk

Abstract:
At the eve of the reorganization of the Netherlands Judiciary which led to fully responsible boards of the courts and a council for the Judiciary, in 1998 an inventory was made of bottlenecks in the performance of the courts, as perceived by their users, and the gains for society of removing these bottlenecks were calculated in economic terms. Conceptually as well as from the perspective of data availability, this was not an easy undertaking. Now fifteen years later, it is of interest to evaluate whether the bottlenecks were solved and the then calculated gains reached. This paper reports the outcome of this evaluation with respect to civil and administrative cases. It shows that substantial progress was made, for instance, by reducing court delay and that a large part of the previously calculated gains was realized. But it also shows that the demands of society have increased further about timeliness, and, in particular, about digital access of the courts. And again substantial gains are possible and necessary. Within the Netherlands Judiciary it was recently concluded that these improvements require redesign of the laws of procedure to make procedures less formal and much faster, but also demand radical digitalization. As to the methodological aspects, the knowledge about the impact of the judicial function on the welfare of society is growing. However, the assessment of the economic impact of specific improvements such as reduction of court delay, let alone improved reasoning and consistency of judicial decisions, is still rare. The paper discusses possibilities and complications. While it is feasible to assess the direct gains to the parties in a court procedure, the gains resulting from a more effective "shadow of the law" due to the quicker and more predictable adjudication of cases are still elusive.

Keywords: judiciary, performance, Netherlands, societal gains, judicial function

1. Introduction
In 1998 the renewal of the Netherlands Judiciary was being discussed in Parliament. It was decided that each court would get a board integrally responsible for the court and that a council for the Judiciary would be established. The report that formed the basis of this discussion made important and well-reasoned proposals about the organization of the Judiciary to strengthen its independence and capabilities, but did not provide an analysis of the gains to society that could be attained by the reorganization (Commissie Leemhuis, 1998). Therefore, a separate study was undertaken to identify improvements thought necessary and possible by the users of the courts and to assess the benefits in economic terms (Ministry of Justice, 1998). This study, further referred to as the 1998 study, is central to this paper. The idea was that the organizational changes would provide the courts with the capabilities to realize these improvements and to set clear objectives to that end. The study of which I was one of the authors had to be done in a short period of time – a couple of months – but had to enter uncharted terrain.

Now 15 years and several reforms (see Box 1) later, it is of interest to look back. There are two areas of interest. First, based on current knowledge, does the analysis and in particular its economic part still make sense? Second, have the improvements and the associated gains been realized? In addition, it is of importance to know whether the demands of society have changed. The analysis is confined to civil and administrative cases, as the 1998 study dealt with criminal law in a superficial manner. Below, I first take a brief look at economic methodology to give a broad outline of the approach followed. I then discuss the 1998 study in section 3. In section 4, the 1998 study is evaluated from a methodological point of view.
of view. Section 5 discusses the performance of the Netherlands Judiciary with regard to the removal of the bottlenecks, while section 6 examines whether new bottlenecks have formed. Section 7 concludes the paper.

### Box 1. Judicial reform in the Netherlands

<table>
<thead>
<tr>
<th>Year</th>
<th>Reform Measure</th>
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<tbody>
<tr>
<td>2002</td>
<td>Establishment of integrally responsible boards of the courts and Council for the Judiciary</td>
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<tr>
<td>2002</td>
<td>Introduction of output-based funding system and total quality system</td>
</tr>
<tr>
<td>2006</td>
<td>Establishment of quality and lead-time standards</td>
</tr>
<tr>
<td>2011</td>
<td>Increase of competence of small claims courts from 5,000 euro to 25,000 euro</td>
</tr>
<tr>
<td>2011/12</td>
<td>Introduction of new method of handling administrative law cases</td>
</tr>
<tr>
<td>2008/12</td>
<td>Gradual expansion of digital access to the courts</td>
</tr>
<tr>
<td>2013</td>
<td>New judicial map: from 5 to 4 appeal courts, from 21 to 11 first-instance courts, from 56 to 32 court venues</td>
</tr>
<tr>
<td>2013/17</td>
<td>Reform of laws of procedure, simplification and digitalization of procedures, reorganization of the administration of the courts</td>
</tr>
</tbody>
</table>

2. Economic Methodology

At a very abstract level, maximizing social welfare\(^3\) of a society requires an optimal allocation of resources in the whole of its economy. This in turn requires that all possibilities for exchange are utilized, in a market economy largely on a voluntary basis. If the legal infrastructure stands in the way, for instance because property rights are insecure, options for exchange are not pursued. This takes place in the static context of maximizing welfare in a particular moment in time, but also in a dynamic, inter-temporal context. Especially in the latter context, the consequences of a weak legal infrastructure may be dramatic, for instance if investments that have a long pay-out period are too risky due to ineffective legal protection. This can be a major impediment for economic growth. In advanced economies, insecure property rights are generally no longer an issue, although at the micro level, such situations may arise with new technology that cause legal issues not envisaged in the law (can a genome be owned?). In these societies, legal infrastructure challenges are about smaller issues such as the duration of lawsuits and the consistency of the application of the law, and the economic impact is both less glaring and more complex.

There are different approaches to analyzing the impact on the economy of the functioning of the legal infrastructure of which the Judiciary is a key component. A macro-economic approach uses data from different countries with differing growth performance and different performance of the legal infrastructure, and correlates these, while controlling for many other variables that have an impact on economic growth. It captures the general relationship between economic growth and the legal infrastructure, as defined by the chosen indicators. All direct and indirect effects are incorporated in an undifferentiated manner in as far, of course, as these effects are related to the indicators that describe the legal infrastructure. It is classic black box. The benefits accruing to a specific effort to improve the performance of the courts cannot be established. Many of the econometric relationships found in the literature stem from a comparison of wealthy countries with highly developed legal infrastructures and poor nations with weak legal infrastructures. The analysis shows, for instance, which part of economic growth can be attributed to the functioning of the legal infrastructure. In a meta study for the Netherlands, it was calculated that 0.7 percentage point of annual economic growth can be attributed to a legal infrastructure, better than the world average (Van Velthoven, 2005).\(^4\) This study also provides an overview of the literature. However, for the Netherlands this method does not show the potential for improvement, as the legal infrastructure functions at the top of the scale. This thinking is reflected in the global competitiveness index of the World Economic Forum; institutional factors have a larger impact at lower levels of development than at higher ones (e.g. Schwab, 2012). Still, there are no reasons to assume that the possibilities for better performance are exhausted. A

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\(^3\) Social welfare is an economic concept that refers to the well-being of the whole of society. In a narrow interpretation it is often defined as to the total value of consumption. For example, Nordhaus and Tobin (1973) define it as “a comprehensive measure of the annual real consumption of households”. In a very broad definition it encompasses everything people value (e.g. Shavell, 2004).

\(^4\) Ben van Velthoven, University of Leiden, received a research grant from the Netherlands Council for the Judiciary with the assignment to study the role of the courts in the economy, building upon the 1998 study discussed here. Several of his reports will be referred to below.
Judiciary may be one of the best in the world, but it may still lag behind the rest of society. Despite these limitations, the macro-economic approach is very relevant and remains in wide use.

The other, micro-economic approach looks at the traceable effects of specific improvements. It is much less used, and suffers from lack of theoretical and empirical development. It requires in-depth knowledge of how people behave. In practice, causalities are complicated. For example, the reduction of the duration of a procedure has a direct impact on the parties involved in the procedure. The analysis of this impact is relatively straightforward, as we will show below. Speeding up the procedures, however, also affects the behaviour of others than the parties. They have a stronger incentive to stick to the law and to avoid unnecessary legal procedures. See for instance Gravelle (1990). This longer shadow of the law, as it is commonly called, may well have a much larger impact than the direct effects on parties in many situations, but is very difficult to assess. Similarly, increased uniform application of the law reduces costs for the parties involved. They have less reason to appeal first-instance verdicts, and they do not have to bring similar cases to court and/or try other courts. The indirect effects stem from the law being more predictably enforced, leading to more law-conforming behaviour, fewer legal conflicts and fewer court cases. In this situation, the impact on the volume of legal conflicts is probably simpler to assess than in case of the reduction of court delay, but it is still difficult. The 1998 report used the micro-economic approach and confined itself largely to direct effects.

To set the stage, the major categories of costs that are affected by measures to improve the performance of the courts are briefly introduced here.

1. Transaction costs: transaction costs include the court costs of processing a case, the costs of legal representation and other costs incurred by the parties, such as the cost of time spent by the parties litigating the case. All the activities concerned consume resources and time, and as such do not contribute to the overall social welfare. These resources and time could have been used for welfare-enhancing activities, whether in production or consumption.

2. Costs of postponing activities: in many court cases, economic activities are stopped pending disposition of the case. These cases may concern disputes about (intellectual) property rights, but also about transactions. In administrative law disputes, the cases often have to do with permits of divers nature. Assuming these activities enhance welfare, postponement of them reduces welfare. Postponement sometimes leads to the abandoning of activities altogether.

3. Costs of uncertainty: uncertainty is a dominant feature of most court cases. Uncertainty itself may result in large welfare losses, even when there are no other costs. For instance, when a lawsuit is purely about money owed, this is redistribution in economic terms and, disregarding ethical concerns, welfare is not affected. However, the fact that a certain sum is at stake forces both parties, if they are rational, to take the eventuality of an adverse court ruling into account and provide for it. If both have sufficient access to capital, this has no impact. The party that loses the case can go to its bank and borrow the necessary funds. If one or both of the parties has no or limited access to capital, funds have to be set aside, and use of the money for other purposes has to be postponed. Opportunities for welfare-enhancing activities are temporarily missed. Of course, parties may not be prudent or may not be able to be prudent, as when they have to cover other debts. Then, the damage cannot be contained if the party loses; if it cannot pay, it may have to pursue bankruptcy proceedings. Meanwhile, the other party is not compensated and also may suffer adverse consequences. Under current economic conditions, access to capital is severely restricted, and liquidity constraints are prevalent.

Transaction costs can be estimated relatively easily, at least the part that concerns the courts. The assessment of both the costs of postponement and the costs of uncertainty requires an estimate of the economic value of the interests at stake in all lawsuits. In an individual case, this value is easy to establish if the case is about money. There is a monetary claim and, if approved by the judge, an awarded amount. Both amounts may differ considerably. Still, an approximation of the total value at stake in these cases is the sum of all monetary claims. It should be recognized, however, that in many cases such claims do not exist. For instance, in a legal conflict about the ownership of a patent, the economic value may be very large but may not be made explicit. In still other cases, the conflict is not economic in nature, for instance in cases about the custody of children, and it is therefore difficult to attach an economic value to these cases. The money parties spend on legal advice and representation serves in these cases as a minimum estimate of what the cases mean to them, expressed in monetary terms, but such estimates are a poor reflection of the real value.

The next step is to estimate the economic impact of improvements in court performance on these costs. But first the improvements thought necessary in the 1998 study will be discussed. After that the notions presented in this section will be applied.

The 1998 study consisted of a straightforward questionnaire among diverse organizations that have themselves practical experience with the courts or have collected the experiences of groups of clients. These organizations comprise companies in the major sectors of the economy; organizations representing them; organizations that represent the interests of citizens such as consumer organizations; government agencies; and legal intermediaries such as law firms and bailiffs. In total, 37 organizations were approached, of whom 29 completed the questionnaire. Subsequently, in-depth interviews were held with representatives of 21 of these organizations. The questionnaire and interviews dealt with civil, administrative and criminal law, but criminal law was studied in much less detail. I therefore focus the discussion on civil and administrative law. Questions concerned the problems and weaknesses encountered by the respondents in the functioning of the Judiciary and inquiries about the solutions respondents thought desirable. With regard to these solutions, the potential for feasible improvement was assessed as much as possible in quantitative terms, and the economic benefits of these improvements were estimated. Thus, the steps were to identify bottlenecks and solutions, to define feasible improvements and to quantify the benefits to be gained by these feasible improvements. Obviously, questionnaires and interviews run the risk of soliciting superficial responses and even cheap talk. The economic analysis, however, was based on an objective method, and was thus not subject to exaggerated demands. Turning to the problems encountered by the respondents, the concerns in 1998 were the following.

Court Delay

Not surprisingly, by far the most serious and most frequently experienced problem then was the protracted duration of civil and administrative procedures. Respondents frequently mentioned lengthy periods of uncertainty and that they either had to postpone or sometimes abandon activities such as investments. In cases about liability, the accumulating damage due to continuing activities that caused the damage was often unnecessarily large, as well as, conversely, the compensation eventually to be paid. Long procedures also led to emotional damage as conflicts dragged on. In a work context, this emotional damage often resulted in lower productivity of individuals and organizations. It was in particular felt to be extremely frustrating when hearings or verdicts were postponed: parties braced themselves for the hearing or verdict, their emotions built up, only to learn, too often, that the court ordered a postponement of weeks or months. Many examples were given of repeated postponement.

In administrative law cases, government agency representatives complained that for lengthy periods of time, they had to pay out social security benefits to clients who were unable to repay them by the time the judge ruled in favour of the agencies. The converse situation was also often mentioned in which for long periods of time, citizens received no social security benefits resulting in liquidity problems before the judge decided in their favour. Also, negative effects of court delay such as slower reintegration at work after lengthy procedures about disability benefits were mentioned. Government agencies complained about the negative impact of court delay on effective enforcement of the law. In general, it was noted that protracted legal proceedings led to higher costs of legal representation. Even where the proceeding did not require additional legal steps, lawyers had to refresh their knowledge of the case and bill accordingly.

When it comes to quantifying the effects in monetary terms, respondents were generally not able to provide estimates. Obviously, effects are very diverse, and often complicated to estimate. The study therefore took the more general approach described in section 2, and made broad assumptions. The key variable is the total value at stake in all cases. Several studies were used to derive an estimate. A drawback of these studies was that they were all based on small samples, which had to be extrapolated to the total number of relevant cases. The cases in these studies were about monetary claims, and these claims were used to arrive at an estimate of the average value at stake in such cases. That average was used to calculate the total value. The same approach was used for administrative cases, but no studies were available about the financial interests in these cases. Therefore, the 1998 study asked those respondents that had pending or recently concluded administrative cases to estimate the monetary value of the interests at stake in these cases and used these figures to arrive at a rough, overall estimate. Using the estimates of the total value of the cases, the costs incurred during the court case were approximated by the average return on investment minus the legal interest rate used to calculate the compensation the losing party had to pay the winning party for the time delay, for the average time taken by the judges to adjudicate the cases.

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5 It can be readily seen that this deduction is not correct. For practical purposes this does not make much of difference (see section 4).
### Table 1. Potential Benefits of Solving Bottlenecks

<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>Reduction of court delay</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- civil law</td>
<td>Contested value x (rate of return – legal interest rate) x feasible reduction of delay for contested cases) = 2.9B euro x 0.1 x 8/12 (large claims) plus 0.4B euro x 0.1 x 2/12 (small claims)</td>
<td>200</td>
</tr>
<tr>
<td>- administrative law</td>
<td>5.2B euro x 0.1 x 6/12</td>
<td>230*</td>
</tr>
<tr>
<td><strong>Increased quality and consistency of judicial decisions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- civil law</td>
<td>2 - 3% less cases, valued as above</td>
<td>90*</td>
</tr>
<tr>
<td>- administrative law</td>
<td>2 - 3% less cases, valued as above</td>
<td>90*</td>
</tr>
<tr>
<td><strong>Increased expertise</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- in general</td>
<td>Increased expertise leads to higher quality and consistency of decisions and to lower lead-times, and has no independent effect</td>
<td>Not independent</td>
</tr>
<tr>
<td>- re bankruptcy cases</td>
<td>Increase debt recovery: 10% of estimated loss of funds of 450M euro</td>
<td>45</td>
</tr>
<tr>
<td><strong>Improved access to law by reducing procedural and financial thresholds</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>No estimate</td>
<td>No estimate</td>
</tr>
<tr>
<td><strong>Higher service levels, provided by the courts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reduced waiting time before hearings</td>
<td>Eliminating waiting times by 1.5 hours per case for two persons, thereby reducing loss of time for work/leisure and costs of lawyers: 1.5 hours x 2 persons x 45 euro per hour x 500,000 civil cases and 100,000 administrative cases</td>
<td>80</td>
</tr>
<tr>
<td><strong>Increased uniformity of procedures</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total benefits of removing bottlenecks</td>
<td>No estimate</td>
<td>No estimate</td>
</tr>
<tr>
<td>As percentage of GDP</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: second and third column 1998 study; fourth column my update.

* In view of the large margin of uncertainty, figures were rounded in the 1998 study (in guilders).

As to the feasible reduction of the length of proceedings, it was determined that shortening the duration of contested civil cases with claims above 5,000 euro by eight months at first and second instance could be achieved, while the length of contested small claims proceedings could be reduced by two months. Uncontested cases were already concluded very quickly, and substantial gains were not deemed possible. For administrative cases, a reduction of six months was thought to be feasible at first instance, and, where applicable, at the appeals level. With respect to administrative law, cases are nearly always contested, as the defendants are public agencies that could have settled beforehand but did not do so. These agencies chose to litigate the cases.

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6 In a contested case the defendant rejects the claim. In an uncontested case the defendant accepts the claim, but he may not be able to pay. In both types of cases uncertainty about the outcome exists.
Using these figures, the benefits of a feasible reduction of court delay for civil and administrative cases at the first-instance courts were estimated at approximately 430M euro annually in 1998. (See table 1.) It should be noted that the issue of court delay is larger than shown here. A source of delay reported by the respondents was the recurring accumulation and weak coordination of procedures in complex legal disputes. Where such accumulation occurred, lengthy and protracted proceedings prior to final disposition were inevitable. It was not possible to assess the magnitude of these problems, and this is not part of the estimate.

**Quality and Consistency of Judicial Decisions**
Other key elements are the quality and consistency of judicial decisions. Many respondents identified insufficiently substantiated and thus unclear verdicts, leaving the parties to speculate as to what the judge(s) intended. Also, numerous complaints were made about the lack of consistency of verdicts. Both situations led to uncertainty and more procedures in first instance and in appeal than necessary. The report assumed that the volume of civil as well as administrative cases would be reduced by 2-3% by higher quality and greater consistency of decisions. The total benefits were estimated at 180M euro, based on the total value of the cases.

**Specialized Expertise**
According to the respondents, judges did not always have enough knowledge to handle cases adequately. They blamed this on lack of specialization. Insufficient expertise led to decisions that did not thoroughly resolve the cases and sometimes resulted in inconsistent verdicts. It also led to the unnecessary use of expert witnesses, adding both to the cost of and delay in completing the proceedings.

Bankruptcies were singled out as a special category of cases in which lack of expertise resulted in very high costs to society. The level of debt recovery was seen as unnecessarily low, resulting in many creditors not being compensated. Given an estimate of annual bankruptcy fraud of 450M euro, the benefits of improved expertise in this area were assessed at 45M euro. It was noted that bankruptcy fraud could be considered merely as redistribution, but the same would hold for theft. Both were considered as costs to society.

**High Procedural and Financial Thresholds**
Especially consumer organizations reported that procedures were so cumbersome and intransparant that many citizens refrained from going to court. Financial barriers had a similar impact, particularly in civil law. Without insurance to help cover the costs, many citizens could not afford to go to court; as a result, conflicts remained unsolved, damages were not compensated and frustration continued. Court fees were felt to be high, but the costs of lawyers prohibitive.

**Lack of Uniformity of Procedures**
In 1998, legal procedures differed among the courts. Respondents noted that this led to unnecessary procedural mistakes by parties or their legal representation, resulting in delay and associated costs.

**Low Quality of Service**
Finally, many respondents complained about the lack of service the courts provided. They regularly had to wait before their scheduled hearing started; hearings were often postponed; documents were not provided timely; and requests for information were not answered quickly. Respondents missed the exchange of information by email and internet. The report concluded that courts were not yet professional providers of public services. This resulted in substantial costs for all users of the courts. The benefits of a reduction of waiting times before hearings were estimated at 80M euro.

**Total Economic Benefits of Removing Bottlenecks**
All in all the report arrived at an estimate of 735M euro (price level 1998) per annum. This was approximately 0.2% of GDP.

**Solutions**
The respondents were also asked to provide their ideas for solutions to the bottlenecks. Apart from increasing capacity, higher efficiency and other obvious measures, many suggestions called for redesign of procedures, such as the abolition of the summons in favour of a less-formal and less-cumbersome petition, a more active role of the judge, more choice as to the procedure and a broader scope of the small claims procedures. More uniform procedural rules set by the courts were proposed. Also, many thought better-reasoned verdicts and other decisions necessary. Specialisation to maximize specific expertise was also popular among the respondents. Mandatory representation at trial by a lawyer was thought not to be desirable anymore. Finally, respondents believed that for a range of cases ADR had inherent advantages above formal court procedures.
4. Validity of the Analysis
In this section I will discuss whether the analysis of 1998 has withstood the passage of time. The growth of knowledge may have thrown a new light on the prevalence and relevance of the bottlenecks themselves and especially on the economic analysis of their effects. I will examine both topics separately.

Has the Analysis of Bottlenecks Survived?
The bottlenecks that were identified by the clients of the Judiciary have in no way been questioned in the on-going public discussion about the functioning of the Judiciary. If anything, the criticism in the media and in politics of the Judiciary in general and with respect to the duration of procedures, in particular, has increased substantially. However, not much in depth research has been undertaken into the actual relevance of the bottlenecks: are they a nuisance or do they really have a large impact? A small study commissioned by the Ministry of Justice in cooperation with the Council for the Judiciary about the consequences of the long duration of judicial procedures for the parties has yielded a more nuanced view of the impact (Felso, 2007). In twelve court cases in three categories - social security, trade and arrangements for children at a divorce - parties and their legal representatives were interviewed. Only in trade cases were the negative effects large. In the other categories the duration of the court procedures was not a major issue, either because the content of verdicts was anticipated or because agencies other than the courts were involved and caused more severe delay. In the latter situation, much stress and irritation occurred anyway. Court delay apparently did not add much to the already severe problems in these cases. In the trade cases, this was very different, in particular, due to the liquidity problems the plaintiffs encountered. The size of the claim relative to the financial resilience of the companies concerned was of great importance. That determined the liquidity problems the plaintiffs experienced. Small and mid size companies are especially hit hard by long judicial procedures. The researchers note that if it is clear from the start that the plaintiff would not be able to survive the duration of the court case financially, it would be of no use to go to court, and the plaintiff could only accept an unfavourable settlement. Those cases did not show up in the sample. A striking result is that in two of the three trade cases, plaintiffs as well as defendants said they had incurred high costs due to the long duration of the cases. In both cases, the defendants expressed willingness to pay substantial amounts in the range of 2,000 and 3,000 euro to halve the duration of the case. Apparently, for these defendants the advantages of extra liquidity due to delay is outweighed by the benefits of resolving the conflict. In the third trade case, court delay was used by the defendant to shift assets out of the company. As a result the verdict in favour of the plaintiff, could not be executed. In all three cases, the parties experienced, apart from material damage, uncertainty, stress and frustration. These emotions were particularly strong among the small companies. As reported before, parties were particularly annoyed about repeated postponement of decisions by the courts. Stress builds up, as the date of the hearing or verdict approaches. If a hearing or verdict is postponed, frustration is the result, and stress builds up again when the new date draws near. To sum up the results, in one of the three categories of cases the effects, as described in the 1998 study, were found in full magnitude. These commercial cases are precisely the cases that were used to quantify the effects in the 1998 study. In the other categories of cases, the duration of court cases was found not to be a serious problem. Still, many questions remain, and larger scale research of this type is warranted.

An issue not considered in the 1998 study is the impact of the duration of cases on the volume of cases. As argued for instance by Gravelle (1990) court delay could act as a rationing device: the longer cases take, the fewer the cases that will be brought to court. Although this is not necessarily so in all situations, this effect is plausible. So far, this effect has, however, not been empirically demonstrated in the Netherlands. If such an effect occurs, determining the welfare implications will prove to be complicated. As Gravelle (1990) argues, in the context of damage causing behaviour, one has to look back at the level of care that determines the probability of an accident. When an accident has occurred, a claim may or may not follow, followed by settlement negotiations; when these fail, the plaintiff may or may not take the defendant to trial. All these decisions are influenced by court delay. A decrease of court delay will lead to plaintiffs taking defendants to court more often, and this could well lead to people taking more care. As a result, it is not obvious whether the volume of court cases will increase, but welfare does increase due to the decrease of accidents. Another often suggested negative effect of court delay that was not considered in the 1998 study is the deterioration of evidence as time progresses (see again Gravelle, 1990). As the facts are harder to establish, the quality of decisions will decline, the longer the duration of cases.
A different way to check the relevance of the bottlenecks is by means of the customer satisfaction surveys that have been conducted in the courts since 2001. What do the clients of the courts find important? From these surveys it follows that the general satisfaction of professional users of the courts, such as lawyers, is determined foremost by the functioning of the judge, in particular the way he or she treats parties and lawyers. Other important factors are the competent administrative handling of cases and the transparency and use of guidelines for the uniform application of the law. For the parties themselves, the functioning of the judge is also most important. Waiting time before a hearing, the duration of the whole procedure and the way court staff treat parties also are important, but less so. The next question is how do the clients evaluate the performance of the courts on these issues. The functioning of judges is evaluated very positively in all surveys. The reasoning and consistency of the decisions (uniform application of the law) is evaluated negatively, as is the duration of court cases and service in general. The courts are very good at what the users consider to be most important (functioning of the judge), while their weak spots (court delay, reasoning and consistency of decisions) are seen as less important. This is consistent with the positive overall appreciation of the courts that is found in all surveys, and it is also consistent with the bottlenecks found in the 1998 study. It should be noted that while users of the courts do not find court delay and reasoning/consistency of prime importance, these factors may well be dominant from an economic perspective. At the same time, it can be concluded from the preferences of the clients that promoting timeliness does not make sense, if this is at the expense of the interaction with the judge.

Has the Economic Analysis Survived?
The methodology to quantify the benefits of resolving the bottlenecks is vulnerable, given the wide range of cases and the broad assumptions made. The empirical economic (micro) analysis of the courts has not received much attention. The macro-economic approach, however, has flourished, and the outcomes of this approach can be seen as support. However, both approaches cannot be easily linked, as they focus on different aspects of the economy: static welfare versus economic growth. Also, the micro-economic approach addresses primarily direct effects, while the macro-economic approach captures in one sweep all direct and indirect effects (see section 2). Still, some work has been done get into the indirect effects at a detailed level and to bridge the gap between micro and macro approaches. An example is payment behaviour. Van Velthoven (2006) found that a reduction of the duration of relevant court procedures leads to an improvement of payment behaviour in general. The consequence of the focus on direct effects is that the benefits of reducing the length of judicial procedures, but also of a higher quality and greater uniformity, are underestimated, because only the impact on the parties of the procedures is considered. The estimates of the 1998 study can thus be considered as a lower boundary in this respect.

Value of court cases
The economic analysis of the 1998 study depends critically on the value at stake in civil and administrative cases and its estimation. As noted above, the concept of the total value is difficult to operationalize and to measure. The 1998 study was based on shaky data. A much better estimate was made by Van Velthoven (2005) for civil cases in the first-instance courts. His calculation is based on the case-registration systems of the Judiciary, thus does not depend on small-scale samples. The value of all civil cases with explicit financial claims that were adjudicated by the first-instance courts in 2005 is 9B euro in 2005 prices. Of this 9B euro, 6.6B euro was actually contested in court. (See Table 2.) If we correct (backwards) for inflation and the growth of the volume of cases, this figure corresponds with 4.1B euro in 1998 prices and (lower) volume of cases, and can be compared with the estimate of 3.3B of the 1998 study itself. Both figures are in the same order of magnitude. Using the better 2005 data, benefits would be 230M euro (1998 prices and volume), using the same method of calculation as in the 1998 study, and thus would only be marginally larger than the original estimate. We can be reasonably comfortable with the original estimate for civil cases.

The estimation of the value of administrative cases has not improved. The court-registration systems are not of much help in this area, as these cases very often are not about direct financial claims. Administrative cases range from procedures about permits to operate industrial plants and to build highways with very large economic interests to permits to add a garage to a house at minor costs. Also, administrative law deals with tax cases with a very wide range of financial value at stake, as well as social security cases. It makes sense that the value of all cases together is very high. However, it would be helpful to know the dispersion of cases across the range of value. A more in depth study is warranted. For now, it must be concluded that the initial estimate cannot be validated.

Recent data show a large increase of the value of civil cases. Due to registration problems in the courts, it was not possible to fully replicate the estimate by Van Velthoven, but two key variables are available (Table 2). As the data are volatile due to some extreme large cases related to the economic crisis, an average is given for the years 2011 and 2012. The last column of Table 2 provides an extrapolation for 2013 of the contested value of all cases. The estimated value has increased to nearly 20B euro. As a result, the actually realised benefits have increased substantially (see section 5).
Table 2. Estimated value of (contested) civil and administrative cases, M euro in current prices: available data and extrapolation for 2013

<table>
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<tr>
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<tbody>
<tr>
<td></td>
<td>total</td>
<td>contested</td>
<td>total</td>
<td>contested</td>
</tr>
<tr>
<td>Civil cases: large claims</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Summons</td>
<td>5,049</td>
<td>4,110</td>
<td>10,762</td>
<td>11,000</td>
</tr>
<tr>
<td>• Petitions</td>
<td>2,100</td>
<td>897</td>
<td>3,300</td>
<td>3,300</td>
</tr>
<tr>
<td>Total large claims</td>
<td>7,149</td>
<td>5,007</td>
<td>10,762</td>
<td>14,300</td>
</tr>
<tr>
<td>Civil cases: small claims</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Summons</td>
<td>838</td>
<td>374</td>
<td>1,393</td>
<td>1,400</td>
</tr>
<tr>
<td>• Petitions</td>
<td>1,204</td>
<td>1,178</td>
<td>2,382</td>
<td>1,800</td>
</tr>
<tr>
<td>Total small claims</td>
<td>2,242</td>
<td>2,552</td>
<td>3,775</td>
<td>3,200</td>
</tr>
<tr>
<td>Total civil cases</td>
<td>3,300</td>
<td>9,191</td>
<td>6,559</td>
<td>18,400</td>
</tr>
<tr>
<td>Administrative cases</td>
<td>5,230</td>
<td>5,230</td>
<td>7,000</td>
<td>7,000</td>
</tr>
<tr>
<td>Total cases</td>
<td>8,530</td>
<td>2,4%</td>
<td>25,400</td>
<td>19,700</td>
</tr>
<tr>
<td>Percentage of GDP</td>
<td></td>
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</table>

Notes: the extrapolation for 2013 is based on an average rate of inflation of 2% for the whole period since 1998 and on the actual change of the volume of cases.

Legal Interest Rate and Rate of Return

When a critical look is taken at the details of the methodology of the 1998 study, some remarks are in order. It seems that the impact of court delay is underestimated, as there is no good reason to deduct the legal interest rate from the rate of return, and to calculate the benefits of the reduction of court delay by using this net rate of return. The legal interest rate is used to calculate the compensation to be paid by the party that lost the procedure to the other party. This is only a matter of redistribution between the parties. The rate of return as such should have been used. However, as a high net rate of return (10%) was used in the 1998 study, it seems inappropriate to use an even higher rate. It could even be argued that especially in the current economic climate a rate of return of 10% is already too high. The rate of 10% is retained here.

Quality and Consistency of Judicial Decisions

The quantification of the impact of a higher quality and greater consistency of judicial decisions also requires attention. In the 1998 study it rested entirely on assumptions. A reduced case volume of 2-3% was assumed. This raises several questions. First of all, is it certain that higher quality and greater consistency lead to a reduction of the number of cases? The reasoning of the 1998 study was that if the outcome of a court case is more predictable, there is less reason to go to court. This follows from the standard rational choice model of law and economics (see for the basic model Bone, 2003). As long as judicial decisions are predictable and the parties in a dispute know this, both parties benefit from avoiding the extra cost of going to court and settle out of court. However, this effect may be counteracted by a larger incentive to bring cases to court instead of doing nothing: some injured parties will not take legal action because the outcome is too uncertain. If uncertainty declines, more people will go to court for this reason. Following this reasoning to its conclusion, however, people also take more precaution to avoid, for instance, damage to others, and the volume of accidents and other damage inflicting events will decline (see Gravelle, 1990 and Shavell, 2004). Thus, the volume of “reasons” to go to court declines, but, if reason arises, people take more often legal action, while a higher percentage of these legal actions than before will be settled. The net impact on the volume of court cases is, strictly speaking, inconclusive. However, at
high levels of quality and consistency, a low level of litigation is the only possible outcome. Again, empirical studies are very scarce in this area. It seems reasonable to assume that the 1998 study still stands in this respect.

A second question is whether the assumed reduction of the number of cases by 2-3% makes sense. Intuitively, this reduction is quite moderate, noting that when uniformity is complete, judicial decisions are entirely predictable and only cases would go to court in which formal court decisions such as titles for enforcement are needed. The reduction is hard to ascertain empirically, and the assumption cannot be validated. A third question is what the benefits are of a lower level of litigation. I discussed already the way the benefits from the reduction of the volume was calculated in the 1998 study. A safer estimate would be to add up the avoided costs of court proceedings, the also avoided costs of legal representation and the avoided delay the activities would have incurred due to the legal conflict. For instance, an investment plan that is the subject of a legal conflict about property rights will be delayed, as long as the conflict is not resolved, while it can go straight ahead without legal wrangling. It should be noted that the time lost in a legal conflict is much longer than the duration of the court case, as parties generally start out by negotiating, getting legal assistance and further negotiating before going to court. Adding up these costs leads to a lower estimate of 40M euro (1998 prices) for civil cases and 35M euro for administrative cases.

Other Benefits
As to the other benefits explored in the 1998 study, the higher debt recovery in insolvency cases resulting from a higher level of expertise of judges is based on a conservative estimate of the total amount of debt that was not recovered, and a likewise conservative assumption about the feasible reduction of this amount. Finally, the gains from reduced waiting times before hearings are straightforward.

The fourth column of Table 1 gives the updated estimate of the benefits in 1998 prices and volume of cases that follows from the discussion here. The total estimate of the potential benefits has been reduced somewhat, but basically stands.

5. Have the Bottlenecks been Resolved?
Expectations were high with regard to what could be achieved by the change of the governance structure of the judiciary. I will discuss here whether progress has been made with the removal of the bottlenecks and whether the benefits have been realized. Box 2 summarizes the improvements that have been made. With regard to the potential benefits, the increased contested value of civil cases has to be taken into account, as does the impact of inflation on the value of administrative cases. The growing value expands the benefits of, for instance, the reduction of court delay. The fourth column of Table 3 gives the adjusted potential benefits at current prices and volume of cases, and the fifth column presents the realized benefits. In this section the progress made resolving each bottleneck will be discussed.

<table>
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<tbody>
<tr>
<td>Reduction of court delay:</td>
</tr>
<tr>
<td>civil law</td>
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<tr>
<td>administrative law</td>
</tr>
<tr>
<td>Change of percentage of (very) satisfied clients about:</td>
</tr>
<tr>
<td>Higher quality of verdicts</td>
</tr>
<tr>
<td>Greater consistency of verdicts</td>
</tr>
<tr>
<td>Greater specialist expertise</td>
</tr>
<tr>
<td>Waiting times</td>
</tr>
<tr>
<td>General satisfaction</td>
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</tbody>
</table>

7 For civil cases the three components are estimated at 7, 14 and 19M euro, assuming conflicts took overall two years to resolve for large claims and one year for small claims. For administrative cases the estimates are 3, 6 and 26M euro, assuming conflicts took two years.

8 The volume of civil cases has increased as well as the average value of a civil case. The volume of administrative cases increased since 1998, but declined in recent years. As a result, the volume of these cases in 2013 is roughly the same as in 1998.
Timely Justice

Since 1998, the measurement of the duration of cases has improved enormously. A consistent set of definitions was developed, these definitions were systematically applied in the case registration systems and the data were published for the Judiciary as a whole and for each court separately. Also, within the Judiciary, standards for the duration of cases were agreed upon for important categories of cases. These standards do not apply to individual cases. It is up to each judge to give cases the required attention. Also, the judge does not have full control over the procedure, as parties have much freedom to choose procedural steps. This is accommodated by standards of the form that x% of the cases are to be adjudicated within y days. For instance, at the first-instance courts, 70% of commercial cases with financial claims larger than 25,000 euro must be disposed of within a year\(^9\). A major impulse to actually reduce the duration of civil cases was given by offering a simplified civil procedure with a swift hearing aimed at settlement and, where not possible, collecting all information to adjudicate the case. The combined result of all these actions is that the length of contested civil cases has been reduced considerably. The original study used marginally reliable figures. Then, the average duration was estimated at 626 days. Currently the average is 436 days (same categories of cases, average over three years, 2010-2012). The duration has been reduced with 190 days or over six months. That is still two months short of the eight months anticipated in the 1998 study. The associated benefits in current euro’s and at current volume of cases can be calculated at 530M euro annually, using the same methodology as in the 1998 study. It should be noted that civil cases take much less time if parties are willing to litigate efficiently by using the simplified procedure described above. In that situation, the procedure will not take more than six months. This procedure does not suit all cases. A more elaborate procedure is generally thought necessary in complex cases in which experts have to report and witnesses have to be heard, but it must also be recognized that often one of the parties unnecessarily complicates procedures by offering new evidence or asking for expert witnesses with the sole purpose to cause delay. The judge may be convinced that these offers are just to delay the case, but he or she cannot do much against it.

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<tbody>
<tr>
<td><strong>Reduction of court delay</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- civil law</td>
<td>++</td>
<td>230</td>
<td>730</td>
<td>530</td>
</tr>
<tr>
<td>- administrative law</td>
<td>++</td>
<td>230</td>
<td>350</td>
<td>175-350</td>
</tr>
<tr>
<td><strong>Increased quality and consistency of judicial decisions</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- civil law</td>
<td>+</td>
<td>40</td>
<td>95</td>
<td>No data</td>
</tr>
<tr>
<td>- administrative law</td>
<td>+</td>
<td>35</td>
<td>50</td>
<td>No data</td>
</tr>
<tr>
<td><strong>Increased expertise</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- in general</td>
<td>+</td>
<td></td>
<td></td>
<td>Not independent</td>
</tr>
<tr>
<td>- bankruptcy</td>
<td></td>
<td>45</td>
<td>60</td>
<td>No data</td>
</tr>
<tr>
<td><strong>Improved access to law by reducing procedural and financial thresholds</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reduced procedural thresholds</td>
<td>+</td>
<td></td>
<td></td>
<td>No data</td>
</tr>
<tr>
<td>Reduced financial thresholds</td>
<td>-</td>
<td></td>
<td></td>
<td>Not analysed</td>
</tr>
<tr>
<td><strong>Higher service levels, provided by the courts</strong></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Reduced waiting time before hearings</td>
<td>+</td>
<td>80</td>
<td>135</td>
<td>90</td>
</tr>
<tr>
<td><strong>Increased uniformity of procedures</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Increased uniformity</td>
<td>++</td>
<td></td>
<td></td>
<td>No data</td>
</tr>
<tr>
<td>Total benefits of removing bottlenecks</td>
<td></td>
<td>660</td>
<td>1,420</td>
<td>795-970</td>
</tr>
<tr>
<td>As percentage of GDP</td>
<td></td>
<td>0.18</td>
<td>0.24</td>
<td>0.13 - 0.16</td>
</tr>
</tbody>
</table>

\(^9\) For the standards and actual lead-times see Raad voor de rechtspraak (2013).
For small claims procedures, fewer gains have been realized. The duration of contested cases was 133 days and is now 117 days (three-year average). The reduction is only two weeks with small benefits of 10M euro, although it should be recognized that in 2011, the value threshold of the small claims procedure was increased from 5,000 to 25,000 euro. The reduction of the duration of the cases that were shifted to the small claims procedure is very large (from 436 days to 117 days). As parties do not need legal representation at the small claims departments of the courts, this is an additional source of cost savings for them. For the teams at the courts that handle the small claims, the new cases are more complicated and require more processing time. The actual improvement of the duration of all civil cases including the small claims is thus higher than reflected in the figures presented here.

For administrative-law disputes, the data on the duration of cases were even less reliable in 1998 than for civil cases. As to ordinary administrative cases, averages ranging between 324 and 378 days were used for the main categories of cases that remain relevant today. The duration is now 259 days on average. The acceleration is thus two to four months. So far, just a part of the reduction of six months deemed possible has been realized. However, much of the reduction was realized in the last year (from an average of 308 days in 2011 to 259 days in 2012). This is primarily the result of the nationwide implementation of the so-called new method of handling administrative cases, after extensive experimentation. This new method requires that in all cases, a hearing must take place within 13 weeks. At or shortly after the hearing, all but the most complex cases should be adjudicated, taking into account underlying conflicts and the resolution thereof. For the latter purpose, the judge uses mediation techniques. If cases are too complicated to decide at the first hearing, the judge agrees the further procedure with the parties and sets deadlines. When this method is fully implemented, the average duration of administrative cases will be reduced to six months, a goal already achieved in the one court that now uses the new method in all relevant cases. For all courts, this is within reach in 2013 or 2014, at the latest. At that time, the reduction envisaged in 1998 of six months will have been realized. The projected benefit for society would increase from the present 175M to 350M euro annually. Another factor that contributed to the reduction of the duration of administrative cases is the entry into force of the Crisis and Recovery Law in 2010. This law applies to large infrastructure projects and makes it possible to combine the judicial procedures about diverse aspects of these projects. This law also sets targets for the duration of these procedures. An evaluation (Marseille et al., 2012) has shown that this law has been effective, although the impact on the average duration of all administrative cases is small due to the small number of cases the law applies to.

The 1998 study assumed a reduction of the duration of appeal procedures necessary and possible. About this duration, not much was known. The respondents in the study reported that commercial law appeal cases took between one and two years. In recent years lead-times are decreasing rapidly at the appeal courts. The duration stands now at 55 weeks in commercial cases. The reduction is nearly six months. This is still very long. Parties can be embroiled in court cases that take several or more years to fully adjudicate, in particular when the time spent on negotiations and preparations by the lawyers is included in the calculations.

Content of Judicial Decisions
The 1998 study revealed considerable shortcomings in the reasoning and consistency of decisions, also with respect of the uniform application of the law, leading to uncertainty and forcing parties to appeal cases and to bring more new cases to court. Very recently, the courts have started with the direct measurement of the quality of civil verdicts, having developed criteria for what constitutes a good verdict. A comparison over time is not yet possible. It is, therefore, necessary to resort to indirect measurements that can be derived from the customer satisfaction surveys that the courts have regularly administered since 2001. Most courts have undertaken three surveys by now. The last in 2011 was simultaneously undertaken at all courts. Prior to that, each court could decide itself when to undertake a survey. The first wave of surveys took place between 2001 and 2004, the second between 2005 and 2008 and the third, as mentioned, in 2011. See Prisma (no date) which summarizes all customer satisfaction surveys from before 2011 and Synovate/Regioplan (2011) which is the survey for 2011. All survey results presented below stem from these publications.

The surveys distinguish between parties and professional participants such as lawyers and bailiffs. The satisfaction of both groups about the reasoning of decisions has increased considerably. In the first wave of the surveys, 52% of the professionals were satisfied or very satisfied, while in 2011 67% were (very) satisfied. The satisfaction of the parties themselves about the intelligibility of verdicts increased from 59% to 83%. In 2011, the satisfaction about the
reasoning of decisions, which the parties was not asked in the earlier surveys, was 79%. Dissatisfaction was registered by fewer than 10% of the parties and 15% of the professionals. It is questionable whether these scores can be much improved upon, bearing in mind that a large part of the parties and the professionals will read the decisions very critically, as these went against them.

The uniform application of the law requires more attention. As only professionals have extensive experience on which to draw, they alone were asked to evaluate the performance of the courts in this respect. The percentage of (very) satisfied professionals increased from 38% in the first wave of surveys to 49% in the second wave and to 56% in 2011. In 2011 11% were (very) dissatisfied and 32% were neutral. Also, a very high percentage, 20%, answered that they did not know\(^{10}\). Judging from the inconclusive and the neutral answers, this question is difficult to answer. It is not obvious how to interpret the still relatively low satisfaction rate. What is clear, however, is that satisfaction has increased. It can be concluded that progress has been made to remove this bottleneck.

Has this improved quality and uniformity of decisions, as perceived by the clients of the Judiciary, led to the predicted benefits, i.e. the reduction of the number of cases? Unfortunately, it is not possible to disentangle the factors that influence the volume of lawsuits. Overall the volume of civil cases has increased, largely following economic trends.

**Specialized Expertise**

Again recourse needs to be taken to customer satisfaction surveys to get some idea of the developments in this area. Professional users of the courts have become somewhat more positive about the expertise of judges: the percentage of (very) satisfied professionals increased slightly from 72% in the first wave to 79% in 2011. In that year the percentage of (very) dissatisfied professionals was only 7%. The satisfaction of parties increased more, from 70% to 82%. Also, employee satisfaction surveys that have been conducted regularly at the courts are informative. Satisfaction with their own expertise increased from 61% to 75%. These general surveys do not measure the satisfaction with knowledge intensive, specialized areas of the courts. A study commissioned by the Council of the Judiciary about the performance of specialized judges in areas such as patent law and maritime law, reveals a very high satisfaction of their clients and lawyers (Böcker et al., 2010). Specialization definitely has added value from the perspective of the clients. The redrawing of the judicial map of the Netherlands which came into effect on the first of January of 2013 and led to the merger of small courts with other small and sometimes larger courts must be seen in this context. It increases the possibilities for within-court specialization. The effects are not visible yet, but should become so in the coming years. Again, indications are that knowledge has improved, and will improve further. Lack of expertise is likely to result in many erroneous verdicts of first-instance courts that will be appealed, where competent verdicts would not have been appealed. This causes unnecessary costs to the parties and the Judiciary. It was, however, not possible to quantify these costs.

**High Procedural and Financial Barriers**

In civil law the procedural barriers have been lowered with the introduction of the simplified procedure, described above. In administrative law, this procedure was further developed, as was also discussed already. Further simplifications have been introduced by abolishing the need to have a local procurator (local lawyer) if a lawyer handles a case outside his own jurisdiction. Also, the broadening of the scope of the small claims procedures has led to lower barriers. As to the issue of the accumulation of uncoordinated procedures, in cases pertaining to youth information regarding the relevant civil, criminal and administrative law procedures about the same youth are shared among the judges, and all legal issues can be addressed at one hearing before one judge. Thus, substantial steps have been made, but more are necessary.

Financial barriers are another matter because these are largely determined by government and parliament. Court fees were increased several times to generate more revenue for the government and have, in all likelihood, led to a reduction of the volume of cases. Access to justice is, therefore, a major issue for the Judiciary. Obviously, the trends work against each other: the reduction of procedural barriers promotes access to justice, but the raising of financial barriers results in the opposite.

**Uniformity of Procedures**

By the introduction of uniform procedural rules for all courts, procedural differences between courts have largely disappeared, making life much easier for lawyers and other professionals. These rules were developed by meetings of judges in management positions within the courts for the different areas of law.

**Waiting Times**

\(^{10}\) Deducted beforehand.
The 1998 study reported that according to the respondents, delays of one to two hours were usual. Delay was and is not measured systematically. Still, it is known that delay before the start of hearings has been reduced considerably. To find out what the clients themselves feel about this, the customer satisfaction surveys are again informative. According to the first wave of surveys, less than half of the clients were (very) satisfied. The satisfaction of parties increased from 48% at the first measurement to 58% at the second, while in 2011 78% of the parties were (very) satisfied, while 13% were (very) dissatisfied. Professional clients are more negative: the ratings improved from 31% to 38% and to 63% in 2011 with 16% being (very) dissatisfied. The performance of the courts improved considerably in the eyes of the clients. This fits in with the general observation by clients as well as the employees that the courts are becoming much more customer oriented. It seems safe to assume that waiting time has at least been reduced to half an hour on average, resulting in benefits to society of 90 million euros.

**Expansion of ADR**

The potential benefits of a broader use of ADR were not part of the initial calculation of benefits but may still be of interest. Over the years much effort has been put into increasing the use of mediation either by referral by the courts or by promoting its application at an earlier stage in conflicts. Despite all these efforts, it was found that the impact of mediation on the volume of court cases was negligible (Gerritsen, Weda and Poort, 2009). Surprisingly, on average, mediation took longer to resolve a dispute, and the costs for courts and clients together did not decline. This result may be specific to the Netherlands where many traditional, informal ways exist to resolve conflicts, and the volume of court cases is relatively low (Van Velthoven and Klein Haarhuis, 2010). It was concluded that the use of mediation techniques by judges in court procedures to reach settlement would be more effective than further promotion of mediation. Given this state of affairs, ADR is not discussed here further.

**Overall Results**

In these fifteen years the bottlenecks have been reduced. Timeliness is the only bottleneck that was measured objectively. In both civil and administrative law, delay has declined, and in administrative law delay is expected to decline rapidly further. In civil law, the 1998 objectives have not been fully reached. The realized benefits for society are calculated in current prices and volume of cases annually. The benefits will increase with 175 million euros when the new method for handling administrative cases is fully implemented. With respect to the other bottlenecks the words of the clients - parties and professionals - have to be taken as evidence. The customer satisfaction surveys show marked improvements in all respects. With the exception of waiting time before hearings, expressing these results in economic terms is very problematic at the current state of research. A fundamental issue is the impact of the quality (reasoning) and consistency of judicial decisions on the volume of cases. Although it is likely that the volume will decline when quality and consistency go up, there is no certainty about this relationship. This is definitely an urgent subject for empirical research.

**Indirect Benefits**

Again it needs to be stressed that only the direct benefits were estimated. The impact of improved performance by the Judiciary on the extent to which rules are adhered to and the volume of conflicts in society is difficult to address. Van Velthoven and Vervoort (2009, p. 218 and 219) report on the basis of a large questionnaire among the population of the Netherlands that over the period 2004 -2009 citizens older than 18 years had on average 1.9 "justiciable" problems, and that only 4.9% of these problems resulted in legal proceedings being filed with the courts. For small and mid-size companies, a similar study was undertaken by Croes and Maas (2009). This study shows that these companies experienced 2.1 potentially legal problems in one year (2006). Court proceedings were initiated for 8.5% of these problems. These data show that a large amount of conflicts occur, most of which are handled by means other than court adjudication but still under the shadow of the law. There seems to be much room for conflict prevention. It is likely that the courts have the potential to be more effective in preventing conflicts in general to the extent that they expedite their adjudicative functions and improve the quality and precision of the guidance they provide. The threat of being effectively summoned to court with predictable outcomes will affect behaviour. It would follow that the benefits for society of a reduction in conflicts as a consequence of improved court performance are potentially a multiple of the direct benefits, but this is speculation.

6. Have New Bottlenecks Emerged?

In the first place it can be argued that the anticipated and realized reductions of court delay are not sufficient anymore, given the speed and further acceleration of economic and other processes in society and the related increasing expectations. Some evidence of this can be found in the customer satisfaction surveys. In 2001-2004, 41% of the parties were (very) satisfied about the duration of cases; in 2005-2008 44%. In 2011 the satisfaction increased, but still was not
higher than 55% with 29% being (very) dissatisfied. Professionals were again more negative, but they did see a stronger improvement: at the first measurements, only 28% were (very) satisfied, the second 38% and in 2011 46% with 27% being (very) dissatisfied. One would have expected higher scores, given the objective improvements. A recent survey of the opinions of major decision makers and opinion leaders in the Netherlands about the Judiciary shows that for these persons, court delay is a major issue, although it should be noted that these views seem largely incident-driven (Frissen et al., 2012). In the original 1998 study, the business sector expressed the wish that a conflict for which a summary procedure was not applicable, be adjudicated within six to eight months. This fits in with the timeframe of budgeting and reporting processes of companies. This timeframe seems also reasonable for other parties in commercial and administrative cases. De Jong (2004, p. 198) found that plaintiffs as well as defendants in administrative cases prefer a duration of six months. As shown above, the practice of administrative cases is moving rapidly in this direction. In civil law, the simplified procedure takes six months, but many cases do not follow that route. Radical simplification and informalisation are necessary, but foremost judges must be empowered to really manage cases. Also, appeal procedures need to be shortened further. A specific challenge is mass tort litigation. Recent examples show that, despite several improvements, the legislative and judicial functions are not fully equipped to deal with these problems, and the plaintiffs have to wait unnecessarily long periods of time to obtain clarity about their legal positions. The phenomenon of mass tort litigation is spreading, and its spread is further promoted by the banking crisis. While the duration of normal civil cases is getting under control, the next step is to find more timely solutions for mass litigation.

In the 1998 study digital access of the courts was not a big issue: respondents mentioned in passing that email and internet were not effectively utilized to speed up and facilitate the exchange of information. The needs and expectations of society are rapidly increasing in this area. While the Judiciary offers a range of digital services, these services are far from complete. Digital filing of cases and exchange of documents, digital archives, apps to set the date of hearings and internet were not effectively utilized to speed up and facilitate the exchange of information. The needs and expectations of society are rapidly increasing in this area. While the Judiciary offers a range of digital services, these services are far from complete. Digital filing of cases and exchange of documents, digital archives, apps to set the date of hearings and electronic payment of court fees are not yet widely available. Digital services have gradually expanded, but the expansion does not keep pace with demand, due in particular to a low sense of urgency and adaptability in the Judiciary and the legal system as a whole as well as technological problems. This definitely is a new bottleneck.

If a reduction of the duration of civil cases (large claims; summons procedure) from the current 436 days to 180 days (six months) would be possible, the benefits for society would be an additional 630M euro on top of what has been realized to date. It is, however, neither possible nor desirable to push all cases into this timeframe. The Irish example of its commercial court, which applies very strict case management based on procedural decisions taken at a pre-trial conference, shows that it is possible to adjudicate very complex cases in a short period of time: the average duration of these cases was 21 weeks in 2009, while 50% were concluded within 15 weeks (ENCJ, 2013). Obviously, parties have to thoroughly prepare their cases before they appear in court. When this becomes the norm, many more cases can be handled within six months than occurs now. Still, the procedure will not be suitable for all cases. A reduction to an average duration of eight months is more realistic and would result in benefits of 480M euro. Digitalization will be needed to speed up procedures. It will also reduce the litigation costs for parties, as, for instance, communication with the courts becomes less time consuming. It may also become easier for parties to represent themselves at court. And it may lead to a higher efficiency of the courts, which in the current economic climate is an important objective.

7. Conclusions and Discussion
The 1998 study was, at least for the Netherlands, ambitious in trying to establish the economic impact of resolving the major bottlenecks in the functioning of the Judiciary. The analysis was hampered by lack of data. Looking back, the analysis still stands: it contains some questionable points, but these are not fundamental. Also, better data have become available, but these led only to minor improvements in the benefits as initially estimated. It must be recognized, however, that empirical in-depth knowledge about the economic impact of the functioning of the Judiciary has not improved very much. As a result, there is still uncertainty about issues such as the impact of the quality and consistency of judicial decisions on the volume of cases. In this respect, the 1998 study makes reasonable assumptions, and in the absence of contrary information there is no reason to discard them. The recalculated potential benefits amounted to 0.18% of GDP annually in 1998 and in current prices and current volume of cases amount to 0.24% of GDP (2013). It was shown that considerable progress has been made to resolve the bottlenecks, ranging from court delay and quality and consistency of judicial decisions to waiting times before hearings. Quantifying the actually realized benefits was only possible with respect to reduced court delay and waiting times before hearings. The realized benefits for society that can be calculated amount to 0.13-0.16% of GDP annually. This does not mean that the other improvements have not realized benefits; these cannot be calculated. In management-speak, the objectives were not very SMART (specific, measurable,
achievable, realistic and timely). However, by focusing solely on SMART objectives, essential bottlenecks would not have been addressed. Measurability cannot take the place of essence. Whether new bottlenecks have emerged was also discussed. It was argued that the demands with respect to timeliness have further increased, and that this raises the bar, especially in civil law. A real new bottleneck is digital access to the courts: the courts offer some digital services, but from the perspective of the clients these need to be expanded and their sophistication enhanced.

These rather practical outcomes raise three issues. The first is about the impact of the functioning of the Judiciary on the economy. In section 2 it was noted that the legal infrastructure of which the Judiciary is a key component has a large influence on economic growth. It has been calculated that 0.7% of economic growth of the Netherlands derives from a legal infrastructure better than the world average. For Italy it has been suggested that the weak performance of the Judiciary with respect to civil cases causes economic growth to be 1% lower than would be possible (Draghi, 2011, see also IMF, 2001, p 68). It was noted that the underlying macro-economic models do not show whether economic growth would benefit from a further improvement of Judiciaries that are already at the top of the scale. The global competitiveness methodology of the World Economic Forum assumes that further improvement is not very important (see Schwab, 2012, p 4 and 8). Our micro-economic approach shows that the direct benefits to society of better performance of the Judiciary are in the order of 0.2% (1998 targets) to 0.25% (realistic further improvements) of GDP annually, only measuring the direct effects. The potentially big impact on the extent to which rules are adhered to is left out of consideration. In section 5, it was argued that the indirect benefits are potentially a multiple of the direct benefits. It seems safe to conclude that also in the best-performing Judiciaries, further improvement has a large economic impact.

The second issue is whether the focus of reform is justified. Currently, there is a strong focus on timeliness. There are good reasons for this, as the performance of many Judiciaries is quite abysmal in this respect. However, attention is also drawn to timeliness, because lead-times are readily measurable and it is a rather technical and logistical matter. It stays away from the independence of the judge. It should be recognized, however, that in the situation of the Netherlands Judiciary, the clients of the courts find the interaction with the judge and the way they are treated by the judge of greater importance than timeliness of the proceedings. Improvement of lead-times should not be undertaken to the detriment of this interaction. Also, the quality (reasoning) and consistency (uniform application of the law) of judicial decisions is neglected. While it seems likely that higher quality and consistency result in fewer cases, this has not been researched properly. This topic is the essence of the work of judges and needs much more attention.

The third issue is whether the improvements and associated benefits seen in the Netherlands are caused by the change of the governance structure, an issue raised at the beginning of this paper. This is always a difficult question, as it cannot be known what would have happened, had the governance structure not been changed. The simplification of civil procedures was already well underway before the changes to governance. Although stimulated and funded by the Council of the Judiciary, the new method of dealing with administrative cases was developed by the judges themselves. In a sense, the changes were in the air. In other respects the new governance structure played a major role by making larger interventions possible, such as setting standards for the duration of cases and holding courts responsible for meeting the standards. Also organizational interventions such as the revision of the judicial map would not have been possible. The boards of the courts and the Council for the Judiciary have led the process of change in many respects, and they have supported judges to develop new ways of working. The change of the governance structure has increased the organizational capabilities of the Judiciary, and this made it possible to address the bottlenecks discussed here.

Finally, it should be noted that the value at stake in civil and administrative cases at the courts has increased since 1998 and is now in the order of 4.2% of GDP (see Table 2). This percentage points to the importance of the Judiciary for the economy, but it also stresses the responsibility of the Judiciary to deliver high-quality justice.

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Do Resources, Justice Administration Practices And Federalism Have An Impact On Registered And Sentenced Crime Prevalence?
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Abstract:

This contribution, based on a statistical approach, undertakes to link data on resources (personnel and financial means) and the working of the administration of penal justice (prosecution, sentencing) taking into account the nationality of those prosecuted. In order to be able to distinguish prosecution and sentencing practices of judicial authorities and possible processes of discrimination, diverse sources have been used such as data from court administrations, public finances and police forces, collected by the Swiss Federal Statistical Office and the Swiss Federal administration of finances. The authors discuss discrimination in prosecution and sentencing between Swiss residents and foreigners taking into account localization and resources regarding personnel and public finances.

Keywords: federalism; crime prevalence; resources, nationality, decentralization

1. Introduction

This study is part of a larger research program which started in the 1990s and is currently managed by the BADAC, a Swiss database on the cantons’ administrations and activities and an instrument for bench-learning and monitoring of federalism, attached to the University of Lausanne1. Following studies conducted on organizational structures, political-administrative reforms and the personnel of the State, the BADAC started, in cooperation with the Institute for criminology and penal law of the University of Lausanne, a research program in the field of security and justice. A first study was designed to understand differences among cantons in the field of prosecution, sentencing and its outcome in terms of reoffending, without taking resources and organizational matters into consideration2. In this new research, the first aspect of prosecution and sentencing shall be looked at together with questions of resources and aspects of administrative organization. Three aspects are now under scrutiny, namely:

- **politico-administrative**: differences in the organization and the administration of security at the three levels of the state – with a particular attention to reforms of the State and the role of cooperation among levels of the State;
- **criminological**: equality before the law enshrined in art. 8 of the Swiss Constitution and federalism in matters of penal justice – the aim is to understand differences in the frequency of prosecution, sentencing, imprisonment, including the analyses of populations groups – Swiss nationals and foreigners - which get prosecuted;
- **systemic**: analyses of links between the politico-administrative organization of justice and police, resources available, registered crime and penal responses.

Whereas the social problem of inequality before the penal law received much attention in several countries (see among others Albrecht 1995 for Germany, Mucchielli 2002, 2011 for France; see also bibliography), it remains a subject seldom studied in Switzerland, more so regarding cantons. An analysis of links of penal law, resources in personnel and finances, demographic and economic development, politico-administrative organization and crime has to be implemented, according to us, with an interdisciplinary approach.

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2 See Daniel Fink, Christophe Koller, Justice and court administrations, their workings and efficiency in Switzerland. Aspects of sentencing and its outcome in Swiss cantons, IJCA 2012, Special Issue 2
Sociologists, geographers or jurists are interested in their specific fields of work (Huissoud 1996, Pellaton 1980, Piguet 2005, 2009, Uebersax et al. 2002, Wanner 2004, Wicker 2003). The criminologists are, focused on statistics as they are, mostly interested in the regularities of crime, the frequency of the prosecution of persons and the judicial outcomes (Bauhofer-Queloz (éd.) 1993); the link with resources and the organizational matters is rarely seen and even less frequently analyzed (Estermann 1984, Killias et al. 2012, Kuhn et al. 2003, Storz 1996, 1997, 2007).

The researchers in administrative sciences, on their side, are interested in the organization of the public services and the reform of the State. They however rarely study the impact of reforms on populations or pay attention to the inequality before the law, whether at national or cantonal level (Bochsler et al. 2004; Giauque, Emery 2008; Koller 2008, 2012, 2013; Lienhard et al. 2005). The study on the activities of migration services of seven cantons (BE, GE, SG, TI, VD, VS, ZH) in relation with the profile of the population of foreigners (Koller 2010) constitutes a rare exception.

It is important to put the accents as follows: on geopolitical matters: the territory as a unit of analyses; on sociodemography: the differences in the structure of the population; on an organizational level: the allocation of financial resources and personnel and the degree of centralization, in order to explain disparities in matters of criminal justice. In this research, special attention has been given to the differences in matters of prosecution and sentencing among Swiss nationals and foreigners. Due to the lack of detailed data about the residence status of the latter, there cannot be a final judgment with regard to the differences found. The objective however remains to describe levels of differences and to ask if these differences may be explained in terms of discrimination policies.

If there is general acknowledgement that the Swiss federalism offers advantages in terms of respect of minorities, administrative autonomy, equilibrium of partisan forces, this system has also its weaknesses, especially on the level of cooperation, the lack of harmonization of practices, whereas the Federal Constitution is very precise: “No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, (...)” (art. 8, fig. 2 CSt.).

The statistical sources used in this study are taken principally from the Swiss Federal Statistical Office (FSO) regarding population data, data on personnel in public offices (Federal census of enterprises (FCE), registered crime (SPC) and sentencing (SUS). Financial aspects are known through the statistical work of the Federal Administration of Finances (FAF) and the data on organization and politico-administrative reforms are taken from the BADAC (ESAC08).

All analyses refer to the years 2008 (resources) or 2011 (judicial statistics). Without other explanations, the results are standardized for 1000 people of the resident population. Refugees and asylum seekers are excluded from the study. Cantons are classified in decreasing order by the size of their foreign population (residents plus nonresidents) among the total population (expressed in terms of a percentage or part).

For readers not familiar with the make-up of the Swiss State, one has to know that there are three State levels, e.g. the federal State, the cantons and the communes. The cantons have constitutions and are sovereign, except for the policy domains handed over to the federal State such as the overarching policy domains which are: foreign policy, defense matters, currency, border control, the national highway system, among others. To take just a few examples in which cantons are in control, let’s mention population matters, traffic, education and universities, health, and, in our subject field, police, justice and prisons. There is hardly any federal police; federal prisons do not exist and with regard to judiciary, there is a high court to judge the legality of procedures. The federal State hasn’t competence to supervise policing, the working of justice and of prisons. The only real competence in this field regards the legislative work, e.g. the drafting of the penal code which was adopted in 1937 (entering into force in 1942) and its revision, and the code of penal procedure, adopted in 2007 (entering into force in 2011) and its revision.

In this paper, the focus is on the extent of differences between cantons. By tradition, cantons have all an abbreviation: ZH stands for Zurich, BE for Berne, GE for Geneva, BS for Basel-Stadt, and all the others for the further 22 cantons, which we do not want to enumerate as our interest is on levels of differences among cantons – and not on single cantons. We nevertheless will give hints on possible reasons for extremes – a further study will have to be undertaken to build clusters in order to find explanations in exterior factors.

This paper is part of an exploratory phase of our overarching research subject of the economy of security in Switzerland. We formulate the thesis that the levels of prosecution and sanctioning of Swiss and foreign nationals are not only based on differences of crime levels, but the result of discriminatory policies. For the time being, this thesis cannot be statistically validated, but the results of the chosen approach provide strong arguments for such bias in the working of the judiciary.
In a first step, differences of the profile of the foreign population are presented with regard to their status; secondly, the organization of the security undergoes scrutiny, especially in respect to the personnel; finally, in the third part the link with criminological data is made.

2. Profile of the Foreign Population per Canton

In 2012, the resident foreign population reached 1.8 million persons, e.g. 23% of the general population. Geneva is leading all other cantons, with a foreign population which accounts for 39%, followed by Basel-City and Vaud (33%), whereas seven cantons counted less than 15% foreign residents (AI, AR, BE, JU, OW, NW, UR). (G1).

If one adds the foreign population which is nonresident (short term permits, foreign students, among others), varying from 1.2 to 4.9 percentage points among the cantons, the proportion of the foreign population may rise in a significant manner in several of these more peripherical or excentred cantons because of the impact of:

- tourism;
- agriculture;
- wine growing, or more
- alpine or pre-alpine with the tourist season.

Those cantons are: FR, GR, OW, UR, VS. The highest part of nonresident foreigners can be seen in the canton of Grisons; his part of foreigners rises from 14 to 19% due to manpower employed especially in the tourism industry. The profile of the foreigners in a canton varies strongly according to the type of permit and the nationality (Koller 2010, 2013). Cantons at the external borders (BL, BS, GE, JU, BE, SG, TI) have a large body of people who cross the border every day (“frontaliers” or “Grenzgänger”), representing for border cantons from 10 to 25% of foreign employees.

Yesterday as today, the Italians are in most cantons the majority of foreigners; they are followed by the Germans, Serbs and the Turcs (especially in the German speaking cantons) and the Portuguese (more often resident in the French speaking part, also in Grisons). The big difference between the Latin speaking and the German speaking cantons is the overrepresentation of people from the EU and the students in higher education, a secondary explanation is where there is a foreign population with a more diverse origin including foreigners from former Jugolavia, countries of Eastern Europe and also from Turkey.
3. Organization of the Police and Cost of Security

In order to overcome the absence of data on the organization and financial resource for areas of public security, the BADAC integrated a module with questions on this subject in its nationwide survey in 2010. This was with the support of cantonal chancelleries and the head of the crime statistics department of the FSO. The objective was to be able to draw a multi-level picture of available forces, of the volume of police interventions and of the organizational charts of the security forces in every canton.

The first observation to be made relates to the strong regional disparities in the organization of the public police/security forces:

- on the one side are modernizing cantons, oriented towards practices of new public management (NPM), or small ones which have concentrated their police forces on cantonal level (AI, AR, BS, GL, OW, NE, NW, SH, SZ, ZG);
- on the other side are those units with a decentralized or mixed form of organization of their police forces (AG, FR, JU, GR, LU, SG, SO, TI, TG, VD, ZH).

The cantons of the Mittelland, of the North-Ouest and of the Central Switzerland seem to be more centralized in this field. These regions are also benefiting from the intervention of the Confederation, the central State, via the border-guards (G2) linked to customs. One may therefore point of the strong link between cantonalized forces and the forces of the federal State.

In 2008 Switzerland employed 17'818 in the area of security in full time jobs (FTJ), of which 63% were working for cantons, 20% for communes and 17% for the Confederation. Seven cantons have only a cantonal police (AI, AR, GL, OW, NW, SZ, UR). Some cantons have strongly decentralized forces, e.g. Zurich and Vaud (41% of the forces). Others still, more often in the border regions, may take benefit of the important resources placed there by the Confederation (BS 42%, JU 28%, SH 55%, TI 30%). Basel-City has the highest pro rata number of local police forces (5,5 per 1000 inhabitants in 2008). The richer and larger centers such as Zurich (4,8) and Geneva (4,5) follow with police forces much above average density (2,8 per 1000).

Between 2001 and 2008, the total number of employees for the maintenance of public order of the public sector (administrative personnel included) increased by 21.5% (with large differences among cantons), whereas the population grew only by 6.2%.

Our research shows that the cantonalization, geared towards professionalization as well as towards improvements in police practices and interventions, leads to an increase in the density of security forces compared to the cantons maintaining a decentralized or mixed model (with the notorious exception of Zurich).

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3 The analyses of the personnel are based on the FSO (FCE; NOGA 2008: 8424 “Activities for public order and security”).
4 Of which certified police officers, plus candidates, plus police personnel in administrative jobs.
The cantonal and communal public expenses are directly correlated with the level of the police and security employed personnel. They increased significantly since 2000 in all cantons. The highest cost per inhabitant may be seen in BS, GE, and ZH, followed by SH and ZG, five cantons with high revenues, well above the average cost of 1000 CHF (G3).

4. «Crime», Status of Sojourn and Federalism

In his introduction to the volume containing the contributions to the conference on "Foreigners, crime and the penal system", N. Queloz stated that the subject of the relations between immigration and crime constituted, in Switzerland, already a classical subject of criminology going back to the 1980s (Bauhofer, Queloz 1993). We will not go into details on this classical matter, but provide, for further orientation, the major key-figures about prosecution and sentencing.

In 2001, the FSO registered in its police crime statistics 693,000 offences committed for 466,000 affairs, 560,000 (81%) being criminal code offences (CP). Of the 77,600 offenders according to the CP, 51% were foreigners, of which 29% residents, 6% asylum seekers and the rest foreigners with nonresident status, or without information about their place of residence.

Of the 94,600 sentences (containing 101,000 violations) handed down in 2011, 56% concerned foreigners, without any information about the status of sojourn. More than 50% concerned traffic offences, one third criminal code offences, 15% offenses against the law on foreigners, and 5% drug offences. Of all sanctions imposed, 73% were monetary penalties with suspension, 13% monetary penalties without suspension and 9% prison sanctions without suspension, the suspended prison sanctions having lost any importance (1%), and the rest community work orders.

4. 1. The Prosecuted Offences and Foreigners

4.1.1. Criminal Code (CP): Offences and Offenders

The offences related to the criminal code are considered both, an indicator for the apparent level of crimes committed in a country and an indicator for the work undertaken by the police, especially with regard to the clearance rate for the more serious offences.

Of the close to 78,000 offenders regarding the criminal code registered by the police in 2011, some 56% had no Swiss nationality. However, more detailed information on status of residence of the offenders is required, in order to calculate rates of prevalence regarding the population with a status of residence (in-country made crime) and offenders who come from abroad and commit an offense in the country, be they tourists, businessmen, on transit or burglars. Despite of the absence of data, we undertook the exploration of differences in the prosecution of Swiss and foreign offenders, the focus in this study being the differences between cantons.

Initially the focus is on the convictions for criminal code offences in relation to the overall number of convictions, and then on the rate of offences with the number of offenders regarding criminal offences for 1000 inhabitants (G4, G5). In a further stage, we will look at the principal violations of penal laws by offenders of foreign origin.
Source: FSO-SPC, ESPOP; own calculations.

The highest number of convictions for offences relating to the criminal code can be observed in GE (47.8%), NE (43.3%) and AR (40.6%). Five cantons are below average (BL, GR, NW, TG and UR, with the lowest in UR (10.3%). The Latin cantons have higher numbers (33.9% for francophone cantons and 33.5% for the Italian speaking canton) than German speaking cantons (27.1%). The rate of offences according to the criminal code lies at 71 for 1000 resident persons. Cantons of BS, GE, NE, VD increase the average (GE: 160, resp. for the city 217; BS, 199; VD 95, but the city has a rate of 190) (G4). At the opposite end, ten cantons – especially those of central Switzerland and of Appenzell (AI, AR, GL, OW, NW, SZ, UR) are characterized by rates well below average, at 40 for 1000 inhabitants. More interestingly is the relationship between the rate of registered offences and the rate of offenders. Despite large cantonal disparities of offences, the ratio of offenders does not change. In fact, with the exception of one canton (AR), the rate of offenders is lower than 20 for 1000 inhabitants for the offenders of foreign origin and below of 10 for Swiss offenders (G5).

With the notable exception of Basel (BS), it’s not among the cantons with a strong foreign population that one finds the highest rates of foreign offenders. An absolute maximum can be seen for AR the rate of which is four times higher than the neighboring canton of TG and three times higher than in the other neighboring canton of SG. If one takes into consideration religion and culture, it appears that cantons with a majority of French speaking and protestant inhabitants have higher rates than all other cantons. However, cantons with higher rates of prosecution of foreigners have also higher rates of prosecution for Swiss people. There is a significant correlation between police registration and prosecution of offenders regarding criminal code offences (Corr. Pearson: 0.651**; 0.01).

Source: FSO-SPC, ESPOP; own calculations.

Seven types of offences show frequencies of 5000 offenders and more in 2011. With 39,000 cases, offences against property (among which are theft) committed by foreigners are at the top of all types (50%, see G6 – Total; 40% for Swiss people). In decreasing importance for foreigners are felonies against liberty (17%), offences against life and limb (15%), offences against personal honor (4%), offences against official powers (3%), contraventions of federal law (3%) and
offences against sexual integrity (2%). Except for theft, more frequent among foreigners, the structure of delinquency according to the criminal code of the latters is very similar to the one of the Swiss.

![Graph G6: Foreign offenders according to the type of offences CC (>5000 offenders), 2011, in %]

Source: FSO-SPC; own calculations.

In 2011, the variation per cantons of the foreign offenders is important, with an overrepresentation of theft for BS, GE, GR, LU, TG, as well as for offences against public powers. Except for the small canton of AI, the part of offences against the honor is very high in NE, SO and VS, whereas BL is characterized to have a part of offences against sexual integrity over average.

4.1.2. Traffic offences (LCR): convictions

Due to the fact that Switzerland does not have a centralized registration of traffic offences, we will consider convictions for the purpose of this study in place of this major area of offences (>50%) in Switzerland. We find again extreme differences among the cantons with regard to the convictions for traffic offences as for criminal code offences, especially with regard to the status of residence of foreigners. There were 51,500 traffic offences registered in the penal registry of which 47% were for foreigners. Graph 7 shows the part of foreigners sentenced for this type of delinquency, compared to those for criminal code offences, figures presented in decreasing order of the part of the foreign resident population. The highest parts have GR (with 73%), followed by BL (71%), UR, GE, NW and BS (>60%), being as well the result of important highways as of policing priorities in these cantons (G8).

![Graph G7: Part of foreigners regarding traffic offences and criminal code offences (CC), in 2011, selected in decreasing order of foreigners in the canton]

Source: FSO-SPS-ESPOP; own calculations.
Culture could play a role in the explanation for the high rate of convictions for traffic offences in the French speaking cantons - 8 per 1000 inhabitants compared with 7 for German speaking cantons, whereas the Italian speaking area has a rate of 6. The rate of the French speaking area is also higher as cantons with most Catholics (7.7) or mixed (7.4); the cantons with a majority of protestants are quite lower (6.6).

The dimension of the cantonal territory, the size of the population, the length of highways and the intensity of the traffic seem equally to play a role, the highways presenting an important potential in terms of automatic controls of speeding, with interesting financial resources to be gained for the coffers of the State. Convictions are particularly frequent in the cantons AG, BE, GR, VD, ZH. The border cantons, such as BS, BL, GE, TI as well as UR, placed on the main axes of transit, have particularly high rates of convictions of foreigners for traffic offences, most probably foreigners without residence in Switzerland.

4.2 Sentencing: Use of the Prison Sanction
Before the revised criminal code came into force on 1st January 2007, 94% of all convictions contained as a noncustodial penalty, be it a fine, a suspended prison sanction or a prison sanction converted into a community work order. Or, as for the indicators discussed above, there are important disparities among the cantons when one focuses on the prison sanctions imposed by judges, much to the disadvantage of foreigners.

The part of prison sanctions with (PSWS) and without suspension (PSWO) with relation to all sanctions imposed is particularly high in the canton of Geneva, especially for foreigners (27%). This part can only be explained with the important use of pre-trial detention in that canton, consequence of an exclusively repressive policy conducted by the Prosecutor's office for over one decade. The opposite can be observed in BE and VD, where one finds high parts of prison sanctions for foreigners, compared to those imposed for Swiss citizens. The canton of NE occupies a single position because it shows a high rate of prison sanctions for Swiss as well for foreign nationals. The average length of sanction imposed shows equally high disparities not only with regard for nationality - it is always higher for foreign nationals -, but also among cantons.

5. Conclusions
The present analyses of the profile of the foreign population, of resources of security forces and of policing and judicial practices show strong disparities among cantons, with cleavages along language, cultural and geographical boundaries. It is not easy to find causal explanations about the level of crime in the cantons and about the implication of foreigners along their status of sojourn. All indicators used – or at disposal – show however a prevalence of prosecution and sentencing two to five times higher than that for Swiss people, with extreme disparities among cantons. If the prevalence of offenders prosecuted and convictions handed down are systematically higher for foreigners, whatever the type of offence, the overrepresentation of young men among this group may push the figures upwards, but it does not explain the importance of inequalities among cantons. If one considers the use of pre-trial detention, it is evident that foreigner, due to their
status, meet more often the criteria required for the use of pre-trial detention, especially the fact that they could be tempted to quit the country in order not to undergo a criminal procedure. However, the discrepancies in the use of this judicial instrument are horrendous among cantons. The same holds true for the sanctions imposed, especially the use of the unsuspended prison sanctions, much more often used for foreigners than for Swiss citizens.

For the territorial discrepancies, the systematic analyses of all available indicators show an overrepresentation of GE, ZH, BS, but also of NE, ZG, and SH, for police registered offences as well as for convictions. Culturally speaking, delinquency seems in the French speaking parts to be higher than in the German speaking part, especially in the larger and richer cities; and it’s again GE which pushes the figures above average.

Partial disparities of delinquency are explained by geo-topographical factors, determined by borders, especially for offences against the law for foreigners, and transit axes with regard to traffic offences. However the geography of offences regarding the penal code is conditioned by politico-administrative decisions, expressed in terms of financial resources and personnel. We have seen that the density of police forces is correlated with finance, those being again correlated with the number of offences/convictions, the increase in costs and resources in personnel leading to more prosecutions, more sentencing, and in some cantons, to more incarcerations.

The profile of the foreign population constitutes a further explanatory factor for disparities among cantons; to take just one example, the foreign population in the French part seems better integrated, speaking most of the time the local language, and being less heterogeneous than in the Swiss German part. However, in the field of crime policy, a part of the foreign population in the French part of the country is confronted with more repressive responses from penal authorities, closer in that policy area to the repressive French model.

The comparison of different indicators requires postulating the existence of selection and filter processes typical to the institutional treatment of delinquency and the criminal policy of the State. These are determined in part by the allocation of resources and financial means. In several small cantons, more rural and at the periphery, the low level of crime is most probably due to a more intense integration and a higher degree of social control, whereas cities offer numerous opportunities for all types of populations, whereby social control and institutional control may be much weaker.

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