Rwandan Gacaca Court
Rwamagana District, Eastern Province, Rwanda
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In this issue:

From the Editor
By Luis Maria Palma

Professional Articles:

Court Administrators and the Judiciary - Partners in the Delivery of Justice
By Wayne Martin

The Supreme Court of the United Kingdom (UKSC), an Exploration of the Roles of Judicial Officers and Court Administrators and how the Relationship between them may be improved and enhanced: a Case Study
By William Arnold

Academic Articles:

Performance Assessment In Courts - The Swiss Case - Constitutional Appraisal And Thoughts As To Its Organization
By Prof. Dr. Andreas Lienhard

Using IT To Provide Easier Access To Cross-Border Legal Procedures For Citizens And Legal Professionals - Implementation Of A European Payment Order E-CODEX Pilot
By George Pangalos, Ioannis Salmatzidis and Ioannis Pagkalos

Reducing Unwarranted Disparities: The Challenge Of Managing Knowledge Sharing Between Judges
By Sandra Taal, Mandy van der Velde and Philip Langbroek

Understanding The Service Quality Perception Gaps Between Judicial Servants And Judiciary Users
By Rodrigo Murillo

Book Reviews:

Transitional Justice, Culture and Society: Beyond Outreach
Reviewed by Elise Ketelaars

Fair Trial and Judicial Independence – Hungarian Perspectives
Reviewed by Thomas de Weers

The Territorial Jurisdiction of the International Criminal Court
Reviewed by Markus Zimmer

From the Executive Editor:

The Role Of Judicial Accountability In Achieving Institutional Independence
By Markus Zimmer

In mid-November, I spent two weeks at the Documentation Center for Cambodia in Phnom Penh working on a new genocide memorial institute to honor the memory of the victims of the 1975-1979 Khmer Rouge reign of terror. While there, I was reminded of the significant progress the global community has made in bringing to justice the perpetrators of genocide and mass crimes against humanity in the 20th Century. This global initiative commenced with the special military tribunals convened in Nurnberg, Germany from 1945 to 1949. Those tribunals conducted 13 trials whose defendants included not only leading Nazi Party officials and high-ranking military, Schutzstaffel (SS) and Geheime Staatspolizei (Gestapo) officers but, in addition, an assortment of German industrialists, lawyers, doctors and other civilians charged with aiding and abetting the institutional sponsorship of sustained ethnic cleansing. In the intervening seven decades, the global community, largely under the auspices of the United Nations, has established a variety of international criminal tribunals and hybrid courts to bring to justice senior-level criminal sponsors and conspirators of similar categories of mass violations of human rights that litter contemporary history and continue as I write.

Perhaps the primary moral issue that looms over this enterprise of pursuing justice internationally is the extent to which thousands of lesser petty criminals, those who execute the orders of the senior leaders and engage in the raw violence that terrorizes and victimizes millions of innocent civilians, have managed to evade accountability. With few notable exceptions, governments of the subject countries have not pursued systematic criminal prosecution of these lesser criminals. Indeed, it is not unusual, when searching through directories of key government officials in some of these countries, to discover among the names of incumbents those who functioned as secondary officials, either in the criminal regimes or their mercenary forces, engaged in heinous war crimes and ethnic cleansing. Some states have established the equivalent of truth and reconciliation commissions with mixed success. In several Balkan states, special state-level criminal tribunals were authorized by reluctant governments, with secure facilities and operational resources provided by western nations and/or the UN, to investigate and prosecute select lesser war crimes offenders not pursued by The Hague-based International Criminal Tribunal for the Former Yugoslavia. Those resources included expat judges, prosecutors and investigators to ensure the legitimacy and objectivity of the criminal proceedings.

The magnitude of mass war crimes comprising the Rwandan genocide prompted the United Nations to establish the International Criminal Tribunal for Rwanda in Arusha, Tanzania, to fund it at an exorbitant cost, and to charge it with bringing to justice the senior-level ringleaders and masterminds. No provision is made for prosecuting their underlings.

Notwithstanding Rwanda’s status as an impoverished developing country and the destruction of the institutional framework of its government as a byproduct of the genocide’s civil war, the new regime committed itself to bring to justice as many of the lower-level criminals as possible, to date the only government motivated to do so entirely on its own. Tens of thousands were apprehended and imprisoned in a severely over-extended network of prisons, overwhelming the justice system’s capacity to accommodate and to process them in timely fashion through its existing framework of courts. Desperate for a solution, the government opted for an innovative but legally perilous transitional-justice solution. It resurrected an innovative but legally perilous transitional-justice solution. It resurrected a framework of courts. Desperate for a solution, the government opted for an

1 For an overview of the new Cambodian Sleuk Rith Institute for genocide studies and research, go to www.cambodiasri.org and/or https://www.youtube.com/watch?v=nuJCvdsLoa0

...Continued
indigenous form of community-based justice courts without benefit of lawyers in which respected community elders, serving as nine-member panels of lay judges in towns and villages throughout the country, collectively enquired into the circumstances of alleged violations. Known as gacaca courts, they typically conducted outdoor proceedings in community settings to which locals were invited. Surviving victims were also in attendance and allowed to contest the confessional testimony offered by the accused. Observing gacaca proceedings in person, as I was privileged to do in a village clearing on the outskirts of Monrovia, is an inspiring and memorable experience.

The pursuit of vengeance in the context of gacaca justice was subordinated to the values of reconciliation and healing. Although gacaca judges were authorized to impose punishments up to and including life imprisonment, those adjudged guilty as charged by the panels, and by the collective sentiment of those in attendance, were often sentenced to varying terms of community service, the intent of which was to gradually reintegrate them into productive and responsible roles in their home districts.

Gacaca courts were introduced to supplement the overwhelmed capacity of Rwanda’s indigenous courts of law, whose legally trained judges would adjudicate the more serious criminal charges, including rape, leaving to gacaca justice the resolution of lesser crimes charged.

In a ceremony on 17-18 June 2012, the government of the Republic of Rwanda officially closed the gacaca courts, bringing to an end this innovative and controversial ten-year experiment to pursue criminal justice under the most difficult conceivable circumstances and challenges. As myriad critics have opined, both the process and the results were flawed by 21st Century standards of western justice systems. Notwithstanding those flaws and imperfections, however, the Rwandan government deserves the global community’s praise and gratitude for having demonstrated the courage, the tenacity, and the imagination that spawned the experiment. In a world in which most governments similarly challenged to bring criminals to justice on a mass scale have simply opted to drop the ball, Rwanda persisted, notwithstanding enormous resource, capacity, and other challenges.

The cover of this issue of the International Journal for Court Administration captures a gacaca court in session. We feature it as a contrast to the cover of Vol. Six, No. 1, the new ultra-modern courthouse in Adelaide, Australia, to emphasize that the pursuit of justice occurs in settings that differ dramatically. The photograph for this cover was taken by Elisa Finocchiaro and is reproduced with her permission. For more detailed information on gacaca justice, see Phil Clark’s The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda – Justice without Lawyers, Cambridge Studies in Law and Society, Cambridge University Press, 2010.
From The Editor: Judicial Management Training in Latin America: A Personal Experience
By Dr. Luis María Palma

Many judicial systems in Latin America suffer common problems both in their forms of organization and operations. A possible explanation underlies in a common cultural and historical heritage, as well as in quite similar institutions and political dynamics that most of Latin American countries share.

There are several problems to be highlighted among those that are faced by the judicial units (court, prosecutors and public defenders offices): among them, the use of bureaucratic, slow and written procedures, methods of artisanal work –sometimes even obsolete– and –overall- a deep confusion between jurisdictional and administrative activities, which are carried out both by judges, prosecutors and defense, as well as by the staff that serves in the judicial units. With very few exceptions, there is no professional official as a court administrator who can take care of administrative tasks in a professional manner.

As a result of the former, the quality of the judicial services is often negatively affected.

The education provided by the School of Law partially explains the problems reflected in the operation of the judicial systems. A theoretical training mainly delivered through passive teaching methods of legal and doctrinal works provides very little practical preparation for the exercise of the legal profession or the judicial work. Therefore, those lawyers who will be probably in a day appointed as judges, prosecutors or public defenders, have not acquired, during their legal studies, a real understanding of how the justice system works.

Given the current structure of the judicial offices of many Latin American countries require that judges acquire managerial skills to lead working teams, training in techniques of management and administration of courts has become utterly necessary.

Therefore, during the past two decades it has greatly increased the quality and range of these studies, provided by judicial colleges –through continuous training- and Latin American Universities -through graduate studies.

Within this context and during almost sixteen years, I’ve been providing training and giving lectures on case management in several Latin American countries (such as Argentina, Brazil, Colombia, El Salvador and Mexico), which so far have included more than 160 courses in law schools and graduate programs. The contents of these training activities are aimed at the practical learning of case management, the pursuit of efficiency in the judicial services, leadership, teamwork, strategic planning, techniques of motivation, elaboration of operational manuals, reengineering of work processes, the intensive use of information technologies and of indicators.

The methodology I regularly use is based on practical training through workshops, so the participants can solve by themselves those organizational and functioning problems they identify in their workplaces. In order to achieve these results, I request to participating judges, prosecutors, defenders, officers and employees, to work in groups to identify problems and build solutions that they subsequently put into practice in the judicial units in which they work.

The results obtained through these training activities are positive and encouraging, because participants often introduce beneficial changes in their workplaces that improve the quality of the judicial outcomes through the assistance of the

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users, and even also conflict resolution. On the other hand, such changes also reflect the commitment and actual interest of the participants to improve the services of their judicial systems.

It is quite clear that this kind of work is mainly aimed to achieve improvements in the context of prevailing models of judicial management in the region, characterized by the common confusion between judicial and administrative tasks. The aim is to contribute to a gradual reform of judicial services, to promote a discussion about the need for further reforms, and to build consensus to carry out a cultural change that allows a deeper modernization, according to the times of the information age\(^3\), but also respectful of local identities.

Within most of the region, it is still pending the creation of new models of courts, tribunals, prosecutors and public defenders offices, based on the separation between the judicial and administrative activities, where the position of court administration is widely accepted. An increasing number of Latin American leaders are working on this area, to build a public policy on the matter\(^4\).

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\(^4\) Various Authors, *The Culture of Dialogue*, La Ley, Buenos Aires, April 2011, Foreword, p. IX-X.
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Court Administrators and the Judiciary - Partners in the Delivery of Justice

By The Honorable Wayne Martin AC, Chief Justice of Western Australia

Abstract:

This article examines several topics relating to the administration and governance of courts in democratic societies. It includes a summary of the development of court administration as a profession, highlighting Australia and the United States. The summary includes a discussion of how judges and court administrators must work together and coordinate their efforts in key areas of court administration and management. The article also reviews separation of powers issues, highlighting the problems that emerge in systems in which oversight and administration of the courts is vested in the executive branch or power of government, most commonly in a justice ministry. It reviews the practical advantages of having courts governed and managed through institutional mechanisms failing under judicial power rather than the executive power.

Keywords: Court administration, history of court administration, court administration in Australia, relationship between judges and court administrators, separation of powers, institutional independence of the judicial system

1. Introduction

Court administration is a subject of vital importance not only to those who are engaged in the task of administering justice, but also to the broader community. It is difficult to imagine a society or community which is not dependent upon the rule of law for its happiness and prosperity. Without the rule of law, there is either anarchy or despotism. And of course the rule of law depends upon the effective administration of justice by the courts created for that purpose.

It is now generally recognized that the effective administration of justice depends critically upon a successful partnership between the judiciary and those responsible for the administration of the courts. It has not always been thus, as the brief historical review later in this article shows. That review also highlights the unintended consequences of developments in many common law jurisdictions which entrenched the executive model for court administration.

The next section of this article examines some examples of the more recent reforms in court administration and the clearly emerging trend towards greater administrative autonomy and judicial control. This is followed by an examination of two of the emerging objectives of recent court administration reform — case management and 'New Public Management' ('NPN') principles — and how these have necessitated a close working collaboration between judges and court administrators. In this context, the last section addresses the question of whether there is in fact a bright line which demarcates the judicial function from the administrative function in contemporary court administration, and the implications for the executive model of court administration.

Before turning to that, however, some preliminary comments are apposite.

2. The Importance of a Successful Partnership between the Judiciary and Administrators

Contemporary recognition of the vital importance to the community of effective collaboration between the judiciary and those who provide administrative support to the work of the court is encapsulated in the United Nations Office of Drugs and Crime ('UNDOC') publication, Resource Guide on Strengthening Judicial Integrity and Capacity:

Although most of the discussion on judicial competency and ethics focus on the role of judges, there is a growing recognition of the importance of the role of court personnel. Non-judicial court support personnel, who frequently make

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1 Institutional Affiliation: Supreme Court of Western Australia, Email Address: chief.justice.chambers@justice.wa.gov.au. See biography at article end. Acknowledgement: The article is based on an address delivered to the 7th International Association for Court Administration Conference, Sydney, 26 September 2014. I am indebted to Dr. Jeannine Purdy for her assistance in the preparation of this article. However, responsibility for the opinions expressed and any errors is mine.
up the bulk of judiciary’s employees, are crucial to any reform program that aims at strengthening integrity and capacity of the justice system. Courts cannot carry out their functions without these personnel. They are responsible for administrative and technical tasks that contribute to the outcome of cases and the efficiency of the judiciary. Perhaps most importantly, these officials typically serve as the initial contact point and the dispenser of information to nearly all who come into contact with the judicial system. This initial contact forms citizens’ impressions of the system and shapes the confidence that they place in the courts. This role places court employees in an ideal position to promote innovation and help improve services to the public, thereby raising the stature of the court in the public eye.2

3. The Importance of an International Perspective
There is much to be gained from taking an international perspective of issues relating to court administration which many face many times a day in the course of their work. An international perspective provides the opportunity to step back from the daily grind and place the issues in a broader perspective. This can only enhance our capacity to analyze and respond effectively to the more significant underlying issues.

Some years ago, at an international conference concerning the judicial function, I made the observation that:

The issues which we share in common … are vastly greater, and more significant, than the issues which are specific to our individual jurisdictions. The rule of law is a universal concept, and the skills required to maintain the rule of law effectively derive from our shared humanity, and depend much more upon the way in which we interact with our fellow human beings in the administration of the law, than the language we use, the precise structure of our particular judicial system, or, often, the content of the laws we administer. … The rule of law depends upon the independence of the judiciary. Judges must be free to administer the law without fear or favor, free from interference. The challenges to judicial independence are many and varied …3

For reasons which I develop later, one potential source of challenge to the independence of the judiciary lies in the arrangements that are made with respect to the administration of the courts in which the judiciary serve. An international perspective of the manner in which that challenge has been addressed can only inform and enhance our response to this challenge in our particular jurisdictions.

4. The International Association for Court Administration
The importance of an international perspective upon issues relating to court administration was recognized 10 years ago when the International Association for Court Administration (IACA) was created. It is interesting to note that the need for such an organization was presciently anticipated by Professor Carl Baar when, after addressing the third Asia Pacific Courts Conference in Shanghai in 1998, he observed that: 'It is a mark of the coming century that judges and courts in many countries, despite their diversity, meet together to share their commonly-understood problems and celebrate their emergence as distinct and significant institutions.'4

As Professor Baar observed, the characteristics of court administration have a universality which transcends the particular political, social, cultural, ideological or governance characteristics of any particular jurisdiction:

Courts not only share functions that both reinforce and check the exercise of public power, but also share common institutional characteristics and concerns. These are often summarized in the twin concepts of judicial independence and impartiality. … [T]he fundamental clash of political theories does not seem to have produced a fundamental clash between judges — whether in liberal regimes, Marxist regimes or regimes based on Asian values or apartheid — over the institutional principles underlying the courts, and the need to protect the principles of independence and impartiality

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2 United Nations Office of Drugs and Crime, Resource Guide on Strengthening Judicial Integrity and Capacity (2011) 21 (citation omitted). The UNDOC notes, at 21 n 11, that: Among other functions, court personnel manage court facilities, assist with case management, protect evidence, facilitate the appearance of prisoners and witnesses, and perform a variety of other functions that help avoid postponements and ensure a professional and timely adjudication process. They also help judges conduct thorough legal research and draft decisions, and they ensure that decisions are properly announced and published, thus supporting consistency in decision-making. Court personnel also process and maintain case files to preserve the record for appeal; and promote judicial independence through competent budget and finance controls, and by fostering strong public relations and transparency in court proceedings.


in practice. This phenomenon is all the more remarkable because the emergence of judging as an activity requiring independence and impartiality is relatively recent.5

The importance of the arrangements made in any particular jurisdiction for the administration of the courts of that jurisdiction so as to achieve judicial independence and impartiality, both real and apparent,6 is a theme to which I will return.

5. Court Administration — A Brief History
The quaint history of the administration of the common law courts of justice shows not only how much the administration of these courts has changed, but also the presumably unintended effect which the elimination of sinecures, nepotism and corruption had upon the capacity of the judiciary to control the courts’ administration. A colorful picture of the administration of the courts at Westminster in the 18th and 19th centuries is provided by former Justice Bruce McPherson of the Supreme Court of Queensland:

Like most other things associated with courts, an account of their staff begins some way back in time. Until well into the first half of the [19th] century, the offices and officers of both Chancery and the courts of common law in England were impressive in number and variety, and included such indispensable functionaries as a purse-bearer, a chaff-wax [whose duty was to prepare wax for sealing documents] and a sealer, not to mention the bag-bearer [who literally attended court with a bag containing the books, documents and pleas] to the custos brevium [the keeper of the writs]. Antedating as they did a permanent paid public service, court offices were a saleable commodity that lay in the disposition of the Lord Chancellor or the Chief Justice of the particular court in question. Holders of office were remunerated by fees exacted from litigants as the price of many useless services that were seldom, in fact, performed. Vested interests of purchasers of those offices were thus at stake, and reform came gradually because it was thought necessary to compensate those whose offices were abolished. After 1810 much was done to abolish sinecures, and by 1837 legislation had been passed providing for masters, clerks and messengers of court to receive fixed salaries. Although they were still remunerated out of court fees, what remained after paying their salaries was directed into consolidated funds, and officers were made liable to removal for accepting ‘gratuities’ in return for their services.8

As Justice McPherson points out, these reforms travelled to colonial Australia. Significantly he observed:

As the means of ending past abuses, they have naturally been welcomed. Attention is less often given to the fact that they also served to diminish the extensive control that powers of appointment, remuneration and dismissal of court officers gave to the judiciary.9

Later, I refer to the more recent phenomenon by which the courts of Australia, in common with the courts of many countries, have been subjected to contemporary principles of public administration often collected under the slogan 'New Public Management' ('NPM'). For present purposes it is sufficient to note that, like the reforms of the 19th century, while driven by the best of motives and intentions, they risk the unintended consequence of diminishing the capacity of the judiciary to control the administration of the courts in which they serve.

5.1. An Historical Anomaly
There is a curious historical anomaly which should also be noted. As Professor Baar observed:

Only in the last two centuries has it been possible in the English-speaking world to talk about courts without using the term 'courts of justice' to differentiate judicial bodies from the royal courts surrounding European monarchs. In this century, many former British colonies still retained executive control over the exercise of judicial power.10

Judicial independence and impartiality are relatively recent concepts. In the English language the word 'court' reflects the close connection between the judiciary and the monarchy at a time when executive and legislative power were both reposed in the monarch. Even in relatively recent times in the United Kingdom, the most senior member of the judiciary was a member of both the executive government and the legislature, and the members of the highest court were all

5 Ibid, 220–221.
6 'Justice must not only be done, but must also be seen to be done.'
7 My apologies for the common law focus of this section, but considerations of space do not permit a broader comparative analysis.
9 Ibid, 176.
10 Baar, above n 4, 221 (citation omitted).
members of the legislature. It is hardly surprising that the same approach was taken in many British colonies. In many of those colonies, the Chief Justice had full executive authority and served as one of the officials administering the colony under the supervision of the Governor.\textsuperscript{11}

As the Canadian Judicial Council has observed, this had a particular effect upon the administration of the courts of Singapore:

In colonial times, there was no separation of executive and judicial authority; as a result, the chief justice sat in cabinet. Thus court administration was under the authority of the chief justice in British times, and remained with the chief justice after independence. Singapore court officials have never known any other system, taking for granted and taking seriously their responsibility for managing the Courts and introducing a wide range of innovations in technology and organization.\textsuperscript{12}

Hence the anomaly. When the common law courts were closely aligned with the executive, the judiciary had the practical capacity to control the administration of the courts. In many jurisdictions, the steps which have been taken to separate the judiciary from the executive, in the interests of judicial independence, have had the consequence of significantly reducing the capacity of the judiciary to control the administration of the courts, thereby diminishing judicial independence in a very real and practical sense. The courts of Singapore provide a notable exception, as anyone with even a passing interest in court administration will attest, given the innovation and efficiencies which have been achieved by the administrators of the courts in that country under the direction of the judiciary.

In other common law jurisdictions, this anomalous loss of judicial independence has been addressed by the creation of governance structures which have restored the power of the judiciary to direct and control the administration of the courts in which they serve.\textsuperscript{13} However, in many common law jurisdictions, the anomaly remains and under the ‘executive model’ of court administration, most personnel engaged to administer the court and support the exercise of the judicial function are to a degree controlled by, but always ultimately answerable to, executive government and not to the judiciary. In the increasing number of jurisdictions in which that model of court administration has been abandoned, it has been recognized that not only does it diminish judicial independence, in a real and practical sense, but it is also inefficient economically and managerially, for reasons which I develop later.

5.2. The Executive Model

Justice Bruce McPherson’s interesting history of court administration in Australia provides some colorful examples of the inevitable tensions created by the executive model of court administration. The obvious areas of tension concern staffing and budgetary resources.

5.3. Staffing Tensions

In 1889 the executive government of Queensland purported to create the new office of ‘taxing officer’ of the Supreme Court of Queensland without the prior approval of the judges. During the course of argument in the litigation which followed, Chief Justice Lilley (a former Premier and Attorney General) was moved to volubly enunciate the independence of the court when he observed: ‘The Supreme Court is not under any department; it is under the Judges. The Crown comes into the court as a suitor, and as nothing else. It cannot come here to command, nor can it put in any officers to interfere with the functions of the court.’\textsuperscript{14}

In the judgment later delivered, speaking on behalf of the Full Court, Lilley CJ asserted judicial control over all court staff in these terms:

\begin{footnotesize}
\textsuperscript{11} Traces of this approach to colonial governance remain, even in contemporary Australia. See Rebecca Ananian-Welsh and George Williams, \textit{Judges in Vice-Regal Roles} (9 September 2014) Judicial Conference of Australia http://www.jca.asn.au/judges-in-vice-regal-roles-september-2014/.

\textsuperscript{12} Canadian Judicial Council, \textit{Alternative Models of Court Administration} (September 2006) 106 (‘Alternative Models’).

\textsuperscript{13} Such as the judicial council model adopted in South Australia and Victoria, and in a modified form in Ireland, or the limited autonomous court model adopted by the Federal Courts of Australia and the Canadian Supreme Court, or the executive/guardian model adopted by the other Federal Courts of Canada (see Canadian Judicial Council, \textit{Comparative Analysis of Key Characteristics of Court Administration Systems} (6 July 2011) (‘Comparative Analysis’)). I use the term ‘judicial council model’ as employed by the then Lord Justice Thomas, for the Council of Europe, in \textit{Councils for the Judiciary – Preliminary Report: States without a High Council} (March 2007); that is to mean ‘a body run by the judiciary which enables the judiciary to administer the courts with a professional management structure’; at 5.

\textsuperscript{14} McPherson, above n 8, 173 quoting ‘Supreme Court Tuesday, September 10 – Monthly Full Court’, \textit{Brisbane Courier} (Brisbane), 11 September 1889, 1, 3.
\end{footnotesize}
Now, it matters not what rank a person holds in the Supreme Court, whether called a clerk or registrar, if he is lawfully appointed to carry on the administration of justice or the administration of the Court in any way, however humble, he is an officer of the Court subject to the jurisdiction of the Court; all these officers, from the registrar down to the humblest clerk in the office, is subject to the authority of the Court, controlled by it in the discharge of his duties in the Court, and any interference with them is an interference with the Court itself, and cannot be allowed. The importance of this state of the law can hardly be overestimated.\(^{15}\)

However, there is reason to suspect that this is more wishful thinking than an accurate statement of the true position under the 'executive model' of court administration. For example, as Justice McPherson points out,\(^ {16}\) a little earlier in New South Wales in 1883, the Prothonotary, Mr T M Slattery, acted in accordance with the direction of the judges of the court and refused to report to government with respect to his administration of intestate estates. He was dismissed by the government of the day, even though he was obeying the directions of the judiciary.\(^ {17}\)

It should not be thought that tensions under the executive model of court administration between the executive control of administrative staff and the independence of the judiciary are confined to the annals of history. Within the last 30 years, a Registrar of the District Court of Western Australia, who had both quasi-judicial and administrative responsibilities, vacated his office as a consequence of a dispute relating to his asserted independence from executive direction.

### 5.4. Budget Tensions

Not surprisingly, many examples of tension between the executive and the judiciary under the executive model of court administration can be found in the area of budgetary constraint. Justice McPherson provides two examples, each related to the expenses of circuit travel.

In 1887 a long-running dispute over the circuit expenses of the northern judge came to a head when the government unilaterally altered the rules by including in the estimates a reduced sum specifically to cover expenses in the north. No-one told Cooper J about it until the money was about to run out; but the government was in the end forced to relent in the face of his threat to close the circuit, release the prisoners awaiting trial, and return forthwith to his base in Bowen.

The Premier responsible for the confrontation was none other than Sir Samuel Griffith. As Chief Justice of the High Court, he had the chance in 1906 to sample the effects of executive frugality when Federal Attorney-General J B Symon elected to cut court expenses by reducing the number of associates and telephones and refusing to install bookshelves for the High Court in Sydney. His contention that the High Court should confine its sittings to Melbourne led Griffith to adopt Cooper's expedient of cancelling the court sittings due to take place there. The conflict ended only with the fall of the government of which Symon was a member. The judges won their point, the High Court remaining resolutely peripatetic until the creation of a permanent seat in Canberra under the High Court of Australia Act 1976.\(^ {18}\)

My reference to historical examples should not be taken to suggest that tensions between the executive and the judiciary with respect to budget under the executive model of court administration are historical. To the contrary, I suspect that virtually every head of a court administered under that model would be able to provide endless examples of tension arising from disputes over the provision of resources. I will relate one example from the many I could provide, chosen because it relates to the same subject as Justice McPherson's historical examples — namely, circuit expenses.

Some years ago now, a senior official advised me that a circuit to the north of our State would have to be cancelled because there was insufficient funding remaining within the relevant budget item for the current financial year. Trials had been listed for the circuit, cases had been prepared, witnesses and jurors summoned, etc. A little like Justice Cooper in 1887, I responded by advising the official that while of course I accepted that the provision of the resources necessary to enable the court to function was a matter for executive government, he or any other official minded to give me a written direction to cancel the circuit should understand that the direction would be attached to a media release which I would issue immediately. Happily the direction never came and the circuit proceeded.

### 5.5. A Threat to Independence

There is a more fundamental point which underpins these apparently superficial examples. As Professor Baar points out, whatever may have been the case in the past, the importance of judicial independence and impartiality now has a universality which transcends politics, ideology and culture. In countries with a written constitution like Australia, it is often


\(^{16}\) McPherson, above n 8, 178.

\(^{17}\) A classic example of the adage 'no man can serve two masters'.

\(^{18}\) McPherson, above n 8, 172 (citations omitted).
recognized as a fundamental characteristic of the constitutional structures for the governance of the country. But can a court which lacks the capacity to decide where and when it will sit, because it depends upon executive government for resources, truly be said to be independent? Can a court which lacks the capacity to appoint and fully control its staff truly be described as independent? Can a court in which most staff are appointed and ultimately controlled by the most prolific litigant in the court truly be said to be impartial?

5.6. Managerial Efficiency and Accountability

There is another dimension to these issues. That dimension concerns the relationship between managerial efficiency and accountability. One does not need to be an economist to understand that holding the person responsible for the allocation of resources accountable for the outcomes achieved by the utilization of those resources is likely to improve efficiency. Most budgets operate on precisely this principle. Disconnection between the authority to allocate resources, and accountability for the outputs from those resources is a recipe for inefficiency and waste.

Because systems for the administration of courts are infrequent topics of conversation amongst members of the general public gathered in bars, restaurants, or indeed anywhere, members of the community understandably hold the courts accountable for their performance. So, when the time which it takes to process a routine application for probate of a deceased estate blows out from two weeks to ten weeks because of staff shortages, the families affected by their incapacity to access the deceased estate so as to put food on the table complain to me, not to the department of government responsible for providing the staff. Very few of those correspondents would be aware that the department has the exclusive responsibility for providing human resources to the court, and that there is nothing which I or any other member of the judiciary can do if adequate resources are not provided. This means that, in a very real sense, the departmental officials who make decisions with respect to the allocation of human resources are not accountable for the consequences of those decisions and those who are held accountable lack the authority to discharge their responsibilities. If one were designing a governance structure for a public enterprise from scratch, it is hard to imagine a worse model.

The problems of efficiency and accountability to which I refer persist even if we assume public knowledge of the arcane structure for the administration of the courts under the executive model. That is because of the bifurcated nature of responsibility under that model. So, when a citizen complains to executive government about delays in the courts, the responsible minister customarily responds by referring to the independence of the judiciary and the inability of executive government to dictate the manner in which the courts allocate and list cases for trial. When that same citizen writes to me complaining about delays in trial times, I reply referring to the fact that executive government decides the level of resources to be provided to the courts, and that the court can only do so much with the resources which have been provided. The citizen exasperated by this passing of the buck from one branch of government to another might be forgiven for thinking that nobody is responsible, or at least that nobody is accepting responsibility.

6. Court Administration Reforms – Some Examples

6.1. The United States

In the United States at least some commentators have suggested that reforms in court administration during the last century were driven more by notions of managerial efficiency and economy than by the objective of institutional independence. Gordon Bermant and Russell R Wheeler assert:

The idea of a truly independent judicial branch, administratively responsible and competent, even if not administratively autonomous, emerged only in the twentieth century as a product of the Progressive Movement's effort to rationalize government and make it more efficient.19

Support for this proposition can be found in the writings of Professor Roscoe Pound. In 1906, he called for the unification of courts in the states in order to facilitate the development of systemic court administration controlled by judges rather than local political elites.20 In 1914, Pound elaborated what has been described as the ‘principle of real administrative autonomy for the judiciary’.21 However, it seems clear that Pound’s justification for providing the judiciary with administrative autonomy was economy and efficiency, not judicial independence. Referencing state court systems, he wrote (with others):

20 However, by 1940 he was able to record only individual experiments in some states: Pamela Ryder-Lahey and Professor Peter H Solomon, 'The Development and Role of the Court Administrator in Canada' (January 2008) 1(1) International Journal for Court Administration 31, 31 citing Roscoe Pound, The Organization of Courts (1940).
21 Alternative Models, above n 12, 61.
the court should be given control of the clerical and administrative force through a chief clerk, responsible to the court for the conduct of this part of its work. We have hampered the administration of justice by the extreme to which we have carried the decentralization of courts. In many jurisdictions the clerks are independent officers, over whom the courts have little or no control. … Each clerk's office [in most states] is independent of every other. It is no one's duty to study the system, suggest improvements, or enforce them when made. What responsibility will do in this connection, when joined to corresponding power, is shown in the Municipal Court of Chicago, where the system of abbreviated records is said to have effected a saving of $200,000 a year. Moreover, if courts are to do the work demanded of the law in large cities … and in industrial communities, they must develop much greater administrative efficiency, and must be able to compete in this respect with administrative boards and commissions.22

Whatever the motivation, in 1939, the US Congress passed legislation creating the Administrative Office of the United States Courts. The office was responsible for administering the federal courts, including determining their budget, under the control and supervision of what is now known as the Judicial Conference of the United States.23 The independence of the US Federal Courts from executive interference extends even to their budget, which is prepared by the Administrative Office and approved by the Judicial Conference, before being sent to the office of the President, who has a statutory obligation to forward it to Congress without change.24 However, similar progress in state court systems lagged behind their federal counterparts; according to Alexander B Aikman, it was not until 1947 that an administrator was engaged to assist a US State Chief Justice to bring professional services to the court.25 According to Aikman:

It is only since the mid-1950s that courts, the 'third branch', actually have started to create a coherent institution … Extraordinary strides in court administration and in courts themselves have been made since 1947. The judiciary has gone a long way toward establishing itself as a viable, truly independent, responsible, and accountable, branch of government. Part of the growth and maturation is attributable to the growth and maturation of court administration.26

6.2. Canada
In Canada the 'emergence of the court administrator … was tied to the movement to unify and streamline provincial courts that began in the late 1960s and reflected a realization that courts had fallen behind the rest of government in the process of administrative modernization'.27 However, it seems that the modernisation of court administration in Canada 'made some judges nervous that functions that mattered to the administration of justice were being performed by staff that were subordinate to the executive branch.'28

These concerns were addressed in a major report sponsored by the Canadian Judges Conference and the Canadian Institute for the Administration of Justice and published in 1981 — Masters in their Own House: A Study on the Independent Judicial Administration of the Courts.29 In that report, the authors called for the establishment of court services departments accountable to provincial judicial councils. However, it seems that the movement towards greater judicial control of court administration was impeded by the decision of the Supreme Court of Canada in Valente v The Queen30 in which it was held that the independence of the judiciary did not require court administration to be subject to judicial control, but that only functions directly related to the adjudicative process, such as the assignment of judges, the scheduling of trials and the allocation of courtrooms was required to be under the control of the judiciary.31 Notwithstanding that decision, while most provincial and territorial courts in Canada remain governed under the executive model, at the federal level, the Supreme Court of Canada has achieved what has been described as limited autonomy, and the other federal courts are administered by what is described as the executive/guardian model.32

6.3. Australia
A similar structure has emerged in Australia. The federal courts have a degree of autonomy, administered by Registrars/CEOs who are responsible to the judiciary but within a budget set by the executive. South Australia and

23 Alternative Models, above n 12, 62.
24 Ibid.
26 Ibid.
27 Ryder-Lahey and Solomon, above n 20, 31.
28 Ibid, 34.
30 [1985] 2 SCR 673.
31 Ryder-Lahey and Solomon, above n 20, 34.
recently Victoria have moved to the judicial council model, while the other states and territories remain under the executive model.

6.4. Europe

As many would know, Ireland moved away from the executive model in favour of a modified judicial council model about 15 years ago, and among the non-common law countries, the Scandinavian countries of Denmark, Norway, and Sweden, as well as Holland have been prominent in segregating court administration from executive control. Many other countries in Europe have created judicial councils.33

6.5. International Standards for Court Administration

Various international organizations have directed their attention to the relationship between court administration and the independence of the judiciary over the last few decades. In 1980, the International Bar Association embarked upon a project to develop an international code of minimum standards for judicial independence,34 which included requirements relating to court administration. In 1983, the Montreal Declaration on the Independence of Justice adopted standards similar to those formulated by the International Bar Association,35 and included a provision that ‘the main responsibility for court administration shall vest in the judiciary’.36 In 1995, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region was adopted at a conference of Supreme Court Chief Justices from the Asia Pacific region.37 It contains prescribed minimum standards for judicial independence after allowing for national differences within the various countries represented in the LAWASIA organization. In relation to judicial administration, the Beijing Principles provide:

The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.38

In 1997, the Chief Justices of the Australian States and Territories issued a 'Declaration of Principles on Judicial Independence' which referred with approval to the Beijing Statement of Principles.39 The question of whether the current arrangements for the administration of all of the Australian courts comply with the Beijing Principles is a fair question for debate, but the competing arguments lie beyond the scope of this paper.

6.6. Models of Court Administration

I have already referred to the emergence of different models of court administration in differing jurisdictions, prompted in some cases by a desire to reinforce judicial independence, and in others by a desire to improve economy and efficiency. There have been a number of very helpful surveys of different models in different jurisdictions. Notable amongst those surveys are the comparative analyses of key characteristics of court administration systems presented to and published by the Canadian Judicial Council in 2011, and the preliminary report requested by the Council of Europe on Councils for the Judiciary which was presented by the then Lord Justice Thomas in 2007.40 Other authors have made important contributions to this analysis.41

Differing taxonomies have emerged in the course of these comparative analyses, but they usually identify the extent to which the administration of the court is under the control of the executive and the extent to which the administration is

33 Thomas, above n 13.
36 Montreal Declaration on The Independence of Justice (10 June 1983) article 2.40.
38 Published in (1996-97) 15 Australian Bar Review 176.
39 See Comparative Analysis, above n 12; Thomas, above n 13.
subject to control and direction by the judiciary. It is unnecessary to replicate these helpful analyses in this paper. It is sufficient to note that in different jurisdictions, different methods have been adopted in an attempt to enhance judicial independence, improve efficiency and reduce cost. It is clear from the various reviews to which I have referred that in both common law and civil law jurisdictions, a clear trend towards greater administrative autonomy and judicial control is readily apparent.

7. Two Emerging Objectives - Case Management and New Public Management

Over the last few decades, in most jurisdictions two significant objectives have emerged which have had a profound effect upon court administration, and upon the relationship between the judiciary and court administrators. Those two objectives are the proper management of individual cases and the application of the principles of public administration embodied in the expression 'New Public Management' ('NPM').

7.1. Case Management

In common law jurisdictions, traditionally, the emphasis upon the adversarial process resulted in the progress of the case being largely left to the parties. If they took no action, the court took no action. Predictably enough, in the civil side of the court's work, this produced massive backlogs of cases which had been lying stagnant for many years.

In civil law jurisdictions, although the court has traditionally taken greater responsibility for the progress of each case, responsibility for each case is allocated to a particular judicial officer. Caseloads varied between judges, as did attitudes towards expedition and timeliness, which could be idiosyncratic. Overall supervision by the court as a whole was limited.

In both common law and civil law jurisdictions, the last few decades have seen an appreciation of the need to introduce better systems for the management of cases, across the whole jurisdiction of the court, so as to improve timeliness, consistency of process, and efficiency. In many (probably most) common law jurisdictions, there has been a significant cultural shift toward proactive intervention by the court in the progress and resolution of individual cases. In many jurisdictions, this cultural shift has been accompanied by the introduction of procedures for the referral of cases to alternative dispute resolution (ADR), which has become the dominant means for the resolution of civil disputes.42

The number of cases which have to be managed in most jurisdictions has meant that judges have had to turn to court administrators for the introduction of systems and technology to support the new approach. In a very real sense, the judges and the administrators have become partners in the achievement of a common objective - the just and fair resolution of all cases before the court in the shortest possible time and at the minimum cost.

The impact of the introduction of case management upon court administration in common law jurisdictions has been cogently expressed by Ryder-Lahey and Solomon:

Over time the emphasis in judicial administration in the USA shifted from improving the organization and structure of courts to enhancing their accountability, performance, efficiency, and effectiveness. This shift came from the realization that improvements in structure alone would not achieve the goal of efficient and effective courts. Of primary concern was addressing the problems of case backlog and delay, including the potential of caseflow management and mediation. Judges also came to recognize that administrative efficiency of courts required professional managers and staff capable of working with judges in formulating and executing policies at the court.

Caseflow management became in the 1970s a central concern among judges, lawyers and especially court administrators. The increasing caseload in many courts and the accompanying growth in court delay made the achievement of efficiencies imperative and provided fertile soil for the introduction of changes in scheduling and allocation of cases and of major reforms in the processing of cases. Changes in scheduling required wresting control of the calendars of courts away from local lawyers, prosecutors, and elected clerks of courts, and the assertion instead of judicial control. By 1984 the bar recognized the potential benefit of time standards governing the progress and disposition of cases.

Ultimate responsibility for caseflow management rested officially with judges. Judges had the authority to seek assistance from the court administrators and get these administrators actively involved in the pursuit of caseflow management innovations. Such innovations included new systems of allocating cases among judges (not by

42 In the Supreme Court of Western Australia, for example, less than 3% of the cases lodged with the court are resolved at trial – the majority are settled, many following mediation. This ratio is comparable to many superior courts in the common law world (Chief Justice Wayne Martin, ‘Managing Change in the Justice System’ (18th Australian Institute of Judicial Administration (‘AIJA’) Oration in Judicial Administration, Brisbane, 14 September 2012) 6).
specialization but by the complexity of cases and the time needed for resolution); and new ways of tracking and managing cases from initiation to disposition. Thus, caseflow management came increasingly to imply the use of early screening and disposition, and various forms of alternative dispute resolution. In some courts new posts like ‘case manager’ or ‘trial coordinator’ were established, in addition to or as substitutes for ‘court administrators’.

Arguably, it was the new body of knowledge about caseflow management that gave court administrators a distinct professional identity. Court administrators fully versed in the latest techniques of caseflow management, including the use of computers, offered something to the operation of courts that persons with legal training did not.43

A similar point was made in the UNDOC’s Resource Guide on Strengthening Judicial Integrity and Capacity:

Case management, performance evaluation and technological developments increase the organizational complexity of courts and require new professional skills and abilities that do not necessarily fit the traditional professional profile or job description of judges. This led to the increased prominence of the position of court administrator that in many jurisdictions has authority over all non-judicial court management and administration functions. More specifically, functions that are typically assigned to such court executives or managers include long-range administrative planning, finance, budget, procurement, human resources, facilities management, court security, emergency preparedness planning, and employee discipline in addition to the ministerial and judicial support functions. These new court professionals liberate the chief judges of the courts from having to invest considerable time and energy on non-judicial functions for which they have not been trained. As a consequence, chief judges of the courts can focus on the judicial functions for which they have been trained and can work to implement more far-reaching strategies aimed at guaranteeing a high quality of judicial decisions and dispute resolution. Finally, since the overall functioning of a court depends heavily on the interplay between judges and administrative staff, it is important to set up a system capable of building a shared responsibility between the head of the court and the court administrator for the overall management of the office.44

7.2. New Public Management (‘NPM’)

The adoption of case management techniques over the last four decades corresponds to a broader change in the approach to public administration which has been applied to many agencies and branches of government in many countries. Although in most countries the courts are regarded as an independent branch of government, separate and distinct from the executive branch, they have not been exempted from the modern principles of public management.45 Those principles, and their application to the judiciary, have been described by Swiss researchers, Professor Yves Emery and Lorenzo De Santis:

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 …

All public organizations are accountable to the citizens and governments for the way that they spend their money. 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, it created lively debates in both research and practice. As for its methods, Hood [in ‘A Public Management For All Seasons?’] 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 emphasize 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’.46

43 Ryder-Lahey and Solomon, above n 20, 32–33.
44 UNDOC, above n 2, 40.
45 See, eg, Professor Andreas Lienhard’s examination of the benefits and risks of NPM, from the perspective of Swiss constitutional and administrative law, and including the feasibility of applying NPM to the organisation of the justice system (Andreas Lienhard, ‘New Public Management and Law: The Swiss Case’ (Winter 2011/12) 4(2) NISPAcee Journal of Public Administration and Public Policy (Special Issue: Law and Public Management Revisited) 169, especially at 183–184).
46 Yves Emery and Lorenzo Gennaro De Santis, ‘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’ (June 2014) 6(1) International Journal for Court Administration 1, 1–2 (citations omitted).
However, the vital point is that there is no need to trade off judicial independence in order to improve managerial efficiency. To the contrary, they can be aligned. This alignment between judicial independence and the achievement of managerial efficiency in accordance with NPM principles is well demonstrated in a monograph commissioned by the Australasian Institute of Judicial Administration in 2004, in which three senior academics in the field of management reviewed the operation of Australia’s courts from a managerial perspective. The thesis of the monograph was put succinctly in an address by one of the authors a few years later:

the courts play a role as an arm of government; and the courts should assume control over court staff and court budgets if they are to be independent of the other arms of government.

(And this is the managerial perspective) Courts also play a role as providers of services. In performing this role, the Executive holds the courts responsible to produce certain services. Principles of sound management demand that those who are to be held responsible to produce must be given the power to fulfil the tasks demanded of them. If the courts are to be held responsible for the production of services they must be given the power to manage their own staff and manage their own budgets.

This managerial perspective means that the perception of a conflict between sound management and the proper role of the courts as an arm of government is illusory. Both principles demand that our courts should be responsible for managing their own staff and should be free to allocate the funds allocated them by the Executive.

However, the application of NPM principles to the courts comes at a price. As Richard Foster PSM has noted:

notions of accountability and performance tend to come laden with the nomenclature of business and bureaucracy — inputs, outputs, objectives, outcomes, policies, programs and key performance indicators. Such language can sit uncomfortably with the judiciary and it often falls to the senior court administrator to assist them in understanding their accountabilities and responsibilities.

So, like case management, the application of NPM principles to the courts has necessitated a collaborative partnership between the judiciary and those responsible for the administration of the court not only in the management and the administration of the court, but also in the design and application of data collection systems which enable the court to report to executive government and the broader community upon the outcomes which have been achieved by the utilization of public resources.

7.3. Another Threat to Independence

However, there are real dangers if too much emphasis is placed upon the statistical reporting of outcomes. Those dangers include a potential threat to the fundamental objective of the judicial branch of government, which is the provision of justice. That threat arises if judges are influenced in their management of individual cases by a desire to improve statistical outcomes, rather than a focus upon the needs of justice in each individual case. As Chief Justice Spigelman has famously observed many times in this context, 'Not everything that counts can be counted'; nor indeed does everything that can be counted matter.

I know from personal experience that there is an almost irresistible tendency to collect data that can be collected easily and to assume, without careful analysis, that the data collected reveals useful information about performance and efficiency, when often it does not. This danger emphasizes again the vital need for a full partnership between the judiciary and the administration. If that partnership is to be successful, the judiciary must discharge the responsibility of identifying precisely what matters in the management of the court by reference to the fundamental objectives of the court. The responsibility of the administrator is to design and implement systems which collect information on the extent to which those fundamental objectives are being achieved. If those systems capture useful information, it can be used to inform decisions as to the processes and procedures which might better achieve the things that really matter, and to report to executive government and the community on the extent to which the court has achieved its fundamental objectives. This can only occur if there is a common understanding between the judiciary and the administration as to the fundamental objectives of the court. If wrong or inaccurate measures of performance are used by executive government to inform

49 Richard Foster, ‘Towards Leadership: The Emergence of Contemporary Court Administration in Australia’ (February 2013) 5(1) *International Journal for Court Administration* 1, 5.
decisions with respect to the amount or the allocation of the resources provided to the court, the quality of justice delivered by the court will be diminished.

**Courts are not Businesses**

There are other dangers in an over-rigorous application of NPM principles to the judicial branch. Principles adopted from the private sector, designed to improve the profitability of a business venture, cannot be applied without modification or analysis to a court. A court is not a business venture. Courts are indispensable to the rule of law, and the value of the rule of law, or the provision of justice in an individual case, defies quantification on a balance sheet.

**A Business Case?**

Despite this fairly obvious proposition, the ubiquity of NPM principles in contemporary public administration can require any proposal for the expenditure of funds to be justified by a 'business case', even though, obviously enough, a court is not a business. The notion of a business case can be readily understood in the private sector, where the fundamental objective of deriving profit requires that expenditure should only be incurred if it produces an acceptable rate of return. The concept has no ready or apparent application to an enterprise in which the fundamental objective is the delivery of justice. Nevertheless, it has been suggested that, for example, every appointment of a judicial officer should be justified by a 'business case'.

It may be possible to make some sense of a 'business case' in the context of a court if there are service and performance parameters which can be measured objectively and against which expenditure can be assessed. So, if the failure to appoint a judge will result in an increase in the median time taken to resolve cases in the court, the consequence of failing to appoint a judge can be assessed, albeit not in terms of revenue or profit. However, that assessment is only useful if one places an economic value upon the timely disposition of cases. But if 'justice delayed is justice denied', can an economic algorithm be usefully applied to the quality of justice provided by a court? And, if the failure to appoint a judge not only delays median times to resolution, but increases the workload of the judges to the point where the quality of justice provided in individual cases diminishes, how is that to be measured in a 'business case'?

7.4. Where does Judging End and Administration Begin?

In the preceding section of this paper I have assessed the impact which contemporary attitudes towards case management and NPM principles have had upon the relationship between judges and court administrators. I have concluded that the emergence of those objectives has necessitated a close working collaboration. In that context, in the last section of this paper I will return to the vital topic of judicial independence and address the question of whether there is in fact a bright line which demarcates the judicial function from the administrative function in contemporary court administration. The answer to that question has profound implications for appropriate court governance structures. For example, the executive model, although in retreat, presupposes that there is a clear delineation between the judicial function, which is the exclusive province of the judicial branch of government, and the administrative function, which is under the control of the executive. If that assumption is flawed, then so is the model.

The contemporary relevance of this issue, in the context of the emphasis upon a managerial approach to court administration, is neatly encapsulated in the following passage:

> The question of independence of the judiciary, due to a more performance-orientated administration of justice, is often brought forward by the heads of the courts. They keep protesting against the reduction of their initiatives and influence in favor of managers who have a direct relationship with the central administration. Such a tension between judges and managers is not peculiar to England, France and the Netherlands, and may prevail at a European level. The question is to know where the action of « judging » begins, and where the action of « administering » ends.

In his review of court governance systems, Lord Justice Thomas noted that the distinction between matters which were the subject of judicial responsibility, and matters of administration, was 'never clear cut and there has been no success in drawing the line'. He went on to observe: 'This is a factor which has to be considered when deciding whether administrative services can be provided to the judiciary which are not ultimately answerable to the judiciary as opposed to the executive.'

At different ends of the spectrum of functions performed in a contemporary court, the allocation of responsibility is clear-cut. The adjudication of a case after trial is the clear responsibility of the judiciary, and nobody would suggest that the

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51 At least not since the abolition of sinecures dependent upon extracting maximum fees from litigants.
52 Loïc Cadiet et al, 'Better Administering for Better Judging' (December 2012) *International Journal For Court Administration* (Special Issue) 1, 6 (citations omitted).
53 Thomas, above n 13, 17.
judiciary should take responsibility for the engagement of cleaning contractors or the acquisition of pens and paper. However, there are many areas between the two ends of this spectrum in which the allocation of responsibility is far from clear. I will endeavor to make that proposition good by considering a variety of functions performed in a contemporary court. The topics are not meant to be exhaustive.

Judicial or Administrative Functions?

1. Accepting or Rejecting Documents Filed at Court
Most courts have specific requirements which must be satisfied before a document will be accepted for filing. The standards will commonly cover matters of form54 and substance. Usually those standards will be prescribed by the judiciary and implemented by administrative staff at the front counter or registry of the court.

The manner in which the prescribed standards are implemented can have a profound effect upon the character of the justice dispensed by the court. If those standards are enforced pedantically, with a zealous eye to detail, legally represented parties will suffer delays while documents are redrawn and will incur additional cost, and parties without legal representation may find this practical barrier to justice insurmountable and give up. On the other hand, if the prescribed standards are disregarded by court staff, and documents are accepted that are not properly attested or verified, the quality of justice delivered by the court will be diminished. The creation and maintenance of an administrative culture which strikes an appropriate balance between these two extremes can only be achieved by close collaboration between the judiciary and court administrators. The judiciary must clearly enunciate the manner in which they would like the balance to be struck, having regard to the objectives of the court, in terms of accessibility by self-represented litigants and the maintenance of appropriate standards with respect to reliability and authenticity of documentation. The administrators must implement systems for training and supervision which enable the desired balance to be consistently achieved.

Analysed in this way, it would be facile to suggest that the role of either the judiciary or the administration is more important than the other in the discharge of this important function. Nor would it be accurate to describe this function as falling exclusively within the province of either the judiciary or the administration.

2. Case File Maintenance and Management
In most courts, responsibility for the maintenance and management of case files rests with administrative personnel. Responsibility for the IT systems that are now increasingly engaged to perform or support this function also usually rests with administrative personnel. However, the manner in which this function is performed can have a significant effect upon the quality of justice delivered by the judiciary. If documents are misfiled, or take a long time to reach the relevant file, the quality and efficiency of the judicial function will be diminished. Perhaps more significantly, in most courts there will be systems employed so as to identify documents of particular significance, or which require a prompt or even urgent judicial response. The quality and efficiency of those systems will have a significant effect upon the quality and efficiency of judicial work. For that reason, the judiciary must be involved in the specification and oversight of those systems. This is another area in which it would be invidious to suggest that either the judiciary or the administration has a more important role than the other, or to assert that the function is exclusively judicial or exclusively administrative.

3. The Administrative Disposition of Cases
Most courts exercising civil jurisdictions will have procedures by which cases can be resolved administratively - for example, if a party fails to respond to court process, or if the moving party fails to take any action in the case for a prescribed period. Often those processes will be implemented administratively, without reference to a judicial officer. However, they usually result in an order of the court which finally disposes of the case. The processes have characteristics which are both administrative and judicial, in the sense that they result in the final disposition of the case. The effective implementation of these procedures is a matter in which the administration and the judiciary have a joint interest.

4. Allocating Cases to Judicial Officers
Systems used to allocate cases to judicial officers vary widely. At the risk of over-generalization, in courts with docket-based systems of case management, the process requires each case to be allocated to a particular docket. In courts which do not operate dockets, the process will require each hearing to be allocated to a judicial officer.

The systems used to allocate cases or hearings also vary widely. In some courts, the judiciary perform this function. In others, the function is entirely administrative. In many courts, like mine, the systems involve both judicial officers and administrative personnel.55

54 Font size, lay-out of the document, manner of execution, etc.
Even in those courts in which allocations are performed entirely by administrative personnel, it is obvious that the judiciary have a vital interest in the efficient and impartial performance of the function, and must take responsibility for the methodology employed. So, whatever systems are used to allocate cases, this is another function which cannot be said to lie exclusively within the province of either the judiciary or the administration, nor can the role of either be said to be more important than the other.

5. **Effective Utilization of Information Technology**

Courts increasingly rely upon information technology to dispense justice. There are now very few areas of activity which do not depend heavily upon IT support. IT systems support electronic filing, case management, the listing of cases and notification to the parties, the research and information resources available to the judiciary, trials are commonly conducted using audio visual systems and digitized data, and IT systems support the preparation and publication of reasons and orders of the court, court hearing lists and information for the public on court procedure and statistics.

In most courts, judges have come to rely heavily upon IT managers who are part of the administrative resources of the court for the design, implementation and operation of the various systems which support the judicial function. Close collaboration between the judiciary and relevant IT personnel is essential if the systems are to achieve their objectives. This is yet another area in which the judiciary and administrative personnel have equally important roles and responsibilities and which cannot be said to lie within the exclusive realm of either.

6. **Data Collection and Analysis**

The comments I have already made with respect to the significance of data collection and analysis in the context of New Public Management principles demonstrate the importance of this function to each of the judiciary and the administration, and the important roles which each must play in this area. It is yet another area of joint enterprise or partnership.

7. **Budget Management**

The relationship between the management of the budget and resources available to the court and the effective performance of the judicial function is obvious. Illustrations can be seen in the examples I cited of tension arising in relation to circuit expenses. The level of resources available to support the judiciary, in terms of personal staff, research facilities, clerical and administrative support will obviously affect the quality and efficiency of the justice provided by the court. In most courts decisions will have to be made as to the allocation of limited resources between competing areas of court operations. If the court is to achieve its fundamental objectives, the choice between competing priorities must be made by close collaboration between the judiciary and administration. This is yet another area of joint enterprise or partnership.

8. **Designing, Constructing and Maintaining Court Buildings**

Contemporary research shows a clear relationship between the design and quality of court buildings and the quality of justice delivered in those buildings. This is hardly surprising. Appropriate building design should give all court users - public, media, litigants, witnesses, security and administrative personnel and judiciary - safe and secure access to the spaces and facilities which they need to achieve their objectives.

In the past there has been a tendency to consign responsibility for the design, construction and maintenance of court buildings to administrative personnel because it is usually executive government which bears the cost. In that process, the judiciary are sometimes seen as 'stakeholders', to be consulted by the project team in the same way as other court users, like the legal profession and the media are consulted.

However, in more recent times, in most jurisdictions a more enlightened approach has been taken, in which the judiciary and court administration are viewed jointly as ‘the client' by the architects, builders and treasury officials responsible for delivering the project. Experience has shown that this approach delivers much better outcomes in terms of buildings that provide the functionality required for the efficient delivery of justice. So, this is yet another area in which joint enterprise is essential.

9. **Recruiting, Supervising and Retaining Court Staff**

In most courts, responsibility for the recruitment, supervision and retention of court staff rests with administrative personnel, although in some courts the judiciary may have a role in the appointment of the chief executive officer. Nobody would seriously suggest that judicial officers should be involved in the recruitment or supervision of base-level clerical

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55 In the Supreme Court of Western Australia, civil cases managed by a judge on a docket are allocated by a judge. Criminal trials are mainly, but not exclusively, allocated under the supervision of a judge. Administrative staff list civil cases that are not managed on a docket and various miscellaneous cases for hearing.
staff. However, the manner in which those staff are recruited, trained and supervised can have a significant effect upon the quality of justice dispensed by the court, as the example I have already cited in relation to shortages of staff in the probate section of my court illustrates. As the judiciary are held responsible for the outcomes produced by the administrative personnel of the court, they should also have the responsibility and the authority to determine policies with respect to recruitment, training and supervision of administrative staff in collaboration with those responsible for the implementation of those policies.

10. The Development of Policy with respect to Court Administration and Procedures
As with any other complex organization, courts must constantly review policies relating to administration and procedures to take account of changing circumstances and opportunities for improved efficiencies. Any effective process of procedural reform must give weight to the fundamental objectives of the court, as assessed by the judiciary, but must also give weight to administrative efficiency, which is best assessed by those responsible for the administration. This is yet another area in which joint collaboration is essential.

11. Managing the Relationship between the Judiciary and Court Users
Courts are increasingly regarding themselves as service providers, with a responsibility to continually improve the quality of their service. This is evident in the development of systems for the assessment of the quality of the service delivered, such as the International Framework for Court Excellence, developed in a joint enterprise between the courts of Singapore, the United States and Australia. Even the most superficial glance at that framework will show the importance of the respective roles performed by the judiciary and administrative personnel in service delivery.

In most jurisdictions, communication between the judiciary and court users is constrained to communication within the court process - during hearings and in the publication of reasons for decision, although heads of jurisdiction will often act as a spokesperson for the court. Management of the daily interface between the court and its users is largely the responsibility of administrative personnel, although the judiciary have an obvious and direct interest in that process. The culture which characterizes interaction between court personnel and court users will have a significant impact upon the public assessment of the quality of justice provided by the court. This is yet another area which requires close collaboration between the judiciary, who must take responsibility for providing the cultural settings or parameters which are to govern the interface between the court and the public, and the administrative personnel who are responsible for implementing those standards.

8. Is There a Bright Line between the Judicial and the Administrative Function?
In the preceding section I have not attempted to cover all the many and diverse functions performed by a modern court. However, the functions which I have specifically assessed cover many, if not most of the more important functions which lie between the extreme ends of the spectrum which I earlier posited - namely, adjudication in court at the one end, and buying stationery at the other. The analysis strongly suggests that all of these important functions must be regarded as the joint responsibility of the judiciary and the administration if they are to be effectively performed. The analysis reinforces the views of Lord Justice Thomas and Cadet et al as to the difficulty of assessing where judging begins and administering ends. It leads me to conclude that while there are ends of the spectrum of court activities which can be classified as exclusively judicial or exclusively administrative, there is a large range of important functions between those ends of the spectrum which are neither.

The consequences which follow from that conclusion are, I suggest, obvious. Earlier portions of this paper assessed court administration from the perspective of judicial independence and managerial efficiency. I suggested that the achievement of those objectives has resulted in a demonstrable trend towards systems of court administration which provide the court with a degree of autonomy and independence from executive government. The assumption which underpins the executive model of court administration, to the effect that all functions which are performed by a court can be classified as either judicial or administrative is demonstrably false. The fact that the effective performance of many of the functions performed by contemporary courts requires close collaboration between the judiciary and administrative personnel should inform the creation of court governance structures which embody a partnership in which each of the partners has different but equally important roles in the achievement of their common objective: the delivery of justice.

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Biography:
The Honourable Wayne Martin AC was appointed as Western Australia’s 13th Chief Justice on 1 May 2006. He joined the Independent Bar in 1988 and was appointed Queen’s Counsel in 1993. From 2001–2003, he took on the role of counsel assisting the HIH Royal Commission in Sydney. The Chief Justice was President of the WA Bar Association between 1996 and 1999, and Chairman of the Western Australian Law Reform Commission from 1996 to 2001, when the commission completed the *Review of the Criminal and Civil Justice System in Western Australia*. The Chief Justice was also a member of the Council of the Law Society of Western Australia, and was President of the Society when appointed to his current office. In 2007, the Chief Justice was awarded WA Citizen of the Year for the Professions. In 2012, the Chief Justice was awarded a Companion (AC) in the General Division of the Order of Australia for eminent service to the judiciary and to the law, particularly as Chief Justice of Western Australia, to legal reform and education, and to the community. Amongst other positions and appointments His Honour is also Lieutenant Governor of Western Australia and Convenor, Asia Pacific Region, for International Organisation for Judicial Training.
The Supreme Court of the United Kingdom (UKSC), an Exploration of the Roles of Judicial Officers and Court Administrators and how the Relationship between them may be improved and enhanced: a Case Study

By William Arnold

Abstract:

This article provides a brief historical summary of the process that culminated in the creation of the Supreme Court of the United Kingdom (SCUK), highlighting important changes in the relevant laws and regulations and the institutional framework within which authority for final appellate review of lower court decisions was and currently is vested. It also examines the administrative organization of the SCUK, where authority for key elements of court administration at that court is vested and how, for practical purposes, the SCUK is administered.

Keywords: Court Administration; Judicial Administration; Court Governance; Court Management; Financial Administration

1. Introduction

The Supreme Court of the United Kingdom (UKSC) is unusual amongst supreme courts for a variety of reasons. This arises partly from its history and the way it came into being. Until 2009 the UK’s final court of appeal was the ‘Appellate Committee of the House of Lords’.

The judicial role of the House of Lords evolved over more than 600 years: originally from the work of the royal court, the “Curia Regis”, which advised the sovereign, passed laws and dispensed justice at the highest level. Until 1399, both Houses of Parliament heard petitions for the judgments of lower courts to be reversed. After this date, the House of Commons stopped considering such cases, leaving the House of Lords as the highest court of appeal.

In 1876, the Appellate Jurisdiction Act was passed to regulate how appeals to the House of Lords were heard. From that time, for practical purposes, the UK had a supreme court in all but name. That Act provided for the appointment of ‘Lords of Appeal in Ordinary’, often known just as the Law Lords, who were highly qualified professional judges, to work full time on the judicial business of the House. These Law Lords were also able to vote on legislation as full Members of the House of Lords, thereby simultaneously exercising both judicial and legislative authority on behalf of the state, but increasingly by convention did not do so.

Before the Second World War, the Law Lords heard appeals daily in the chamber of the House of Lords. After the House of Commons was bombed in 1941, the Law Lords moved their hearings to a nearby committee room to escape the construction noise of the building repairs, temporarily reconstituting themselves as an Appellate Committee for the purpose. In fact, this temporary arrangement proved so successful that it continued for the remainder of the Appellate Committee’s life until 2009.

The United Kingdom has three separate justice systems (one for England and Wales, one for Scotland and one for Northern Ireland) each of which is each headed by a Lord Chief Justice or equivalent. As a consequence the UKSC is the only UK court with UK-wide jurisdiction and the President of the UK Supreme Court (and before 2009 the Senior Law Lord) does not have, and has never had, responsibility for the administration of the courts throughout the UK.

History also accounts for the asymmetric jurisdiction of the UKSC. When Scotland joined the UK through a Treaty and Acts of Union in 1707, it retained its own separate court system. One consequence of this is that today the UKSC does not hear criminal but only civil appeals from Scotland (although it can hear criminal cases which raise human rights points), whereas it hears both criminal and civil appeals from the two other UK jurisdictions.

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1 William Arnold is director of corporate services of the UK Supreme Court. He can be contacted via william.arnold@supremecourt.uk
2. Creation of the UK Supreme Court
In June 2003, as part of a wider range of constitutional reform which it then announced in order to make clearer the constitutional separation of powers between the Executive, the Legislature and the Judiciary, the UK Government decided to separate out the judicial and legislative roles of the House of Lords, by creating a fully separate Supreme Court of the United Kingdom.

The subsequent relevant legislation was enacted as the Constitutional Reform Act 2005 (CRA). The UKSC legally replaced the House of Lords on 1 October 2009 as the UK final court of appeal, when the refurbishment of the former Middlesex Guildhall to be the new home of the UKSC had been completed and the relevant provisions of the CRA were brought into force. On 1 October 2009, the former Lords of Appeal in Ordinary were sworn in as Justices of the new UKSC.

The new court has exactly the same jurisdiction as the House of Lords did (final court of appeal on all cases in England & Wales and Northern Ireland and in all civil cases in Scotland), with the addition of jurisdiction over devolution cases (disputes between the UK Government and Parliament and the devolved administrations in Scotland, Northern Ireland and Wales), which was transferred from the Judicial Committee of the Privy Council (JCPC – see also the next paragraph). With some limited exceptions (so-called leapfrog appeals), appeals to the UKSC can only be made on appeal from the appeal courts in the three territorial jurisdictions on points of law of general public importance. There are no appeals on matters of fact. As was the case with the House of Lords there is also a ‘permission to appeal’ (PTA) regime in respect of appeals from England & Wales and Northern Ireland. Scottish appeals at present require certification from two Scottish Advocates that they are fit to come to the UKSC, although there is legislation currently before the Scottish Parliament, which would replace the certification process with a PTA regime similar to that which applies from the two other territorial jurisdictions. Written PTA applications are considered by panels of three justices, who decide whether to grant permission for an oral hearing. At present the Court receives around 250 PTA applications a year of which around 30% are granted - leading in the last year to around 80 actual UKSC judgments given.

At the same time in October 2009, the Judicial Committee of the Privy Council (JCPC), which remains the final court of appeal for around 30 Commonwealth, British Overseas Territories and Crown Dependency jurisdictions (including e.g. the Channel Islands, the Isle of Man and Gibraltar – a full list is attached to this paper at Annex A) moved from its former home at 9 Downing Street to be co-located with the UKSC. The Lords of Appeal in Ordinary, as they then were, also had served as the JCPC Board, so it made logistical sense to bring the physical locations of the two courts together. The administrations of the two courts were finally merged (under the Chief Executive of the UKSC) in April 2011.

3. Administration of the UKSC
The relationship between administrators and judges in the Supreme Court is in part set by statute, the Constitutional Reform Act 2005 (CRA), as subsequently amended by the Crime and Courts Act 2013. This clearly defines the key powers of the President of the Court and the Chief Executive, as well as those of the Lord Chancellor, the UK equivalent of the Minister for Justice. Although the relevant part of the CRA was passed to make manifest the independence of the UKSC from the legislature, in practice in its early years, the challenge has been to ensure the reality of its independence from the Executive. The relevant statutory provisions are set out below.

The court is supported by a Chief Executive (CE), Miss Jenny Rowe. She holds a statutory office created by s48 of the CRA, and she must carry out her functions in accordance with any directions given to her by the President of the Court, to whom she reports. She also may not act inconsistently with the standards of behaviour required of a civil servant or in breach of her duties as an Accounting Officer. Under the CRA, the present Chief Executive was appointed by the Lord Chancellor after consulting the President of the Court. In order to underline the independence of the Court from the Executive, the President was, however, successful in getting this provision changed in the Crime and Courts Act 2013; now the President of the UKSC will appoint future Chief Executives. The CRA also provides that the President may appoint the other officers and staff of the court, but under s48 (3) of the CRA the President of the Court may delegate to the Chief Executive this function and all other non–judicial functions of the Court; both Lord Phillips, the Court’s first President, and now Lord Neuberger have indeed so delegated them.

The Chief Executive, officers and staff of the court are all civil servants and have their pay, terms and conditions determined as such. The CRA provided that the Chief Executive might determine the number of officers and staff of the Court and the terms on which they are appointed, with the agreement of the Lord Chancellor. Again, however, in order to underline the independence of the Court from the Executive, the President was successful in getting the statutory requirement for the agreement of the Lord Chancellor to staff terms and conditions removed in the Crime and Courts Act
2013, so these are now entirely determined by the Chief Executive, although they must remain consistent with the provisions which apply to the Civil Service as a whole.

Under the CRA, the Lord Chancellor is under a statutory duty to ensure the UKSC is provided with such accommodation and other resources as he thinks are appropriate for the Court to carry on its business. The Chief Executive is placed under a parallel statutory duty to ensure that the court’s resources are used to provide an efficient and effective system to support the Court in carrying on its business. The administration of the UKSC is classed as a Non–Ministerial Department in its own right for Government accounting purposes. It is not part of the Ministry of Justice (MOJ).

So from 1 April 2010 onwards, i.e. its first full UK financial year of operations, the Court has had its own Estimate. Since 2010, for the financial year starting on 1 April 2011 onwards, it has had its funding allocation determined directly by the Treasury as part of the Treasury–led, Government-wide Spending Reviews, which normally cover a four year period. The next such Review is expected to take place in 2015 for the four years 2016 – 2020. Although the Treasury determines the allocation, it comprises money voted directly by Parliament, contributions from the three jurisdictions from which cases come to the UKSC, money raised from fees charged to parties to cases and a small amount from so called ‘wider – market initiatives,’ e.g. hiring out space for events to be held in the court building.

The justices have consistently regarded maintaining tangible independence from both the Legislature and the Executive, particularly the MOJ, as a key constitutional objective, the more so because the Executive, either Her Majesty’s Government or another statutory public authority, is in practice a party in slightly more than half the cases in which an application is made or a hearing takes place before the UKSC. The CE is therefore also an Accounting Officer in her own right, accountable directly to the House of Commons Public Accounts Committee.

The CE has two immediate deputies: the Director of Corporate Services, who is also de facto the deputy Accounting Officer, who is responsible for the institutional and organisational side of the UKSC; and the Registrar, who is the court’s senior lawyer and is responsible for the progress of cases and the Court’s business. An organogram of the staffing structure is attached to this paper at Annex B.

Corporate services cover broadly (1) accommodation & health and safety; (2) finance; (3) human resources; (4) communications, publicity and educational outreach; and (5) records, IT and library services. The head of this function is also Secretary to the UKSC’s Management Board.

The Registry functions cover the listing and progress of (1) applications for permission to appeal; (2) the actual hearing of appeals; (3) the issuing of judgments; and (4) the resolution of disputed costs issues. The Registrar has management responsibility for the justices personal support staff, namely their legally qualified) judicial assistants and their personal secretaries. The Registrar also has judicial functions delegated to her under the Supreme Court Rules of 2009, which together with the 14 Practice Directions, which supplement them, provide the practice and procedure to be followed by the Court. Thus the Registrar has two lines of accountability, one to the President and the Justices on her judicial responsibilities, and one to the Chief Executive on her administrative and management responsibilities.

We have found that, in trying to put the CRA into practice, there are internal tensions. Some of those have now been resolved through further legislation, for example, in relation to the appointment of the Chief Executive and the setting of staff terms and conditions, in the Crime and Courts Act 2013. Others potentially remain. During the passage of the Bill for the CRA, the Government gave repeated assurances to Parliament that the UKSC would be independent of Government and that its Chief Executive (and thus its administration as a whole) would be ‘principal answerable to, and operate under, the day to day guidance of the President of the Supreme Court’; and that the Chief Executive ‘will be accountable directly as Accounting Officer for the court rather than under the DCA [now MOJ] Permanent Secretary’ (Lord Chancellor Hansard HOL 14 Dec 2004, col 1236 – 37). He said:

‘The model now proposed by the Government is to establish the Supreme Court as an independent statutory body with its own estimate within the overall Department for Constitutional Affairs departmental expenditure limit and, as a result of a separate Estimate, independent financing from the Consolidated Fund through the normal supply process. The Chief Executive of the Supreme Court will be a separate Accounting Officer in right of the court itself and not a sub-accounting Officer under the DCA Permanent Secretary.

‘Treasury accounting regulations make it unnecessary to spell out in full detail in the Bill how the revised model will work. However, I am sure that the House will appreciate my placing on the record how the model is to operate. The Supreme Court will be an independent statutory body responsible for appointing the staff for its own administrative service. That
service will be headed by a Chief Executive – a civil servant appointed by a process involving an ad hoc commission and designed to exclude political interference.

‘The staff of the court will also be civil servants, accountable to the Chief Executive and not to the Minister. The Chief Executive himself will be principally answerable to, and operate under the day-to-day guidance of, the President of the Supreme Court and will be accountable directly as accounting officer for the court rather than under the DCA Permanent Secretary.

‘The President of the Supreme Court and the Chief Executive will determine the bid for resources for the court in line with Governmental Spending Review timescales, and they will pass it to the Minister, who will include it as a separate line in the overall DCA bid submitted to the Treasury. The Treasury will scrutinise the overall DCA bid and approve the overall expenditure before putting the bid before the House of Commons as part of the overall Estimates. The House of Commons will approve the overall Estimates and transfer resources accordingly. Because the Supreme Court will have its own Estimate, the funds approved will be transferred to the court direct from the Consolidated Fund and not via the DCA. That assures the Supreme Court a high level of independence in securing and expending resources and in the day-to-day administration of the court.

‘In this revised model, the Minister will simply be a conduit for the Supreme Court bid and will not be able to alter it before passing it on to the Treasury. Once the Treasury has scrutinised the bid and it has been voted on by Parliament, the funds will go directly to the Supreme Court from the Consolidated Fund rather than via the DCA. That ring-fences the Supreme Court budget and ensures that it cannot be touched by Ministers. The Chief Executive will be able to allocate resources as he considers appropriate to ensure an effective and efficient system to support the Court in carrying out its business. In other words the Chief Executive will be solely responsible for the administration of the Court, in accordance with directions from the President, and will be free from Ministerial control.

‘Your Lordships will note, however, that this model retains some Ministerial involvement. That remains absolutely necessary, as it is a key constitutional principle that a Minister must remain ultimately responsible for securing funding from the Treasury and be answerable to Parliament for its overall operation.’

Perhaps because this explanation was not subsequently embodied in the words of the statute, we have found that a part of the challenge for the court administration since 2009 has been to hold subsequent Governments to operate pursuant to the statutory provisions, especially those in relation to the process for bidding for resources in the Government-wide spending Reviews, in accordance with the assurances Lord Falconer then gave.

The other key relevant undertaking subsequently given to Parliament was that by Lord Bach in 2010 during the passage of the Bill for the Constitutional Reform and Governance Act 2010. This was to make it clear that, although UKSC staff are civil servants, they do not report to and are not accountable to UK Government Ministers. Although Section 7 of that Act creates a statutory requirement for civil servants to carry out their duties for the assistance of the administration they serve, Lord Bach said, on moving the Second Reading of the Bill for that Act in the House of Lords on 24 March 2010 (Hansard col 960):

‘Clause 7(2) provides that the Civil Service and the Diplomatic Service codes must require civil servants who serve an Administration, mentioned in Clause 7(3), to carry out their duties for the assistance of the Administration as it is duly constituted, whatever its political complexion. The Administrations in question are Her Majesty’s Government and the devolved Administrations in Scotland and Wales. This does not affect civil servants who are on loan to or directly employed by bodies such as the Supreme Court, the Scottish Court Service or arm’s length bodies, whose duty is to serve the organisation they are seconded to or employed by, and not the aforementioned Administrations.’

4. Practical Operation of the Court
We have developed both formal and informal mechanisms of working together with the Justices, to ensure that difficult issues can be raised and dealt with, but also to ensure that there is good communication on a daily basis. Although the President of the Court has formally delegated to the Chief Executive the non-judicial functions of the Court, this is on the basis that he is kept informed of issues.

This means the Chief Executive is very clearly responsible and accountable for issues such as finance, appointment of staff, provision of corporate services, etc. Having a civil servant accountable for these functions is important in ensuring that Parliamentary scrutiny is confined to civil servants and not to judges. This is why it is the Chief Executive that the Act
places under a direct statutory responsibility to Parliament to ensure that the Court’s resources are used to provide an efficient and effective system to support the Court in carrying on its business.

S48 (4) of the CRA does provide that the Chief Executive must carry out her functions ‘in accordance with any directions given by the President of the Court’, but this formal statutory power has never been used.

There is at least a theoretical tension between this power and the Chief Executive’s direct statutory responsibilities. Obviously this power could not be used to direct the Chief Executive to do anything illegal, and we think it could not be used to direct her to do anything which was either clearly incompatible with her status as a civil servant or in conflict with her direct statutory duty to use the resources provided by Parliament for the purposes for which they were voted and in the way which achieves the best value for money for the taxpayer. So far this has not been put to the test; we hope that such a test never comes to pass.

Any President would be foolish even to try to do so, since this could potentially risk exposing the Justices to the kind of Parliamentary and political scrutiny and accountability from which the existence of the statutory office of Chief Executive is designed to insulate and protect them and in order to preserve their independence from both Parliament and the Executive.

Further Reading:
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Frances Gibb, Opening up justice: UK Supreme Court marks five years of public access, The Times, 23 October 2014
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Lord Hope, The Creation of the Supreme Court – was it worth it? 24 June 2010
https://www.supremecourt.uk/docs/speech_100624.pdf

http://joomla.cjicl.org.uk/journal/issue/pdf/2


Jenny Rowe, Chief Executive of the UK Supreme Court, Interview Civil Service World, 1 November 2013
http://www.civilserviceworld.com/interview-jenny-rowe-supreme-court

Christopher Sargeant (editor), Supreme Court Review, Cambridge Journal of International and Comparative Law – Vol. 3(1) (2014)
http://joomla.cjicl.org.uk/journal/issue/pdf/10
ANNEX A

Jurisdictions where the Privy Council is the final Court of Appeal
Anguilla
Antigua and Barbuda
Ascension
Bahamas
Bermuda
British Antarctic Territory
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Cook Islands
Dominica (albeit its Government has announced its intention to leave the JCPC)
Falkland Islands
Gibraltar
Grenada
Guernsey
Isle of Man
Jamaica
Jersey
Kiribati
Mauritius
Montserrat
Niue
Pitcairn Islands
Saint Christopher and Nevis
St Helena
St Lucia
St Vincent and the Grenadines
Sovereign Bases of Akrotiri and Dhekelia
Trinidad and Tobago
Tristan da Cunha
Turks and Caicos Islands
Tuvalu

Brunei
Civil Appeals from the Court of Appeal to the Sultan and Yang Di-Pertuan for advice to the Sultan

UK
Royal College of Veterinary Surgeons
Church Commissioners
Arches Court of Canterbury
Chancery Court of York
Prize Courts
Court of the Admiralty of the Cinque Ports

Power to refer any matter to the Judicial Committee under section 4 of the Judicial Committee Act 1833.
Annex B

The UK Supreme Court Organisation Chart
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Performance Assessment In Courts - The Swiss Case - Constitutional Appraisal And Thoughts As To Its Organization
By Prof. Dr. Andreas Lienhard

Abstract:

Performance assessment has become commonplace in management, even in the public sector. With the increasing pressure on courts to perform while making efficient use of resources, performance assessments in the justice system are also gaining in importance. However, the need for judicial independence poses special challenges for performance assessments in courts.

Against this background, this article conducts a constitutional appraisal, and contrasts the need for judicial independence with the principles governing effectiveness and efficiency, self-government and supervision, and appointment and re-appointment. A duty to guarantee justice can be derived from this, that in principle, does not exclude the performance assessment of judges, but even renders it essential, subject to compliance with certain requirements.

In these circumstances, it seems hardly surprising that numerous countries conduct performance assessments of judges and that various international institutions have developed principles for this purpose, a summary of which is presented. In Switzerland’s case this is based on a recently conducted survey.

In the field of conflict between guaranteeing justice and protecting the judiciary, the following key questions arise in particular:

- What is the purpose of performance assessments and what are the consequences?
- What is subjected to a performance assessment and what are the assessment criteria?
- How is performance recorded as the basis for the performance assessment?
- Who is subjected to a performance assessment, and must a distinction be made between judges in higher and lower courts?
- Who carries out the performance assessment and what methods of protecting one’s rights are available?
- Who should receive the results of the performance assessment?

This contribution sketches out possible answers to these key questions and aims to encourage academics and practitioners to give further consideration to this subject.

Keywords: performance assessment, judicial independence, effectiveness and efficiency, self-government, supervision

1. Introduction

 Courts have recently found themselves under an increased pressure to perform, and there are several reasons for this: the workload is rising, whereas the available resources are limited. The quality of the justice system is increasingly being...
discussed and questioned\(^3\) by the authorities responsible for the supervision and (re-) appointment of judges.\(^4\) Judges are also becoming the subject of assessment.\(^5\) Judicial performance is compared through rankings\(^6\) and judicial activity is critically debated by politicians and the media.\(^7\) The demands for court management have risen accordingly.\(^8\)

In many areas of public administration, performance assessment has become a fixed date on the management calendar and is a crucial element of quality assurance and development.\(^9\) The performance of each authority is recorded and evaluated in reports (such as public office annual reports). In addition, performance records (for example, course evaluations) are also kept and performance assessments (in particular staff appraisal interviews) are undertaken at employee level.

This inevitably raises the question of whether and how judicial performance can and should be assessed. In particular the performance of judges is singled out as an issue. This has been a topic of discussion in Switzerland for some time\(^10\) and was recently the subject of an international conference of the Swiss Judges’ Association (Schweizerische Vereinigung der Richterinnen und Richter, SVR)\(^11\). The importance and current relevance of the topic was underlined by a recent decision not to re-appoint a supreme court judge due to perceived shortcomings in his working methods and organisation.\(^12\) In the canton of Lucerne, a change to cantonal law has given rise to a debate on the principles for deciding who should be appointed as a judge.\(^13\) The canton of Geneva’s new constitution even contains the following regulation: ‘Before each appointment to the judiciary, the Magistrates Supervisory Council shall evaluate the qualifications of the candidates. It shall prepare a preliminary opinion.’\(^14\)

The following paper addresses the question of the performance assessment of judges from the point of view of constitutional law. It also considers developments abroad and recent empirical findings.

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\(^12\) Aargauer Zeitung, 23 August 2013.


2. Constitutional Context\textsuperscript{15}

2.1. Requirements

Courts and their judges are expected to perform appropriately and efficiently, and judicial performance is partly guaranteed by the prohibition of judicial delays and the requirement of prompt procedures contained in Article 29 Paragraph 1 of the Swiss Federal Constitution, according to which judgments must be issued within a reasonable time.\textsuperscript{16} At the same time, basic procedural rights must be respected, particularly the right to an impartial court (Article 30 Paragraph 1 Federal Constitution) and the right to a fair hearing, which includes the requirement to provide adequate justification for any decision (Article 29 Paragraph 2 Federal Constitution).\textsuperscript{17} In addition to these procedural (formal) aspects of the judicial process, court decisions are expected to be of a high content-related (material) quality: judgments should guarantee legal protection and contribute to legal harmony\textsuperscript{18}; the practices of the supreme courts should also function as a guide and as an example for legal development.\textsuperscript{19} This touches on the effectiveness and efficiency of the justice system\textsuperscript{20}, qualities that must be considered in relation to all state tasks (cf. at federal level Article 43a Paragraph 5, Article 170 Federal Constitution).\textsuperscript{21} Even courts have only limited resources – despite the fact that the need for sufficient financial support is constantly being reiterated.\textsuperscript{22} Therefore the need to use the available funds economically becomes more important, just as it is with the entire national budget (see at federal level Article 126 Paragraph 1 Federal Constitution).

Judicial performance and economy are, when taken with legality, the main criteria applied in supervision.\textsuperscript{23} This applies first of all to parliamentary oversight (at federal level Article 169 Paragraph 1 Federal Constitution)\textsuperscript{24}; the control over the content of individual judgments is out of the question and oversight is limited in principle to court management.\textsuperscript{25} However, judicial independence and the safeguarding of judges’ independence are also stressed with reference to Art. 6 ECHR by the Committee of Ministers of the Council of Europe in its recommendation dated 17 November 2010 On judges: independence, efficiency and responsibilities (Recommendation CM/Rec[2010]12; see 2011 Richterzeitung, no. 3 (Recommendation of the Committee of Ministers of the Council of Europe in its recommendation dated 17 November 2010 On judges: independence, efficiency and responsibilities (Recommendation CM/Rec[2010]12); see 2011 Richterzeitung, no. 3 (Recommendation of the Committee of Ministers of the Council of Europe in its recommendation dated 17 November 2010 On judges: independence, efficiency and responsibilities (Recommendation CM/Rec[2010]12)).

\textsuperscript{15} The reference relates to the Federal Constitution. The cantonal constitutions have increasingly analogous provisions, where the federal constitutional law does not apply in any case to the cantons as well. In some cases the framework is also marked out in international law, e.g. in the ECHR and in UN Covenant II. On the international discussion, see for example P. Albers, Performance indicators and evaluation for courts (<http://www.coe.int/T/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf> (last visited 20 October 2014)); R. Mohr & F. Contini, ‘Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries’, 2007 European Journal of Legal Studies, Vol. 1, no. 2 (<http://www.ejls.eu/2/30UK.htm> (last visited 20 October 2014)).

\textsuperscript{16} Excessively long proceedings reduce both the legal protection afforded to the parties to the proceedings and to third parties. Avoiding excessively long proceedings is therefore a feature of a good judge (see for example K. Rennert, ‘Was ist ein guter Richter? – Fünfzehn Thesen für eine Annäherung’, 2013 DRIZ, no. 6, p. 216). More recently on the issue, see B. Brändli, Verwaltungsjustizbezogene Legalität und Prozessökonomie, 2011, in particular p. 21 ff. as well as C. Bürki, Verwaltungsjustizbezogene Legalität und Prozessökonomie, 2011, in particular p. 128 ff.; Kettiger, note 10, p. 200).

\textsuperscript{17} For an overview of the constitutional procedural guarantees see for example G. Steinmann, in B. Ehrenzeller et al. (eds.), St. Galler Kommentar zu Art. 29 BV, para. 4 ff., 2014.


\textsuperscript{19} See for example Biaggini, note 18, para. 1 and para. 34.


\textsuperscript{21} See also J.-M. Doogue et al., Accountability for the Administration and organisation of the Judiciary, Paper presented to the Asia Pacific Courts Conference, 2013, p. 10.


\textsuperscript{23} Lienhard, note 4, para. 15 f.

\textsuperscript{24} In relation to judicial councils (equipped with various powers), see Lienhard, note 4, para. 22, with further references.

judicial performance is a significant element in general procedural matters. The oversight authority must investigate whether the courts generally comply with their constitutional duty and whether they efficiently use the available resources in the judicial process. The oversight authority or its advisory committees must be allowed to look into judge-related matters (such as the number of cases dealt with by individual judges) where there are multiple, objectively inexplicable anomalies.26

The ongoing transition to self-government by courts (for the Swiss Federal Supreme Court [Schweizerisches Bundesgericht] Article 188 Paragraph 3 Federal Constitution)27 brings with it the requirement of in-court supervision (supervision of management and administrative bodies) – for higher and lower judicial authorities, depending on the structure. This supervisory activity concerns itself mainly with court management. The supervisory authority must query excessively long lists of pending cases and inefficiencies (also in relation to individual judges).28 Self-government makes high demands with regard to (management) quality. Caseload management is an important element of self-government29; case allocation takes the workload and the performance of individual judges into account.30 Self-government also includes personnel management and career development; performance assessments are an essential basis for employee appraisal interviews and status reviews, not to mention employers’ references. Unlike most EU states31, Switzerland has no particular law of the judiciary in the sense of comprehensive public service legislation.32 Judges of first instance especially are usually subject to general public service law, sometimes with modifications specific to the judiciary.33 This means that, where applicable, even a judge can demand an employer’s reference, which not only confirms the judge's employment as such, but includes details concerning performance and conduct. This is important, in part because Switzerland has no regulated or customary career paths for judges, and changes of occupation from the judiciary to public administration and the private sector are common.34 Guaranteeing that an employers’ reference will be provided requires a continual assessment of performance and conduct. This is particularly essential in the case of judges, who often have no designated superiors or whose governing committee members change annually or at regular intervals.

In Switzerland, judges are appointed for a fixed term of office (at federal level in accordance with Article 188 Paragraph 4 Federal Constitution) either by parliament or by plebiscite (at federal level in accordance with Article 168 Paragraph 1

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34 If available, candidates for new judicial positions, for example in the canton of Aargau, must also submit employers’ references or the minutes of any performance review interviews (A. Schmid, ‘Vorbereitung der Wahlen von Richterinnen und Richtern durch das Parlament des Kantons Aargau’, 2013 Parlament – Mitteilungsblatt der Schweizerischen Gesellschaft für Parlamentsfragen, no. 2, p. 37 ff., in particular p. 39).
Federal Constitution, they are elected by the United Federal Assembly). The criteria for eligibility vary from canton to canton. The process of judicial selection is generally prepared by a parliamentary judicial committee. However, affiliation to a political party usually plays a crucial role. Switzerland does not have a career judiciary and has no procedure for promotion to higher courts. The system of reappointment is mainly justified by “…the necessity, for the very sake of his independence, to occasionally place the judge under the spotlight of measurable control, measurable by whether the superior authority continues to recognize and respect his judicial qualities.” This inevitably raises the question of (re)appointment criteria, aside from affiliation to any political party. It is self-evident that individual performance should be among these criteria. Accordingly, it must be possible to assess a number of professional and personal characteristics (in particular professional expertise, personal and social skills and management abilities). Insofar as appointments are considered decisions and thus fundamental procedural guarantees must be observed in (re-)appointments (Article 29 Federal Constitution), such acts of applying the law must also be adequately justified. In this case, the pre-defined suitability or appointment criteria must be referred to.

As non-re-appointment for personal rather than organizational reasons is equivalent to dismissal from office to the individual concerned, it is essential that proper justification is given. In any case, non-re-appointment must not be abused in order to avoid proceedings to dismiss a judge from office. The necessity of adequate justification, and where applicable justification that considers individual performance, is further accentuated in the context of disciplinary proceedings.

Where objectively inadequate justification is given for non-re-appointment, dismissal or disciplinary decisions, this is also problematic from the point of view of judicial independence (Article 30 Paragraph 1, 191c Federal Constitution).


38 See also T. Hugi Yar & A. Kley, in M. A. Niggli et al. (eds.), Basler Kommentar zu Art. 9 BGG, para. 3e; see also D. Rietiker, ‘Qualitätskontrollen für Strassburger Richter’, 2012 Richterzeitung, no. 2 (<http://richterzeitung.weblaw.ch/riszues/2012/2/r1102.html> (last visited 20 October 2014)); electing judges on the basis of the performance of the candidates (a ‘merit-selection system’) is also derived from Art. 14 Sec. 1 UN Covenant II (Reference of R. Kiener, ‘Verfahren der Erneuerungswahlen von Richterinnen und Richtern des Bundes’, 2008 VPB, no. 3, p. 363). For appointments to the federal courts, although reference is made to professional and personal suitability in the invitation for applications, these criteria are not laid down in the legislation; in the case of re-appointments, the judicial committee preparing for the appointments does not obtain an overview of performance to date (see K. Marti, ‘Die Gerichtskommission der Vereinigten Bundesversammlung’, 2010 Richterzeitung, no. 1, in particular para. 7 (<http://richterzeitung.weblaw.ch/riszues/2010/1/r719.html> (last visited 20 October 2014))). The principles of conduct of the judicial committee on the Committee procedure for removal from office or non-re-appointment of 3 March 2011 (BBI 2012 1271 ff.) indeed cover the procedure, but say nothing further on professional or personal eligibility criteria.


40 In any rate in relation to re-appointment of federal judges, see Kiener, note 38, p. 357 ff., 360, 379. In this sense, see also Mahon & Schaller, note 35, p. 13 f.

41 For example in the canton of Aargau: Schmid, note 34, p. 39 f.

42 Kiener, note 38, p. 39 f.; similarly Stadelmann, note 13, para. 8.

43 Kiener, note 38, p. 369.

44 Kiener, note 38, p. 369.

45 See for example M. Kayser, ‘Richterwahlen: Unabhängigkeit im Spannungsfeld von Rechtsstaatlichkeit und Demokratie’, in B. Schindler & P. Sutter (eds.), Akteure der Gerichtsbarkeit, 2007, p. 60 f. The grounds for not re-electing judges must be substantial, such as permanent disruption of the judicial process, damage to the trust in/credibility of the justice system, incompetence/inappropriate conduct, serious/repeated breaches of official duties (Kiener, note 36, p. 42).
2.2. Barriers
Judicial independence is the key constitutional barrier that prevents external influencing of judicial decisions (Article 30 Paragraph 1, 191c Federal Constitution).46 In this context, binding performance targets for judges seem constitutionally problematic, certainly if they are not set by the Constitution itself (for example by the prohibition of judicial delays) or by law (for example case processing deadlines prescribed by law).47 However, performance targets such as planning measures within the judicial sector in relation to the number of cases are increasingly viewed as acceptable and necessary.48 Court administration necessitates management. Management does not necessarily violate personal judicial independence as long as it contributes to the self-government of the court. ... Binding goals of an organizational nature or that concern the management of the justice system are not merely acceptable, but absolutely necessary.49

The ongoing problem of how to assess judicial performances in qualitative terms is often mentioned in connection with judicial independence.50 The problem with judicial activity is that its influence on society cannot easily be measured.51 Performance indicators are often quantitative measurements that give little indication of the quality of a judgment.52 Efficiency analyses therefore must always consider qualitative aspects as well, otherwise judicial independence could be affected.53

However, judicial independence does not preclude effective quality control in principle. Indeed it could even ensure it: 'Adequacy or inadequacy in office is not a question of independence, and suitable preventive or repressive measures in order to guarantee quality foster and do not counteract, the right form of independence. In particular, the nimbus of independence does not trivialize the seriousness of professional or social shortcomings, and a judge’s autonomy must not allow him to treat his office as a comfortable sinecure. Despite the shield of independence, effective quality control is a matter of means, not of principle.'54

The imperative of efficiency as part of the guarantee of justice55 must not undermine that guarantee. It has been established, for example, that judicial performance increases with an increasing workload – though only to a certain degree.56 Excessive pressure on courts and judges to be efficient must therefore be avoided.57

As long as performance assessments concern individual judges, the constitutional protection of privacy (in particular Article 13 Paragraph 2 Federal Constitution) could be affected:58 every person has the right to be protected against the

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49 Cavelti, note 48, p. 332.

50 Walter, note 7, para. 28.

51 Lienhard, note 27, p. 424.

52 Raselli, note 20, para. 20, also Mosimann (2011), note 46, para. 50, who comments critically in particular on numbers of appeals and reversed decisions.


54 Walter, note 7, para. 34; see also No 2.1 above.

55 On the requirement of efficiency, see Sec. 2.1 above.


58 The protection of privacy may have compensatory significance for judges, because they cannot themselves call on judicial independence in its form as a fundamental right (Kiener, note 46, p. 381).
misuse of their personal data. Therefore, judgment-related performance data for individual judges is not made available to the general public.59

2.3. Preliminary Conclusion
Constitutional law offers certain principles that underline the appropriateness of performance assessments of judicial activity: judicial performance is an element of effectiveness and efficiency, the subject matter of self-government, supervision and oversight, and a criterion in appointments, re-appointments and dismissals or disciplinary proceedings. The assessment of the performance of judges is therefore essential to guaranteeing justice.

However, constitutional law also lists a number of substantial barriers to performance assessment in order to protect the judiciary. Judicial independence above all other factors is meant to allow courts and judges to perform their duties without performance targets that directly influence judicial activity. Certain special requirements regarding the conduct of performance assessment of judges also arise from the law on the protection of privacy.

Performance assessments cannot be equated with performance targets – however, they can indirectly exert a certain pressure on the level of performance. Even this effect is problematic when considering the importance of judicial independence.60 It can only be justified when set against the background of other principles relating to the organization of the judiciary – but only as long as the procedurally prescribed care in case processing is not adversely affected.61

Therefore, from a general constitutional standpoint, it is not a question of whether performance assessments in the judiciary are permitted. Rather, it is a question of how these assessments should be organized in a fair and balanced manner in accordance with the various principles of constitutional law. The conflict between guaranteeing justice and protecting the judiciary raises the following key questions62:

- What purpose do performance assessments serve (case allocation, quality assurance, career development, re-appointment, agreeing salaries) and what are the consequences?
- What is the subject of a performance assessment (judicial activity, management) and what are the assessment criteria?
- How is performance recorded in order to form the basis for a performance assessment (statistics, surveys, meetings)?
- Who is the subject of a performance assessment (courts, divisions, judges, clerks of court) and should there be a differentiation between members of higher and lower courts?
- Who conducts a performance assessment (judges themselves, presidents of divisions, court management boards, higher courts, supervisory authorities) and what are the rights of recourse?
- To whom are the results of the performance assessment addressed (judges, presidents of divisions, court management boards, supreme courts, the oversight authorities, the general public)?

The following observations focus on the performance assessment of judges. The challenges raised by judicial independence do not affect the performance assessment of courts or court registrars as significantly.65

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60 Roland Rechtsreport, Sonderbericht: das deutsche Rechts- und Justizsystem aus Sicht von Richtern und Staatsanwälten, 2014, p. 54 (34 or 45% of judges interviewed [with or without management duties] admit that the assessment system influences their personal or professional independence).
61 Lienhard & Kettiger, note 27, para. 18, ibid., note 59, para. 18 ff.
63 As a whole or of specific collegial panels of judges (divisions, chambers).
3. Current Examples in Switzerland

3.1. Preliminary Remarks
The following section should give an overview of existing approaches to the performance assessment of judges in Switzerland with the help of selected, succinct examples. The simple supervision of court business, as is standard in courts, is not the subject of this overview. Likewise it will not review the performance targets for or within courts or divisions.

3.2. Number of Cases Dealt with by Specific Judges
For implementation of the Federal Assembly’s Ordinance on Judicial Positions (Verordnung der Bundesversammlung über die Richterstellen am Bundesgericht) at the Federal Supreme Court of 30 September 2011, the Federal Supreme Court runs a controlling procedure devised in consultation with the parliamentary supervisory committees. As a result of the observations made, this procedure has recently been revised and presented to the supervisory committees. With regard to the accessibility of the statistical data obtained, the controlling concept differentiates between public data in its annual report, special controlling data for the parliamentary committees and internal controlling. The controlling records inter alia the performances of the individual divisions (for example the number of judgments issued). The number of cases completed by individual judges is recorded as part of the internal controls. The supervisory committees receive details of the average number of cases per judge for each division. Deficiencies in individual judges are brought to the attention of the parliamentary Judiciary Committee (Gerichtskommission) if these are significant and could potentially jeopardise re-appointment.

The Federal Administrative Court (Bundesverwaltungsgericht) allocates cases to individual judges in an electronically automated procedure (known as the Bandlimat). It therefore possesses performance data pertaining to individual judges that are drawn from the electronic administrative process and can be combined with each other.

The Cantonal Supreme Court in Graubünden (Kantonsgericht Graubünden) and the Cantonal Supreme Court in Neuchatel (Tribunal cantonal Neuchâtel) both use a similar automated case allocation system. The Social Insurance Court of the Canton of Zurich (Sozialversicherungsgericht des Kantons Zürich) takes the current workload of the judges in each division into consideration when allocating cases to judges. Caseload management systems that record the judges’ workload can likewise be found in other higher cantonal courts. Many cantonal courts regard the work output of the individual judges as an element in quality management.

3.3. Employee Appraisal and Status Interviews
At civil and criminal courts of first instance in the canton of Bern, annual status interviews with the judges are carried out. These talks are considered to be a factor in the quality of institutional independence and serve to maintain and encourage the judges’ professional and social skills. The subject of the discussions is the judges’ activities in office, including the

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66 Lienhard et al., note 2, p. 14 f.
67 See for an overview of this Lienhard et al., note 2, p. 18 f., with further references.
68 SR 173.110.1.
69 Federal Supreme Court Controlling Concept for the attention of the Control Committee, 5 March 2007; for detail, see Lienhard, note 20, para. 10 ff.
70 On this cascade-type structure see Lienhard, note 20, para. 8 ff.; ibid., note 4, para. 65 ff.
71 Lienhard, note 20, para. 13.
72 Lienhard, note 20, para. 12; according to a draft of the ordinance it was intended to provide the Commission with statistics on the number of cases dealt with by the individual judges.
74 Lienhard et al., note 2, p. 16, with further references.
76 Supreme Court of the Canton of Basel-Landschaft, Administrative Court of the Canton of Bern, Supreme Court and Administrative Court of the Canton of Graubünden, Supreme Court of the Canton of Lucerne, Administrative Court of the Canton of St. Gallen, Administrative Court of the Canton of Ticino, Supreme Court and Administrative Court of the Canton of Thurgau, Supreme Court of the Canton of Vaud, Supreme Court of the Canton of Valais, Supreme Court and Administrative Court of the Canton of Zug, Administrative Court of the Canton of Zurich (Lienhard et al., note 2, p. 15 f.).
77 The performance of the judges and the court staff is used at the following courts as one of several indicators for measuring quality: Supreme Court of the Canton of Aargau, Supreme Court of the Canton of Bern, Supreme Court of the Canton of Lucerne, Administrative Court of the Canton of St. Gallen, Supreme Court of the Canton of Schaffhausen, Administrative Court of the Canton of the Ticino, Administrative Court of the Canton of Zug (Lienhard et al., note 2, p. 17 f., with further references).
duration and number of concluded cases, but not the content of judicial decisions. Senior judges of the courts of first instance conduct the interviews (although a representative of the supervisory authority can be called on in exceptional cases). The President of the Cantonal Supreme Court receives the results in anonymized form and is responsible for providing the annual management feedback to the senior judges. The individual reports may not be used in connection with judicial appointments and are only available as reference information with consent. The status interviews have no effect on salary.79

Staff appraisal interviews at courts of first instance are also held in the canton of Zurich.80 Under the rules on personnel management, each year superiors assess judges on their performance and conduct (such as expeditiousness in dealing with cases, personal development corresponding to the judges’ portfolio81). Judicial decisions as such are not the subject of this assessment, but the assessment is relevant to increases in salary.82

Staff appraisal interviews with judges at courts of first instance are also conducted in the canton of Lucerne; the court presidents hold the meetings with the judges annually.83

The higher courts in the canton of St. Gallen84 and the Social Insurance Court in the canton of Zurich also carry out regular staff appraisal interviews with judges.85

3.4. Quality Circles and Peer Reviews

Judges discuss questions of judicial activity and management at regular sessions (plenary, divisional or chamber) at numerous cantonal supreme courts and federal courts.

In addition, colleagues discuss individual cases at most cantonal supreme courts, the Federal Supreme Court and at the Federal Criminal Court (Bundesstrafgericht).86

For the last three years, voluntary ‘collegial feedback’ has been an option at the Federal Criminal Court. This assessment focuses on efficiency and professional, management and social skills. Around half of the judges make use of it.87

3.5. Surveys

A survey on the performance of judicial authorities was recently carried out in the Canton of Bern.88 Court management was the subject of the survey, which identified points such as the accessibility of the authorities or interaction with parties to the proceedings and the legal profession. Participation in the survey was anonymous and the evaluation made no comments on particular individuals.

Surveys on satisfaction with the quality of service in courts were also carried out in five other cantons.89

82 On implementation, see Mosimann (2011), note 46, para. 22 f.; Müller Brunner, note 79, p. 72. The relevance of the performance assessment for an increase in salary must be distinguished from the initial allocation to a salary class, which is not considered in this paper (on the latter see D. Kettiger, ‘Zur Gehaltseinreihung von Richterinnen und Richtern: Anmerkungen zu BGE 138 I 321’, 2013 Richterzeitung, no. 1 (<http://richterzeitung.weblaw.ch/ruzissues/2013/1/2137.html> (last visited 20 October 2014))).
84 Lienhard et al., note 2, p. 26 (the interviews are conducted by the president of the Administrative Court).
86 Lienhard et al., note 2, p. 27, with further references.
87 Müller Brunner, note 82, p. 72.; see also Stadelmann et al. (eds.) note 1, p. 293 ff.
3.6. Empirical Findings

The overview reveals that there are various approaches to assessing the performance of judges at federal and cantonal courts. These approaches range from the simple quantitative recording of processed judgments to staff appraisal interviews, and they can concern management and/or judicial activity. The performance assessment is the responsibility of the judges themselves (peer review and quality circles), the court or divisional management (case allocation, status discussions and staff appraisal interviews) or, in the case of re-appointment, of the advisory parliamentary committee. Surveys, when carried out, do not pertain to specific individuals. Performance assessments – with one apparent exception – have no effect on salary.

However, not enough experience has been gained in order to provide meaningful information on the structure and effects of the performance assessment of judges.

4. Developments Abroad

4.1. Preliminary Remarks

Information on selected international institutions and their approaches to assessing the performances of judges are listed below first. Thereafter, examples from various different countries (mainly in Western Europe) are used to illustrate how the performance assessments of judges are organized.

In addition, reference is made to the recently published country reports, and the corresponding summary, on most of the countries represented by the European Association of Judges/EAJ.90

4.2. International Institutions

The European Commission for the Efficiency of Judges (CEPEJ) has for a long time concerned itself with the assessment of judges’ performance as an element in the quality of the justice system. In particular the duration of proceedings and the number of concluded cases are specified as criteria.91 The CEPEJ is currently compiling further principles for the quality assessment of courts. They underline the necessity of differentiating between the quality of judgments and quality of service in courts. In addition to the quality of courts, the question of the quality of judges’ performance continues to be addressed.92

The Consultative Council of European Judges (CCJE) has published a report on the quality of judicial decisions. It particularly emphasizes the fact that the quality of judicial decisions depends not only on controllable factors (such as procedural management, duration of proceedings, intelligibility, communication), but also on the external environment (for example the quality of legislation, available resources, the quality of legal training). Quality assessment requires a number of indicators and methods. Personal data must remain confidential. Self-assessments should be given priority.93

The structures for the evaluation of judges in the member states are highly heterogeneous, according to a recent survey.94 Recently, the CCJE has adopted its Opinion No. 17 on “the Evaluation of judges’ work, the quality of justice and respect for judicial independence”.95

Various other organizations in Europe study the issue of judicial performance assessment: a report by the European Network of Councils for the Judiciary (ENCJ) has given an overview of various existing evaluation systems.96 The Committee of Ministers of the Council of Europe has likewise commented on judges and performance assessments in a

90 Stadelmann et al., note 1, p. 135 ff.
92 CEPEJ, Measuring the Quality of Judicial Services, Draft, 2 April 2013.
93 In general: CCJE, Opinion No 11 for the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, 2008. The issue of performance assessment is also the subject of other CCJE opinions: for example, Opinion No 1 on standards concerning the independence of the judiciary and the irremovability of judges, 2001, Opinion No 6 on fair trial within a reasonable time and judges’ role in trials taking into account alternative means of dispute settlement, 2004, Opinion No 10 on the role of the Council for the Judiciary in the service of society, 2007, Opinion No 14 on justice and information technologies (IT), 2011 and Opinion No 15 on the specialisation of judges, 2012.
94 Riedel (forthcoming), note 39, p. 8 and Annex II, with further references.
recommendation. The Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) has held an event dedicated to judicial evaluation. The International Association of Judges (IAJ) has published a report, comprising 32 countries, which also dealt with the issue of performance assessment.

4.3. USA
The National Center for State Courts (NCSC) runs a program of judicial performance evaluation (JPE) that seeks to reconcile the conflict between independence and the guarantee of justice. The goal and purpose of the program is to develop the skills of individual judges. This is implemented differently at the individual courts – some even publish the performance details of individual judges in reports or on websites.

4.4. Germany
The assessment of judges is part of administrative supervision. In principle, these assessments are conducted every four to five years until the judge reaches the age of 50. Selection for judicial office or promotion is also primarily made according to suitability, competence and professional performance. The requirement of performance assessment is derived from the duty to guarantee justice.

The assessments cover legal knowledge, negotiation skills (not, however, the conduct of court hearings), decisiveness, the quality of written documentation, productivity (for example number of completed cases), organizational and management skills, communication and cooperation skills, and the ability to handle conflicts. Judgments themselves and their immediate environment (such as the taking of evidence) are not subject to assessment. Superiors, usually the president of the court, sometimes with the assistance of the president of the higher court, conduct the assessment. The judges have a right of appeal against the assessment outcome.

It is critically noted that the administrative assessment of judges can compromise judicial independence. “...This is however not yet the case when judicial administration and specifically judicial skills are being assessed. In fact, that is the purpose of the official assessment of judges.” “An official assessment of judges only violates judicial independence if it results in a direct or indirect directive on how the judge is to act or decide in future.”

In view of the conflict between various constitutional principles, it is imperative to act on the principle of the unity of the Constitution and aim for the optimal effectiveness of the various constitutional norms and, subject to maintaining proportionality, to achieve a coherence of legal interests. Accordingly, “...the dependence of judges on the justice

100 National Center for State Courts (NCSC), Judicial Performance Evaluation (JPE), Resource Guide (<http://www.ncsc.org> (last visited 21 October 2014)).
105 Bundesgerichtshof (BGH), decision of 4 June 2009, RiZ(R) 4/01, para. 33.
107 Bundesgerichtshof (BGH), decision of 25 September 2002, RiZ(R) 5/08, para. 15-17. The question is again being intensely debated after a judge was told by his supervisors (criticism with warning) to increase the by comparison considerably below average number of cases that he had dealt with (see H. Forkel, ‘Erledigungszahlen unter [Dienst-]Aufsicht!’, 2013 Drz, no. 4, p. 132 ff., with further references; F. Wittreck, ‘Erledigungszahlen unter [Dienst-]Aufsicht?’, 2013 Richterzeitung, no. 1, [http://richterzeitung.weblaw.ch/rzissues/2013/1/2223.html] (last visited 21 October 2014)); ibid., ‘Durchschnitt als Dienstpflicht? Richterliche Erledigungszahlen als Gegenstand der Dienstaufsicht’, 2012 NJW, p. 3287 ff.
management system must be kept to a minimum. Any avoidable (due to it not being necessary to the functionality of justice) exertion of influence on the legal status of judges must not be allowed to happen.”

4.5. Austria
All judges (except the presidents of the Regional Courts and Higher Regional Courts and the judges of the Highest Court of Justice) are subjected to a performance assessment, conducted by the personnel chambers of the courts acting as independent bodies, after two years in office. Professional and personal characteristics are assessed, with a view to promotion where appropriate. The performance assessments are incorporated into service descriptions. If the performance is rated as ‘excellent’ or ‘very good’, a further assessment is conducted with a view to promotion. Judicial independence, which also pertains to the persons directing the proceedings, finds its limits in administrative supervision.

The experiences are basically positive. With regard to risks, it should be noted that performance assessments may lead to changes in judges’ behavior in relation to judicial activity and therefore may compromise judicial independence. It is also regarded as detrimental in that only a single performance assessment is carried out, unless a change in position is pending, which therefore makes it largely meaningless as regards the remainder of the term of office.

4.6. The Netherlands
Superiors assess the performances of judges in regular employee appraisal interviews. Individual court judgments are not the subject matter of the meetings. The bases for discussion differ from court to court, but they are due to be standardized in the near future.

Performance assessments of judges are an important quality assurance instrument. The aim is also to make the judges aware of the collective performance of the court. It is also seen as essential that performance goals (output, workload, resources) are agreed in advance – and then act as a basis for the performance assessment. The performance assessment should be conducted as a participative process, i.e. the assessment should not be made without consulting the judge concerned.

Risks relating to judicial independence are perceived in the implicit pressure to deal with cases quickly – which can be detrimental to the quality of the judicial process. However, this pressure existed before the introduction of performance assessments though implicit, and to some extent subliminal. The current absence of adequate rights of recourse is sometimes criticized. However, the experiences are generally viewed as positive.

4.7. France
French courts are assessed on the basis of statistical data. In addition, a performance assessment of judges is conducted on the basis of the number and degree of difficulty of the cases handled. Normally, the court president conducts the assessment, which serves as an aid in promotion decisions and in disciplinary processes conducted by the Conseil Supérieur de la Magistrature (CSM).

4.8. Italy
In Italy, judges are evaluated periodically in a procedure relevant to their career status and salaries. In addition, comparative performance assessments are conducted if more than one judge applies for a vacant position. The Consiglio Superiore della Magistratura is responsible in both cases. The assessments include various aspects of judicial activity such as work capacity, productivity, diligence and motivation.

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109 Bundesverwaltungsgericht (BverwG), ZBR 2006, 349 (350).
113 Overview based on Gass & Stolz, note 7, p. 129 f.; see also the country report in: Stadelmann et al. (eds.), note 1, p. 199 ff.
4.9. Empirical Findings

Without being able to make a comprehensive or conclusive evaluation of the performance assessment of judges at present, we have seen that important international institutions that are concerned with judicial management and related issues of quality assurance have addressed the issue of the performance of judges. This underlines the topicality of the subject.

The above overview of the six countries, the USA, Germany, Austria, the Netherlands, France and Italy, also shows that performance assessments of judges are being carried out. Assessment methods that predominate evaluate professional and personal competences, without addressing the judicial decisions themselves. Management bodies within the court or superordinate offices/judicial councils conduct the assessments, and the results are used for both quality assurance and personal development. Judicial independence is regarded as a priority in the conception and conduct of performance assessments. Opportunities to participate in the assessment process and rights of recourse are also seen as being particularly important.

Even if the justice systems of these countries cannot consistently be compared with those in Switzerland (especially judicial appointments for terms of office\textsuperscript{115}), the findings can, in principle, be applied to the Swiss system due to the parallels in constitutional provisions on the judiciary.

5. Consequences for Performance Assessments in Switzerland

5.1. Basic Assessment

From a general constitutional standpoint, the recording and assessment of the performances of individual judges seems to be permissible subject to certain requirements and, indeed, expedient, subject to those requirements. The assessment results aid internal court management (in particular caseload management and balancing the workload) as well as career development\textsuperscript{116} (e.g. with a view to taking on management duties) and are therefore an integral element of quality management. Ultimately, this is meant to consolidate or raise the performance of the court.\textsuperscript{117} Additionally, assessment results for individual judges can, when processed appropriately, aid authorities (committees or judicial councils\textsuperscript{118}) in (re-)appointment, dismissal or disciplinary procedures.\textsuperscript{119}

Adequately publicizing the performance of individual judges aids transparency and makes general discussions around the performance of individual judges that inevitably take place at all levels (‘corridor conversations’) more objective,\textsuperscript{120} thereby contributing to legal harmony in the court system.

Accordingly it seems important that the courts do not obstruct the ongoing discussion on performance assessments, but rather indicate methods themselves and express their views on the assessment process before others decide on it for them.\textsuperscript{121}

5.2. Organization

The specific process for performance assessments of individual judges that conform to the Constitution depends, as has been shown, on various elements, in particular the purpose, the subject matter, responsibility, the target group, opportunities to participate, to have a say in the process and rights of recourse.

In relation to the purpose of performance assessments of individual judges, caseload management systems that aim to optimize caseload allocation internally in the courts, based on a quantitative recording of the number of cases\textsuperscript{122} handled by the individual judges, seem essential to the courts in general and in view of the requirement of judicial independence not simply reasonable, but necessary. Employee appraisal interviews and status discussions serve to ensure quality

\textsuperscript{115} See Mosimann (2015), note 46, p. 89 ff., with further references.

\textsuperscript{116} See in particular Bieler & Lorše, note 39, p. 365 ff.

\textsuperscript{117} For a sceptical view in relation to this, see Mosimann (2015), note 46, p. 103.

\textsuperscript{118} On the latter in this connection, see Stolz & Gass, note 25, p. 177 f.

\textsuperscript{119} See already Lienhard, note 20, para. 8, and the findings in Kettiger, note 10, p. 190; for a more critical view, see D. Kettiger & A. Lienhard, Möglichkeiten und Grenzen von WOV in der Aargauer Justiz, legal opinion dated 29 August 2002 (unpublished), p. 28, with further references.

\textsuperscript{120} See Raselli, note 20, para. 30.

\textsuperscript{121} See also Bandli, note 3, p. 206; see also Walter, note 7, para. 28, who regards quality controlling as a personal task for judges themselves.

\textsuperscript{122} Taking account of the differences in weighting the cases.
throughout the court as well as personal development.\textsuperscript{123} Performance assessments can additionally aid bodies responsible for (re-)appointment, dismissal or disciplinary procedures: in order to fulfil their tasks, they require relevant information on the performances of the individual judges.\textsuperscript{124} However, it appears problematic to use information gathered in performance assessments when deciding on salaries, as this could obviously lead to false incentives. It is clear that the pecuniary aspect is an unsound basis for legitimizing the performance assessment of judges. What is not permitted, according to the opinion represented here, is the reinterpretation of performance assessments as specific, binding performance requirements.\textsuperscript{126}

With regard to the subject matter of performance assessments of individual judges, initially only the number and nature of the proceedings involved (personal case statistics including duration of proceedings)\textsuperscript{127} seem appropriate in relation to judicial process.

In contrast, further quantitative statistics (such as rates of appeal) seem less suitable, especially where there is a lack of causality (apart from special or obvious cases).\textsuperscript{128} A content-based (qualitative) analysis of individual judgments (material quality) or the procedural process (formal quality) is, in contrast, not compatible with judicial independence, unless it has been initiated and carried out by the relevant judges for the purpose of quality assurance or personal development\textsuperscript{130} (for example in the form of an exchange of experiences in quality circles, peer-reviews or 360-degree feedback).\textsuperscript{131} The required parallel assessment of the quality of the judicial process thus reaches its limits.\textsuperscript{132} The subject matter of performance assessment is therefore, primarily aspects of court management (management quality), such as the management of proceedings, personnel management, communication or team skills.\textsuperscript{133} These aspects should also be a priority in employee appraisal interviews or status discussions, or in employers’ references, and only these aspects can be assessed in surveys, although these surveys must not be related to specific persons.

What always appears to be essential is that various criteria be evaluated in the performance assessment, so as to obtain what is at least an approximate picture of the (measurable) performances of judges.\textsuperscript{134} It must not be the case that only the number of concluded cases or the average duration of proceedings is assessed, for example, as this would undoubtedly lead to false incentives. In addition, the different requirements and particularities of judicial activity in the lower and upper courts must be taken into account (such as the type of proceedings, how the facts are established, speed of proceedings and the creation of case law).\textsuperscript{135}

As far as responsibility for conducting performance assessments is concerned, it should be noted that performance assessments are an element of management and an essential counterpart to setting objectives. Superiors usually carry out employee appraisal interviews. In a court, this task is usually given (even if these are not superiors in the proper sense) to the president of the plenary court, or in the case of larger courts, of the division concerned.\textsuperscript{136} The presidents must be given the corresponding management authority in terms of the judicial organizational law. This will confer on them the required democratic legitimacy and the duty to manage (court management) which is compatible with their role as a primus inter pares in the judicial process.\textsuperscript{137} As an alternative, collegial models or judicial councils could be considered.

\textsuperscript{123} For an opinion against formalised performance assessments, see Mosimann (2015), note 46, p. 105, 107.
\textsuperscript{124} On this, see immediately below.
\textsuperscript{125} See also Kettiger, note 10, p. 196 ff.; Mosimann (2015), note 46, 103; Kiener, note 46, p. 290; Cavelti, note 48, p. 330; CCJE, opinion No. 17, note 95, para. 28, 45, 49.13.
\textsuperscript{126} See Sec. 2.3 above.
\textsuperscript{127} See also Mosimann (2015), note 46, p. 99 ff.; for a critical view of case statistics, see Walter, note 7, para. 26.
\textsuperscript{128} See also Mosimann (2015), note 46, p. 98, 104 ff.; CCJE, opinion No. 17, note 95, para. 35.
\textsuperscript{129} See for example Poltier, note 20, p. 1028. This is more often the subject of appeal proceedings; see also Mosimann, note 46, p. 98.
\textsuperscript{130} For a sceptical view in relation to the purpose as regards changes of function, See Mosimann (2015), note 46, p. 103.
\textsuperscript{131} See for example Kettiger & Lienhard, note 119, p. 43; Stolz & Gass, note 25, p. 177, and Walter, note 7, para. 28, emphasize the importance of internal mechanisms; on the topic of 360-degree feedback see M. Warren, ‘Enhancing our self-perception: 360-degree feedback for judicial officers’, 2011 Journal of Judicial Administration (JJA), p. 3 ff.
\textsuperscript{132} See also Walter, note 7, para. 27; Tschümperlin, note 47, p. 93.
\textsuperscript{133} See on the various areas of competence Sec. 2.1 above.
\textsuperscript{134} On the unmeasurable qualities of judges, see Mosimann (2015), note 46, p. 104 ff.; Raselli, note 20, para. 20; Walter, note 7, para. 27; Gass & Stolz, note 7, p. 128 ff.; see also CCJE, opinion No. 17, note 95, para. 35, 49.6.
\textsuperscript{136} For a sceptical view on the role of superiors, see Mosimann (2015), note 46, p. 104, and pleading instead for a consideration of individual strengths and weaknesses in a collegial exchange, p. 107. In this context, see also H. P. Walter, who calls for personal responsibility in an open discussion within the court (Walter, note 7, para. 28); see also above.
\textsuperscript{137} Cavelti, note 48, p. 327 ff.
Additionally, a distinction must be made between the addresssees of the performance assessment data on individual judges. The data primarily aids the court management board in fulfilling its managerial role. Conventional supervisory authorities generally do not need this data – other than in certain exceptional cases, as their supervisory purview concerns the efficiency of the lower court as a whole rather than the performances of individual judges. This must be evaluated differently only in the case of the performance of judges entrusted with the management of the lower courts. The same applies to a greater extent to oversight authorities (normally parliaments or parliamentary supervisory committees), whose supervisory activity is generally characterized by additional distance. Authorities concerned with the preparation of (re-)appointments (parliamentary committees or judicial councils) have the right to additional information. In principle, generalized, condensed information from the court management board on the performances of individual judges should suffice. The bodies responsible for the preparation of (re-)appointments must only receive additional information if an accumulation of not objectively explicable deficiencies occurs. Special rights to information are also necessary in disciplinary or dismissal procedures.

Judges must have appropriate opportunities to have their say and, if necessary, rights of recourse when undergoing a performance assessment. In the case of employee appraisal interviews, this can initially entail a meeting with the supervisory authority, and in the second phase an appeal to an impartial authority. In the case of dismissal or disciplinary procedures, as well as non-re-appointments (where appropriate), existing or yet to be established appeal mechanisms must be used. Here, models involving judicial councils are an obvious option.

5.3. Outlook
The performance assessment of judges remains a subject that has not been researched much. Even if the constitutional framework has been roughly defined and various empirical principles have been established abroad in the meantime, further research into performance assessment systems that conform to the constitution is required.

Additionally, Switzerland has little experience of assessing the performance of judges. Carefully conducted practical projects in cantonal and federal courts could provide valuable findings.

Only then can equally carefully developed performance assessment systems which successfully strike the balance between guaranteeing justice and protecting the judiciary begin to be incorporated into judicial organizational law.

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138 See already the findings in Kettiger, note 10, p. 189; also Raselli, note 20, para. 29.
139 Calling for the supervisory authorities to have a duty to report failures to achieve annual objectives, see Bandli, note 30, p. 114.
140 See Sec. 2.1. above; for detail on the differences between oversight and administrative supervision, see Tschümperlin, note 48, p. 233 ff., p. 235 ff.
141 On the requirements for independent election bodies, see M. Felber, ‘Richterwahlen sind nichts für Politiker’, NZZ am Sonntag, 13 April 2014, p. 19 – a principle also accentuated by the existence in some cases of appointments of judges by the people.
142 See already Lienhard, note 20, para. 7, and the findings in Kettiger, note 10, p. 190.
143 See already Lienhard, note 20, para. 7; see also ibid., note 26, p. 467; for Mosimann (2015), note 46, p. 103, however, it is inconceivable to sanction poor performance assessments by not re-electing the judges concerned.
Annex: Articles from the Swiss Federal Constitution

Article 13 Right to privacy
2
Every person has the right to be protected against the misuse of their personal data.

Article 29 General procedural guarantees
1
Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.
2
Each party to a case has the right to be heard.
3
Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.

Article 30 Judicial proceedings
1
Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.
2
Unless otherwise provided by law, any person against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside.
3
Unless the law provides otherwise, court hearings and the delivery of judgments shall be in public.

Article 43a Principles for the allocation and fulfilment of state tasks
5
State tasks must be fulfilled economically and in accordance with demand.

Article 126 Financial management
1
The Confederation shall maintain its income and expenditure in balance over time.

Article 168 Appointments
1
The Federal Assembly elects the members of the Federal Council, the Federal Chancellor, the judges of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces ('the General').

Article 169 Supervisory control
1
The Federal Assembly supervises the Federal Council and the Federal Administration, the federal courts and other bodies entrusted with the tasks of the Confederation.

Article 170 Evaluation of effectiveness
The Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness.
Article 188  Status of the Federal Supreme Court
2
Its organisation and procedure are governed by law.
3
The Federal Supreme Court has its own administration.

Article 191c  Independence of the judiciary

The judicial authorities are independent in the exercise of their judicial powers and are bound only by the law.
Using IT To Provide Easier Access To Cross-Border Legal Procedures For Citizens And Legal Professionals - Implementation Of A European Payment Order E-CODEX Pilot

By George Pangalos, Ioannis Salmatzidis and Ioannis Pagkalos

Abstract:

Integration in Europe has resulted in a steadily increasing number of legal procedures containing cross-border requirements to ensure better cooperation between different national judicial systems and establish simpler and more efficient procedures for the users. Information and Communication technologies can help make cross-border judicial procedures more transparent, efficient and economic both in civil and criminal matters.

e-CODEX is an important project of the EU in the domain of e-Justice that aims to provide to citizens, companies and legal professionals easier access to justice in cross-border processes, as well as make cross-border collaboration between courts and authorities easier and more efficient. It develops the required infrastructure and the organizational, procedural and legal environment necessary and also conducts a number of real life cross-border pilot projects. One of the first such pilots to become operational is the European Payment Order (EPO), in which Greece also participates. In this paper we briefly present the e-CODEX cross-border services which provide access for citizens and legal professionals to legal processes in Europe and also discuss the Greek e-CODEX pilot of European Payment Order, which is now operational in this major e-Justice project.

Keywords: e-Justice, European payment order, cross-border access, automated court processes, e-lawyer, automated legal processes.

1. Introduction

Because of the current level of integration in Europe and the resulting high mobility of European citizens, procedures and businesses, legal procedures containing cross-border requirements are steadily increasing. These procedures require better and faster cooperation between the different national judicial systems involved. With the continuous growth in data exchange, beyond the traditional manual methods, different forms of communication to address these requirements are also necessary. ICT (Information and Communication Technology) can help make judicial procedures more transparent, efficient and economic. It can also facilitate access to justice for citizens, companies, administrations and legal practitioners. This results in both smoother access to information and the ability to process cross-border cases more efficiently.

Access to justice has already become an important issue in many justice systems around the world. Technology is also increasingly seen as a potential enabler of access to justice, particularly in terms of improving justice sector efficiency. The following examples of systems in use today help illustrate how those systems might improve access to justice:

(a) TOL: an Italian information system for the electronic transmission of data, accessing procedural documents and notifications, and the payment of fees in civil cases. Its main goal is the creation of the so-called paperless office, an e-justice system that allows complete electronic management of any type of civil proceeding, from case filing, through to judgment and then final enforcement.

(b) MCOL: an online service for the e-filing of money claims in England and Wales that enables most English and Welsh citizens to issue a money claim twenty-four hours a day, seven days a week through a user-friendly website. The website allows for filing documents, checking claim status, and requesting both judgment entry and enforcement (by way of a warrant of execution).

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(c) e-CODEX: a large-scale e-Justice pilot project co-funded by the EU Commission and coordinated by the Ministry of Justice of the German Land Nordrhein-Westfalen. A more detailed description of the systems and applications developed in the framework of e-CODEX will be given in a subsequent section.

(d) IJP: a project initiated in 1996 to streamline then existing justice sector processes, replace paper based systems with computer based systems and create a Common Inquiry System for criminal cases that would allow authorized persons from various justice areas to link to files (e.g., about witnesses, offenders, victims) held in other areas. It is designed to impact 22,000 government employees at 825 different locations in Ontario, in addition to the law enforcement/police forces, judges, lawyers, and the general public.

(e) CIMS: an integrated Court Information Management System developed in Canada in 2009 that aims to permit enhanced functionality such as e-document management, court scheduling, financial and automated workflow capabilities, and the introduction of online services to the public.

(f) BCI: a British Columbia’s e-Court Initiative to develop an integrated case management system and publicly accessible e-services, which eventually paved the way for public access to court documents and e-filing capabilities at all levels of BC courts (including, most recently, the Court of Appeal).

The European Union has already undertaken several initiatives in this area. One of the most important ones is the e-Justice initiative. e-Justice aims to improve access to justice and to facilitate cross border judicial proceedings through the use of information and communication technology and EU-wide interoperability. It also targets the lack of information deficit and language barriers. Its potential audience includes citizens, businesses, legal practitioners and the judiciary. It also strives to develop the European e-Justice Portal as a one-stop (electronic) shop for justice information in the EU.

e-Codex (e-Justice Communication via Online Data Exchange) is one of the most important Large Scale e-Justice Projects of the EU designed to provide to European citizens, companies and legal professionals with easier access to cross-border proceedings, improve cross-border collaboration between the courts and agencies and improve efficiency through interoperability between the existing national ICT solutions.

The main objective of e-CODEX is to enable access to justice systems across Europe and provide an easier (digital) way to execute cross-border proceedings and exchange legal information between EU-countries, replacing bureaucratic paperwork, regardless of any differences between the EU countries. It also aims to improve efficiency of cross-border judicial processes through standards and solutions that improve and facilitate the cross-border case-handling activities.

The e-CODEX project, started in 2012, is funded through the ICT Policy Support Program of the EU and has duration of 50 months. Twenty EU and EU-associated countries participate in the project (Austria, Belgium, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Ireland, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Spain, Turkey, United Kingdom), along with the organizations CCBE and CNUE. Greece participates in e-CODEX through the Greek Ministry of Justice, which has mandated the overall responsibility for the national participation and implementation to the Informatics Laboratory of the Aristotle University of Thessaloniki.

Beyond the development of the required infrastructure, organizational, procedural and legal environment necessary for providing the e-CODEX services (organized around seven work packages), e-CODEX also runs a number of real life pilots projects (or use cases). The first pilot to become operational is the European Payment Order (EPO), in which Greece also participates. In the following chapters we will briefly present e-CODEX objectives and structure, which is

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7 CCBE: Council of Bars and Law Societies of Europe

8 CNUE: Council of the Notariats of the European Union

9 It belongs to the Faculty of Technology of the Aristotle University of Thessaloniki, and has been mandated by the Greek Ministry of justice because it has a long record and experience in implementing similar cross-border applications
mostly based on\textsuperscript{10}, and the methodology used and experience gained from the implementation of the first Greek EPO pilot use case.

2. Technical Background and Implementation Structure
As stated earlier, as the European Union evolves, it requires different forms of communication to cope with the continuous growth in data exchange caused by increasing commercial activities. Exclusively manual processing does not provide the responsiveness that a modern society requires. There is therefore a need to automate legal procedures and to make cross-border judicial proceedings more transparent, efficient and economic both in civil and criminal matters. IT and advanced communication technologies can significantly help in this direction since they allow the use of e-Services and make use of the connectivity through the national infrastructure that Member States have already established. e-CODEX aims to automate legal procedures without re-inventing the wheel.

In this context, electronic transmission of data and documents is a key piece of the solution. Any functionality developed for a cross-border e-Justice service will necessarily mean transmission and exchange of information from one country to another, including communication between the e-Justice Portal and the national infrastructure. Because there is a focus on security and availability for the cross-border e-Justice service, e-CODEX coordinates and establishes an appropriate, efficient and secure e-Delivery solution (figure 1).

![Figure 1: The e-CODEX e-Delivery solution and inter-connection approach](image)

The e-CODEX e-Delivery solution and connectivity requires interoperability in several technical and semantic areas is guaranteed. Thus, e-CODEX cross-border e-Justice services are based on a decentralized approach and a delivery platform consisting of (i) an e-CODEX Gateway, (ii) an e-CODEX National Connector, (iii) a National System (service provider), and (iv) the e-Justice portal (figure 2).

e-Delivery is the basic function of the Gateway. Communication between Gateways takes place through the internet (and possibly in the future through S-TESTA). This approach makes it easier to integrate existing national solutions into a new cross-border e-Justice service\textsuperscript{11}.

The National Connector is responsible for all semantic local mapping and guarantees the ability of the national systems to communicate with the e-CODEX gateway. It is usually linked to a National System which is, in turn, used by the courts, lawyers, parties, etc. The e-CODEX Gateway establishes a secure and standardized connection with any other Gateway connection on either the member state’s national or e-Justice portal side (figure 2).

Communication flows from the National System, to the National Connector, to the National e-CODEX Gateway and then, respectively, to the foreign country’s e-CODEX Gateway, their National Connector and their National System. The e-Justice Portal of the EU is the only e-CODEX component that communicates directly with the gateway without a connector (since there is no need to transform documents to a national standard format). Depending on the service to be supported, the bi-directional communication could be from the e-Justice portal to the courts, from court to court, from court to the secure mailbox in the e-Justice portal, etc. The overall information flow supported by e-CODEX is also depicted in figure 2.

The e-CODEX Building Blocks

A basic characteristic of e-CODEX project develops common building blocks (components) that can be used in, or, between Member States to support cross-border operation of processes in the justice field. Such solutions have been developed in different areas, ranging from safe transportation to identity and document standards, and are used in several different e-CODEX pilots. The developed solutions also enable a secure environment for different user-groups to access a wide range of legal services across Europe. More specifically, e-CODEX is currently using the following main building blocks:

- **e-Delivery**
  The e-Delivery building block is at the center of the e-CODEX architecture and is responsible for securely transporting information between member states. The e-Delivery system includes for every participating country - the gateway and a basic framework for the national connector. The connector is then customized by each participating country to fit its specific needs. The e-CODEX e-delivery / e-transport building block is a reusable connection solution based on the ebMS 3.0 standard (based on the Holodeck b2b messaging software) and the ETSI REM, and ISO, OASIS and ETSI standards. It is essentially a content agnostic, plug and play cross-border connection solution, that could also be used as the basis of other inter-European and world-wide projects.

- **e-Signature**
  The e-Signature building block is part of the national e-CODEX connector and helps to sign documents and generate the so-called ‘trust-ok’ token. It also checks the validity of incoming signed documents and, thus, helps guarantee the security of the cross-border transmission of documents. It also provides connection with the national e-identity frameworks (existing national solutions). The implementation and verification of e-Signatures is based on the so-called DSS-Tool.

- **e-ID**
  The e-ID building block makes it possible for EU citizens and legal professionals to access e-CODEX services and the e-Justice portal by authenticating themselves through the use of their national identities. A specific role authentication system for lawyers called “Find a lawyer” is also being considered to be connected to e-CODEX.

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14 For more information: Council of Bars & Law Societies of Europe, Find A Lawyer
The e-Document building block deals with document conversion and semantics. Documents need to be converted to conform to national standards. The document conversion is done through the use of XML schemas and mappings. The XML data accompanying the documents are automatically converted to fit the national case management system. This conversion again takes place on the return transmission to transform data to the EU standard. This makes it possible for national systems to stay independent and still participate in the cross-border exchange of data. All of this takes place in the national connector.

3. The e-CODEX Pilots

Beyond the development of the infrastructure and the organizational, procedural and legal environment necessary for providing the e-CODEX services, e-CODEX also runs a number of real life pilots (use cases). During the piloting phase, which started in 2013, real life pilots are being tested. Upon completion of the pilot phase, an evaluation will also be done and further revisions undertaken. Pilots will be easily adaptable by countries wishing to join the use case at a later stage, provided that they fulfill the necessary technical and legal requirements. These pilots also address some of the weaknesses that have been identified in regards to current practices, by providing the ability to reduce delays, in the interest of both the judicial authorities and the requested person, and ease the collection of statistical data.

Eight major procedures have been identified by e-CODEX so far as use cases for piloting:

A. Civil Claims Area:
   - European Payment Order (EPO), and Small Claims (SC)

B. Cross-border Mutual Legal Assistance Area:

3.1. The European Order for Payment Pilot

The swift and efficient cross-border recovery of outstanding debts is of prime importance not only for EU citizens but also for companies, as late payments often constitute a major reason for insolvency, threatening the survival of many small, medium-sized and even large businesses and resulting in numerous job losses. EU has taken the initiative to simplify and speed up the recovery of uncontested monetary claims in cross-border cases by creating a harmonized European order for payment procedure (EPO)\(^\text{15}\). EPO procedures are applicable in several cross-border case types. For example, sales contracts, rental agreements, contracts of service (related to transportation, hotels, restaurants, etc), subscription agreements (newspapers, magazines, etc.), insurance contracts, out-of-court settlements, membership fees, etc.) It must be noted that many of such small claims do not reach the courts, because the expected financial outcome does not compensate for the costs (accounting for 63% of all such cases EU-wide today)\(^\text{16}\).

Cross-border communication in this area has traditionally been paper-based. The EPO e-CODEX pilot implements the necessary technical infrastructure and interfaces for secure electronic cross-border submission of business documents, based on the European order for payment procedure. The e-CODEX pilot enables companies, institutions and legal professionals (e.g. lawyers), to electronically file EPO cases to the competent court in another piloting Member State, by connecting to the respective national filing systems via e-CODEX.

EU citizens therefore benefit from the new functionality, as they are able to complete the application-form for a European order for payment and submit this application and the accompanying documents directly in electronic format to the competent court in any other Member State participating in the pilot directly from their desk. These actions result in speedier access to efficient justice in cross-border money claims. Courts also become more efficient in handling cases with less burdensome paper effort.

The e-CODEX implementation of the EPO cross-border pilot is based on the EPO workflow, as described in current EC regulations (1896/2006 and 936/2012)\(^\text{17}\). Ideally, according to the EU regulations, a claimant fills in the claim, signs it with


his electronic signature and transmits it to the appropriate court. The court considers the applicability of claim and decides
to issue an EPO, or rejects it, or requests further information, or assesses that only a part of the claim meets
requirements. The defendant then either accepts or contests this decision. Finally, if there is no response by
the defendant, the court declares EPO enforceable and processes it. Several complexities in completing the process remain
due to the individual country rules still in place regarding, the payment of court fees, notification issues, etc.

The main stakeholders of the e-CODEX EPO pilot are the legal professionals and companies which need to submit EPO
claims using electronic interfaces, the EU citizens which are enhanced to support electronic communication via e-CODEX,
and the courts which are connected via their national electronic filing systems and their national back-office applications
for court case management. Other stakeholders of the e-CODEX EPO pilot include the Justice Ministries of the
participating Member States, which are responsible for the national filing systems and the country’s court case
management systems, as well as the EU Commission, which is responsible for running the European e-Justice Portal.

Some EU Member States already allow the electronic filing of EPO cases, especially for key customers of justice that
comprise the majority of the courts civil proceedings caseload (e.g. lawyers, banks, insurance companies and social
security institutions). Two examples are the national filing system “EGVP” (Elektronisches Gerichts und
Verwaltungspostfach) of Germany and the “ERV” (Elektronischer Rechtsverkehr) system of Austria. Currently these
national filing systems are only in use for participants in their own Member State, while the e-CODEX EPO pilot aims to
provide interfaces to enable cross-border communication between EU member states.

4. The Country Specific Requirement
Each country intending to participate in the different use cases selected for the e-CODEX piloting phase has to meet a
number of organizational and technical requirements. For each one of the use cases a country chooses to participate in, a
corresponding country wide or member state case management system has to be available (or be implemented). The participants have also to make sure that their national technical, organizational and legal framework provisions allow for
the respective electronic submission and processing of documents to their court system.

The key players for the implementation of the first e-CODEX EPO pilot in Greece have been the Greek Ministry of Justice
(overall political responsibility and guidance), the Aristotle University of Thessaloniki (national coordinator and technology
provider, responsible for setting up the e-CODEX Gateway and the National Connector and for implementing the national
EPO Case Management System - CMS), and the Athens Court of First Instance (CMS host and also responsible for
involving stakeholders during the piloting stage - mainly lawyers of the Greek Bar Associations). Just prior to the EPO pilot
launch (beginning of 2014), the electronic submission of documents to Greek courts was also made available to the
lawyers of Attica.

Significant time and effort was spent during the design and implementation phase of the Greek EPO pilot in in discussions
with potential users, mainly lawyers of the Greek Bar Associations. The lawyers also participated in assessing the current
conventional practices of the paper-based procedures and discussing organizational issues regarding the potential and
limitations for the application of EPO procedure in Greece and their exploitation by local lawyers including:

- The detailed organizational analysis of the Greek Payment Order procedure
- The detailed study of the e-Codex requirements regarding e-Signatures and e-ID and the assessment of their
  compatibility with the Greek eID government portal “Ermis”
- The analysis of the European Payment Order and its actual implementation at national level by the Greek courts
  and lawyers
- The stakeholder organization and roles of the Athens Court of First Instance (Judges and Court Administration), the Athens Bar Association and more recently the Thessaloniki Bar Association
- The setup of the necessary technical communication infrastructure (Gateway, National Connector, CMS, etc.)
- The development and Implementation of a suitable security policy and the necessary procedures foreseen by
  the ‘Circle of Trust’ agreement signed among all EU partners participating in the pilot
- The development of the national EPO Case Management System
- The promotion of dissemination activities for local stakeholders, etc.

The involvement of stakeholders (mainly lawyers, court clerks and Judges) from the early stages of the exercise has been
crucial in order to gather information on organizational issues regarding the actual courts’ application of the European


18 For more information: Greek Ministry of the interior, The Greek government portal, Retrieved May 23, 2014, from
procedure and the actual use of the procedure by lawyers, their attitude against the new procedure and the issues that they may encounter. The Greek—specific problems encountered include the limited use of the EPO procedure by Greek lawyers, the relatively scarce number of EPO claims that courts receive, the difficulties lawyers encounter in identifying the competent courts in another country and the payment of fees. These are issues and difficulties that other future piloting countries may also encounter. These issues are systemic and cannot be solved by e-CODEX infrastructure.

![Figure 4: Overall structure of the Greek EPO pilot](image)

The Greek EPO pilot (figure 4) has been operational since June 2014. Today, Greek lawyers, using a fully automated, fast and easy procedure, can submit EPO cases directly to competent European courts (figure 5) from their offices, as can lawyers from other pilot European countries. For the time being, cases from abroad can only be submitted to the Athens Court of First Instance (which handles approximately 60% of all cases at the country/national level). A detailed users’ manual (handbook) for the Greek e-CODEX EPO pilot and an instructions manual for the Greek users are also available (figure 6)\(^\text{19}\).

![Figure 5: On-line submission forms for a new EPO case – Form ‘A’](image)

Managing the technical and organizational complexity of the national system is the key to a successful pilot. Greece decided to implement a phased or gradual pilot approach where the initial pilot is restricted to lawyers. The pilot will be opened to citizens with digital signatures at a later stage. While not a technical limitation of the system, Greece determined that the electronic procedure may be too complicated for the average user at this stage, due to the belief the citizens may have a limited understanding of the legal terms and procedures, the identification of the correct court and the payment of fees.

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To validate the installed system (e-Codex gateway and connector) are working properly, a peer member with a working connector sends a series of test messages. To accurately test the system, the user needs to send a number of variable messages, on a sporadic and random basis. This user testing process may prove difficult to set up, since it is difficult to predict exactly when these messages are needed. To answer this concern, we are setting up an automated testing tool that can be easily adapted to national environments and can make implementation easier for piloting countries. The testing platform may acquire all relevant roles (sender and receiver) and support not only EPO XML schemas, but also schemas regarding the rest of the use cases, such as small claims, criminal law use cases, etc.

Figure 6: The EPO handbook and the instructions manual for the EPO Greek users

The implementation and use of the Greek EPO pilot to date has demonstrated several advantages. It helps to speed up and facilitate the processing of EPO cases that include parties domiciled in different member states by discounting the geographic locations and transforming them in an electronic system. It is also important to note that no special expertise or infrastructure is required for installing and using the system (only a computer, an internet connection and a digital signature are required). The new system can also support a rapid debt recovery for companies, by reducing the delays often occurring in today’s civil procedures, and thus helps built a better economic environment all over Europe. It also provides a direct and secure communication with courts and also provides for the acknowledgement of exchanged forms through electronic proof of receipt. It also helps reduce costs of cross border communication by automating the entire process and eliminating registered mail. Finally it helps eliminate language barriers since e-filed are created in the local language (court accepted languages are only used for some small parts of the form). Finally, the Greek lawyers that have used the system so far are very positive on its usefulness and simplicity of use.

5. Conclusions

The steadily increasing number of legal procedures containing cross-border effects in Europe requires better cooperation between different national judicial systems and simpler and more efficient procedures for the users (citizens, lawyers, companies, etc). Information Technology and telecommunication can help make those procedures more transparent, efficient and economic, in civil and criminal matters alike. e-CODEX aims to provide citizens, businesses and legal professionals with easier access to justice in cross border proceedings and to make cross border collaboration of courts and authorities easier and more efficient.

The project has already developed the required infrastructure, organizational, procedural and legal environment necessary for testing and piloting. It also operates a number of real life cross-border pilot use cases. One of the first to become operational is the European Payment Order (EPO). In this paper we briefly presented the services of cross-border access of citizens and legal professionals to legal procedures in Europe provided by e-CODEX as well as the Greek e-CODEX pilot of European Payment Order, which has already operational under the framework of this major project. Today, through this pilot, Greek lawyers can easily submit and process EPO cases directly to the competent European courts from their offices, using a fully automated, simple and fast procedure. Lawyers from other piloting European countries can do the same. All they need is a computer, an Internet connection and a digital signature. A number of related issues which cannot be solved only by technology as they are systemic (payment of court fees, identification of competent courts, notification, etc.) have also been studied and solutions are being researched. The project demonstrates that modern information technology and telecommunications processes can help improve efficiency of cross-border judicial procedures, through solutions that facilitate and improve cross-border case-handling activities.
References


Is Sky The Limit? Revisiting ‘Exogenous Productivity Of Judges’ Argument
By Kamil Jonski* and Daniel Mankowski**

Abstract:

This paper revisits the ‘exogenous productivity of judges’ hypothesis, laid down in numerous law & economics studies based on the production-function approach. It states that judges, when confronted with growing caseload pressure, adjust their productivity upward, thereby increasing number of resolved cases. We attribute this result to assumptions regarding court productivity. In this paper, we present an alternative – the ‘hockey-stick’ production function model -- taking into account the time constraints faced by judges. We seek to reconcile this ‘production function’ model with more traditional and popular approach among practitioners to court performance modelling – the use of weighted caseload methodology. We also propose extended methodology of model evaluation, taking into account its ability to reproduce empirical regularities observed in ‘real world’ court systems.

Keywords: court efficiency, caseload management, judicial productivity, production function, weighted caseload
JEL Code: H 11, H 50, K40,

Remember that all models are wrong;
the practical question is:
how wrong do they have to be to not be useful?

George E. P. Box

1. Introduction

Regardless of the legal tradition and the level of economic development, any judiciary is confronted with a fundamental dilemma: to effectively administer justice, often under budgetary constraints. One aspect of this dilemma is the challenge of efficient allocation of judges across the court system to ensure the achievement of maximum performance.

The history of contemporary court reform, rooted in a focus on ‘law in action’ instead of ‘law in the books’, began with works of American legal realists. In his path-breaking address to the annual convention of the American Bar Association in 1906, Roscoe Pound blueprinted the agenda of such reform. As he ascertained, ‘Judicial power may be wasted in three ways: (1) by rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle; (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies; and (3) by nullifying the results of judicial action by unnecessary retrials.’ Pound’s first point references dilemmas relating to appropriate design of the court system, in order to allocate resources (including judicial work) efficiently.

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The views and opinions expressed in this paper are those of the authors and do not necessarily reflect the official policy or position of the Ministry of Justice. Assumptions made within the analysis are not reflective of the position of any Polish government entity.
Half of a century later, Pound’s remark that ‘dissatisfaction with the administration of justice is as old as law’ was still current. In search for modern solutions for chronic problems, some researchers decided to look at court performance through the lens of quantitative analysis. The seminal study conducted in the late fifties by H. Zeisel, H. Kalven Jr. and B. Buchholz, under the University of Chicago Jury Project – in order to find remedies for the excessive delay in Supreme Court of New York County - significantly influenced modern thinking on court administration. The key contribution made by Zeisel et al. (1959) was the design of statistical methodology focusing on how to estimate judicial staffing requirements essential to reduce case backlogs. It was based on the concept of the so-called ‘judge year’ – ‘the average workload of one judge during one court year’ (p. 8). A ‘judge year’ encompassed judicial capacity, specifying the typical number of cases that can be adjudicated by single judge within one year. If the number of filed and pending cases can be meaningfully translated into ‘judge years’, then researchers can begin to devise possible remedies for court productivity delays. Building upon this, Zeisel’s team presented their assessment of the magnitude of ‘the additional effort required’ to clear the backlog. As they proclaimed - ‘The answer is 11.7 judge years’ (p. 59).

Following the initial enthusiasm, the Zeisel team’s quantitative approach to judicial staffing was subject to criticism for neglecting the ‘demand side’ of the court delay problem. Priest (1989) depicted Zeisel’s team approach in terms of ‘the metaphor, drawn from the lumber industry, of a logjam. The determinants of the size of the logjam at any point are the rate that logs flow into the lake, the rate that logs flow out of the lake, and the number of logs stuck in the lake from earlier imbalances in the flow.’ Thus, the delay problem or log jam might be addressed by allocating additional judges based on the ‘judge-year’ calculus. Alternatively, the ‘economic approach’ – underlying incentives faced by the litigants advocated by Priest (1989) – ‘suggests that (...) plucking logs off the lake increases the rate that logs flow into the lake.’ In other words, although increasing the capacity of the court results in delay reduction, the improvements in court productivity prompts citizens to file more cases because improved court performance reduces litigants’ costs. Therefore, court caseloads increase and threaten the productivity gains. Priest dubbed this mechanism ‘congestion equilibrium.’

Despite these criticisms, Zeisel’s thinking about court performance fueled the development of the weighted-caseload approach. According to the classic handbook dedicated to the courts as well as legislative bodies (Flango, Ostrom, 1996), weighted caseload methodology is applied to translate court caseload (raw number of cases) into workload (amount of time it will take to dispose that caseload) – which then are converted into judicial staffing needs. Since different types of cases require different amount of processing time, analyzing a ‘mix’ of case filings using weights assigned to particular types of cases, rather than the total (raw) number of filings, offers a better approximation of the workload. In this vein, a ‘weighted caseload study is essentially the response to these two questions:

1. How much judge time, on average, is required to hear each type of case?
2. How much time does a typical judge have available for hearing cases?

In a nutshell, the number of judges required is determined by dividing the amount of judge time needed to hear all cases by the time judges have available to hear cases’ (p. 25). Thus, it is just more sophisticated way of thinking about judicial capacity – Zeisel’s team ‘judge-years.’ Weighted caseload methodology gained popularity in the United States in the 1960s, notwithstanding initial criticism which pointed to its inability to take into account cross-court differences in efficiency (Doyle, 1978). Since then, weighted caseload statistical models have been systematically developed, for example, to account for productivity differences between metropolitan courts in the largest cities and smaller courts (Flango, Ostrom, 1996, p. 21). They also gained traction outside the USA in continental legal systems like the Netherlands’ ‘Lamicie-model’ and Germany’s ‘PEBB§Y-system’ (Lienhard, Kettiger, 2011).

The logic of weighted caseload systems, built on constant weights assigned to particular types of cases, drew the attention of law and economics (“L&E”) scholars. Applying a rigorous set of assumptions from mainstream ‘rational agent’ economics to their analysis of court case processing, they proclaimed that courtrooms are populated by ‘homo oeconomicus.’ Fueled by an array of theoretical and econometric models, researchers endorsed the so-called ‘exogenous productivity of judges’ – the hypothesis stating that judges pressured by growing caseloads adjust their case processing activity to increase their productivity – in terms of weighted caseload model – to squeeze time required to adjudicate given

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1 Authors themselves called this number ‘the cardinal fact of the study and the pivotal figure for the subsequent discussion of remedies for backlog’ (p.8)
2 Also dubbed as ‘demand side’ as oppose to the ‘supply side’ – focused on court system resources
3 Recommended in the handbook as the best method for assessing judicial needs
4 See Tennessee Trial Courts Judicial Weighted Caseload Study (Tallarico et al., 2013) for contemporary example
5 In practice, weights are updated every few years – for example in Tennessee first study has been conducted in 1999, second in 2007 and third in 2013 (Tallarico et al., 2013)
6 Their credo might be summarized in the statement ‘people respond to the incentives’
The contribution of this paper to the literature on quantitative modeling of court performance is threefold. First and foremost, it revisits the ‘exogenous productivity of judges’ hypothesis, arguing that its empirical confirmation has been driven by assumptions regarding court’s production function -- assumptions offered by L&E scholars. Second, it proposes a ‘hockey-stick’ production function that reconciles the ‘production function’ approach with weighted caseload methodology. Thus, it enables scholars and practitioners to empirically address typical research questions relating to court case processing efficiency studies with the improved reliability of weighted caseload models. Third, it proposes an extended methodology of model evaluation, rooted in the tradition of ‘stylized facts’ popular among macroeconomists, by taking into account the model’s ability to reproduce key regularities observable in ‘real world’ court performance.

The rest of this paper is organized as follows: Section Two briefly reviews law and economics literature devoted to the modeling of court performance and presents in detail the ‘exogenous productivity of judges’ hypothesis. Section Three discuss our empirical strategy, and proposes a methodology of model evaluation. Section Four outlines institutional background of the key elements considered in our production function. Section Five presents the simplest formulation of our ‘hockey-stick’ production function model. Section Six evaluates the performance of that model, comparing it with Cobb-Douglas models popular in L&E literature. Section Seven offers some insights for further research, incorporating the ‘quality dimension’ into production-function analysis. Section Eight concludes the discussion.

2. ‘Exogenous Productivity of Judges’ – The Hypothesis and Empirical Evidence

Although weighted caseload methods dominate the allocation of judicial and staff resources in many jurisdictions, they still attract criticism from academia. As pointed out earlier, weighted caseload methods assume that given types of case require on average measurable adjudication time frames which are converted into case weights. Similar to other occupations, there are limits to how many cases judges, on average, can reliably process in a given time frame. On the contrary, L&E scholars argue that the time required to adjudicate any given type of case can vary, depending on the relative levels of court congestion and the pressure exerted on judges – whether internally or externally – to relieve such congestion. In other words, judges consciously exercise some flexibility in determining how much time is required to adjudicate the case. When overloaded, they may be motivated to simply work faster; their productivity is exogenous. This implies that staffing needs calculated using weighted caseload may result in excess capacity because this judicial flexibility factor is not included in the calculus. Because Beenstock and Haitovsky (2004) offer the most advanced example of such an approach, we rely heavily on it to present and detail the logic and methodological apparatus behind the ‘exogenous productivity of judges’ hypothesis.

Beenstock and Haitovsky based their argument on two different analytical tools: a theoretical model of the rational judge, and an empirical one – the estimated production function. We present them below in detail.

To explain interdependencies between judicial appointments and the court output, Beenstock and Haitovsky deployed mathematical model of judicial behavior, building upon the influential work of Posner (1993) and Cooter (1983). They assumed that judges (i) are rational ‘homo-oeconomicus’ maximizing their expected utility and (ii) draw utility from that leisure, (Posner, 1993; Cooter, 1983) thus minimizing the effort required for case adjudication. However, they also (iii) draw disutility or negative utility from increasing backlogs, because they may diminish their prestige and prospects for promotion or incentives. Thus the central mechanism behind the model is the trade-off between ‘exerting more effort and thereby improving performance, or taking it easier, thereby risking the wrath of the court president’ (Beenstock, Haitovsky, 2004).

A complex analysis of the model, one requiring ‘paper and pencil’ exercises with differential equations, led the authors to the conclusion that ‘Judges are apparently no different to other human beings insofar as they respond to the incentives under which they operate. The amount of judge-time required to complete a case varies inversely with caseload pressure.’ (p. 368) It means not only that overloaded judges are likely to work in a more efficient fashion but, in addition, that with minimal case processing pressure, judges will procrastinate and expand the time required to finish the case. Thus ‘a ceteris paribus increase in the number of judges will tend to reduce the productivity of incumbent judges, because their caseload pressure is reduced. (…). The newly appointed judges naturally increase the output of the court. However, this increase may be partially or even totally offset by the fall in output of the incumbent judges.’ (p. 352) To sum up, according

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7 The authors of this paper prefer the notion of “homo-maximizer” since the objective of the agent (modeled judge) is to maximize discounted expected utility. Certainly, it is not the only approach represented in contemporary (as well as historical) economics, so we believe that notion ‘homo oeconomicus’ encompasses also other concepts of ‘rationality’ e.g. bounded rationality and adaptive learning.

8 Case weight in the weighted caseload vocabulary
to the Beenstock and Haitovsky’s model there is no clear link between the number of serving judges and a court’s overall capacity to handle its caseload.

This theoretical insight has been put under empirical scrutiny. At the initial, descriptive stage, the authors simply plot unweighted caseload numbers against the number of resolutions in each court. Hardly surprising, it turned out that courts with larger caseloads also yielded higher quantities of resolved cases. Seeking more formal confirmation of their hypothesis, Beenstock and Haitovsky estimated so called ‘production function’ equation. In economics, the concept of production function is defined as ‘the relationship [functional] between the quantity of inputs used to make a good and the quantity of output of that good’ (Mankiw, 2014, p. 376) under available production technology. In the context of court efficiency, Beenstock and Haitovsky linked case processing productivity ‘inputs’ – namely caseload and number of judges - and ‘output’ - the number of resolutions - in the following fashion:

\[ \ln_{\text{resolutions}} = \alpha + \beta (\ln_{\text{caseload}}) + \gamma (\ln_{\text{judges}}) + \varepsilon \]  

(1)

As all variables entered the model in logarithms, the production function took the well-known Cobb-Douglas type form. Estimation results sealed the ‘exogenous productivity of judges’ argument, upon which bold evaluative judgment and a landmark policy recommendation have been made: ‘Planners of the judiciary might cynically conclude that they should let growing caseload pressure over-work judges even further, thereby increasing their productivity. After all, this strategy has worked over the last 40 years, so why not continue? Better still, if the number of judges makes no difference to the output of the court, why not cut the number of judges?’ (Beenstock, Haitovsky, 2004 p. 368)

Certainly both the existence of a positive correlation between the caseload and the number of resolutions and the interpretation that congestion incentivizes judges to work harder have been present in the academic literature long before Beenstock and Haitovsky. Robert Murrell (2001) reviewed such claims and attributed their conclusions to the application of inappropriate statistical techniques like OLS regression, incapable of dealing with simultaneous relation between congestion and caseload (see Priest’s congestion equilibrium). He also demonstrated, using Romanian courts data, that simultaneous estimation of ‘supply’ and ‘demand’ equations - instead of just one ‘production function’ - can overcome this problem.

Surprisingly, Murrell’s estimation approach leading to the ‘prosaic conclusion that larger caseloads cause longer delays (p. 2)’ does not resonate within the L&E literature; Beenstock and Haitovsky’s Cobb-Douglas production-function approach attracted many followers. Rosales-Lopez (2008) (OLS), deploying the Cobb-Douglas analytical model in Spain’s courts, reported that ‘a 10% increase in workload produces a 3% increase in judicial output’ (p. 241). Dimitrova-Grajzl et. al (2012) went much further, accompanying similar estimates with the claims that ‘in contrast to judicial staffing, we find that caseload has a statistically significant positive effect on the number of resolved cases.’ (p. 24). The conclusion seems straightforward: ‘congruent with Beenstock and Haitovsky’s (2004) evidence from Israel, our results therefore suggest that in Slovenia, judge productivity is endogenous in the sense that incumbent judges complete fewer cases in the presence of new judicial appointments’ (p. 24) and ‘(…) in Slovenia, an increase in the demand for court services (as proxied by an increase in caseload) incentivizes judges to substantially increase their productivity’ (p. 25).

What is more, Dimitrova-Grajzl et. al. (2012) disturbingly remarked: ‘holding everything else constant, court output does not statistically significantly depend on the number of serving judges…In contrast to judicial staffing, we find that caseload has a statistically significant positive effect on the number of resolved cases.’ (p. 24). This explanation offered by production function econometrics, seems at odds with the common sense assumption that cases are adjudicated by judges. Regrettfuly, in a subsequent empirical study carried out on judge-level data (Dimitrova-Grajzl et. al, 2012b), the same research team abandoned further exploration of the ‘exogenous productivity’ hypothesis.

What is noteworthy is that some researchers went beyond the simple Cobb-Douglas equation and estimated more elaborate versions of court production functions. For example Van der Torre et al. (2007) applied the court level translog

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9 Strong, positive linear correlation between caseload and number of resolutions.
10 The equation (1) can be easily rewritten as: \[ \text{resolutions} = \text{const} \times \text{caseload}^\beta \times \text{judges}^\gamma \]. As the expression become linear in logs, researchers are able to use wide range of linear estimators in order to uncover values of \( \beta \) and \( \gamma \) parameters.
11 Ordinary least squares (OLS) - a method for estimating the unknown parameters in a linear regression model.
12 Although imperfect due to data limitations. Despite the fact that Murrell studied commercial courts, he applied total number of judges in the examined courts, including those assigned to non-commercial cases.
13 OLS and its instrumental variable extension - two-stage least-squares (2SLS).
production function\textsuperscript{14} to Netherlands’ data, however squared and interaction variables turned out statistically insignificant, reducing the specification to the well-known Cobb-Douglas form.

3. Setting the Stage - General Remarks on Court’s Production Function Empirics
To set the stage for our empirical analysis of interdependences between an individual judge’s workload and output, we address some methodological issues which, in our opinion, undermine many earlier empirical inquiries. This section explains our empirical strategy aimed at reducing ‘noise’ in the data, in order to distill ‘the signal’ - to follow N. Silver (2012) book’s metaphor.

3.1 Model’s Consistency
First of all, maintaining the production function approach, we consider it essential to provide conceptual consistency and traceability from known weighted-caseload models or other approaches (e.g. the queuing models – depicting flow of cases through the court in terms of queue\textsuperscript{15}). In the universe of weighted-caseload model, each judge has a defined docket and time resources which define his or her capacity - the number of cases feasible to adjudicate in a given time period. In contrast, production functions applied in the empirical analysis constitutes ‘black boxes’ loosely linking (in Cobb-Douglas fashion) aggregated number of cases and judges in order to obtain aggregated number of resolutions. As illustrated in the next paragraph, common data shortcuts only amplify this problem.

For example Mitsopoulos and Pelagidis (2007) in their study of Greek courts’ timeliness applied the ‘number of total employees that work in any given year for the Ministry of Justice’ instead of number of judges in their analysis (p. 224). Barrère et al. (2001) estimated sophisticated stochastic frontier production functions\textsuperscript{16} for civil and criminal cases in French first-instance courts. However, in each production function, they included the same total number of judges – despite the fact that some of them have been assigned exclusively to civil while others to criminal cases (Goudriaan, 2003). Similarly, Murrell (2001) - advocating simultaneous estimation of ‘supply’ and ‘demand’ equations on the example of Romanian commercial courts - utilized the total number of judges, including those assigned to non-commercial cases. What is more, Cobb-Douglas approach is also error-prone – especially during simulation exercises. In order to illustrate this point, we fed Rosales-Lopez (2008) model with following – hypothetical – data: workload = 550 cases,\textsuperscript{17} court staff = 11\textsuperscript{18}. The model predicted... 560 resolutions! Undoubtedly such result is ridiculous – judges cannot resolve 560 cases, when there are only 550 cases in the docket. In contrast, our proposal offers conceptual traceability in terms of understanding what is going on inside the model and the source of the results.

Thus, our proposal requires distilling, from aggregate data, the amount of judicial time devoted to adjudicate particular type of cases, as well as capturing the number of cases. Contrary to the traditional court level approach,\textsuperscript{19} the production function should then link individual workload (and, in more sophisticated version, some individual characteristics) with the number of resolved cases.

In order to practically illustrate this proposal, we limited our empirical inquiry to the first-instance criminal divisions in Polish Regional Courts. The organization of the criminal court system in Poland is defined by a two-instances principle, the right to appeal, and a three-tier hierarchical structure (district courts, regional courts and appellate courts). Generally, the criminal division of district court acts as court of first instance, and the regional court as a court of appeal. However, in the felony cases, the regional court act as court of first instance and the appellate court as a court of appeal (see fig. 1). To improve work organization, the first- and second-instance criminal divisions or regional courts have been separated, and judges are (more or less) permanently assigned to them. Thus, in our dataset, we are able to accurately pick the amount of judicial time (full-time equivalent, hereafter FTE) devoted to adjudicate the pool of felony cases. Since judges assigned to the first instance criminal divisions of regional courts deal exclusively with felonies, we are able to obtain a fairly reliable picture judicial work and case flow.

\textsuperscript{14} The translog production function is a generalization of the Cobb–Douglas production function, including interaction variables (and, in this case, squared variables). It is expected to offer more detailed and flexible alternative to the latter.
\textsuperscript{15} See RAND (1975) for early review
\textsuperscript{16} Frontier production function encompass the best performing (efficient) units in the sample – creating so called ‘production possibility frontier’
\textsuperscript{17} Minimal value of workload in her sample was 1241, thus value 550 seems imaginable in some counterfactual exercise e.g. reform blueprinting.
\textsuperscript{18} Values in her sample range from 8 to 11
\textsuperscript{19} Typically, one data point represent one court’s ‘inputs’ and ‘output’ - Dimitrova-Grajzl et. al, 2012b is a notable exception (data points represent individual judges), however they abandoned any attempt to uncover relations between judicial congestion and productivity
3.2. Data Aggregation

A common pitfall of much empirical (econometric) research on court performance is a doubtful aggregation of cases. Obviously, cases differ in terms of their complexity. The main types of complexity discussed in the legal literature are (i) legal complexity, (ii) factual complexity, and (iii) participant complexity (Ford, 2013). However, as far as productivity, understood in terms of the number of cases that can be adjudicated in given time period, the notion of ‘time-consuming case’ seems to be more appropriate than ‘complex case’\textsuperscript{20}. While a legally complex case might require a library work and reflection or a flash of genius, a simple case might require extensive amount of paperwork. This consideration is particularly valid in case of heavily procedural frameworks\textsuperscript{21}, requiring judges to perform excessive paperwork.

Typically, researchers either simply aggregate different types of cases or focus on a particular category such as civil, criminal or administrative. To the extent of our knowledge, the studies of Gillespie (1976) and Van der Torre et al. (2007) are notable exceptions because they employed case weights. Unfortunately, up to this date, the Polish courts have not implemented a weighted caseload system. Thus we focused on particular case types, excluding court divisions with a case mix encompassing time-consuming cases – trial-level cases -- and large number of far less time-consuming ones, like writ of payment cases, adjudicated using streamlined procedure by civil and commercial divisions. As we concluded, in civil or commercial divisions, courts with equal aggregated caseload might substantially differ in terms of actual workload. In contrast, criminal divisions of regional courts dealing with felonies were a favorable choice because the caseload should provide better approximation of workload. Certainly, focusing on criminal courts cannot solve the problem of data aggregation; however, we expect that it mitigate its impact enough to draw meaningful conclusions.

3.3. Stylized Facts Approach to the Model Evaluation

We also departure from typical approach in terms of model evaluation. In our opinion, standard statistical tests\textsuperscript{22} are just the tip of the iceberg, and the decisive criterion should be based on the model's ability to replicate empirical patterns observed in the real world. To facilitate such assessment, we follow the so-called ‘stylized facts’ approach introduced by Kaldor (1961). As Kaldor explained ‘Since facts, as recorded by statisticians, are always subject to numerous snags and qualifications, and for that reason are incapable of being accurately summarized, the theorist in my [Kaldor’s] view, should be free to start with a ‘stylized’ view of facts - i.e. concentrate on broad tendencies, ignoring individual detail, and proceed on the ‘as if’ method, i.e. construct a hypothesis that could account for these stylized facts.’ In other words, stylized fact

\textsuperscript{20} Although it is plausible that complex cases require (on average) more time to adjudicate, the relation between ‘complex’ and ‘time-consuming’ cases seems to be far from straightforward.

\textsuperscript{21} See (Djankov et al. 2003) for influential comparative view of procedural formalism as a primary driver of court delay. According to them, formalistic civil law systems rooted in French legal tradition are associated with longer delays as compared with common law systems. See also Siems (2005) for critique of their approach.

\textsuperscript{22} Carried out during regression model’s diagnostics
might be described as a widely accepted stable pattern, observed regularity -- confirmed by different sources of information: like statistical studies, experience, expert opinion -- that demand scientific explanation.\textsuperscript{23} We argue that stylized facts can also be formulated in the field of court performance. Thus, any model pretending to reliably depict court performance, including production function models, should be able to replicate them. Below, we list three basic and presumably uncontroversial regularities observed in various court systems:

- There are courts perpetually struggling with persistent and serious backlogs;
- There are courts operating without excessive backlogs which also seem to be able to handle increasing workload without additional resources;
- These courts systematically differ in terms of size and congestion - larger courts in highly populated urban areas and confronted with huge caseloads tend to be sluggish from a case processing perspective and to accumulate increasing backlog.

In our opinion, their universality, confirmed in the literature as well as practical experience, qualifies them as a useful departure point in model evaluation. Figures 2 and 3 briefly illustrate these stylized facts in the context of Polish first-instance criminal divisions of regional courts, henceforth criminal courts. The former compares caseloads, number of resolutions, backlogs and number of judges serving in the largest, in terms of filed cases, court, SO\textsuperscript{24} in Warsaw, and 15 of the smallest, in terms of filed cases, courts. Despite similar numbers of filings, the Warsaw court resolves fewer cases than the 15 smallest courts, thus it has accumulated a larger backlog. One possible explanation is comparatively smaller numbers of active judges. The latter figure illustrates the third stylized fact; it provides basic statistics depicting the performance of three largest and three smallest, in terms of filed cases, courts. Satellite image of city lights provides insight on population density – illustrating that the biggest and most poorly performing, in terms of backlog, courts are located in the biggest urban centers, while smallest courts are typically located in the less-populated areas of the country.

![Fig. 2. Comparison of the filings, resolutions, backlog and the number of serving judges in the largest (Warsaw) and in 15 smallest criminal courts in 2012.](source: The Ministry of Justice unpublished statistics)

\textsuperscript{23} On the other hand, N. Kaldor’s assessment of broadly agreed patterns has been challenged by other macroeconomists. As remarked by R. Solow (2000) ‘It is no doubt that they [Kaldor’s facts] are stylized, though it is possible to question whether they are facts (p. 2)’. Despite this critique, stylized facts approach is routinely used in contemporary macroeconomics.

\textsuperscript{24} Polish abbreviation of Regional Court
Fig. 3. Key data on three largest and three smallest first instance criminal courts. Satellite image of city lights (2010) reveals population density.

Source: www.esa.int, The Ministry of Justice unpublished statistics

4. Institutional Background – Key Elements of the Production Function

In this section we briefly describe key elements considered in our production-function approach, namely criminal courts judges, felony cases and the criminal procedure. Although readers who focus on modelling issues rather than institutional background may want to skip this section, we consider it particularly useful, both for better conceptualization of the model, and to illustrate the complexity of modelled phenomena.

4.1. Criminal Judges

In criminal courts, professional judges sit together with lay judges, serving as non-legal representatives of the local community. Despite strong *de jure* guarantees, lay judges who are chosen by the councils of municipalities within the jurisdiction of a given court tend to be *de facto* primarily inactive ‘observers’ of the adjudication process (Bartnik, 2009).

Although we are unable to provide information about number of lay judges in criminal courts, Table 1 presents the aggregate number of lay and professional judges in the Polish common court system. Substantial decline in the number of lay judges reflects changes in the civil and criminal procedure; the scope of cases requiring lay judge participation has been significantly reduced over past years25. Thus, it seems highly unlikely that the remaining small number of lay judges can be construed as a bottleneck in felony case adjudication. The key determinant of a criminal court’s productivity is the number of professional judges, thus, from our empirical standpoint, lay judges might be omitted without noticeable loss of accuracy.26

<table>
<thead>
<tr>
<th>Years</th>
<th>Number of professional judges (judicial posts stated in the budget)</th>
<th>Number of lay judges</th>
</tr>
</thead>
</table>
9 853 (in 2006) | 44 000 |
10 323 (in 2010 and 2011) | 22 000 |
| 2012 - 2015 | 10 348 (in 2012) 
10 448 (in 2013 and 2014) | 14 000 |

Source: CEPEJ studies and MoJ unpublished statistics

According to the provisions of Article 28 of the Code of Criminal Procedure (hereafter CCP), for hearing felony cases, *the court shall sit in a panel consisting of one judge and two lay judges*. However, in rare situations, the court may decide to hear the case in a panel comprising three judges because of the *special complexity of the case*. Also, when hearing cases involving offences for which the law provides punishment of life imprisonment, the court shall sit in a panel of two judges and three lay judges. Generally, the share of cases involving atypical panels other than a professional judge and two lay judges should not exceed 5-7% of the caseload. Table 2 illustrates that offences for which the law provides punishment

25 For example they have been excluded from first tier of criminal court system: district courts – see fig. 1

26 Although there is widespread view that lay judges appointment is not a bottle neck in criminal courts, the issue of lay judge change during adjudicating particular case (i.e. death) might be serious obstacle.
of life imprisonment comprise 5-7%. Moreover, as far as special case complexity is concerned, the authors of WC study (see section IV.2) during first half of 2012 report no such cases.

Unfortunately, due to data limitations, we are unable to pick cases requiring atypical panels, thus we have to assume that such situations are uniformly distributed across the courts. Any violation of this assumption will be reflected in the increase of error term (dispersion of the observations around the fitted function).

4.2. The Felony Case

As pointed out in Section Three, felonies adjudicated in criminal courts represent the most serious, and - what particularly important in the context of our modelling exercise – the most time-consuming cases. They usually include an elaborate discovery phase, including witness testimony, as well as drafting complex opinions.

From the legal point of view, these cases are defined in the article 25 § 1 of the CCP as:

1. felonies enumerated in the Penal Code (offences for which the law provides for the punishment of 3 or more years) and in special acts (Drug laws and Nazi war crimes),
2. misdemeanors specified in Chapters XVI (war crimes) and XVII (treason) and in selected articles (special categories of beatings, euthanasia, abortion, plane hijacking and so on),
3. misdemeanors which pursuant to some particular regulation lie within the jurisdiction of the Regional Court (threatening to the journalist and suppressing freedom of the press).

In fact, the first point encompasses vast majority of the cases. The statistics on the number of adjudicated offenders, provides some insight to the nature of adjudicated cases.

| Table 2. Felonies – share of adjudicated offenders in 2013 |
|-----------------|-----------------|
| Drug offences   | 15.5 %          |
| Robbery with a firearm, knife etc. | 7.3 %          |
| Homicide        | 4.7 %           |
| Fencing         | 2.1 %           |
| Rape (selected cases) | 1.7 %          |
| Grievous bodily harm | 1.5 %       |
| Brawl or a beating with the consequence of death of a human being | 1.4 %          |
| Counterfeiting or altering money | 1.1 %          |
| Others (not specified) | 64.6 %         |

Source: MoJ unpublished statistics

According to the preliminary and still officially unpublished report from pioneering ‘weighted caseload’ study carried out in 2011 - 2012 (Ministry of Justice, 2013) – herein after (“WC study”) - adjudication of felony cases requires on average ca. 102.1 hours of judicial work.

Besides felonies, criminal courts handle also so called cumulative judgments: these are aggregate penalties imposed on criminal defendants sentenced in multiple judgments rendered by different courts. These cases constitute roughly 33 percent of caseload and are considered as much simpler, requiring 26.3 h of judicial time according to the WC study.

In order to make our results independent from the WC study, since they are rather experimental, not fully operational and officially implemented, we regretfully abandoned the distinction between felony cases and cumulative judgments, assuming that the share of the latter is roughly constant across the courts. We concluded that the ‘average’ criminal case requires 77 hours of judicial time. Thereby, departure from this assumption translates into the error term in our model.

In order to assess plausibility of this assumption, we presented in Appendix I an alternative version of our model, taking cumulative judgments explicitly into account. Results obtained in this exercise are in line with baseline model reported in the Section Five.

27 Authors of WC study presented exact figure of 102 hours 04 minutes and 32 seconds. In this paper we rounded up WC Study’s estimates to the first digit.

28 Time required to adjudicate ‘average’ criminal case was calculated using felony case weight derived from WC study multiplied by their share in the caseload (102.1 h x 67%) plus cumulative judgment weight multiplied by their share in the caseload (26.3 h x 33%)
4.3. Criminal Procedure
Since the empirical part of this paper employs the production-function approach, using particular functional form to depict relation between inputs (judicial time resources) and outputs (number of resolved cases) under given production technology (the way of transforming inputs into desired outputs), we might think about criminal procedure rules in terms of ‘production technology.’ This provocative interpretation was also presented in Dusek (2013).

Poland has a continental criminal justice system rooted in the Romano-Germanic law tradition and heavily influenced by the period of communist rule - a consequence of the lengthy Soviet domination after World War II. In 1997, almost a decade after the collapse of communism, a new modern code of criminal procedure (CCP) was promulgated. In line with inquisitorial tradition, it is based on the principle of objective truth which requires courts to establish the relevant factual circumstances of the case that constitute the basis for judicial decision (Murzynowski, 2005).

The principle of ‘objective truth’ affects criminal court’s performance in at least two ways. First and foremost, it mandates the judicial obligation to gather the evidence and establish this objective truth as opposed to comparing evidence presented by opposing parties in adversarial proceedings during the discovery, sentencing and opinion-drafting processes, making adjudication more time-consuming.29

Secondly, procedures might affect judicial decision-making process, as analyzed by cognitive psychologists (see Casey et al. 2013 for literature review). For example it seems plausible that inquisitorial, formal procedures of discovery and decision making might constrain heuristic decision making. As noted in (Gigerenzer, Engel, 2006), ‘there are a number of restrictions or constraints upon their [heuristics] use. (...) The constraints also differ between the continental and the case law systems’ (p. 250). On the other hand, The Royal Commission on Criminal Justice, also known as the Runciman Commission, found that in inquisitorial jurisdictions like Germany and France, cognitive bias - judicial tunnel vision - creates greater risk of the wrongful conviction than in an adversarial framework (Leigh, Zedner, 1992). The specific relations between inquisitorial and adversarial frameworks and judicial decision-making exceed the scope of this paper.

Keeping in mind, that according to Beenstock and Haitovsky, ‘pressing for compromises, plea bargains and streamlining courtroom hearings’ (p. 367) are key mechanisms enabling judges to ‘adjust’ their productivity, we concluded that the procedural framework of the CCP is an important obstacle to such ‘adjustments’. On the contrary, American judges, when confronted with exploding caseload during the prohibition era, improved their productivity by abandoning trials as primary mode of adjudication (see fig. 5). For example, in U.S. state courts, over 90% of felony convictions are routinely obtained by guilty plea.30 In Polish first-instance criminal divisions of regional courts, alternative case-resolution models to the full trial process, which requiring all parties’ agreement31, account for ca. 20% of all convictions.

5. The Model – ‘Hockey-Stick’ Production Function
Having in mind the ‘exogenous productivity of judges’ hypothesis as well as stylized facts approach outlined in Section III.3, we now move toward blueprinting an alternative quantitative model of court performance. Our point of departure is the ‘production function’ approach; however we also take into account insights from other models, especially the weighted caseload methodology.

29 Anecdotal evidence points to the court’s obligation to hear 15 thousand witnesses (repeating roughly the same story, depicted also in the collected financial documentation) in a Madoff-style fraudulent investment scheme case.

30 Felony Defendants in Large Urban Counties, 2009 - Statistical Tables; December 2013, NCJ 243777, Table 21

31 Art. 335 and 387 CCP, constituting respectively so called ‘conviction without a trial’ and ‘voluntary submission to penalty during a trial’
Our dataset is based on the yearly statistical reports collected by the Ministry of Justice from particular criminal courts. For each of the 45 criminal courts, the dataset contains the amount of judicial time devoted to adjudication (number of judges expressed in FTE’s), the number of cases pending from previous year, the number of cases filed in the given year and the number of cases resolved in given year (see table 3 for basic statistics). Since we are unable to examine individual judge’s dockets, we calculated – for each criminal court – the ‘average judge’s’ workload and output. The former was calculated as a sum of cases pending from previous year plus cases filed in given year, divided by number of judges (FTE). The latter was calculated by dividing number of cases resolved in the given year by the number of judges (FTE). Thus, our results could be intuitively interpreted in terms of ‘average criminal judge’s’ reaction to growing caseload pressure. Figure 6 plots the ‘average criminal judge’s’ workload against output, using data from 44 criminal courts in the 2012 (each data point represents one criminal court).

### Table 3. Estimation dataset: basic statistics

<table>
<thead>
<tr>
<th></th>
<th>Min</th>
<th>Median</th>
<th>Average</th>
<th>Max</th>
<th>St. dev.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pending cases (from 2011)</td>
<td>12</td>
<td>62</td>
<td>130</td>
<td>688</td>
<td>150</td>
</tr>
<tr>
<td>Filed cases</td>
<td>25</td>
<td>144</td>
<td>223</td>
<td>1061</td>
<td>207</td>
</tr>
<tr>
<td>Resolved cases</td>
<td>29</td>
<td>147</td>
<td>221</td>
<td>1014</td>
<td>200</td>
</tr>
<tr>
<td>Share of cumulative judgments in the caseload</td>
<td>13 %</td>
<td>33 %</td>
<td>33 %</td>
<td>48 %</td>
<td>8 pp</td>
</tr>
<tr>
<td>Number of judges (FTE)</td>
<td>1.8</td>
<td>5.7</td>
<td>8</td>
<td>36.9</td>
<td>6.9</td>
</tr>
</tbody>
</table>

Source: Own work

Any parametric estimation of the production function (regression like OLS), inevitably imposes restrictions on the function’s shape – in the majority of L&E papers Cobb-Douglas one. Instead, we remain agnostic about all aspects of production-function shape, applying nonparametric regression called LOWESS (locally weighted scatterplot smoothing, see Hamilton, 2009, p. 233). Thus, the data is not ‘forced’ to fit a particular, assumed curve, but directly shapes the estimated line. Green line on the fig. 6 represents LOWESS estimate of the production function.

![Fig. 6. Scatterplot exploring behavior of the ‘average judge’ facing growing workload](source: Own estimations based on The Ministry of Justice unpublished data)

A visual examination of the scatterplot leaves no doubt that there is positive correlation between workload and ‘output’ of the judge (in line with L&E literature). However, the pattern seems to change with growing caseload. LOWESS results offers a quite blurred but still recognizable picture. Although the relationship appears quite linear, with judge whose workloads are increased able to handle the additional work in line with the ‘exogenous productivity’ hypothesis, everything changes when the workload exceeds a ca. 38-case threshold. At that point, our ‘average criminal judge’ has been

---

32 Court in Olsztyn was omitted as an outlier due to exceptionally high share of cumulative judgments (55.5% of caseload as compared to the average 33%)
banished from the ‘exogenous productivity’ paradise; notwithstanding the growing caseload, he or she is able to resolve only ca. 28 cases; his productivity absorption capacity has been exhausted, and the LOWESS production function breaks). Because of this break point between the steep and flatter part of the function, we dub this production function as the ‘hockey-stick’ model.

Noteworthy, this prosaic story – the existence of a quite rigid limit of cases that might be resolved by a single judge in a finite time period - is in line with the well-established tradition of modeling court performance. Weighted caseload models identify this limit, which corresponds with our break point, as a moment when judicial workload capacity is equivalent available judge-time. Similarly, simulation models of court systems incorporate such mechanisms (see e.g. early works of Taylor et al. (1968) and Stein (1969) or the more contemporary compendium of Nagel (1992, p. 190-200). Also R. Posner, one of the founding fathers of law and economics, assumed that in short run it is impossible to expand court system output (Posner, 2009 p. 128 - 9). Even Beenstock and Haitovsky themselves foresee the existence of ‘some upper limit of coping’ (p. 366) – however abandoned its further exploration. Recent literature on cognitive psychology of judicial decision-making also offers strong support for the case of ‘upper limit of coping’ – see for example (Klein, Mitchell, 2010).

Going back to the ‘stylized facts’ developed in the previous section, one can see that ‘hockey-stick production function’ – despite its simplicity – offers a potential to replicate them. Smaller, less congested courts - operating below break-point, are able to adjust their productivity to growing caseload (until they reach the threshold). On the other hand, larger and often congested courts with more than ca. 38 cases in the judicial docket, are typically unable to further increase their productivity, thus backlog growth is inevitable without the provision of additional judicial resources.

Indeed, the empirical analysis presented in this paper, although crude if compared with reviewed empirical approaches, tells a quite reasonable story backed up by consistent combination of the agnostic, data driven analysis and common sense. In the next section we propose a more rigorous framework to respond to Box’s question about usefulness of our model.

6. Assessing Calibrated ‘Hockey-Stick’ Judicial Production Function

Since court delay, the main motivation behind empirical modeling of court performance, is a dynamic phenomenon, usually deteriorating over time, any model claiming practical application should be able to replicate the process of backlog accumulation. In order to verify our model through this lens, we performed simple counterfactual exercise attempting to visualize whether it is able to replicate actual dynamics of criminal courts ‘output’ and backlog during 2008 – 2012 period33.

For the purpose of this exercise, we calibrated – on the basis of fig. 6 - the simplest possible hockey-stick production function formula (see green dashed line in fig. 7):

\[
\text{av. judge output} = \begin{cases} 
0.75(\text{av. judge workload}), & 38 < \text{av. judge workload} \\
28, & \text{av. judge workload} \geq 38
\end{cases}
\]  

(2)

The mechanism of our counterfactual exercise is straightforward – for each court we obtained actual data on initial backlog (from 2007) and the number of filed cases, as well as the number of serving judges (FTE) in each consecutive year. Then we applied our model (equation 2) to calculate artificial time series for number of resolved cases and corresponding backlogs during a five-year horizon. We then assessed model performance, comparing this artificial time series with real-world data. Secondly, we carried out an analoical exercise with constant returns from the scale Cobb – Douglas production function34 (see red dotted line in fig. 7). Taking into account ‘stylized facts’ listed in the subsection III.3, we selected the three largest and three smallest criminal courts, in terms of filed cases, as our test site (see fig. 3 for basic data on their performance).

Results are plotted in fig. 8. As can be seen, a very simple model offers a reasonably useful explanation of court productivity as well as backlog dynamics in the smallest and largest courts in mid-term horizon. We consider these results very promising.

In our opinion fig. 8 offers also tough reality check for competing model, estimated under assumption that a court’s ‘production function’ has a constant returns of scale Cobb-Douglas form. Although the results for the smallest courts are comparable, the Cobb–Douglas model visibly fails to replicate the process of backlog accumulation in three largest courts. In line with hypothesis that overloaded judges increase their productivity, the model systematically overstated the number

33 The period was selected due to comparable data availability
34 In case of variable returns of scale Cobb-Douglas production function, backlog in the biggest courts would be attributed to their size.
of resolved cases, thereby predicting systematically declining backlog. One might bitterly conclude, that in the universe of such model, the backlog simply clears itself, absent any need for any backlog-reducing policies.

What is particularly important, as noted by Gillespie (1976), who found evidence that in US federal district courts, judicial response to the growing caseload differs between courts operating ‘below’ and ‘over’ their capacity;35 ‘until resources are fully employed, productivity is not relevant, as the additional costs of meeting increased demand are zero’ (p. 259). Also New Zealand’s Report of the Ministry of Justice (2004) found evidence in favor of a nonlinear relation between court’s ‘inputs’ and ‘outputs’. In line with this reasoning, measuring court efficiency in the Cobb-Douglas framework, thus ignoring the ‘upper limit of coping’ might lead to the misattribution of inefficiency – e.g. to the court size.

The second test, aimed at assessment and verification of our hockey-stick production function, addresses its ‘microfoundations’. Since the break point on the function represents the situation when ‘average criminal judge’ reached his capacity, it conceptually corresponds with a situation when the judicial workload is equivalent to the judge year in the weighted caseload model. Thereby, points unveiled by both methods should coincide. In this case we are able to conduct a falsification exercise – if our production function is not a mere mirage, the break point should hit the judicial capacity derived from WC study.

The so-called ‘process approach’ applied in the WC study emphasized criminal procedure design (for example case reception has been divided into eight possible judicial activities). The authors carefully analyzed CCP, identifying almost 100 steps required to fully process felony cases. Then, using sample of 430 felony cases and 367 cumulative judgments, they assessed the time required to complete particular steps and their frequency, calculating an aggregated criminal case weight. Such approach provides a genuine link between procedural rules, the time required to adjudicate felony case and judicial capacity. On the contrary, our framework provides only a bird’s eye view of these links (as painted by aggregate, court-level data). Figure 9 confronts our LOWESS estimates with the value equalizing judicial workload and judge-year, derived from WC study.

![Fig. 7. Production functions employed in counterfactuals](image)

Source: Own estimations based on The Ministry of Justice unpublished data

35 According to Gillespie, even courts operating ‘over’ their capacity has been able to absorb some additional caseload (however to a lesser extent than in those operating ‘below’ capacity) – as he concluded ‘Courts - even those at ‘capacity’ - retain the ability to process additional demand with existing resources’. Discussion on procedural framework in the context of court production function, presented in subsection IV.3. offers potential explanation for this finding.
Fig. 8. The results of counterfactual exercise – hockey-stick vs. Cobb - Douglas production function.

Source: Own estimations based on The Ministry of Justice unpublished data.
This graphic demonstrates that despite a pyramidal gap in the sophistication and costs of both applied methods, they offer fairly consistent estimates of judicial capacity. Undoubtedly, it is quite powerful argument in favor of proposed formulation of judicial ‘production function.’ Since this very basic model, omitting other production factors such as courtrooms,36 obvious controls like case complexity and various sources of technical inefficiency, is able to deliver pretty reasonable results, it offers substantial potential for further development.

Fig. 9. Limits for judicial capacity – hockey-stick break point (green line: LOWESS estimate - solid, equation 2 – dashed) and WC study judicial capacity (blue dashed line)

Source: Own estimations based on The Ministry of Justice unpublished data, and WC study

Given promising results described above, Bayesian estimation of the hockey-stick production function seems to be a natural extension of our work. It would enable rigorous combination of prior knowledge (case weights derived from separate studies, stemming from the detailed consideration of procedure framework) and aggregated data - in order to fit judicial production function. Such models would enable e.g. systematic ex ante impact assessments of quite detailed procedural reforms.

7. Judicial Productivity and Quality

Traditionally, research papers on court performance, building upon production function approach and usually written by economists, focus entirely on quantitative aspects like relation between filed and resolved cases or time to disposition.37 While this paper is also almost exclusively devoted to the quantitative modelling of judicial productivity, we decided to include some ‘qualitative aspects,’ in order to better illustrate the analytical potential of proposed modelling tool.

Undoubtedly, measuring the ‘quality’ dimension of judicial performance is challenging, both in defining the quality measurement standards and in ensuring consistent application of those standards. Traditional measures applied in empirical studies build upon higher court reversals or number of citations (Posner, 2000) – as a ‘proxies for quality of judicial output’ (p. 711). Other approaches stress the importance of so called ‘procedural justice’ (Hough et al., 2013) – concepts like trust, neutrality and voice (all of them difficult to precisely define). Also practitioners struggle to develop a set of balanced and realistic performance measures covering aspects like access and fairness, inextricably linked with quality of judgments.38

Unfortunately, due to paucity of data, we are unable to design and to implement such quality measures and to integrate them into our empirical framework. However, thanks to Court Watch Poland- an NGO ‘supporting positive changes in the

36 Anecdotal evidence suggests that lack of courtrooms is not the primary concern of criminal judges, especially in the largest regional courts – thus such simplification seems to be justified in the presented case.
37 Rosales-Lopez (2008) is a notable exception, as she considered ‘quality of resolutions’ using reversal rate.
38 E.g. CourTools designed by the National Center for State Courts, http://www.courtools.org/Trial-Court-Performance-Measures.aspx. Also Trial Court Performance Standards, developed by U.S. Bureau of Justice Assistance, offers quite interesting approach: its Measure 3.1.1 requires panels of expert practitioners to assess the court’s adherence to legal requirements by examining documents, case files, and other court records.
Polish system of justice through citizen court monitoring\(^{39}\), we are able to incorporate some ‘quality’ dimensions to our production function framework. Court Watch Poland generated the dataset encompassing several criminal courts, building upon ‘citizen trial monitoring’ – observation of the court sessions carried out by trained\(^{40}\) volunteers. The methodology applied by the Court Watch Poland, based on forms filled in courts, was outlined in (Pilitowski, Burdziej, 2013).

Thus we are able to match our production function (indicating overloaded courts) with data derived from ‘citizen trial monitoring’ – thereby visualizing potential trade-offs. To facilitate comparability with our production function dataset, we selected 378 criminal trials observations carried out in 12 criminal courts in 2012\(^{41}\).

Fig. 10 plots calibrated ‘hockey-stick’ production function (eq. 2) and data points representing courts covered in Court Watch Poland dataset\(^{42}\) encompassing:

- Judicial lateness (arising from judicial fault\(^{43}\)). If the proportion of court sessions delayed as a consequence of judicial fault exceeds 10 percent of observations, the data point is marked red;
- Judicial politeness. Volunteers recorded whether the judge addressed someone in a rude or aggressive manner - if so data point was marked red. Although highly subjective,\(^{44}\) this measure seems very interesting, since irritation is a well-recognized symptom of stress (see Arnetz, Ekman (2006), especially the Chapter ‘Work, Stress and Productivity’);
- The mode of preparing minutes. Typically, judges dictate aloud the text of the minutes. When the judge corrected or amended the minutes prepared by the court clerk during more than 5% of the observed sessions, the data point was marked red. This measure is also quite interesting, in terms of judicial work organization and cooperation with the support staff.

Although data plotted in figure 10 are only illustrative and by no means should be interpreted as conclusive empirical evidence (due to small sample and subjective nature of applied measures) – there appears to be some trade-off between increased productivity and quality. For example, judicial lateness and irritation tends to be more likely around and beyond the break point of judicial capacity, which is consistent with insights from psychological studies of stress in work environment (Arnetz, Ekman, 2006).

Moreover, similar effects might influence judicial decision-making. As suggested in (Klein, Mitchell, 2010) it seems reasonable ‘to predict more intuitive processing by judges facing greater workload pressures and more deliberation by those who are relatively unconstrained by such pressures (p. 38).’ Undoubtedly, the interdependences between judicial workload, procedural framework (adversarial or inquisitorial) and modes of decision-making (fast and frugal heuristics,\(^{45}\) cognitive biases, deliberation) offer promising areas for further research.

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\(^{39}\) http://courtwatch.pl/

\(^{40}\) ‘During the (…) training participants acquire basic information on the Polish court system, including rules for conduct in the courtroom and citizen rights (depending on the level of knowledge of the participants). This is expected to make them more confident without losing the “ignorance” characteristic for those who have never dealt with courts before’ (Pilitowski, Burdziej, 2013 p. 21)

\(^{41}\) In the smallest court in Przemyśl (25 cases filed in 2012) there were only 6 observed trials, while in the largest Warsaw (1061 cases filed in 2012) there were 106 observed trials. Thus, as stressed at the end of this section, presented results are only illustrative and by no means should be interpreted as conclusive empirical evidences.

\(^{42}\) The authors would like to thank B. Pilitowski and S. Burdziej for providing the ‘Citizen Trial Monitoring’ raw database

\(^{43}\) Situations when judge was late because his previous session extended have been removed, as we concluded that there is high probability that they are independent from the judge. Certainly such cases might also indicate judicial inability to exert control over the courtroom. Robustness check using total share of sessions started late, yield qualitatively similar results. Court Watch Poland’s volunteers need to record judicial lateness (yes or no, if yes – its duration in minutes) and its reason (e.g. extended previous session) thus the measure seems to be quite objective.

\(^{44}\) Note that such assessment is inherently subjective and involves observer’s personal sensitivity – thus should be interpreted with caution. Moreover, the ‘citizen trial monitoring’ has been typically conducted by volunteer law students, typically engaged in other human rights promoting activities. Thus one might reasonably expect them to be biased (overly critical towards judges) and, despite training, unaware of daily courtroom practice. As acknowledged in (Pilitowski, Burdziej, 2013) ‘Their [volunteers] assessment of the situation will inevitably be subjective (and not always accurate), but citizens also experience the court subjectively (p. 14)’

\(^{45}\) See (Gigerenzer, Todd, 2000) for discussion on fast and frugal heuristics - simple rules for making decisions when time is pressing and deep thought an unaffordable luxury (so called ecological rationality)
Fig. 10. Judicial production function and work performance observed during the ‘trial monitoring’

**Judicial lateness**
(red points denote courts where share of sessions delayed from judicial fault exceeds 10% of observations)

**Judicial politeness**
(red points denote courts where judge at least one time addressed someone in a rude or aggressive manner)

**The mode of preparing minutes**
(red points denote courts where judge only corrected or complemented minutes prepared by court clerk, during more than 5% of observed sessions)

Source: Own calculations based on The Ministry of Justice unpublished data and Court Watch Poland dataset

8. Conclusions
Over one hundred years after Roscoe Pound’s speech, reformers across the world still try to cope with delayed (thus denied) justice, improving methods of assessing judicial staffing needs, optimizing structure of judicial districts and streamlining procedures. The work associated with such reform efforts can be supported with court system models which might be applied to generate counterfactuals, perform stimulations and impact assessments that allow reform designers to verify their prescriptions in the artificial world, instead of imposing experiments on the living tissue of the court system.

Modeling court performance is a specific endeavor, too fluid to be a science and too rigorous to be an art. Although models by definition constitute simplified, ‘alternate universes,’ to remain useful they need to properly capture the basic characteristics of our own universe. Otherwise, obtained answers might be spurious and formulated recommendations misguided.
This paper provides evidences that so-called 'exogenous productivity of judges' hypothesis might be attributed to a modelling flaw, originating in neglecting time constraints faced by judges or in ad hoc application of specific functional form, without in-depth consideration of their plausibility. Thus our primary contribution to the existing literature on court performance, particularly employing production functions, is the proposal for alternative formulation of court’s production function, taking into account time constraints faced by judges. The proposed ‘hockey-stick’ production function reconciles the weighted-caseload approach, popular among practitioners on both sides of the Atlantic, with production function approach advocated by L&E scholars. Thus it enables researchers to address research questions typical for production function literature (i.e. comparing court performance, identifying drivers of court’s inefficiency and proposing optimal allocation of judges) without losing consistency and traceability of weighted caseload methods.

Building upon this toolkit, we demonstrated the common sense conclusion: contrary to the views promulgated by the prophets of the ‘exogenous productivity,’ judges operate in the universe where adjudication takes time and a day lasts no more than 24 hours. Thus, while appreciating the importance of technical efficiency improvements as well as potential pitfalls of performance measurement, ‘planners of the judiciary’ must realize that judicial productivity is objectively constrained. When these constraint is met, additional staffing or procedural streamlining is necessary in order to avoid backlog explosion.

Another contribution of this paper is the proposed extended method of model evaluation, rooted in ‘stylized facts’ approach known from contemporary macroeconomics. It requires the model to be able to replicate key regularities observed in the real world, not just pass the battery of statistical tests.

We also believe that our results offer some value to practitioners – especially as a cheap and simple tool for evaluating weighted caseload studies (like in exercise depicted in the fig. 9).

Last but not least, approach presented in the Section Seven might offers valuable insight for further research on judicial productivity, the impact of work stress and the cognitive psychology of judicial decision-making in order to encompass all aspects of adjudication.

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APPENDIX I

In order to ensure that our results are fully independent from WC Study, up to this point we employed its results only to evaluate our model. Since reader might be concerned with two assumptions made in section IV, namely that: (i) criminal court’s capacity is driven by the number of regular judges, so lay judges might be excluded from the model, and that (ii) cumulative judgment cases are uniformly distributed across the criminal courts. While the former seems uncontroversial in light of practical experience as well as data presented in the table 1, the latter is more problematic. Despite the exclusion of the court in Olsztyn (due to disproportionately high number of cumulative judgments), the diversity between remaining 44 courts remains substantial (see table 3). Thus, building upon WC Study weights, we recalculated our model, assigning to each felony case value 1, and for each cumulative judgment 0.26 (26.3h divided by 102.1h). The results (including court in Olsztyn) are plotted on the figure A.1. Again, LOWESS estimate of production function breaks in the point corresponding with judicial capacity derived from WC Study. Moreover, ca. 25 felony cases seems to constitute glass ceiling for the judicial productivity – holding for 30 as well as 50 cases in the docket. Thus, it confirms the main finding of this paper, namely that judicial production function is ‘hockey-stick’ shaped – with break point between steep (from 0 to the full capacity) and more flat (full capacity and beyond) part.

**Fig. A.1. Hockey stick production function - (green line - LOWESS estimate, blue dashed line - WC study judicial capacity)**

Source: Own estimations based on The Ministry of Justice unpublished data
Reducing Unwarranted Disparities: The Challenge Of Managing Knowledge Sharing Between Judges
By Sandra Taal, Mandy van der Velde and Philip Langbroek1

Abstract:
In their role as decision-makers, judges face the challenge of the law failing to provide clear answers to concrete cases. This may result in dissimilar decisions and outcomes in similar cases. In order to reduce unwarranted disparities, judges should participate in knowledge exchanges on a regular basis. That way, they can benefit from each other's expertise, insights and experiences and make better informed decisions. In order to manage this process in the court more effectively, a better understanding of the knowledge sharing behavior of judges is required. In this article, we will discuss how four dimensions (the technological, managerial, social and motivational dimension) can influence the knowledge sharing behavior of judges. Based on this discussion, a research model is proposed.

Keywords: Knowledge Sharing; Court Management; Judicial Behavior.

1. Introduction
In the decision-making process, judges are bound by the law. The law provides the general framework in which they need to maneuver to find a correct solution to the case at hand. In this process there is often ample room for divergent reasoning and alternative ways of handling a case. It is the responsibility of the judge to deal with this discretionary space correctly and provide justice-seeking citizens with a fair court process. Based on the principles of legal certainty and equality before the law, similar cases should be treated in a similar manner. To a certain extent, those who seek and expect justice need to be able to predict the outcome of their legal proceedings. However, ambiguous legal terms and alternative interpretations in previous cases can leave the judge puzzled with questions. Also procedural rules can cause interpretation problems. In hard cases, solutions need to be constructed based on both the law and on interaction with party’s representatives. Another cause of uncertainty may have to do with recent changes in legislation. Judges need to be able to handle such changes consistently in different cases. Knowledge sharing between judges may help to prevent deviant outcomes in similar cases and otherwise enhance the quality of reasons and content of court decisions. This presupposes knowledge sharing on a regular basis. Through knowledge sharing, judges can benefit from the expertise, experience and ideas of other judges in order to make better informed decisions.

One of the main goals of this article is to feature knowledge sharing as a form of collaboration that enables judges to reduce unwarranted disparities. In the early 1990s, knowledge management started to gain popularity as a new management concept (Hislop, 2013). The general idea of knowledge management is that knowledge is essential for the success of an organization. And, in order to use the full potential of the existing knowledge in an organization, this knowledge should be captured and disseminated (Ipe, 2003). In more recent years, the popular management term also received some scholarly attention in the judicial context. Here, the focus lies primarily on technology-supported information systems that are designed to support judges in their search for more detailed information and expert knowledge from others (Apistola, 2010; Casanovas et al., 2005; Wang, Noe, & Wang, 2014). Less attention has been given to the related process of knowledge sharing between judges. This is unfortunate, because knowledge sharing between judges is an important (more informal) method to promote coordinated action and uniform decision-making. Without knowledge sharing, judges cannot benefit from each other’s expertise, experience and ideas on pressing matters. In that sense, knowledge sharing between judges is as important as knowledge sharing between professionals in other knowledge-intensive organizations, like hospitals and law firms. Ultimately, a lack of knowledge sharing between judges can be detrimental for the overall quality of judicial decisions.

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In this article, we propose a theoretical framework that identifies four dimensions that are relevant for the individual engagement of judges in knowledge sharing. These four dimensions are listed as: the technological dimension, the managerial dimension, the social dimension and the motivational dimension. A better understanding of the knowledge sharing behavior of judges in relation to these dimensions is needed to manage this process more effectively. First, we will start with a more general discussion on knowledge sharing. After that, the four proposed dimensions will be discussed and applied to the judicial context.2

2 This article is part of a doctoral research on knowledge sharing between judges. The empirical results of this research are expected to be published in 2015.

2. Defining Knowledge Sharing
In the knowledge management literature the concept of knowledge is often used, but not always clearly reviewed and provided of an accurate meaning. The reason is that there is no consensus on what exactly is knowledge (Wilson, 2002). For the purpose of this article, no lengthy discussion needs to be held about the definition of this complex concept. It is, however, important to make clear how ‘knowledge’ and ‘knowledge sharing’ are interpreted and used in the context of judicial administration.

Although often used interchangeably, the concepts knowledge and information are not synonymous. Information refers to ‘just’ facts and figures (Kluge, Stein, & Licht, 2001) whereas knowledge is often perceived as ‘information plus’, i.e. information added or mixed with interpretation, experience, skills and attitude (Lee & Yang, 2000; Weggeman, 1997). But what does this mean for knowledge sharing? Lee and Yang (2000, p. 783) state that “information is transformed into knowledge when a person reads, understands, interprets, and applies the information to a specific work function”. This means that “one person’s knowledge can be another person’s information” (Lee & Yang, 2000, p. 783).

“We do not share just information we share knowledge” (Lee & Yang, 2000, p. 782). If a person cannot understand and apply the information to anything, it remains just information. However, another individual can take that same information, understand it and interpret it in the context of previous experience, and apply the newly acquired knowledge to make business decisions or redefine a laboratory procedure. Yet a third person may take the same pieces of information, and through this unique personal experiences or lessons learned, apply knowledge in ways that the second person may never have even considered.” (Lee & Yang, 2000, p. 783)

According to Senge (1998, pp. 11-12), “sharing knowledge is not about giving people something, or getting something from them. That is only valid for information sharing. Sharing knowledge occurs when people are genuinely interested in helping one another develop new capacities for action; it is about creating learning processes”. Lin (2007a, pp. 316) states that individual-level knowledge sharing is about “talking to colleagues to help them get something done better, more quickly, or more efficiently”. So, how should we perceive all of this from a judicial perspective?

Most importantly, administering justice is a knowledge intensive activity (Apistola, 2010). Applying legal and procedural rules to concrete cases should be done correctly and consistently. From a normative perspective, assigning a case to a particular judge should not make any difference for the outcome of the legal proceeding (Langbroek & Fabri, 2007). In practice, differences in knowledge or knowledge-use between judges do exist (Apistola, 2010). Judges have different backgrounds and different sets of experiences. In hard cases, these different stocks of knowledge may lead to different individual actions. Knowledge sharing is basically about connecting these different stocks of knowledge (Christensen, 2007). However, in order to make this work, basically two processes need to take place: knowledge donating and knowledge collecting. According to Van den Hooff and De Ridder (2004, p. 118), knowledge donating is about “communicating to others what one’s personal intellectual capital is”. And knowledge collecting is about “consulting colleagues in order to get them to share their intellectual capital” (Van den Hooff & De Ridder, 2004, p. 118). Both processes need to take place in order to create a “reciprocal process of knowledge exchange” (Renzl, 2008, p. 207).

Knowledge sharing is not a new activity for judges. Many judges would even state that it is already part of the job. Multi-judge panels, case law meetings, symposia and training sessions; judges are used to have informative discussion sessions with their peers. In this article, we would like to broaden our view on knowledge sharing. Here, knowledge sharing is about the willingness of judges to help each other with work-related issues by putting equal efforts in donating their knowledge to others and collecting knowledge from others.

3. Explicit versus Tacit Knowledge
Numerous classifications of knowledge have been constructed to identify the types of knowledge relevant for collegial knowledge sharing. The most dominant psychological distinction in types of knowledge is between explicit knowledge and tacit knowledge. Explicit knowledge is knowledge that is easy to codify and, in that sense, easy to disseminate and communicate to others (Frappaola, 2008). In contrast to explicit knowledge, tacit knowledge is knowledge that, in
Polanyi’s definition (1973), cannot be articulated, is highly personal and hard to formalize. It is “embedded in an individual’s action in a certain context and, therefore, cannot be easily codified” (Joshi & Sarker, 2003, p. 31). The concept of tacit knowledge was first introduced by Michael Polanyi (1958), and later used by many other scholars in the field of knowledge management. Whereas tacit knowledge, by definition, cannot be articulated, it forms a serious challenge for knowledge sharing (Hansen, Nohria, & Tierney, 1999). Nonaka and Takeuchi (1995), triggered by the tacit dimension of knowledge, identified four modes of knowledge conversion: tacit to tacit (socialization), tacit to explicit (externalization), explicit to explicit (combination) and explicit to tacit (internalization). Nonaka and Takeuchi’s model implies that tacit knowledge can be shared, but that it requires a somewhat different approach (Figure 1). In their view, tacit knowledge can be articulated through dialogues amongst individuals and, in that sense, converted into explicit knowledge. Nonaka and Toyama (2003, p. 5) state that “dialogue is an effective method to articulate one’s tacit knowledge and share the articulated knowledge with others.” They further explain that “through dialogues among individuals, contradictions between one’s tacit knowledge and the structure, or contradictions among tacit knowledge of individuals are made explicit and synthesized” (Nonaka & Toyama, 2003, p. 5). Based on our definition of knowledge sharing, we are especially interested in the explicit-to-explicit and tacit-to-explicit knowledge (sharing) processes.

![Figure 1: Four modes of knowledge conversion](image)

Although some researchers make a strict distinction between explicit and tacit knowledge sharing (Zaqout & Abbas, 2012; Hau, Kim, Lee, & Kim, 2013), we perceive knowledge sharing as a form of interaction in which explicit and tacit knowledge are intertwined. According to Nonaka and Von Krogh (2009, p. 637), knowledge exists along a continuum that ranges from tacit to explicit and vice versa. It is therefore hard to depict knowledge as purely explicit or purely tacit. Nonaka and Von Krogh (2009, p. 637) further state that “tacit knowledge can be accessible through consciousness if it leans towards the explicit side of the continuum”. In that sense, we are interested in those parts of tacit knowledge that are consciously transferable. In the remaining sections of this article, we will consider knowledge sharing as a process that combines knowledge that leans more towards the explicit side of the continuum, i.e. theoretical legal knowledge, with knowledge that leans more towards the tacit side of the continuum (but is still consciously transferable); i.e. practical know-how and experience-based knowledge.

4. Four Dimensions of Knowledge Sharing Enablers

In general, knowledge management initiatives are implemented based on the assumption that knowledge sharing will automatically follow as a result of the opportunity that has been created. But is this true? Does a Wiki Juridica\(^3\) really stimulate judges to share their knowledge? Or, does a formally organized meeting really leads to more knowledge sharing between judges? In our view, knowledge sharing cannot simply be assumed. Instead, the knowledge sharing behavior of judges should be better understood in order to manage this process more effectively. In the below sections, we will discuss four dimensions that have, on the basis of previous research, shown to be relevant for individuals to engage in knowledge sharing. We will present these dimensions and discuss their relevance within the judicial context.

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\(^3\) Wiki Juridica is a technological tool, used in the Dutch judiciary, that allows judges to upload information and edit existing pieces of information.
4.1. Technological Dimension

A discussion on knowledge management often goes hand in hand with a discussion on the use of Information Technology (IT). For many organizations, IT is a “natural medium for the flow of knowledge” (Borghoff & Pareschi, 1997, p. 837). To that end, investments in IT-solutions are a popular method to deal with knowledge management issues, such as knowledge sharing. However, previous research has shown rather mixed results (Alavi & Leidner 2001; Cabrera, Collins, & Salgado, 2006; Kim & Lee, 2006; Lin 2007a, McDermott 1999; Newell, Scarbrough, & Swan 2001; Van den Hooff & Huysman, 2009). McDermott (1999, p. 104) states that, “if a group of people don’t already share knowledge, don’t already have plenty of contact, don’t already understand what insights and information will be useful to each other, information technology is not likely to create it”. On the other hand, Kim and Lee (2006) found in their study that IT application usage is a strong determinant of employee knowledge sharing in the public sector. Within the judicial context, it could be wondered whether IT-solutions can influence the knowledge sharing behavior of judges. In other words, are IT-solutions primarily suitable for the function of storing information in databases (i.e. jurisprudential databases)? Or, can collaborative IT tools, such as e-mail, intranets and electronic discussion forums contribute to the engagement of individual judges in regular knowledge exchanges.

Focusing on the link between information technology and knowledge management, there are basically two knowledge management strategies: the codification strategy (‘people-to-documents’) and the personalization strategy (‘person-to-person’) (Brink 2003; Hansen et al. 1999; Scheepers, Venkitachalam, & Gibbs 2004). The role of information technology slightly differs between the two strategies. In case of the former, the focus lies on databases and electronic repositories to store knowledge in order to make this codified knowledge available to others in the organization. Scheepers et al. (2004, p. 204) state that “the investment in IT infrastructure should enable people easy access to reusable codified knowledge”. The Dutch information system ‘Wiki Juridica’ would be a good example here. For the personalization strategy, the focus lies more on interpersonal relationships in the organization and the associated technological tools to “facilitate networks between people to share and learn from their individual skills, experiences, and expertise” (Scheepers, 2004, pp. 204-205). Here, online communication tools, such as discussion forums or internal instant messenger programs are good examples. Although both strategies can contribute to a more effective knowledge flow in the court organization, the personalization strategy is probably better suited for establishing a dialogue between judges. A dialogue in which personal views and professional opinions can be exchanged.

Considering the increased importance of technology-supported information systems in court organizations, we should increase our understanding on the impact of these systems on the knowledge sharing behavior of judges. In other words, to what extent is technological support a knowledge sharing enabler? And, under what circumstances are technological tools the most effective? In the next sections, we will discuss three other dimensions that will put this discussion into perspective.

4.2. Managerial Dimension

Previous research has shown that the support of (top) management and/or immediate supervisors is positively associated with knowledge sharing (Kang, Kim & Chang, 2008; McDermott & O’Dell, 2001; Wang & Noe, 2010). Due to the voluntary character of knowledge sharing, ‘support’ is primarily perceived as encouraging professionals to share their knowledge. Some scholars link management support for knowledge sharing to the organization’s culture (Connelly & Kelloway, 2003; McDermott & O’Dell, 2001). By supporting knowledge sharing, managers show their commitment to this voluntary act and make it a visible component of the organization’s culture (McDermott & O’Dell, 2001). Compared to most other organizations, the court organization has a flat structure, which makes the role of managers different from those working in more hierarchical organizations. Due to the constitutional demands of judicial independency and judicial impartiality, a manager can never be the ‘boss’ of the judge (Maan, 2009). As judges do not have a typical manager-employee relationship, it could be wondered whether judges are sensitive for this type of support.

In the court organization, there are several managerial positions. The term ‘manager’ could refer to the heads of courts (the court president), the heads of divisions (e.g. the administrative law division or the civil law division), or the heads of the work units within the court (“specialised parts within a division” (Fabri & Langbroek, 2007, p. 34), such as teams or chambers) or some other managerial positions within the court (Fabri & Langbroek, 2007). The court president and other board members are mainly responsible for the development of a knowledge management strategy. But, the heads of work units within the court are the most suitable persons to encourage individual judges (and the group of judges in the work unit) to participate in knowledge exchanges.

The role of these heads of work units are not the same in all judicial systems. In the Netherlands, for instance, team managers (‘teamvoorzitters’) are part of the management team of the court organization. The team manager can be a judge, but this does not have to be the case. If the team manager is also a judge, he or she has judicial tasks as well. In
Germany, the role of the head of the work unit is quite different. Here, the work units (‘Kammern’) are highly specialized and judges can be assigned to more than one work unit (Fabri & Langbroek, 2007). In these work units, the chairperson (‘Vorsitzende’) is always a judge and in that sense also involved in concrete cases. The role of these chairpersons is more judicial and less managerial.

Although, the court organization is a rather flat organization in which typical manager-employee relations are non-existent, persons with executive responsibilities can still have a positive effect on the knowledge sharing behavior of judges. Above all, they can make judges in their ‘team’ or ‘Kammer’ aware of the importance of knowledge sharing. In the Netherlands, team managers have the explicit task of stimulating knowledge sharing. In Germany, the work units are generally smaller in size. Here, the chairpersons are more substantively involved in the content of judicial work and are not so much managers. The extent to which ‘management support’ positive influences knowledge sharing behavior, can therefore differ between countries.

4.3. Social Dimension
From a social capital perspective, it is assumed that knowledge sharing between individuals depends on the “social dynamic between group members” (Van den Hooff & Huysman, 2009, p. 2). Nahapiet and Ghoshal (1998) consider three types of social capital: structural social capital, relational social capital and cognitive social capital. Structural and relational social capital both refer to “the connections between individuals in an organization” (Bolino, Turnley, & Bloodgood, 2002, p. 506). However, structural social capital puts emphasis on “whether employees are connected at all” (Bolino et al., 2002, p. 506) and relational social capital is more focused on “the quality or nature of those connections” (Bolino et al., 2002, p. 506). Next to that, cognitive social capital is about “the extent to which employees within a social network share a common perspective or understanding” (Bolino et al., 2002, p. 506). Previous research has shown that factors associated with these three types of social capital are positively associated with knowledge sharing (Chow & Chan, 2008; Chang & Chuang, 2011).

Social capital factors, such as social ties (Liu & Besser, 2003), the level of social trust among organizational members (Chow & Chan, 2008) and the shared goals between organizational members (Chow & Chan, 2008) are also expected to be relevant in the judicial context. As knowledge sharing is a social process in which a voluntary participation is required, it seems only logical that (the nature of) connections between judges also affects knowledge sharing behavior in the judicial context. Focusing on the individual engagement in knowledge sharing, it is expected that the social dimension is important, if not, more important, than the technological and managerial dimension. After all, social relationships are the basis for voluntary cooperative behaviors, such as knowledge sharing.

However, in order to build and sustain social relationships, some face-to-face contact is desirable (Nohria & Eccles, 1992; Cummings, Butler, & Kraut, 2002). This does not necessarily mean that judges (still) have to work in the same work unit (Agrawal, Cockburn, & McHale, 2006), but it does mean that it is highly unlikely that technological solutions alone foster close interpersonal connections between judges. But, if technological solutions are not enough, what else it expected from court organizations? Based on their findings, Bock, Zmud, Kim and Lee (2005, p. 101) suggest that “those leading knowledge-management initiatives or otherwise desiring to encourage knowledge sharing within their organizations” should first take the effort to “nurture the targeted social relationships and interpersonal interactions of employees before launching knowledge-sharing initiatives” (Bock et al., 2005, p. 101). They suggest that social relationships form a primary condition for effective knowledge sharing.

Within legal (sub)fields, judges meet on a regular basis. These meetings vary from small-scale team meetings within the court to large-scale network meetings outside the court. These meetings do not immediately have to lead to structural knowledge exchanges between judges. However, regular attendance of these meetings can contribute to enduring social relationships, which in the long run can have a positive impact on structural knowledge sharing. Across legal (sub)fields, less contact moments exist. As a result, there are less opportunities for judges to formally meet with other judges. This may limit the creation and sustainability of cross-field social connections and in that sense cross-field knowledge exchanges between judges. In order to foster coordinated action and uniform decision-making across legal fields, the added value of these contact moments should not be underestimated (Riege, 2005). In some Swedish courts, a project has been introduced that gives judges and other court staff the opportunity to participate in group discussions on the general functioning of their court (Hagsgård, 2008). These so-called internal dialogues do not only get judges involved into matters of court functioning, but it also opens the door for further discussions on other pressing matters (Hagsgård, 2008).

4.4. Motivational Dimension
Knowledge sharing is not enforceable. Several studies have shown that motivation is an important determinant of work-related behaviors, including knowledge sharing (Lin 2007b; Lu 1999). Individual motivation can be divided into intrinsic motivation and extrinsic motivation. According to Lee, Cheung and Chen (2005, p. 1097), “intrinsic motivation refers to the
fact of doing an activity for its own sake: the activity itself is interesting, engaging, or in some way satisfying”. And, “extrinsic motivation pertains to behaviors that are engaged in response to something apart from its own sake, such as reward or recognition or the dictates of other people” (Lee et al, 2005, p. 1097). Intrinsic and extrinsic benefits are expected to be important motivators for the participation in knowledge exchanges (Kankanhalli, Tan, & Wei, 2005).

Referring to intrinsic motivators, ‘enjoyment in helping others’ and ‘knowledge self-efficacy’ have both shown to be relevant factors of knowledge sharing behavior (Kankanhalli et al., 2005; Lin 2007b). From a social exchange perspective, individuals would exchange knowledge due to the perceived benefits of feeling satisfied, feeling knowledgeable and feeling good about themselves (Kankanhalli et al., 2005). As judges are knowledge experts working in knowledge-intensive organizations, they know how important the right knowledge is to perform well as an individual and as a group. In that sense, judges may feel intrinsically motivated to be part of knowledge exchanges in the organization. However, this may also depend on the mindset of the individual judge; is he or she a solitary worker or a team player? Although the day-to-day work of judges is relatively solitary, judges need to be team players too. It is expected that judges who perceive themselves more as team players are more intrinsically motivated to engage in knowledge sharing.

Some researchers state that knowledge sharing is an “unnatural act” (Davenport & Prusak, 2000; Lee & Al-Hawamdeh, 2002). Organizational rewards, such as bonuses and higher salaries, should make individuals more eager to share their knowledge (Wang & Noe, 2010). In private companies, ‘knowledge is power’. Knowledge is a personal asset which makes you of added value for the company. Simply giving your knowledge away can be detrimental for your unique position in the organization. In the judicial context, the situation is somewhat different. The motto ‘knowledge is power’ should be replaced with ‘knowledge sharing is power’ (De Angelis, 2013). As stated before, judges are knowledge experts. Donating your knowledge is a way of showing your skills and expertise. If others consult you for your expertise, it enhances your status in the organization. Participating in knowledge exchanges can thus be beneficial for your professional image, which can in that sense be seen as an extrinsic benefit for knowledge sharing (Gottschalk, 2007; Kankanhalli et al., 2005).

It is expected that intrinsic as well as extrinsic motivators determine a judge’s engagement in knowledge sharing. Managing intrinsic motivation, however, is a difficult task for organizations. Compared to extrinsic motivation, the incentives for intrinsic motivation are generally less clear. According to Osterloh and Frey (2000, p. 539), “the ideal incentive system is in the work content itself, which must be satisfactory and fulfilling for the employees”. Lin (2007b, p. 145) suggests that in order to foster knowledge sharing, managers “should focus on enhancing the positive mood state of employees regarding social exchange (i.e. enjoyment in helping others)”. Compared to the managerial dimension, where the focus lies primarily on managers encouraging individual judges to participate in knowledge exchanges. Here, the focus is broader and lies more on the creation of a positive atmosphere towards social exchanges and interaction as a precondition for regular knowledge sharing. However, creating such an atmosphere is not only the responsibility of the head of the work unit, but of the group of judges as a whole.

5. Does Context Matter?
In the former sections, we argued that court organizations should play an active supporting role in the process of individual-level knowledge sharing. That is not to say that court organizations should start from scratch in this regard. Collaborative software systems, peer review sessions, training and permanent education initiatives, legal symposiums and international exchange programs already represent useful existing platforms for judges to deepen their knowledge, expand their skills and learn from each other. What is missing, however, is a deeper understanding of how to reinforce actual knowledge sharing behavior. The above discussion already provided a general overview of how technological, managerial, social and motivational factors are expected to influence the knowledge sharing behavior of judges. The question is whether we should aim for an one-size-fits-all solution for knowledge sharing? Or, should we expect that the four dimensions (and associated factors) work out differently in different settings? In other words, does context matter?

Referring to the technological and managerial dimension, we expect that ICT support and management support will positively influence knowledge sharing. This is not to say that we expect that the impact of these factors is equal among different settings. First of all, it could be wondered whether the effect of ICT support on the knowledge sharing behavior of judges differs between larger and smaller courts. When we focus on intra-organizational knowledge sharing, smaller courts might be less dependent on ICT support than larger courts. In Switzerland, for instance, there are a number of very small cantonal courts in which only a few (professional) judges are employed. Due to the small-scale setting, it is unlikely that high levels of ICT support will strongly affect the knowledge sharing behavior of the judges. On the other hand, in larger courts where the physical distance between judges is probably also larger, ICT support may play a bigger role (Ruggles, 1997). With the help of technological tools, judges can easily contact each other and exchange knowledge and information.
Second of all, as mentioned earlier, it could be wondered whether the effect of management support on the knowledge sharing behavior of judges differs between countries. In countries, such as the Netherlands, where team managers have the specific task to encourage their team members to share their knowledge, the effect of management support on knowledge sharing behavior might be stronger. In addition, the extent to which managers actively promote knowledge sharing might also reflect the priority given to the topic. In the Netherlands, professionalism is selected as one of the four core values of justice. In the strategic multi-annual plan for the Dutch judiciary (“Vision 2020”), active and structural participation in knowledge exchanges is referred to as one of the key points of professionalism. The emphasis put on knowledge sharing in this long-term strategic policy plan enables team managers to discuss this topic more explicitly in the team setting as well.

Referring to the social and motivational dimension, we expect that these dimensions are equally relevant for all judges, regardless of their work setting. We perceive intrinsic and extrinsic motivators, and the social relationships between judges as the corner stones of knowledge sharing. Regardless of the specific country, the court size, the court level (first or higher instance courts) or the legal field, we believe that individual motivation and social connectivity are essential building blocks for creating an effective knowledge sharing environment in the court organization. An additional remark should, however, be placed here. Although related, knowledge sharing is not the same as giving and receiving feedback from and to others. In a report issued by the Dutch Council for the Judiciary, it is warranted that an open and amicable atmosphere in the court does not necessarily stimulate judges to provide feedback to each other. It can even restrict the creation of feedback-friendly culture as judges do not want to disturb the existing amicable work atmosphere (Raad voor de rechtspraak, 2006). Thus, whereas some initiatives focusing on the social connectivity of judges may foster knowledge sharing, it can restrict more critical conversations between judges.

Miller and Karakowsky (2005) underline the unique characteristics of feedback-seeking behavior. Seeking feedback can result in positive or negative comments from others (Miller & Karakowsky, 2005). Negative comments can be ego-threatening and detrimental to the self or public image (Miller & Karakowsky, 2005; Moss, Valenzi, & Taggart 2003). In the court organization, where all judges as equal, providing and receiving feedback is a useful method to improve individual performances, but can also be confrontational. In that sense, creating a feedback-friendly culture may entail other enablers than creating a knowledge sharing culture.

The above discussion leaves us at a crossroad. It seems reasonable to expect that different situations and settings require different solutions, but a more definite answer cannot be given. Also, factors that are expected to positively influence the knowledge sharing behavior of judges can have a detrimental effect on another activity: providing feedback to each other. A simple solution seems not feasible here. In order to take this discussion to the next step, empirical results are required. These empirical results will be provided in a forthcoming doctoral thesis prepared by the first author. On the basis of these results, we will be able to further structure the discussion on the impact of the four dimensions on the knowledge sharing behavior of judges.

6. Concluding Remarks

Unnecessary or seemingly random inconsistencies in the process of handling and deciding court cases are detrimental for the quality of court decisions. Based on the principles of legal certainty and equality before the law, it is expected that every judge makes similar decisions in similar cases. Unfortunately, this is not always the case. The law is not always clear and the knowledge of the judge is per definition limited. In addition, the knowledge that resides in the mind of the judges is unique and differs per judge. In hard cases, these different stocks of knowledge may lead to different individual actions. In order to limit the differences in knowledge and knowledge use, knowledge sharing needs to take place. In the knowledge sharing process, judges actively donate and collect knowledge in order to help each other to make better informed decisions. Knowledge sharing, in that sense, goes beyond the discussion of hard cases in multi judge panels. Knowledge sharing is a voluntary process which needs to take place on a regular basis.

Knowledge sharing is not only an important quality-enhancing activity for judges, but for professionals working in other knowledge intensive organizations as well. As a result, the scholarly literature that can be found on this topic is quite diverse. So far, knowledge sharing between judges has not been a much discussed topic. Little is known about the knowledge sharing behavior of judges. In this article, we use insights from other studies and apply them to the judicial context. Based on previous study results, we argue to look beyond technological solutions and take into account the managerial, social and motivational dimensions as well. In our view, it is a common mistake to implement knowledge management initiatives (often technological tools) and assume that knowledge sharing will automatically take place. We
expect that knowledge sharing is not only about creating opportunities to share knowledge, but also about creating an atmosphere that encourages judges to participate in knowledge exchanges.

In this article, we have presented a four dimensional framework that describes and explains knowledge sharing between judges. Based on this conceptual discussion a research model has been developed (Figure 2). This model will be empirically tested in a cross-national setting. The results are to appear in a forthcoming doctoral thesis. Understanding how important these four dimensions are for the creation of an effective knowledge sharing environment, will provide a first and essential step towards managing this process even more effectively in the future.

![Figure 2: The research model](image)

**References**


Understanding The Service Quality Perception Gaps Between Judicial Servants And Judiciary Users
By Rodrigo Murillo

Abstract:

Judiciary service user expectations are usually not the same as ideas harbored in the minds of civil servants delivering such services. This discrepancy matches the definition of the service delivery GAP 1, as identified and assessed by SERVQUAL (Service Quality), a tool that for almost three decades has been employed worldwide in measuring service quality in many different industries and countries, in both private and public organizations. Through participant observation, semi-structured interviews and empirical data collected by SERVQUAL, this paper focuses on assessing this service delivery GAP 1 for the Second Court of Appeal within Costa Rica’s Judicial Branch.

Keywords: SERVQUAL, Public service assessment, Service Quality, Public Satisfaction Management.

1. Introduction

As reported in Murillo and Zuniga (2013), the GICA-Justicia Quality Management Standard was developed in 2009-2010 as an ISO9001-like Quality Management Standard intended for adjudicative office accreditations. The most outstanding feature of this standard is that both audits and accreditations must be performed by a national third-party agency, known as SINCA-Justicia (Murillo and Zuniga, 2013). It is thus aimed at finding comprehensive solutions to management issues in Costa Rican and Latin American district courts. Based on this Quality Management Standard, a Quality Management System was deployed in Costa Rica’s Second Court of Appeal (hereinafter the Court) (Zuniga and Murillo, 2014). The initiative was supported by several organizations, including the author’s consultancy contribution that provided him with a deep knowledge of the GICA-Justicia Project in the Court—from inception to implementation (Poder Judicial, 2010a; Poder Judicial, 2010b; Murillo and Zuniga, 2013). Both Costa Rica’s Judiciary and the Court’s main characteristics are described in a section below.

During the GICA-Justicia Project initial stage, a national survey was conducted throughout Costa Rica with an eye to creating a National Service Quality Index for which a modified version of the original SERVQUAL questionnaire (Parasuraman et al, 1985) was employed. In fact, performance improvements stemming from SERVQUAL results were reported in Costa Rica’s Judiciary during the GICA-Justicia Project implementation stage (Poder Judicial, 2010b) meant to correct service delivery issues.

This study relies heavily on data gathered during this SERVQUAL application, as fully reported in Murillo et al. (2014). Its main goal is to contrast user valuations of Judiciary’s service quality and Court staff perceptions of themselves in their civil servant roles, in addition to their perception of user expectations concerning service quality, a concept akin to SERVQUAL GAP 1 (Zeithaml et al, 1988). By and large, this study uses a mixed-method approach, since it employs a set of expectation figures gathered during the aforementioned SERVQUAL application in all Costa Rican jurisdictions, in addition to semi-structured interviews and participant observation at the Court, in assessing psychological constructs.

Although Georgia’s Courts in the United States (Patterson 2009) have reported the specific application of SERVQUAL, an exhaustive review of available literature revealed—to the best of the author’s knowledge—that no SERVQUAL application has been documented in Latin American judicial environments, particularly on a nationwide basis. Moreover, an extensive literature review did not find any specific study reporting a SERVQUAL GAP 1 assessment in judiciary environments in the world.

When Judiciaries engage in a process improvement quest, benefits may not be as evident to their staff. Thus, findings from SERVQUAL’s hard data may be useful in grounding psychological constructs and clarifying Judiciary users’ real

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service requirements. In this context, understanding the mismatch identified in GAP 1 may provide judicial environments with a grounded source of information to steer and align efforts towards a continuous improvement of user’s service quality. In the absence of hard data, persuading Judiciary staff to implement the required process improvements by just presenting qualitative -arguable- arguments would probably be an unwieldy endeavor. This study provides both practitioners and public administrators in judicial institutions with empirical-based evidence that can be used for many process improvement applications in Judiciary environments.

2. Conceptual Framework

Justice, as a public service includes positive characteristics, as well as flaws, that are obvious to all users. Users develop a series of service delivery perceptions based on their personal experiences, information gathered from their surroundings and reactions to observed judicial system dysfunctions (López and Zúniga, 2014). Moreover, given the multiple and diverse stakeholders involved in adjudicative service delivery, i.e., plaintiffs and defendants, witnesses, victims, users and law professionals, there are different levels of expectations in terms of service quality. In this sense, Judiciaries must take on the responsibility for developing and promoting flexible and informal channels for judicial users to freely make suggestions on, and complaints against, system or staff performance. This way, the judicial system would have a direct feedback mechanism supporting of sustainability and continuous improvement. If Judiciary service quality level is linked to users’ satisfaction, provided their real needs and expectations are taken into account, judicial system managers are responsible for reinforcing and assuring delivery of an ‘acceptable’ service quality level.

Bowen and Lawler (1992) recognize service staff importance in having a positive impact on user satisfaction. Adjudicative services provided by Judiciaries consist of a high degree of confidence-based attributes and people contact, highlighting the importance of raising judicial staff’s awareness of the fact service quality is entirely contingent on their performance. Moreover, a high performance level is actually expected from them by judiciary users on account of their public servant role. Hence, understanding the underlying features typical of judicial servants’ paradigm could be used in persuading Court staff to evolve towards a service-oriented mindset, which certainly becomes a cumbersome enterprise.

Parasuraman et al. (1985) argue that service quality represents the customer’s overall assessment of a service offered by an organization, which is often based on the formulated perceptions of service encounters. Hence, an empirical causal relationship is suggested, in which users’ service experience responds to the series of concatenated activities that support the service delivery function. In the particular case of the Judiciary, service quality is thereby suggested to originate from the perceptions -either positively or negatively- Judiciary’s users have about Judiciary staff’s attitudes and performance during service provision, in addition to Judiciary’s organizational practices that directly impact the service delivery function.

Judiciary users’ degree of belief conveys to materialize the potential quality of deliverable services; which in comparison to the quality of manufactured products, is quite difficult to be assessed as it considers not only the results but also the process through which it is delivered. In this venue, Paterson (2009 p.9) states: “it makes sense that when court managers are supplied with meaningful data on how to best serve the customers that better decisions are made in terms of policy, operational procedures, and resource allocation.”; so that, pursuing service quality requires then that both back and front office processes within the Judiciary must be designed and aligned in order to deliver satisfying service experiences, or on the contrary, users may end up having unpleasant ones. Thereby, as improvements to the general service delivery function are sought, service provision features on one hand and also users’ concrete scopes on the other, must be fully comprehended and measured, which in turn posits the challenge of assessing psychological constructs such as expectations and perceptions. It is at this point where a search for indicators, indexes and metrics supported on explanatory models becomes necessary, in order to establish a systematic means both to capture those psychological constructs and also to define what is to be measured and the interpretation of the measured figures.

Although it is difficult to count with an universal tool to measure service quality and users’ satisfaction for all contexts, peer reviewed literature reveals a debate between assessing service satisfaction by means of contrasting expectation and perception constructs or through perception constructs alone. The most spread out, well-known and reported service assessing tools are SERVQUAL –Service Quality- and SERVPERF –Service Performance-, which on both cases are supported by foundational explanatory models, so that they provide practical structures to assess, understand and improve service quality. On one hand, Cronin and Taylor (1992) and Teas (1994) claim that perception constructs are enough to assess overall service quality, principle upon which the SERVPERF model (Cronin and Taylor, 1992) is founded. On the other hand, SERVQUAL -elicited from the research of Parasuraman et al. (1988)- relies on the service quality gaps’ model and focuses on the identification of the primary causes of service quality problems by assessing users’ perceptions and expectations about the delivered services (service gap analysis). SERVQUAL model assumes that
users establish service quality based on the difference between expectations about what they will get and perceptions of the service that is actually being delivered.

3. Service Quality (Satisfaction) = Expectations - Perceived Service

SERVQUAL is based upon 22 perception and 22 expectation comparative questions (Appendix 1 and Appendix 2 show both the English and Spanish versions of the SERVQUAL questionnaire employed in surveying Costa Rica’s Judiciary) graded by a Likert scale, which as contended by Clegg (2001) are useful when intending to gauge the opinion an individual has about a particular subject, in this case measuring the perceptual conceptions judicial users have about the quality of services delivered by the judiciary branch. The 22 contrasting questions (the higher the difference, the higher the end user’s satisfaction) are aggregated in 5 dimensions.

- **Tangibles**: Appearance of physical facilities, equipment, personnel, and communications.
- **Reliability**: Ability to accurately deliver the promised service
- **Responsiveness**: Willingness to aid judiciary users and deliver the promised service.
- **Assurance**: Knowledge and courtesy of public servants and their ability to convey trust and confidence.
- **Empathy**: public servants provide care and personalized attention to judiciary users.

Zeithaml et al. (1988) argue that among the several existing gaps defined by SERVQUAL model, exists a perceptual difference between the expected services residing in users’ minds and the perceptions that staff responsible of delivering services have about those users’ expectations in regards to the services to be delivered: identified as GAP 1 in Figure 1 and defined by Zeithaml et al. (1988, p36) as follows:

“Gap 1: between consumer expectation and management perception: It arises when the management does not correctly perceive what the users want. It is based on key factors: a) insufficient marketing research, b) poorly interpreted information about the customers’ expectations, c) not-focused research on demand quality, d) existence of many layers between the front line personnel and the top level management.”

![Figure 1. SERVQUAL Conceptual Model](source: Adapte from Zeithaml et al. (1988, p36))

Although SERVQUAL has been criticized (Buttle, 1996; Cronin and Taylor, 1992; Teas, 1994) for its 5 RATER (Reliability, Assurance, Tangibility, Empathy, Responsiveness) dimensions not being universal, as it is considered that the model fails in fulfilling on established theory in economics, statistics and psychology, besides of rising validity questions; literature review suggests that among the models developed by scholars for service quality assessment it is the most widespread and known one. SERVQUAL has been widely employed in measuring users’ expectations and service quality perceptions; both through its original and modified versions. The fact is that the instrument has a proven record of almost 30 years deployment, in various countries and industries, conditions that strengthen its validity and reliability qualities (Groves et al., 2009), in particular when compared to other available instruments, specially in-house/custom made user satisfaction measurement questionnaires.
4. Costa Rica’s Judiciary System Overview

Costa Rica’s Judiciary operates independently of the executive and the legislature branches. Judiciary System comprises the Full Court (when Supreme Court exercises its jurisdictional role), Courts of Appeal, Tribunals, Lower and Higher District Courts. Supreme Court is composed of 22 Appeal Judges or Magistrates selected for renewable 8-year terms by the Legislative Branch. The courts and tribunals are created on the basis of their jurisdiction in relation to the subject, amount and territory. Jurisdiction is determined by the Full Court following its own territorial division rules (other than the Administrative Territorial Division of the Republic of Costa Rica as defined by the Constitution), based upon a principle of adequate public services delivery which takes into account factors related to citizens' access to justice. According to its Organic Law, the Judiciary must be integrated by the number of judges considered necessary. Thereby there are a number of tribunals and district courts handling specific subjects, in addition to Mixed Courts in charge of diverse subjects in accordance to the number of cases they must deal with. The following is the current division of tribunals and district courts.

**Tribunals** (comprising three or more judges):
- Criminal Court of Appeal
- Civil
- Criminal
- Juvenile Criminal
- Administrative
- Family
- Labor
- Agricultural

**District Courts**
- Lower Amount
- Misdemeanor
- Criminal
- Juvenile Criminal
- Sentences’ Execution.
- Traffic

First instance courts comprise civil, family, agricultural, alimony, labor, domestic violence, childhood and adolescence, administrative and civil estate. The Supreme Court comprises four high level tribunals of Courts of Appeal, which with the exception of the Constitutional Court, are primarily responsible for handling appeals from sentences previously issued by tribunals.
- First Court of Appeal: civil, commercial, agricultural and administrative litigation.
- Second Court of Appeal: labor, family and civil cases appeals which according to the law must not be handled by the First Court of Appeal.
- Third Court of Appeal: Sentences issued by a Supreme Court’s Tribunal of two or more judges in relation to a criminal subject. However, if the sentence was previously issued by a single judge, the appeal case must be primarily heard by the Criminal Tribunal of Appeal comprising more than three judges.
- Constitutional Court: Established in 1989 is in charge of protecting and preserving the principle of Constitutional Supremacy (provided that no rule, treaty, regulation or law within Costa Rica’s Judiciary system, could be above the Constitution) by means of actions of unconstitutionality. In addition, it is in charge of handling legislative and constitutional judicial consultations, and responsible for protecting fundamental rights through the writ of habeas corpus and amparo.

The amount is determined according to the value of claims which is not cross-sectional to all subjects. It is established in two ways:
- Every two years the Judiciary requests Costa Rica’s Central Bank a report concerning the inflation index in order to fix the boundary amount for Lower and Higher Amount District Courts. The cases that could not be estimated are handled by the higher amount district courts.
- Appeals are admissible when they stem from sentences or sentence-like pronouncements issued by tribunals of three or more judges, provided those sentences do not exceed the fixed amount defined by law for civil and labor subjects. This amount, which is fixed by Magistrates at the time the appeal is admissible by the Court of Appeal, is not related the fixed amounts determined Lower and Higher Amount District Courts, as the mentioned amounts are usually higher. Appeals from courts of first instance in higher amounts or inestimable amounts are under the responsibility of tribunals constituted by three judges with jurisdiction on the particular subject. If the amount
exceeds the value of reference, the case could be elevated to a Court of Appeal, where the First or Second Court of Appeal have jurisdiction to resolve depending on the subject. Appeals from first instance Lower Amount District Courts in civil, labor and administrative disputes are subjected to be revised by higher amount courts, but never are meant to reach the Court of Appeal, given the fact that the appeal could not be filed.

The presiding Magistrate of each Courts of Appeal is responsible to perform administrative functions, as established in Judiciary’s Organic Law:

- Opening and closing the sessions of Tribunal of Magistrates within a given Court of Appeal.
- Anticipate or extend working hours when justified by an urgent and serious matter.
- Convene the Tribunal of Magistrates to extraordinary sessions when necessary.
- Take the proper actions to complete the Tribunal of Magistrates when for any reason the number of required members were scant.
- Set according to the law, the order in which appeals should be analyzed by the Tribunal of Magistrates.
- Moderate discussions and proposals concerning appeals’ sentence projects.
- Manage final voting of appeal cases when the Tribunal of Magistrates reaches a conclusion after the expected debate.

In the particular case of the Second Court of Appeal, it comprises five Magistrates. Each Magistrate is entitled to work along with 2 assistant lawyers, chosen by the Magistrate herself/himself, with the approval of Judiciary Superior Council. These lawyers are regarded as advisor/assistant attorneys and are responsible for writing sentence drafts (tentative sentences to the appeals) for Magistrates. A secretary is allocated to each of the five Magistrates’ office in order to perform administrative tasks. The Court staff also comprises a team of clerks called Secretariat, whose responsibility is to assist in any managerial matter: one secretary, two clerks, four paralegals, one temporary officer, and one delivery clerk in charge of taking legal notices, summons, among other documents, to the correspondent parties.

5. Study’s Core Scope
By pursuing SERVQUAL’s GAP1 assessment, this study attempts to gain insight into Court staff conceptions towards their judicial service roles and contrast them with the conceptions of Judiciary users about the quality of services to ideally be delivered. In absence of a SERVQUAL questionnaire application to specifically measure service quality perception of Court users, results elicited from data gathered in the application of SERVQUAL to the entire Costa Rican population (Murillo et al. 2014) were employed as a proxy. The study has the overarching target of finding out if SERVQUAL’s expectations results, when extracted from an applied survey to the entire Costa Rican population of service users, reflect the same priorities Court staff acknowledge in their public servants’ roles and are consistent with their service delivery duties. Both gaining understanding of the main working environmental features that characterize the Court and also testing SERVQUAL’s potential as a proxy to gauge mismatches between users’ expectations and conceptions about the roles of Court public servants and the real perceived service experiences, are the main targets pursued by the study herein presented.

6. Data Collection
In assessing GAP1, findings from SERVQUAL questionnaire -typical of quantitative research-, seemed appropriate to collect data related to the quality of service perceptions of Costa Rica’s Judiciary users; in order to contrast those figures to the ingrained conceptions of judicial servants about their roles and the services they deliver, for which observations and semi-structure interviews -typical methods of qualitative research- were used. The fact that judicial back office processes are not documented as they have naturally emerged from Magistrates’ decisions (in their managerial role) made throughout the years, actually pointed at participant observation and semi-structured interviews as the most suitable means to collect data from Court staff, in particular because they enabled both to observe Court’s staff behavior and also to subsequently comprehend the underlying reasons for that behavior (Hammersley & Atkinson 2007).

Thereby and as abovementioned, this is for all purposes a mixed methods study (Bryman and Bell 2011) applied to a social science environment: the Costa Rica’s Judiciary, which comprises both judicial servants and citizens in their role of service users as units of analysis. Although the SERVQUAL quantitative section of the study tends to be a priority over the qualitative section, its contrasting nature dovetails the study as a complementary (Bryman and Bell 2011), as both quantitative and qualitative approaches nurture from one another (Greenfield 2002).

As contended by Patterson (2009) “in a government service context, surveys have been considered instruments for increasing citizen participation and equity, setting budget priorities, holding government accountable for results, achieving program effectiveness, and obtaining information on citizen experiences, perceptions, and subjective evaluation of
services received.” Thus, the first data collection method described in this section is the survey based on the SERVQUAL questionnaire, which was thoroughly reviewed and adapted to Costa Rica’s judicial jargon from its original standard version as seen on Appendix 2. The adaptation was a lengthy process because it required of several meetings and small pilot runs in order to validate the meaning of every word used, without denaturalizing the instrument itself.

SERVQUAL data was collected in a nationwide scale through the professional coordination of the author. For survey purposes, the entire population universe was collectively exhaustive since none user was excluded from a particular jurisdiction. Costa Rica’s Judiciary IT department provided a case log with users’ full names, contributing to initially consider a systematic sampling plan. However, missing telephone contact numbers in some records led to discard this idea of single random sampling (entire users’ universe strata was better represented by the likelihood of a particular user showing up to his/her correspondent jurisdiction office building at the given moment when surveys were being carried out). Hence, since the choice of a particular person to fill out the questionnaire would solely be the individual decision of Service Comptroller officer carrying out the survey a given time, it could be implied that the probability of a particular individual to be chosen “out of the pool” of adjudicative service users was not the same for all potential users. Thus, the initial stratified sampling plan was transformed into a non-probability quota sampling plan, were specific questions were incorporated in the questionnaire to filter out, if a particular individual was visiting the given jurisdictional office building seeking for a specific adjudicative service or was simply someone running a particular errand not related whatsoever to judicial services (Murillo et al. 2014). See Table 1 for jurisdiction quota.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Number of cases in 2008</th>
<th>Jurisdiction’s Weight</th>
<th>Sample size per jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 First from San José</td>
<td>103,977</td>
<td>19.5%</td>
<td>234</td>
</tr>
<tr>
<td>2 Second from San José</td>
<td>106,908</td>
<td>20.0%</td>
<td>240</td>
</tr>
<tr>
<td>3 Third from San José</td>
<td>41,248</td>
<td>7.7%</td>
<td>93</td>
</tr>
<tr>
<td>4 First from Alajuela</td>
<td>31,594</td>
<td>5.9%</td>
<td>71</td>
</tr>
<tr>
<td>5 Second from Alajuela</td>
<td>16,132</td>
<td>3.0%</td>
<td>36</td>
</tr>
<tr>
<td>6 Third from Alajuela</td>
<td>21,143</td>
<td>4.0%</td>
<td>48</td>
</tr>
<tr>
<td>7 Cartago</td>
<td>32,683</td>
<td>6.1%</td>
<td>74</td>
</tr>
<tr>
<td>8 Heredia</td>
<td>48,166</td>
<td>9.0%</td>
<td>108</td>
</tr>
<tr>
<td>9 First from Guanacaste</td>
<td>16,497</td>
<td>3.1%</td>
<td>37</td>
</tr>
<tr>
<td>10 Second from Guanacaste</td>
<td>19,338</td>
<td>3.6%</td>
<td>43</td>
</tr>
<tr>
<td>11 Puntarenas</td>
<td>27,016</td>
<td>5.1%</td>
<td>61</td>
</tr>
<tr>
<td>12 First from Zona Sur</td>
<td>15,314</td>
<td>2.9%</td>
<td>34</td>
</tr>
<tr>
<td>13 Second from Zona Sur</td>
<td>13,368</td>
<td>2.5%</td>
<td>30</td>
</tr>
<tr>
<td>14 First from Zona Atlántica</td>
<td>21,939</td>
<td>4.1%</td>
<td>49</td>
</tr>
<tr>
<td>15 Second from Zona Atlántica</td>
<td>18,159</td>
<td>3.4%</td>
<td>41</td>
</tr>
<tr>
<td>Total</td>
<td>533,482</td>
<td>100.0%</td>
<td>1200</td>
</tr>
</tbody>
</table>

Source: Murillo et al. (2014)

Regarding to sample size calculation, Murillo et al. (2014) reported for the SERVQUAL’s questionnaire original data a 95% confidence level and a 3% sampling error, assuming a worst case of 50% dissatisfied population ratio. The theoretical total sample, corrected by finite population factor (Costa Rican population in 2009 was approximately 4.5 million inhabitants according to the National Institute of Statistics and Census -INEC-) turned out being 1067 surveys, so a total of 1200 questionnaires for all 15 jurisdictions were targeted (See Table 1). However, after scrutinizing for errors, sample size was reduced to 873 samples, which is equivalent to a combined confidence level of 95% and 3.32% sampling error; or a 92% confidence level and a 3% sampling error. Since keeping sampling error as low as possible is considered most critical from a statistical point of view, the latter assumption was kept. Executional and financial resource wise, the sampling plan was convenient as each jurisdiction had its own Service Comptroller staff unit, so data was collected and transcribed in an inexpensive and reliable fashion under the direct coordination of the author.

Although the main purpose of a sampling methodology is to generalize the sample result to the entire population, multivariate analysis is out of the scope of this study. Nonetheless, it is worth mentioning that when the original SERVQUAL data is analyzed for quality indicators, it rendered robust results which in turn allow inferring about the population in the original study. In fact, the primary quality indicators elicited by the original study were described as significant in accordance to the following quote: “study’s degree of generalizability is not considered negligible and on contrary is considered to be high, matching arguments found in literature about a trade-off between internal and external validity” (Murillo et al., 2014 p.15).
The second data collection method described herein is participant observation, which derives from the field observation method, and which initially intends to gain insight of the Court’s working environment in order to discover mismatches between Court staff actual attitudes towards service delivery while performing their public servant roles; contrasted to their real performance when actually delivering those services to Judiciary users. Author’s inception during GICA-Justicia Project development was advantageous in carrying out observation on the field, particularly because it became participant observation as it was undertaken for almost a two year period (DeWalt et al 1998), so that the author became part of the group over this extensive lapse (Punch, 2005). Identifying and selecting most knowledgeable, cooperative and change-prone Court staff as positive leaders became an initial must-do endeavor since a fast spread of the message that an observation study was being carried out was pursued. This task was easily and successfully achieved because of the small headcount of the Court. Author’s participatory involvement was actually crucial as it aided in a faster absorption of ideas and concepts considered to provide a better understanding of the Court’s underlying working environment features. Semi-structured interviews is the last data collection method herein described. Semi-structured interviews targeted to explore Court staff mindsets and conceptions of their roles as judicial servants towards the services to be delivered to Judiciary users. Although author’s participatory involvement actually favored to carry out many informal unstructured interviews by means of “go with flow” conversations, those were discarded as formal data collection means on account of its lack of systematic features (Weiss 1994). Close-fixed structured interviews were also discarded as they were considered unsuitable for systematic data collection, particularly because they were though to diminish the chances of Court staff to express their innermost points of views in what concerns their judicial servants’ service delivery role. Consequently, semi-structured interviews were employed as they allowed the author to exercise some degree of freedom and flexibility in so far as interviews were conducted in a conversation-like exchange, at the same time they kept interviews under track by following a set of given inquiries (Robson 1993). Twelve judicial interviewees were asked the same semi-structure questions in order to both facilitate analysis and comparison between answers and also to systematically aggregate information.

7. Data Analysis Results
This study does not attempt to gauge the service gap of judicial services users, but the gap between the judicial users’ expectations and the conceptualized features of the services that must be provided under the lens of judicial servants, in accordance to the SERVQUAL’s model GAP1 definition. So that, out of the data from the original SERVQUAL questionnaire, only expectations figures were employed as proxies of ideal attributes that services delivered by Judiciary must have. Figure 2 shows the full ranking of expectations for the aggregated sample of Costa Rica’s Judiciary service users.

Figure 2. Ranking of SERVQUAL’s expectations

Source: Created by the author based on SERVQUAL data provided by Costa Rica’s Judiciary
As observed in Figure 2, the expectations’ figures range between a lowest value of 6.06 and a highest value of 6.37 with an average expectation value of 6.20. The previous figures are revealing in the sense they show that expectations regarding the services that should be delivered by Costa Rica’s Judiciary are in general high since the top notch of the scale is 7. In addition, the small range between the lowest and the highest figures denotes a general consistency in service expectations, with an average standard deviation value of 1.22.

Out of the 22 values, there are ten values which fall above the average expectation value of 6.20 and thus represent the factors that Judiciary users value the most. For those ten values an average figure of 6.28 and a standard deviation figure of 1.14 could be calculated. See Table 2.

<table>
<thead>
<tr>
<th>Table 2</th>
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<tbody>
<tr>
<td>Top ten users’ expectations</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Dimension</th>
<th>Average</th>
<th>Question asked according to the SERVQUAL questionnaire</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dim5</td>
<td>6.37</td>
<td>QP.18 Judiciary provides service users an individualized attention (when service is being delivered is only delivered to you)</td>
</tr>
<tr>
<td>Dim1</td>
<td>6.35</td>
<td>QP.3 Judiciary staff have a neat personal appearance</td>
</tr>
<tr>
<td>Dim5</td>
<td>6.31</td>
<td>QP19. Judiciary’s opening hours are convenient to all service users</td>
</tr>
<tr>
<td>Dim4</td>
<td>6.29</td>
<td>QP14. Judiciary’s staff behavior conveys confidence to service users</td>
</tr>
<tr>
<td>Dim4</td>
<td>6.29</td>
<td>QP17 Judiciary’s staff are knowlagable enough to answer the specific questions and consultations from service users</td>
</tr>
<tr>
<td>Dim1</td>
<td>6.26</td>
<td>QP4. The material elements related to service delivery used by judiciary are visually attractive (signs, informative posters, brochures, etc.).</td>
</tr>
<tr>
<td>Dim5</td>
<td>6.25</td>
<td>QP20 Judiciary’s staff offer service users a personalized attention (service is adapted to the specific needs of service users)</td>
</tr>
<tr>
<td>Dim4</td>
<td>6.23</td>
<td>QP16. Judiciary’s staff always have a nice attitude towards service users</td>
</tr>
<tr>
<td>Dim1</td>
<td>6.2</td>
<td>QP1. Judiciary have modern equipment (computers, data systems, information systems provided to users)</td>
</tr>
</tbody>
</table>

Source: Created by the author based on SERVQUAL data provided by Costa Rica’s Judiciary.

From Table 2 it is worth noting that 4 out the 4 factors comprising Dimension 4 (System’s Trustfulness) are counted among the top 10, in addition 3 out 4 factors comprising Dimension 1 (Physical perception) and 3 out of the 5 factors for Dimension 5 (Focus on users' needs). Hence, knowledge and courtesy of judicial servants and their ability to convey trust and confidence becomes of higher expectation value for adjudicative service users, followed by the appearance of physical facilities, equipment, personnel, and communications provided by the Judiciary and then by the ability of the Judiciary to provide care and individualized attention to its customers. Those figures can now be contrasted to qualitative findings of both participant observation and semi-structure interviews. Do the latter expectations also match what judicial servants assumed users really required? Are the expectations priorities different for both stakeholders?

Table 3 describes the key features of participants involved during the participant observation period. Roles were previously described in a section above.

<table>
<thead>
<tr>
<th>Table 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Key features of participants involved in Participant Observation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Position</th>
<th>Professional Background</th>
<th>Sex</th>
<th>Nationality</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 5 Magistrates</td>
<td>18 lawyers / attorneys</td>
<td>17 male</td>
<td>33 Costa Ricans</td>
</tr>
<tr>
<td>• 12 assistant lawyers</td>
<td>7 law students</td>
<td>16 female</td>
<td></td>
</tr>
<tr>
<td>• 5 secretaries.</td>
<td>5 secretaries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secretariat</td>
<td>3 non profesionals.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 1 chief lawyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 7 paralegals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 1 delivery clerk</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 2 janitors</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Created by the author

Participant observation carried out within Court’s facilities comprised the entire headcount, and so provided the author with much of the pursued evidence of Court’s working environment features. Although there is no consensus in participant observation assessment standards, minimal personal bias during data collection is expected. Even when no particular protocol was devised to reduce ethnocentrism bias risk (Richardson, 2000), author’s awareness of this potential issue
prevented of acquiring too theoretical or idealized explanations of Court’s working environment. In this way, *participant observation* was boarded through a reflexivity framework (Richardson 2000, p. 254) avoiding philosophical assessments (emotionalism, for instance) to the highest extent.

Recorded *observations* in field notes suggest a general lack of interest from judicial servants to comply with schedules and to perform in a high productivity fashion within the available working hours’ window. In addition, activities and attitudes appeared to be influenced by a daily routine, somehow confirming a “lack of clear performance targets, experimental attitude, evaluation in order to learn from experience and reluctance to abandon programs” which are common barriers public organizations must overcome in accordance to Drucker (1980). A descriptive example to support the argument above is shown as follows in a reflexive writing style note format. It must be noticed that the Court’s working shift starts at 7:30 am.

“[The time clock marks 7:30 pm. 20 minutes after 3 people slide their batches. As they leave their belongings over their desks, they go to a medium size room with a table in the middle and 6 chairs, and start pouring coffee from a coffee maker. As one of them is adding sugar, five more people enter the room, say –good morning- and also start pouring coffee in their mugs. Meanwhile, one of them starts preparing a big ham and cheese sandwich that is going to be shared by all. Although by, 8:01 am, almost everyone has left, there are still two ladies in the room talking about last night’s channel 7 soap opera, when they are suddenly interrupted by a Magistrate who requests one of them to show up in his office as soon as she has the chance.]”

Nonetheless, *participant observation* did not directly provide evidence of the service encounters with users, as the Court staff do not personally deal with them, unless an audience/hearing with a particular Magistrate is requested. However those events are actually the exception and not the rule. In some cases, assistant lawyers have the chance to talk to users on the phone, which unfortunately was not an occurrence recorded during the days *participant observation* was carried out, but only verbally reported by assistant lawyers to have previously occurred. In this venue, *participant observation* contributed to the addition of a question to the *semi-structured interview*, actually pursuing to shed some light about the features of the crucial service encounters between Court staff and judicial users.

The transcribed *semi-structure interviews* were analyzed by means of a Grounded Theory (See Appendix 3 for an example) as this approach focuses on how “to explain what is central in the data” (Punch, 2005). One common denominator in the interview analysis for all interviewees revolved around the *judicial independence issue*, so that various rooted conceptions in judicial servants’ particular mindsets surfaced, which appeared to be a major cause depriving them from delivering services that fulfill users’ expectations. Interview analysis –as this *judicial independence* issue became recurrent in all interviews to the extent of reaching a saturation point- suggests that Court staff have misconceived ideas related to their administrative duties, in the sense that those duties must be totally decoupled from adjudicative functions. The following is a quotation from a given Magistrate’s secretary:

“[Some cases have similar patterns, which could be eventually solved rapidly. However, we have done things like this for many years, and at the end, the judicial independence principle of Magistrates must be respected. They are entitle to last as much as they want when delivering a sentence]”

Even when one interviewee recognized the existence of process inefficiencies negatively impacting judiciary users due to the underperformance of Court’s processes, a justifying argument was given to reinforce the idea that Magistrates are entitled to spend as much time as they considered necessary in their dictating sentences. The following is the literal translated quotation:

“[The Court is the last resort for many citizens to achieve justice for their particular cases, which have already gone through other judges. It is precisely in the details that a Magistrate founds the supportive evidence to either ratify or invalidate a previous sentence. For that, freedom of mind is required and Magistrates cannot be pressured in order to deliver as if they were in a factory of sentences]”

Interview analysis in general suggests that Court’s judicial servants are prone to appeal to the *judicial independence principle* in order to justify service performance inefficiencies. A relevant translated quotation from an assistant lawyer that supports this statement is shown as follows:

“[We are a service organization with a high responsibility, since we deliver justice to Costa Rica’s citizens. The things we do cannot be pigeonholed into fixed times, since every case is different. Forcing us to work under standard quotas and times would certainly violate the judge independence principle, which is a medullar requirement for a Court to function.]”
8. Discussion of Findings
Latin-American judiciaries, within which Costa Rica is not the exception, share among themselves problems such general complaints about large costs related to justice administration, difficulties in access to justice, absence of a fixed organizational and operational pattern for adjudicative and administrative offices, and process complexity. This inventory of dissatisfaction sources, provides an idea of the different quality expectations residing in all stakeholders involved, and so, the complexity of providing an integral solution to the many related issues. Both qualitative and quantitative approaches contributed to unveil different important findings regarding the latter issues.

Survey provided the set of expectations residing in Judiciary users minds about service quality. Despite the critics, the SERVQUAL questionnaire -from which those expectations emerged- is a proven tool buttressed by validity and reliability studies as reported in literature. In fact, all findings stemmed from the original SERVQUAL survey this study is based upon are proven to be statistically significant as they derive from the stringent analysis reported in Murillo et al. (2014). Thus, the idea of having created a ‘brand new’ questionnaire for this study purpose would have become absurd as it would have limited the robustness and quality of survey data.

Participant observation was proven to be useful in terms of gaining insight Court staff attitudes towards their service delivery roles and addition to their actual performances within the working environment. The author tended to perceive in Court staff a general lack of commitment and engagement in relation their service delivery duties. This observed performance when extrapolated to many consecutive working days would indeed account for an underachieving service delivery, particularly from response time perspective.

Semi-structured interviews, although did not assist in designing the survey, were paramount in understanding Court staff mindsets and conceptions of their roles as judicial servants. Findings suggest that judicial users actually have high expectations in regards to quality of service and commitment from judicial servants. Even when Court staff claimed to be focused on servicing Judiciary users, semi-structure interviews suggest their actual performance to be ambiguous in the sense that Court servants do not seem to execute their duties to the best of their abilities. Although Court staff assures to have full awareness of users’ needs, their generalized behavior appears to be the opposite when contrasted to SERVQUAL’s expectations findings.

SERVQUAL’s results (Murillo et al. 2014) have elicited that the main sources of users’ dissatisfaction (defined as the difference between service users’ expectations and perceived service quality) for the entire Costa Rican population of Judiciary service users were speed, accurate reporting upon service conclusion, service delivery within promised time, constant willingness to answer queries, performing well since the very beginning and genuine interest to provide a solution. Findings herein were found useful in further extending the latter reported results, as they actually suggest that Court’s staff priorities are not focused on factors comprising the Capability and Response Speed Service Dimensions.

9. Conclusion
Expectations figures from SERVQUAL’s survey applied to the entire Costa Rican population of judicial service users proved to be a useful proxy for the assessment of Court’s expectations, as they pursue gauging mismatches between users’ expectations and the conceptions Court staff have about their public servants roles. Findings actually suggest that Court staff performances –from the service delivery lens of judicial service users- deviate from what is really expected from them to be delivered. Although generalization from the original SERVQUAL study is possible, findings for the study herein are unfortunately not generalizable to the entire Costa Rican Judiciary, due to the constraining fact that interviewing and observational data is only representative for the Court, which comprises a negligent headcount of Costa Rica’s entire Judiciary staff.

Improvements to the general service delivery function within Latin-American judicial environments become indeed a cumbersome endeavor, particularly because of the pressure exerted on judicial servants, who are usually not accustomed to have their performance assessed. Not surprisingly, there is certainly a widespread perception in Court staff that service delivery performance assessment represents just a means to justify headcount downsizing; blinding Court staff to see its potential to help them in performing better. The fact and the matter is that in hypothetical cases where extra process capacity (more staff than required) were identified and where those idle positions -if costed- would certainly reveal process inefficiencies from a financial perspective; relocation to other areas within the Judiciary would be not as immediate as in the case of a private firm, in special because the labor code strongly protects Judiciary staff. Even though, fear and resistance to change are ingrained characteristics expectable from both Court staff and probably also from of the entire Judiciary personnel in Costa Rica.
All the latter issues do certainly pose constraints regarding the efficient use of resources, particularly in Latin-American Judiciaries. Hence, the deployment of process performance improvement approaches becomes a desirable goal, as those approaches actually may turn into potential public value creation tools. On one hand those approaches target to improve citizens’ perception of service quality and on the other hand to seek to regain public confidence in the Judiciary. In this way, and while keeping in mind it is not the only available tool, in addition to putting aside the expected critics to any instrument intended to measure psychological constructs, SERVQUAL certainly emerges as a non-traditional tool for Judiciaries to address service quality, to identify process improvement opportunities and to persuade Court’s staff to support process-change implementations with an eye on improving service delivery. SERVQUAL indeed appears to be a gauge Judiciaries could rely upon in order to identify the expected services to be delivered and to take the proper organizational change decisions to align processes towards satisfying delivered services. Thus, services could be designed and delivered according to user’s expectations and not as the result of the Judiciary decision makers’ perception of what should be delivered, in accordance to GAP1’s definition.

When improvements in users’ perceived service quality are aimed, Judiciary staff attitude toward their role as public servants is paramount, supported by the premise that the provision of quality service is totally dependable upon their performance. Implementing process improvements requires then of the extensive training of Court staff, by carrying out meetings and coaching sessions, where SERVQUAL’s results may become crucial pieces of information in grounding service delivery perceptions to real service performance needs. The short term efforts required from Court’s staff for improvement changes to take effect in addition to the medium term benefits expected may become clearer. Grounding ‘hard data’ figures like the ones SERVQUAL provide may indeed aid in dissipating much of Judiciary’s staff common fear to change and actually turn into a cooperative attitude. SERVQUAL then appears to be a robust complementary instrument to aid in the service delivery improvement function, which when correctly and recurrently applied could directly benefit staff’s working environments and also and more important positively impact user’s overarching public experience.

10. Further Research
Further research may be advisable, putting to the test other non-traditional approaches, such a Lean Service principles for instance, in order to test its suitability in service quality assessment in judicial environments. Further research may be also required in targeting the collection of more robust ethnographic data by means of interviews, observations or other qualitative methods to all hierarchies in the entire Costa Rica’s Judiciary. The process of course is to be repeated to the extent of reaching a saturation point in a set of more representative succinct voices of judicial servants concerning their duties responsibilities, commitment and engagement as public servants. Performing further research in other countries other than Costa Rica is then desirable, so that the collected data could be employed in cross-country comparisons in order to transversally strengthen the organizational change persuasion arguments for Judiciary public servant. In addition, further research could be employ in lobbying within other Latin-American Supreme Courts’ top management in order to steer their mindsets towards a service quality institutional commitment.

I. References


II. Appendices
Appendix 1. ServQual Questionnaire (-in English-)

<table>
<thead>
<tr>
<th>Category</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>JUSTICE INTEGRATED QUALITY MANAGEMENT PROJECT (GICA)</strong></td>
<td></td>
</tr>
<tr>
<td><strong>CITIZEN PARTICIPATION ACTIVITIES</strong></td>
<td></td>
</tr>
<tr>
<td><strong>MEASURING QUALITY OF ADMINISTRATION OF JUSTICE SERVICES OF THE JUDICIARY OF COSTA RICA</strong></td>
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</tr>
</tbody>
</table>

The Judiciary of Costa Rica with the cooperation of the European Union and the EUROSOCIAL Justice Program, is promoting a worldwide pioneering project called: “Integrated Quality Management and Accreditation Model for Judicial Offices in Costa Rica” (GICA-Justice).

It is intended to collect information regarding the perception of the users of the Administration of Justice System of Costa Rica, known as any direct/indirect contact experience with the services rendered by the Judiciary in all its extension. A user of the Administration of Justice System is a person who externally requires fulfilling some particular need through the services above-mentioned.

We invite you to participate in this Project, filling in the most objective way possible, the following questionnaire based in your experience as an external service user, so this can be used for the developing of this project. Filling this questionnaire will not take you more than 30 minutes. Thank you very much for your collaboration and time.

**GENERAL INFORMATION**

1) Date on which you are filling this questionnaire:

2) Indicate the classification that most suits your status as a user of the Administration of Justice System.

<table>
<thead>
<tr>
<th>Classification</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Lawyer / Notary requesting information</td>
<td></td>
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<tr>
<td>b. Plaintiff (State or another Public Entity)</td>
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<tr>
<td>c. Defendant (State or another Public Entity)</td>
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<tr>
<td>d. User requesting information</td>
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<td>e. Claimant (Criminal matter or Domestic Violence)</td>
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<tr>
<td>f. Respondent (Criminal matter or Domestic Violence)</td>
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<td>g. Paralegal</td>
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<td>h. Plaintiff (natural person)</td>
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<tr>
<td>i. Defendant (natural person)</td>
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<tr>
<td>j. Law student</td>
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<tr>
<td>k. Plaintiff (legal entity)</td>
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<td>l. Defendant (legal entity)</td>
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<td>m. Other</td>
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</tbody>
</table>

3) Have you required the services of the Second Court of Appeal of the Judiciary in the last 3 years (from July 2004)?

If your answer is NO or DK/NA (Doesn’t know/No Answer), proceed with question 4). If your answer is YES proceed with question 1) in the Physical Perception Section located on Page 2.

4) Mark with an (X) which Jurisdiction you visit the most, since July 2006, requiring the Administration of Justice Services

<table>
<thead>
<tr>
<th>Judicial Circuit</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. I Judicial Circuit of San José (Downtown San José, Puriscal, Pavas, Escazú, Mora Santa Ana, Turrubares)</td>
<td></td>
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<tr>
<td>b. III Judicial Circuit of San José (Desamparados, Hatillos, Aserrí, Acosta, San Sebastián, Alajuelita)</td>
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<tr>
<td>c. II Judicial Circuit of San José (Goicoechea)</td>
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<tr>
<td>d. I Judicial Circuit of Alajuela (Alajuela, Atenas, Poás)</td>
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<tr>
<td>e. II Judicial Circuit of Alajuela (San L, La Fortuna de San L, Upala, Los Chiles, Guatuso)</td>
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<tr>
<td>f. III Judicial Circuit of Alajuela (San Ramón, Grecia, Naranjo, Alfaro Ruiz, Palmares, Valverde Vega)</td>
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<tr>
<td>g. I Judicial Circuit of Guanacaste (Liberia, Cañas, La Cruz, Bagaces, Abangares, Tilarán)</td>
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<td>h. II Judicial Circuit of Guanacaste (Nicoya, Santa Cruz, Carrillo, Hojancha, Nandayure, Jicaral)</td>
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<tr>
<td>i. I Judicial Circuit of the Atlantic Zone (Limón, Bribri, Batán)</td>
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<tr>
<td>j. II Judicial Circuit of the Atlantic Zone (Pococi, Siquirres, Guácimo)</td>
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<tr>
<td>k. I Judicial Circuit of the South Zone (Pérez Zeledón, Buenos Aires)</td>
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<tr>
<td>l. II Judicial Circuit of the South Zone (Corredores, Golfito, Osa, Coto Brus)</td>
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<tr>
<td>m. Judicial Circuit of Puntarenas (Puntarenas, Aguirre)</td>
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<tr>
<td>n. Judicial Circuit of Heredia (Heredia, Sarapiquí,</td>
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</table>
y Parrita, Cóbano, Esparza, Montes de Oro, Garabito, San Mateo, Orotina) | San Isidro, San Rafael, Santo Domingo, San Joaquin de Flores

- Judicial Circuit of Cartago (Cartago, Turrialba, La Unión, Alvarado, Paraíso, Jiménez, Tarrazú, Dota, León Cortés)

5) How often do you use the Administration of Justice Services in this jurisdiction? (number of procedures per year). Mark with an (X)

<table>
<thead>
<tr>
<th>None</th>
<th>At least once</th>
<th>2 to 5 times</th>
<th>6 to 12 times</th>
<th>More than 12 times</th>
<th>DK/NA</th>
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</table>

6) Since July 2006 which Court, Tribunal or another related office do you visit more often, in the jurisdiction marked in question 4), requesting the following matters services? Mark with an (X) only one matter.

- a. Agricultural
- b. Civil
- c. Contentious Administrative
- d. Misdemeanour
- e. Notarial
- f. Criminal (Public Prosecutor)
- g. Alimony
- h. Criminal (Judicial Investigation Bureau)
- i. Traffic
- j. Domestic Violence
- k. Criminal (Public Defense)
- l. Labour

7) Mark with an (X) how often do you use the Administration of Justice Services in other circuits than the marked on question 4) (number of procedures per year).

<table>
<thead>
<tr>
<th>None</th>
<th>At least once</th>
<th>2 to 5 times</th>
<th>6 to 12 times</th>
<th>More than 12 times</th>
<th>DK/NA</th>
</tr>
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GENERAL INSTRUCTIONS

Think about the kind of institution that would deliver excellent quality of service, with which you would feel completely satisfied. Based on your experience, we are also interested in knowing your perception regarding the services rendered by the Judiciary of Costa Rica.

Please mark with an (X) the option that best agrees with your opinion concerning how much you agree with the following sentences. Use the following scale.

1: Strongly Disagree  2: Disagree  3: Slightly Disagree  
4: Indifferent  5: Slightly Agree  6: Agree  
7: Strongly Agree  DK/NA: Don’t know/No Answer

If you feel a feature is absolutely essential mark number 7, if you feel that is not at all essential, mark number 1. There are no right or wrong answers, all we are interested in is your overall impression about the Administration of Justice Services.

PHYSICAL PERCEPTION

1. Excellent institutions have modern equipment (computers, data capture systems, information systems provided to users).

2. Judiciary has modern equipment (computers, data capture systems, information systems provided to users).

3. Excellent institutions’ facilities are visually attractive (waiting rooms, toilets, halls, etc).

4. Judiciary’s facilities are visually attractive (waiting rooms, toilets, halls, etc).

5. Excellent institutions’ personnel have a neat personal appearance.

6. Judiciary staff has a neat personal appearance.

7. The material elements related to service delivery used by an excellent institution are visually attractive (signs, informative posters, brochures, etc.).
8. The material elements related to service delivery used by Judiciary are visually attractive (signs, informative posters, brochures, etc.).

**SERVICE DELIVERY**

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<tbody>
<tr>
<td>9.</td>
<td>When an excellent institution promises to do something it does it.</td>
<td>1</td>
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<tr>
<td>10.</td>
<td>When Judiciary promises to do something it does it.</td>
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<td>11.</td>
<td>When a service user has a problem, an excellent institution will show a genuine interest to provide a solution.</td>
<td>1</td>
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<td>12.</td>
<td>When you have a problem, Judiciary shows a genuine interest to provide a solution.</td>
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<td>13.</td>
<td>Excellent institutions perform well since the very first time.</td>
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<tr>
<td>14.</td>
<td>Judiciary performs well since the very first time</td>
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<td>15.</td>
<td>Excellent institutions provide their service within the promised time window.</td>
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<td>16.</td>
<td>Judiciary provides its service within the promised time window.</td>
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<td>17.</td>
<td>Excellent institutions keep error free records (case files, documents, etc)</td>
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<tr>
<td>18.</td>
<td>Judiciary keeps error free records (case files, documents, etc)</td>
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**RESPONSIVENESS**

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<tbody>
<tr>
<td>19.</td>
<td>Excellent institutions’ personnel accurately inform users when a service delivered, is going to end.</td>
<td>1</td>
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<td>20.</td>
<td>Judiciary’s staff accurately informs users when a service delivered, is going to end</td>
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<td>21.</td>
<td>Excellent institutions’ personnel deliver service to users in a fast manner.</td>
<td>1</td>
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<tr>
<td>22.</td>
<td>Judiciary’s staff delivers service to users in a fast manner.</td>
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<td>23.</td>
<td>Excellent institutions’ personnel are always willing to help service users</td>
<td>1</td>
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<tr>
<td>24.</td>
<td>Judiciary’s staff is always willing to help service users</td>
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<td>6</td>
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<td>25.</td>
<td>Excellent institutions’ personnel are never too busy to answer questions and resolve issues from service users.</td>
<td>1</td>
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<tr>
<td>26.</td>
<td>Judiciary’s staff is never too busy to answer questions and resolve issues from service users.</td>
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**CONFIDENCE IN THE SYSTEM**

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<tbody>
<tr>
<td>27.</td>
<td>Excellent institutions’ personnel behaviors convey confidence to service users.</td>
<td>1</td>
<td>2</td>
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</tr>
<tr>
<td>28.</td>
<td>Judiciary’s staff behavior conveys confidence to service users.</td>
<td>1</td>
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</tr>
<tr>
<td>29.</td>
<td>Service users are confident of excellent institutions’ performance (documents handed in, consultations, verdict issued by a judge, etc)</td>
<td>1</td>
<td>2</td>
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<td>4</td>
<td>5</td>
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<tr>
<td>30.</td>
<td>You are confident of Judiciary’s performance (documents handed in, consultations, verdict issued by a judge, etc)</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>31.</td>
<td>Excellent institutions’ personnel always have a nice attitude towards service users</td>
<td>1</td>
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<td>3</td>
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<td>5</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>32.</td>
<td>Judiciary’s staff always has a nice attitude towards you</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>33.</td>
<td>Excellent institutions’ personnel are knowledgeable enough to answer the</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
</tr>
</tbody>
</table>
specific questions and consultations from service users.  

<table>
<thead>
<tr>
<th>Question</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>34. Judiciary’s staff is knowledgeable enough to answer the specific questions and consultations from service users.</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
</tbody>
</table>

**FOCUS ON SERVICE USER’S NEEDS**

<table>
<thead>
<tr>
<th>Question</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>35. Excellent institutions provide service users an individualized attention (when service is being delivered is only delivered to you).</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>36. Judiciary provides service users an individualized attention (when service is being delivered is only delivered to you)</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>37. Excellent institutions’ opening hours are convenient to all service users.</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>38. Judiciary’s opening hours are convenient to all service users.</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>39. Excellent institutions’ personnel offer service users a personalized attention (service is adapted to the specific needs of service users).</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>40. Judiciary’s staff offers service users a personalized attention (service is adapted to the specific needs of service users).</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>41. Excellent institutions’ personnel do care about the interests of service users.</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>42. Judiciary’s staff does care about the interests of service users.</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>43. Excellent institutions’ personnel understand the specific needs of the service users.</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
<tr>
<td>44. Judiciary’s staff understands the specific needs of the service users.</td>
<td>1 2 3 4 5 6 7 DK/NA</td>
</tr>
</tbody>
</table>

**RELATIVE IMPORTANCE OF SERVICE ELEMENTS**

Listed below are five features pertaining to an institution which delivers Administration of Justice Services. According to its importance please allocate a total of 10 points among them according to how important each feature is to you. The more important feature is to you, the more points you should allocate. You may leave blank boxes, just make sure that the points you allocate to the five features add up to 10.

![Table of features and ratings](image)

1. The appearance of the physical facilities, equipment, personnel and computer and communication systems.
2. Ability to perform the promised service.
3. Willingness to help customers and provide a prompt service.
4. Knowledge and courtesy of the personnel and their ability to convey trust and confidence to services users.
5. The caring, individualized attention provided to the customers.
PROYECTO GESTIÓN INTEGRAL DE CALIDAD GICA JUSTICIA
ACTIVIDADES DE PARTICIPACIÓN CIUDADANA

MIDIENDO LA CALIDAD EN SERVICIOS DE ADMINISTRACION DE JUSTICIA DEL PODER JUDICIAL DE COSTA RICA


Se pretende recopilar información sobre la percepción de las personas usuarias del sistema de Administración de Justicia en Costa Rica, entendida como toda la experiencia de contacto directo/indirecto con los servicios brindados por el Poder Judicial en toda su amplitud. Debe entenderse como persona usuaria aquella que externamente requiere satisfacer alguna necesidad particular, a través de dichos Servicios de Administración de la Justicia.

Lo (a) invitamos a participar activamente de este proyecto, llenando de la manera más objetiva el siguiente cuestionario desde la óptica de una persona usuaria externa, de modo que se pueda emplear como insumo para el desarrollo del proyecto. Llenar este cuestionario no le tomará más de 30 minutos. Muchas gracias por su colaboración y tiempo.

INFORMACION GENERAL

8) Fecha en la cual llena el cuestionario

9) Indique la clasificación que más se ajusta a su condición de persona usuaria de Servicios de Administración de la Justicia.

| n. Abogado/ Notario (a) en busca de información | o. Demandante (Estado u otro ente público) | p. Demandado (Estado u otro ente público) |
| q. Persona usuaria en busca de información | r. Denunciante (materia Penal o Violencia Doméstica) | s. Denunciado (a) (materia Penal o Violencia Doméstica) |
| t. Asistente de abogado (a) | u. Demandante (persona física) | v. Demandado (a) (persona física) |
| w. Estudiante de Escuela de Derecho | x. Demandante (persona jurídica) | y. Demandado (a) (persona jurídica) |
| z. Otro (a) |

10) Ha accedido usted a los servicios de la Sala II del Poder Judicial en los últimos 3 años (desde julio del 2004)?

Si su respuesta es NO o NS/ NR (No sabe o No responde), continúe con la pregunta 4). Si su respuesta es SÍ pase a la pregunta 1) en el apartado de Percepción Física que se encuentra en la segunda página de este cuestionario.

11) Desde julio del 2006. ¿Cuál circuito judicial visita con más frecuencia para hacer uso de los Servicios de Administración de Justicia? Sírvase marcar con una (X)

| p. I Circuito Judicial de San José (San José Centro, Puriscal, Pavas, Escazú, Mora Santa Ana, Turrubares) | q. III Circuito Judicial de San José (Desamparados, Hatillos, Aserrí, Acosta, San Sebastián, Alajuelita) |
| r. II Circuito Judicial de San José (Goicoechea) | s. I Circuito Judicial de Alajuela (Alajuela, Atenas, Poás) |
| t. II Circuito Judicial de Alajuela (San L, La Fortuna de San L, Upala, Los Chiles, Guatuso) | u. III Circuito Judicial de Alajuela (San Ramón, Grecia, Naranjo, Alfaro Ruiz, Palmares, Valverde Vega) |
| v. I Circuito Judicial de Guanacaste (Liberia, Cañas, La Cruz, Bagaces, Abangares, Tilarán) | w. II Circuito Judicial de Guanacaste (Nicoya, Santa Cruz, Carrillo, Hojancha, Nandayure, Jicaral) |
| x. I Circuito Judicial de la Zona Atlántica (Limón, Bribri, Batán) | y. II Circuito Judicial de la Zona Atlántica (Pococi, Siquírres, Guácimo) |
| z. I Circuito Judicial de la Zona Sur (Pérez Zeledón, Buenos Aires) | aa. II Circuito Judicial de la Zona Sur (Corredores, Golfito, Osa, Coto Brus) |
| bb. Circuito Judicial de Puntarenas (Puntarenas, Aguirre y Parrita, Cóbano, Esparza, Montes de Oro, Garabito, San Mateo, Orotina) |
| cc. Circuito Judicial de Heredia (Heredia, Sarapiquí, San Isidro, San Rafael, Santo Domingo, San Joaquin de Flores) |
| dd. Circuito Judicial de Cartago (Cartago, Turrialba, La Unión, Alvarado, Paraíso, Jiménez, Tarrazú, Dota, León Cortés) |

12) ¿Qué tan frecuente hace Usted uso de los Servicios de Administración de la Justicia en este circuito (número de trámites por año). Sirvase marcar con una (X)

<table>
<thead>
<tr>
<th>Ninguna</th>
<th>Al menos 1 vez</th>
<th>Entre 2 y 5 veces</th>
<th>Entre 6 y 12 veces</th>
<th>Más de 12 veces</th>
<th>NS/NR</th>
</tr>
</thead>
</table>

13) Desde julio del 2006. ¿Cuál juzgado, tribunal u otra oficina visita con más frecuencia dentro en circuito escogido en la pregunta 4) según las materias que a continuación se indican? Sirvase marcar con una (X) solamente una casilla.

| m. Agraria | n. Civil | o. Constitucional |
| p. Contencioso Administrativo | q. Contravencional | r. Familia |
| s. Notarial | t. Penal (Ministerio Publico) | u. Penal Juvenil |
| v. Pensiones Alimentarias | w. Penal (OIJ) | x. Tránsito |
| y. Violencia Doméstica | z. Penal (Defensa Publica) | aa. Trabajo |

14) ¿Qué tan frecuente hace Usted uso de los Servicios de Administración de la Justicia en otros circuitos del Sistema de Justicia Costarricense (número de trámites por año). Sirvase marcar con una (X)

<table>
<thead>
<tr>
<th>Ninguna</th>
<th>Al menos 1 vez</th>
<th>Entre 2 y 5 veces</th>
<th>Entre 6 y 12 veces</th>
<th>Más de 12 veces</th>
<th>NS/NR</th>
</tr>
</thead>
</table>

**INSTRUCCIONES GENERALES**

Imagine el tipo de institución que brindaría un servicio de calidad excelente, con la cual usted se sentiría totalmente satisfecho (a). Basado (a) en su experiencia, adicionalmente nos interesa conocer su valoración (percepción) de los servicios brindados por el Poder Judicial Costarricense.

Sirvase seleccionar marcando con una (X), la opción que mejor refleja su opinión en relación al grado de acuerdo con las siguientes afirmaciones. Utilice la siguiente escala.

1: En total desacuerdo 2: En desacuerdo 3: En leve desacuerdo 4: Indiferente 5: En leve acuerdo 6: En acuerdo 7: En total acuerdo

NS/NR: No sabe/No responde

Si usted considera que una característica es absolutamente esencial marque 7, si considera que no es del todo esencial marque 1. No existen respuestas correctas o erradas, lo único que nos interesa recopilar son sus impresiones generales acerca de los Servicios de Administración de la Justicia.

**PERCEPCIÓN FÍSICA**

| 45. Las instituciones excelentes tienen equipos de apariencia moderna (computadoras, sistemas de captura de datos, sistemas de información electrónica a la persona usuaria). |
|-----|-----------------------------|
| 46. Los equipos del Poder Judicial tienen la apariencia de ser modernos (computadoras, sistemas de captura de datos, sistemas de información electrónica a la persona usuaria). |
| 47. Las instalaciones físicas de las instituciones excelentes son visualmente atractivas (salas de espera, servicios sanitarios, pasillos, etc). |
| 48. Las instalaciones físicas de Poder Judicial, son visualmente atractivas (salas de espera, servicios sanitarios, pasillos, etc). |
| 49. Los (as) empleados (as) de las instituciones excelentes tienen una apariencia personal pulcra. |
| 50. Los (as) empleados (as) del Poder Judicial, tienen una apariencia personal pulcra. |

1 2 3 4 5 6 7 NS/ NR
| **51.** En una institución excelente, los elementos materiales relacionados con el servicio son visualmente atractivos (rótulos, afiches informativos, folletos, etc.) | 1 2 3 4 5 6 7 | NR |
| **52.** Los elementos materiales relacionados con el servicio que utiliza el Poder Judicial son visualmente atractivos (rótulos, afiches informativos, folletos, etc.) | 1 2 3 4 5 6 7 | NR |

### PRESTACIÓN DEL SERVICIO

| **53.** Cuando las instituciones excelentes prometen hacer algo lo hacen. | 1 2 3 4 5 6 7 | NS/ NR |
| **54.** Cuando el Poder Judicial promete hacer algo lo hace. | 1 2 3 4 5 6 7 | NS/ NR |
| **55.** Cuando una persona usuaria tiene un problema, las instituciones excelentes muestran un sincero interés en solucionarlo. | 1 2 3 4 5 6 7 | NS/ NR |
| **56.** Cuando Usted tiene un problema en el Poder Judicial, éste muestra un sincero interés en solucionarlo. | 1 2 3 4 5 6 7 | NS/ NR |
| **57.** Las instituciones excelentes ejecutan bien el servicio a la primera. | 1 2 3 4 5 6 7 | NS/ NR |
| **58.** El Poder Judicial ejecuta bien el servicio a la primera. | 1 2 3 4 5 6 7 | NS/ NR |
| **59.** Las instituciones excelentes concluyen el servicio en el tiempo prometido. | 1 2 3 4 5 6 7 | NS/ NR |
| **60.** El Poder Judicial concluye el servicio en el tiempo prometido. | 1 2 3 4 5 6 7 | NS/ NR |
| **61.** Las instituciones excelentes insisten en mantener registros exentos de errores (archivos de casos, documentos, etc.) | 1 2 3 4 5 6 7 | NS/ NR |
| **62.** El Poder Judicial insiste en mantener registros exentos de errores (archivos de casos, documentos, etc.) | 1 2 3 4 5 6 7 | NS/ NR |

### CAPACIDAD Y VELOCIDAD DE RESPUESTA

| **63.** En una institución excelente, los empleados (as) informan con precisión a las personas usuarias cuándo concluirá la realización de un servicio. | 1 2 3 4 5 6 7 | NS/ NR |
| **64.** Los empleados (as) del Poder Judicial, informan con precisión a las personas usuarias cuándo concluirá la realización de un servicio. | 1 2 3 4 5 6 7 | NS/ NR |
| **65.** En una institución excelente, los (as) empleados (as) brindan un servicio rápido a las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |
| **66.** Los (as) empleados (as) del Poder Judicial, brindan un servicio rápido a las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |
| **67.** En una institución excelente, los (as) empleados (as) siempre están dispuestos a ayudar a las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |
| **68.** Los (as) empleados (as) del Poder Judicial, siempre están dispuestos a ayudar a las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |
| **69.** En una institución excelente, los (as) empleados (as) nunca están demasiado ocupados (as) para responder a las preguntas y consultas de las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |
| **70.** Los (as) empleados (as) del Poder Judicial, nunca están demasiado ocupados (as) para responder a las preguntas y consultas de las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |

### CONFIANZA EN EL SISTEMA

<p>| <strong>71.</strong> El comportamiento de los (as) empleados (as) de las instituciones excelentes transmite confianza a las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |
| <strong>72.</strong> El comportamiento de los (as) empleados (as) del Poder Judicial, le transmite confianza a las personas usuarias. | 1 2 3 4 5 6 7 | NS/ NR |
| <strong>73.</strong> Las personas usuarias de las instituciones excelentes se sienten seguras en las gestiones hechas con la organización. (entrega de documentos, | 1 2 3 4 5 6 7 | NS/ NR |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>74. Usted se siente seguro (a) en las gestiones hechas en el Poder Judicial (entrega de documentos, consultas, fallos de jueces, etc)</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>75. En una institución excelente, los (as) empleados (as) son siempre amables con las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>76. Los (as) empleados (as) del Poder Judicial, son siempre amables con Usted.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>77. En una institución excelente, los (as) empleados (as) tienen conocimientos suficientes para responder a las preguntas y consultas de las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>78. Los (as) empleados (as) del Poder Judicial, tienen conocimientos suficientes para responder a las preguntas y consultas de las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
</tbody>
</table>

**ENFOQUE A LAS NECESIDADES DE LA PERSONA USUARIA**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>79. Las instituciones excelentes dan a las personas usuarias una atención individualizada (cuando es su turno lo (a) atienden únicamente a Usted).</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>80. En el Poder Judicial le brindan una atención individualizada. (cuando es su turno lo (a) atienden únicamente a Usted).</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>81. Las instituciones excelentes tienen horarios de trabajo convenientes para todas las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>82. El Poder Judicial tiene horarios de trabajo convenientes para todas las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>83. Una institución excelente tiene empleados (as) que ofrecen una atención personal a los (as) usuarios (as) (se adaptan a sus necesidades particulares).</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>84. Los (as) empleados (as) del Poder Judicial, le ofrecen una atención personalizada (se adaptan a sus necesidades particulares).</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>85. En las instituciones excelentes, los (as) empleados (as) se preocupan por los intereses de las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>86. En el Poder Judicial, los (as) empleados (as) se preocupan por los intereses de las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>87. Los (as) empleados (as) de las instituciones excelentes, comprenden las necesidades específicas de las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
<tr>
<td>88. Los (as) empleados (as) del Poder Judicial comprenden las necesidades específicas de las personas usuarias.</td>
<td>1 2 3 4 5 6 7</td>
</tr>
</tbody>
</table>

**IMPORTANCIA RELATIVA DE LOS ELEMENTOS DE SERVICIO**

A continuación se ofrecen 5 características aplicables a una institución que brinda Servicios de Administración de la Justicia. Según su importancia, por favor distribuya un total de 10 puntos entre ellas. Por ejemplo si otorga 2 puntos a un elemento y 1 a otro, significa que para Usted el primero tiene una importancia dos veces mayor que el segundo. Si desea, puede no asignar valor a una o más casillas. Asegúrese que la suma final de todos los puntos sea 10.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>6. Apariencia de las instalaciones físicas, equipamiento, personal y sistemas de computación y comunicación.</td>
<td></td>
</tr>
<tr>
<td>7. Capacidad para proveer el servicio prometido.</td>
<td></td>
</tr>
<tr>
<td>8. Disposición para ayudar a sus clientes (as) y brindar un servicio oportuno.</td>
<td></td>
</tr>
<tr>
<td>9. Conocimiento y amabilidad de los (as) empleados (as) y su capacidad de transmitir confianza y seguridad a las personas usuarias.</td>
<td></td>
</tr>
<tr>
<td>10. Atención cuidadosa e individualizada que ofrece a sus clientes (as).</td>
<td></td>
</tr>
</tbody>
</table>
Appendix 3. Example of an interview analysis employing Grounded Theory

Phase 1 - Stages of Grounded theory analysis

<table>
<thead>
<tr>
<th>Interview Data</th>
<th>Open Codes</th>
</tr>
</thead>
<tbody>
<tr>
<td>“ISO9000 is only for manufacturing companies. We are a service organization with a high responsibility, since we deliver justice to Costa Rica’s citizens. The things we do cannot be pigeonholed into fixed times, since every case is different. Forcing us to work under standard quotas and times would certainly violate judge independence, which is a medullar requirement for a Court to function. If a case, takes 4 months to be solved by a Justice, he/she cannot be pushed to deliver within 15 days, in special because he/she needs -mind freedom- to develop adjudicative arguments, for better sake of the parties involved.”</td>
<td>• ISO9000 is not a tool for the Judiciary</td>
</tr>
<tr>
<td></td>
<td>• Judiciary services involve a higher responsibility compared to manufacturing companies.</td>
</tr>
<tr>
<td></td>
<td>• Time processing variability is high in judicial institutions</td>
</tr>
<tr>
<td></td>
<td>• Judge independence is violated when establishing working quotas.</td>
</tr>
<tr>
<td></td>
<td>• Quality of sentence depends on the freedom a judge when performing his/her jurisdictional functions, which are the core of Judiciaries.</td>
</tr>
</tbody>
</table>

Phase 2 Open codes to sub categories

<table>
<thead>
<tr>
<th>Open Codes</th>
<th>Sub Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>• ISO9000 is not a tool for the Judiciary</td>
<td>• Perceptions of judicial servants about quality management standards in judicial institutions</td>
</tr>
<tr>
<td>• Judiciary services involve a higher responsibility compared to manufacturing companies.</td>
<td>• Perceptions of judicial servants about the nature of judicial institutions in direct relation to the core judicial independence principle.</td>
</tr>
<tr>
<td>• Time processing variability is high in judicial institutions</td>
<td>• Judicial servant’s perceptions and expectations about cycle times in judiciary processes</td>
</tr>
<tr>
<td>• Judge independence is violated when establishing working quotas.</td>
<td>• Judicial servant’s perceptions and expectations on how to maintain sentence quality as a more important factor to service quality.</td>
</tr>
<tr>
<td>• Quality of sentence depends on the freedom a judge when performing his/her jurisdictional functions, which are the core of Judiciaries.</td>
<td></td>
</tr>
</tbody>
</table>

Phase 3 Sub categories to categories

<table>
<thead>
<tr>
<th>Sub Categories</th>
<th>Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Perceptions of judicial servants about quality management standards in judicial institutions</td>
<td>• Understand judicial servants conceptions of their roles as civil servants</td>
</tr>
<tr>
<td>• Perceptions of judicial servants about the nature of judicial institutions in direct relation to the core judicial independence principle.</td>
<td>• Understand the judicial independence concept and how this really relates to service quality.</td>
</tr>
<tr>
<td>• Judicial servant’s perceptions and expectations about cycle times in judiciary processes</td>
<td>• Understand if judicial independence really justifies a judged lasting as long as he/she wants to dictate a sentence.</td>
</tr>
<tr>
<td>• Judicial servant’s perceptions and expectations on how to maintain sentence quality as a more important factor to service quality.</td>
<td>• Decouple the nature of administrative procedures and adjudicative procedures in the entire judicial service delivery.</td>
</tr>
</tbody>
</table>

Phase 4 Categories to major categories

<table>
<thead>
<tr>
<th>Categories</th>
<th>Major Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Understand judicial servants conceptions of their roles as civil servants</td>
<td>• Which are judicial servants main influencing factors to change their mind sets towards their civil servants’ roles</td>
</tr>
<tr>
<td>• Understand the judicial independence concept and how this really relates to service quality.</td>
<td>• Which are the main characteristics of adjudicative processes versus administrative processes</td>
</tr>
<tr>
<td>• Understand if judicial independence really justifies a judged lasting as long as he/she</td>
<td>• What are the priorities, if any, of judicial servants</td>
</tr>
</tbody>
</table>
wants to dictate a sentence.

- Decouple the nature of administrative procedures and adjudicative procedures in the entire judicial service delivery.

when delivering judicial processes to the public users.

Phase 5 Major categories to themes

<table>
<thead>
<tr>
<th>Major Categories</th>
<th>Themes for discussion</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Which are judicial servants main influencing factors to change their mind sets towards their civil servants’ roles</td>
<td>How really judicial servants about their public role</td>
</tr>
<tr>
<td>• Which are the main characteristics of adjudicative processes versus administrative processes</td>
<td>Do judicial servants really care about the service quality they provide?</td>
</tr>
<tr>
<td>• What are the priorities, if any, of judicial servants when delivering judicial processes to the public users.</td>
<td>Judicial independence concept as justifier of service provision inefficiencies.</td>
</tr>
</tbody>
</table>
Book Review - Transitional Justice, Culture and Society: Beyond Outreach, International Center for Transitional Justice, Social Science Research Council
By Elise Ketelaars

Abstract:


Transitional Justice, Culture and Society: Beyond Outreach is the sixth volume in the ‘Advancing Transitional Justice Series’ of the International Center for Transitional Justice and the Social Science Research Council. The aim of this project is to ‘address important gaps in scholarship and provide comparative analysis of transitional justice measures and the difficult contexts in which they take place’. The relationship between transitional justice and other academic disciplines plays a key role in these publications. In this volume, editor Clara Ramírez-Barat has collected a large variety of essays which shed light on the public dimension of transitional justice initiatives.

In the preface, Paulo de Greiff argues that cultural interventions should be given more emphasis in the field of transitional justice. Referring to the traditional distinctions between the social, cultural and personal layers in sociology, de Greiff states that scholarship on transitional justice has traditionally given prominence to the role of social institutions such as courts and Truth and Reconciliation Commissions (TRCs) as catalysts of transformation in societies in transition. Though de Greiff acknowledges there are valid reasons for this institutionalist bias, e.g. that in essence ‘transitional periods are deeply political ones in the life of nations, during which … [t]he bulk of political activity is geared toward institutional transformation’, he is concerned that this exclusivist approach ignores the evidence that successful institutional change largely depends on transformations on the cultural and individual levels as well. Ramírez-Barat endorses this point of view. In her opinion the success of transitional justice measures depends not only on the accomplishment of their most immediate functions (i.e., finishing investigations, writing reports and delivering judgments) and on their political credibility, but also on the extent to which the public perceives these initiatives as legitimate. The public has to be well informed and actively engaged in transitional justice efforts if those efforts are to succeed.

Ramírez-Barat distinguishes outreach activities conducted by transitional justice institutions themselves, from efforts of the media, educational institutions, intellectuals and artists, to portray the processes that take place during the period of transition. Ramírez-Barat uses the concept of public sphere to capture the body of communicative interactions that take place between these entities and society at large without interference of the state apparatus. However, outreach activities and the different forms of communication that take place in the public sphere are not two completely separate phenomena; instead activities at the institutional level and in the social realm can interact like communicating vessels. As Ramírez-Barat puts it:

‘To the extent that well-crafted outreach programs can contribute to laying some of the conditions necessary to catalyze civic trust between citizens and official institutions, the myriad communicative interactions that take place in the social realm can in turn help to establish conditions for catalyzing trust among citizens themselves, while contributing to the societal articulation of new cultural values and norms.’

1 Elize Ketelaars is a Legal Research Master student at the Utrecht School of Law, the Netherlands.
Nonetheless, the structure of the core of the book, consisting of fifteen chapters in which examples of the interplay between transitional justice initiatives and culture/society are discussed, sticks to a clear division between activities organized by the state and initiatives born in the public sphere. The first part of the book contains three case studies about outreach programs of three different tribunals and one chapter about involving children and youth in transitional justice processes. The second part of the book, which is dedicated to the role of the media in transitional justice processes, contains four case studies about the role of the media in different societies and one chapter about the way social media are used by international and hybrid criminal tribunals. The last part of the book contains only two case studies about cultural projects related to transitional justice initiatives in particular countries and contains four chapters on certain forms of artistic and/or cultural expression.

In essence, the book follows the traditional distinction between the social layer on the one hand and the cultural and personal layers on the other, as discussed by de Greiff. Few of the case studies in this volume give a comprehensive overview of the interaction between official outreach programs and initiatives related to transitional justice processes which are rooted in the public sphere. As a result, the reader does not gain any real insight in the ways in which communicative interactions that take place in the public realm can help to create more trust in transitional justice measures. The chapters which are dedicated to the role of the media in transitional society tend to be more informative in this regard, as these chapters focus more on the interactions between tribunals and media outlets and the difficulties which can arise. The fact that this volume is one of the first attempts to draw attention to the role of the public sphere in transitional justice processes, might explain the absence of a more thorough analysis of the cross-fertilization between institutions at different levels. Ramírez-Barat concludes her introduction by underlining that this volume is a ‘preliminary exploration into the relations between transitional justice and the cultural and social spheres’ and should be read as an invitation to researchers in this field to include ‘considerations of the role of the public sphere … in the transitional justice research agenda.’

The book will interest not only professionals in the field of transitional justice, but also readers who do not have a background in the field of transitional justice but who would like to learn more about the cultural and artistic aspects of transitional justice initiatives. The book provides a comprehensive overview of a wide range of activities in the field of transitional justice and communication, enabling readers to become familiar with many different aspects of the topic. Moreover, the vast majority of the essays in this volume are very accessibly written, which means that readers do not need extensive foreknowledge to understand the topics discussed in it. Most of the chapters contain case studies which make it easy for the reader to form an image of the circumstances under which communicative, cultural and artistic projects function in transitional societies. Generally the authors also start with giving sufficient background information about the conflicts which have preceded the time of transition.

The large variety of contributions makes Transitional Justice, Culture and Society: Beyond Outreach both informative and an entertaining read, for experts in the field as well as for newcomers. However, this variety operates to reduce the coherency of the book. This problem with coherency is caused mainly by the fact that the contributions lack a clear common format. Especially when compared to What happened to the women? Gender and Reparations for Human Rights Violations, a previous volume of the Advancing Transitional Justice Series in which each chapter was written according to a fixed format, Transitional Justice, Culture and Society: Beyond Outreach is a hotchpotch of contributions. An explanation for this approach might be that by contrast with What happened to the Women?, Transitional Justice, Culture and Society: Beyond Outreach contains not only case studies but more general reflections on different forms of art and communication. Moreover, the authors of the contributions to this volume have very different backgrounds, ranging from academics to journalists to theater professionals. This is reflected in the diverse styles and degrees of difficulty of the chapters.

In the last part of this review, I discuss and compare two chapters, to show the very differing characters of the contributions to this book. Both of the chapters fall within part three of the book about art, culture and transitional justice. Chapter 11 ‘Reverberations of Testimony: South Africa’s Truth and Reconciliation Commission in Art and Media’ by Catherine M. Cole, is a case study of the way the findings of South Africa’s TRC were depicted in media, literature and theatre. Chapter 12 ‘Photography and Transitional Justice: Evidence, Postcard, Placard, Token of Absence’ by Eduardo González Cueva and M. Florencia Librizzi discusses the role of photography in societies in transition. Chapter 11 solely

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5 Idem, p. 41.
7 Catherine M. Cole is Professor in the Department of Theater, Dance, and Performance Studies at the University of California, Berkeley.
8 Eduardo González Cueva is sociologist and director of the Truth and Memory program at the International Center for Transitional Justice.
that, although photography in a context of transitional justice always only offers ‘fleeting slices of a reality that cannot be

interpreted. Although the structures of both chapters are very different, as are the modes of communication discussed,

enriching destabilization.’ 15

normative principles, establishing a linkage to photography and other cultural practices may introduce a welcome,

‘As transitional justice becomes more juridicized, and possibly desiccated into sets of best practices, lessons learned, or

when so many important facts and insights are revealed.’ 11

In their chapter on the role of photography in periods of transitional justice, González Cueva and Librizzi choose a
different approach to the topic. Instead of presenting a case study of the role of photography during a phase of transition
in one particular country, they explain the effects of photography in times of transition against different national
backgrounds. Like Cole, González Cueva and Librizzi put emphasis on the role that interpretation plays both when a
photographer takes a picture and when a spectator looks at it. 12 By quoting Sontagg they remind us that, ‘[a]s much as it is
an act of intervention, photography can also be an act of nonintervention’. 13 Having said this, they question the
assumption that photography can be favorably consequential in a context of transitional justice. This assumption rests on
the idea that ‘photography is a representation of reality that offers itself directly and with a sense of immediacy’. 14
Subsequently, they discuss five examples of photographs and photographic collections of both a journalistic and an
artistic nature to show the importance of interpretation. In this vein, the chapter contains two discussions which illustrate
this point well. First, there is a discussion of the picture ‘Fikret Alic Behind The wire’, taken by a British journalist in a
prison camp in Bosnia during the 1992-1995 war, and which became world famous because of the strong associations it
evoked with concentration camps during the Holocaust and the controversy which subsequently emerged around it
amongst ultra-nationalistic Serbs who claimed that the picture was a falsification. Second, there is the discussion of the
photo series ‘Absences’ by Argentinean photographer Gustavo Germano, in which the power of interpretation is made
very apparent. Germano has created a series of photos on the disappearances in his country during the 1976–83 military
dictatorship, making the absence visible by showing an original picture of the victim with friends or family taken before the
disappearance next to a recreation of this photograph in the exact same setting, with exactly the same people except for
the victim. The power of this series is that the very absence of a person stimulates and strengthens the mechanism of
interpretation. Although the structures of both chapters are very different, as are the modes of communication discussed,
it is striking that both analyses lead to a very similar conclusion. Like Cole, Gonzáles Cueva and Librizzi finish by saying
that, although photography in a context of transitional justice always only offers ‘fleeting slices of a reality that cannot be
fully grasped’, this might be an advantage:

‘As transitional justice becomes more juridicized, and possibly desiccated into sets of best practices, lessons learned, or

enriching destabilization.’ 15

9 M. Florencia Librizzi is a lawyer and a consultant at the International Center for Transitional Justice.
10 SA-TRC, TRC Report, 2:592–94.
11 C.M. Cole, Reverberations of Testimony: South Africa’s Truth and Reconciliation Commission in Art and Media, in: Clara Ramírez-
13 Idem, p. 435.
14 Idem, p. 436.
15 Idem, p. 455.
As a first attempt to make a compilation of the activities that take place at the cutting edge of transitional justice and communication, culture and art *Transitional Justice, Culture and Society: Beyond Outreach* has succeeded very well. Although the consistency and comprehensiveness of the book sometimes suffer from the wide variety of contributions, the editor and authors are convincing in their belief that that considerations of the role of the public sphere should be included in the transitional justice research agenda. The previously discussed chapters are only two examples of the many thought provoking contributions that this volume contains and I see many new opportunities for interesting research projects - such as a more encompassing examination of the role of social media in transitional societies. Similar to the way in which art and culture can contribute to a more complete picture of 'truth' in societies in transition due to their destabilizing force, more research into this relatively new and exciting topic can contribute to the completeness of the study of transitional justice itself.
Book Review – Fair Trial And Judicial Independence – Hungarian Perspectives, 
by Attila Badó (ed.), Springer International Publishing Cham 2014 
By Thomas de Weers¹

Abstract:


Fair Trial and Judicial Independence – Hungarian Perspectives is the 27th volume of the series ‘Ius Gentium – Comparative Perspectives on Law and Justice.’ Attila Badó, a Professor of Law and the Director of the Institute of Comparative Law at the University of Szeged in Hungary, is its editor. Badó sets out the reasons for the compilation of the book in his instructive foreword. He explains that the ‘[a]uthors of this book were driven to conduct a comparative analysis of judicial independence and fair trial by events unfolding in Hungary in recent years.’² The aim of the study was to present an objective account of the status of the Hungarian judiciary looking at international standards and trends.

Badó explains that Hungary has been subject to several judicial reforms since the first free elections in 1990. The year of 2010 constituted a major turning point which resulted from the parliamentary election that brought a landslide victory to Victor Orbán’s centre right party. This success gave Orbán the qualified majority that was needed to rewrite the Constitution and to radically reform the judicial system.

The new government took on a significant institutional restructuring of the judiciary by placing its central administration in the hands of the National Office for the Judiciary (NOJ), with a very powerful president and the National Judicial Council (NJC) as a supervisory body. The 2011 reform granted extensive powers to the NOJ, and notably its president, and left the supervisory body of the NJC without meaningful influence on actual decisions. Additionally, the political influence on the NOJ was reinforced by the fact that the current president was said to be a close friend of President Victor Orbán and his wife.

Several constitutional lawyers and journalists abroad ‘declared judicial independence in Hungary dead’.³ The Venice Commission, an advisory body of the Council of Europe, was also concerned about the remarkably broad powers of the president of the NOJ. The Commission explicitly declared itself opposed to the right of NOJ’s President to reassign cases from one court to another as ‘a violation of the right to a lawful judge.’ Furthermore, the Venice Commission had strong reservations with regard to the weak monitoring powers of the NJC.

Following the recommendations made by the Venice Commission, the government initiated some changes in the legal framework of the judiciary. The power of the President of the NOJ was limited on some points and the influence of the NJC was strengthened. Nevertheless, international organisations continued expressing concerns.

The book was composed with the abovementioned events and reforms in the background. Badó states that the book ‘aims to present problems and model solutions through a Hungarian perspective using a comparative methodology in areas that currently present professional and political challenges.’⁴ The Hungarian government has attempted to deal with the criticism by pointing to other jurisdictions where similar reforms have taken place. A comparative study can therefore interesting insights on these claims.

¹ Thomas de Weers is a Legal Research Master student at the Utrecht School of Law, the Netherlands.
The book consists of ten chapters written by ten different writers. These ten chapters are divided into three sections. The first section is called **Fair Trial and Judicial Independence in a Comparative Perspective** and contains three interesting contributions on organisational issues, the selection of judges and case allocation systems. The editor’s contribution in chapter two on the selection system of judges is well worth reading. In this chapter the selection system of judges of several countries passes in review, giving a good overview of the existing diversity between different systems and implicitly showing the abnormality of the Hungarian judicial reform. Badó proves that the politically influenced Hungarian way of selecting judges is far from modern compared to other jurisdictions that adopted a merit-based selection process.

The second part of the book is called **A Comparative Approach to Analysing the Right to a Fair Trial in Light of Modern Political Challenges** and consists of two contributions. The first one is about fair trial standards and the second one about trial systems outside Europe. This last chapter provides an interesting insight into the Russian, Chinese and African legal systems. The author of the chapter, Márton Sulyok, describes the main problems in these countries regarding fair trial, and elaborates on power politics, illiberal state practices, lack of institutional setting, and economic factors. On the one hand, this chapter shows that the problems in Hungary can be relativised if one looks at the evident absence of respect for fair trial standards in Russia, China and Africa. On the other hand, it can also be seen as a comparative study to prove that Hungary is moving in the same direction as these countries, although Hungary is not explicitly mentioned.

The third, and last part of this book, is named **A Comparative Analysis of Some Basic Fair Trial Elements** and is composed of five chapters written on the delay of justice, the evaluation of evidence, publicity in administration of justice, double jeopardy and the right to defence. The contribution of Mátyás Bencze stands out in particular. The objective of his chapter is to ‘substantiate a connection between political background of a legal system and the fair judicial evaluation of evidence as a professional issue.’ Bencze starts his contribution by saying that Hungarian courts are often criticised for being too reliant on the prosecutors. The rate of successful prosecutions has been 96-97% over the past several years and this is particularly dangerous with regard to politically sensitive cases – a topic which has received increasing attention in Hungary. Bencze then goes on to compare the evaluation of evidence in various countries, focusing on ‘mainstream’ countries such as the United States, England, Germany, but also less obvious countries, such as Russia, Azerbaijan and China. This comparison is easy to read and contains some very interesting facts about evidence procedures in non-Western countries.

Looking at the book as a whole, the following can be concluded. **Fair Trial and Judicial Independence – Hungarian Perspectives** contains interesting articles on a wide variety of topics. The authors seem to be well-informed and they succeeded in writing contributions that are easy to understand for readers lacking in-depth knowledge on the discussed matter. The book is ideally read as a work of reference instead of a book that is read in its entirety. Some chapters might be somewhat disappointing if one has a strong interest in the Hungarian approach, as the ‘Hungarian Perspective’ is at times hard to find or even completely absent from some chapters. Nonetheless, this does not affect the quality of the contributions. On the whole, the book offers some interesting insights into Hungarian justice practices and provides a good background for the reforms of the Hungarian judiciary, which have been the centre of a lot of media attention over the past several years.

On the website of the publisher there is both an e-book version (€83.29) and a hard copy available (€105.99). A free pdf version can be downloaded legally on the same website. In order to find this free version, do a Google search on the title of the book and click on the second link. This will bring you to a page of the publisher’s website on which the full content has been made available.

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By Markus Zimmer, IJCA Executive Editor

Abstract:

This article reviews The Territorial Jurisdiction of the International Criminal Court by Michail Vagias, published by Cambridge University Press in 2014.

Among the hallmarks of the 20th Century are the determinations of an emerging global community (i) to codify what has come to be known in various cloaks as international criminal law, and (ii) to institutionalize its enforcement across political boundaries. There has been considerable follow-through on both, a singular accomplishment given the enormous diversity and range of political goals pursued by the nation-states that comprise the global community. The latter, enforcement, has turned out the more difficult. The global community has managed to establish and operate special regional and international tribunals whose political status is not anchored in the traditional sovereignty of a nation-state. The trail this second determination has blazed, commencing with the special military tribunals convened in Nurnberg, Germany from 1945 to 1949 and culminating with the entry into force on 1 July 2002 of the Rome Statute of the International Criminal Court, is scarred with delay, twists, turns and compromise.

Collectively, those impediments reflect the difficulty of achieving consensus by the nation-states of the global community on a variety of complex issues and policy questions. One of the most complex is the extent to which these nation-states are collectively willing to authorize these special tribunals or courts either to share, intrude upon, or trump state sovereignty in their zeal to enforce international criminal law. Such sharing, intruding or trumping is a function of how the jurisdiction of these regional and international tribunals is defined; however it is defined gives rise to a host of international public policy concerns. In drafting the formal agreements or statutes that establish such special tribunals, the options range from granting them a combination of elements of universal jurisdiction, custodial jurisdiction, and territorial -- subjective vs. objective -- jurisdiction, among others, to full universal jurisdiction. Simultaneously, the drafters, representing individual nation-states, typically exercise considerable caution to ensure the preservation and supremacy of their own jurisdictional sovereignty.

The effort to create the International Criminal Court (ICC) was informed by the experience of crafting and operating the special tribunals for Yugoslavia, Rwanda and Sierra Leone, among others. However, because the geographic jurisdiction of the permanent ICC is global as opposed to that of its temporary and regionally focused forerunners, the process of building consensus on what its sovereign jurisdiction should entail, vis-à-vis that of the nation states participating in the Rome Conference, turned out to be an exercise in compromise, the result of which was to anchor the ICC's jurisdiction largely on territoriality. A primary consideration throughout that conference’s deliberations was defining the ICC's jurisdiction in a manner that enabled the reasonable enforcement of international criminal law but would not undermine or seriously intrude upon the sovereignty of individual nation-states.

Michail Vagias, lecturer at The Hague University of Applied Sciences, wrote his Ph.D. dissertation on the topic of the ICC’s jurisdiction. More recently, he converted it into a 300-page study, The Territorial Jurisdiction of the International Criminal Court, published by Cambridge University Press in 2014. Much of the study focuses on a fairly exhaustive analysis and interpretation of Article 12(2)(a) of the Rome Statute (Statute). By way of context, the Statute reflects the agreement of the states parties or signatories to establish and define the ICC. One-hundred and twenty two countries are states parties to the Rome Statute of the International Criminal Court.¹ The Statute comprises 13 separate parts.² Article 12, ‘Preconditions to the exercise of jurisdiction,’ is in Part II, ‘Jurisdiction, admissibility and applicable law.’

The work presents a prodigiously researched analytical review of the how Article 12(2)(a) is to be interpreted and, more broadly, the ICC’s territorial jurisdiction. It will be of interest and use to academics and researchers in law, political
science, international public policy and international human rights who specialize in the fields of international criminal law, its enforcement and the ICC’s jurisdictional reach. It also is likely to be of interest to the unique community of judges, prosecutors and defense counsel who serve in the ICC and/or its temporary forerunners, such as the ICTY and ICTR, which are now focused on completing their work, constructively managing their legacies and preserving key records. Finally, it also is likely to be of interest to certain categories of policy-making officials employed in government diplomatic posts, such as nation-states’ United Nations delegations, and NGOs and certain departments within and adjuncts of the U.N., whose work includes advocacy or monitoring of international criminal law jurisdiction and/or enforcement.

Vagias laments at various intervals in the text the inevitable compromises that efforts to reach international consensus among a very diverse assortment of nation-states in various stages of economic and political development and sophistication inevitably entail. The result, for purposes of a clear definition and mandate of ICC jurisdiction, falls short in his judgment and leaves unspecified a number of key jurisdictional issues that will require painstaking analysis and interpretation on the part of the ICC’s prosecutor, judges and defense teams as they grapple with difficult cases that require negotiating new and unclear international legal terrain. A useful example he cites is the burgeoning incidence of cross-border internet-based crimes and cybercrimes and their potentially global reach for victims. Where jurisdiction to prosecute particular cases is determined to exist, the challenge for the court’s judges is crafting judgments that balance the interests of enforcing international criminal law without intruding on the jurisdictional authority of the affected nation-states – judgments that have the potential to ignite international diplomatic firestorms. Vagias lays out useful and often interesting examples of such dilemmas with generous references to pertinent cases, treaties and other official regional and international agreements, commentaries and other materials for interested readers to pursue.

The quality and breadth of Vagias’ legal analysis throughout is sophisticated, technical and highly analytical. He does not shrink from posing hypothetical policy questions that the Court is likely to confront in cases yet to be heard, drawing in some instances on trends in advanced nation-states where courts of final appeal endorse expanded jurisdiction based on such considerations. He examines, for example, the extent to which the Court’s interpretation of its jurisdiction should be expanded to encompass deterrence objectives as a matter of public-interest policy in light of the horrendous nature of much of its criminal jurisdiction as set forth in Part II of the Statute. In doing so, he draws on arguments advanced by U.S. federal appeals courts to justifying expanded jurisdiction in antitrust cases in which foreign defendants are implicated.

Those in search of a primer on jurisdiction in enforcing international criminal law for undergraduate-level international law, public policy or political science courses probably should look elsewhere. Vagias’ comprehensive work is better-suited for specialized graduate-level seminars or faculty colloquia in those disciplines. My primary criticism, admittedly minor, is the author’s proclivity to include summaries of his arguments in the conclusion section of most chapters; it may strike some readers as repetitive and unnecessary.

1 Of the 122, 34 are African states; 18 are Asia-Pacific states; another 18 are Central and Eastern European states; 27 are Latin American and Caribbean states; and 25 are Western European and other miscellaneous states. The United States is not a signatory.
2 http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf