The Tribunal Chamber, Bardo Palace
Tunis, Tunisia
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**International Journal For Court Administration**

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From the Executive Editor:

Acknowledging Our Court System Colleagues In Tunisia
By Markus Zimmer

The cover of this IJCA issue features an 1899 photograph of the Tribunal Chamber in the Bardo Palace in Tunis, the capitol of Tunisia, a small country in North Africa positioned on the southern Mediterranean coast between Libya and Algeria. The chamber was utilized by Tunisia’s Ottoman Era rulers or beys to hear important cases.

Tunisia’s history spans centuries, beginning with indigenous Berber tribes and including Phoenicians, Romans, Byzantine Christians, Ottoman Turks, and Europeans. The spread of Islam into North Africa introduced justice administered by forums in which disputes were adjudicated by clerics schooled in the application of Sharia law based on the Hadith or teachings of the Prophet Muhammad. Predating even these was the jurisprudence of customary law administered by Tunisia’s tribal elder forums. By 1881, French military forces had invaded and reduced Tunisia’s quasi-independent status as a province of the Ottoman Empire to that of a French protectorate. French colonial administrators superimposed on Tunisian justice a new and unfamiliar framework of courts, confounded Tunisia’s legal pluralism by imposing an unfamiliar system, and unilaterally established French sovereign appellate jurisdiction over the country’s indigenous justice framework. Proceedings were conducted in French by magistrates schooled in French law and procedure to the disadvantage of indigenous litigants accustomed to Arabic proceedings and the homegrown legal framework.

In 1896, the French occupiers created a new courts’ administrative oversight service, the Directorate of Judicial Services (Directorate), and appointed a French magistrate to direct and manage it. They then notified local judicial officials that their forums were henceforth under the control of the new Directorate. Within the next few years, Directorate officials organized six new regional tribunals in Tunisia’s larger cities. The Directorate also embarked on an effort to draft civil procedure, contracts and penal codes. The ensuing source documents were largely framed by drawing on existing French law and procedure. Colonial courts were staffed by French-trained magistrates who, unfamiliar with Tunisia’s pluralistic jurisprudence and Sharia law, relied on their training in French law, procedure and jurisprudence. All criminal cases were progressively reserved for French courts. Decisions of the religious-based courts and the first-instance French courts in Tunisia were appealable initially to the French Court of Appeal in neighboring Algiers and ultimately to the Court of Cassation in Paris.

By the mid-1900s, the French colonial regime was battling armed resistance in Tunisia, Algeria, Morocco and its African and Southeast Asian colonies, resistance that took an increasing toll on French resources in a world weary of colonialism and inclining toward independence and self-government. In June 1954, the new French Prime Minister, Pierre Mendès France, initiated a policy of withdrawal from Tunisia. By late 1955, France started to forfeit its claims to Morocco as a protectorate and granted it independence the following year. In 1956, under the leadership of Habib Bourguiba who would rule the country for the next 31 years, Tunisia declared its independence and achieved the status of a sovereign state.

As Tunisia’s first post-independence president, Bourguiba initiated significant political and economic reforms but deployed an authoritarian regime to govern the country. The regime of his successor, Zine El Abidine Ben Ali (1987-2011), fostered a culture of economic corruption and intensifying political repression. Popular resistance mounted and erupted in late 2010 in events that quickly captured the attention of the international community, focusing global attention on this small and habitually overlooked Arab country. Mohammed Bouazizi, a 26-year-old fresh produce seller in a local Sidi Bû Zayd market, had been the main provider for his family since the age of 10. Habitually bullied and harassed by local police, Mohammed persisted, supporting the family and paying school costs for his younger siblings.

Continued...
On 17 December 2010, a female officer confronted him, returning later to demand he turn over his scales. When he refused, she slapped him and, helped by other officers, wrestled him down onto the street, seizing his scales and produce. He went to the local municipality to demand to meet with an official but was rebuffed. Purchasing paint thinner, he returned to the municipal building to douse and set himself on fire. He died on 14 January, igniting a firestorm of festering indignation against an abusive government that soon engulfed the country and deposed the sitting President who fled with his family into exile in Saudi Arabia. The incident was heralded as the stimulus for similar political eruptions in the region collectively termed the Arab Spring, all of which, apart from Tunisia, have thus far failed to successfully implement democratic rule; some, instead, have fallen into political chaos and violent civil war. Tunisia’s 2012 revolution, by contrast, spawned creation of a transitional government that introduced fundamental democratic reforms, including elections, and created the conditions that led, in early 2014, to the passage of the new Constitution that was acclaimed in most sectors of the international community.

The 2014 Constitution’s provisions establish an independent judicial authority. Articles 113 and 114 provide authority for the independence of the institutional framework that undergirds the judicial and court systems. Precisely how these provisions will be fleshed out in the laws currently being drafted remains to be determined.

In mid-January 2015, I traveled to Tunisia to lead a small team tasked with assessing its court and judicial systems. We were sobered by the difficult conditions under which judges and administrators manage to process enormous caseloads, challenged by severe budget constraints as the government wrestles with a fragile economy, shifting political winds and threats to domestic security posed by militant Salafist jihadists already implicated in two cowardly terrorist attacks on tourists in Tunis and Sousse in 2015, transnational criminal enterprises, and the chaotic civil disorder in neighboring Libya. We salute their courage and determination to persist in the administration of justice under dire circumstances that dwarf those of most systems with which I have had the privilege of working. Various agencies of the United Nations along with the European Union and the Council of Europe are currently engaged in assisting our Tunisian colleagues, and the U.S. government just recently solicited proposals for a project there to improve how courts are managed and administered.
From The Journal Editor: Courts and Cultural Diversity
By Anne Wallace¹

Many courts in the modern world are being challenged to meet the needs of increasingly culturally and linguistically diverse communities. This challenge may be more easily recognized in countries that are commonly perceived as having high levels of diversity, based on indices related to ethnicity and language. However, the court user population is not necessarily reflective of the broader population demographics. Countries that appear to be relatively ethnically and culturally homogenous may, in fact, experience higher levels of diversity among the population who access court services. Conversely, the ability to access court services may be unevenly distributed across a community. Research suggests that education, language, and cultural background are all factors that may play a part in determining a person's ability to identify legal problems and access support, including using the courts.

For courts, as institutions, diversity poses a number of challenges. Some of these challenges relate to the potential for the substantive law to be adjusted to, or accommodate, cultural diversity. That is a topic outside the scope of this discussion, but one which is receiving increasing attention by legal scholars. However, the potential impact of cultural diversity on court management and administration is also significant in a number of ways. Citizens from culturally and linguistically diverse backgrounds may be more likely to lack awareness of their legal rights, less able to access legal advice and support, and to access courts to resolve their disputes.

In a culturally diverse community, courts can no longer assume (if they ever could) that those who do come to them share a common understanding of the values, goals and procedures of the justice system that the court embodies. For example, a refugee from a dictatorship, or regime that has experienced high levels of corruption, may have had a very different experience of legal institutions in their country of origin; an experience that may well color their expectations of a court they engage with in their country of refuge. This may impact on both their understanding and their conduct in relation to the court, court officials, and the judge.

At a very practical level, linguistic diversity poses challenges for effective communication. These challenges are exacerbated in the courtroom where communication often takes place under high stress and involves protocols and levels of formality with which participants may be unfamiliar or inexperienced. Access to trained, appropriately credentialed court interpreting services may be critical in ensuring that victims, defendants, parties and witnesses are able to fully participate in court proceedings, and communicate effectively with their legal advisors. It may not be easy to ensure an adequate supply of interpreting services, particular at times of expanding population growth. Ensuring that those services meet the standard required for court interpreting may be even more difficult.

There is a further challenge; one that is harder to identify, but no less significant in its implications. It was expressed recently by the Chief Justice of the High Court of Australia, the Hon R.S. French, who stated:

“Judicial awareness of the significance of cultural diversity is a key area of concern. Another is the unconscious influence on a judge of underlying assumptions or attitudes based on race, religion, ideology, gender or life style which are irrelevant to the case which the judge is hearing.”

To take a simple example; in some cultures failure to make eye contact is seen as a sign of evasion, while in other cultures it may be a sign of respect. An assumption about this by a judge in a particular situation may cause them to draw a completely wrongful conclusion about the truthfulness of a witness. More detailed investigations, such as those undertaken in relation to Australia’s Aboriginal community, have revealed other culturally specific barriers that can have significant detrimental impact on effective courtroom communication. These may often be unknown to presiding judges, whose assumptions will tend to be based on their own cultural backgrounds and understandings.

¹ Professor Anne Wallace PhD, is Head of the School of Law & Justice, Edith Cowan University, Australia. Contact by e-mail: a.wallace@ecu.edu.au.
The challenges of cultural diversity in the courts are being responded to in a variety of ways. These include strategies to engage with communities to build public trust, confidence, and understanding of the work of the court; to extend legal support and assistance to newer arrival and refugee communities; to educate and promote awareness of diversity among court administrators and the judiciary. Australia has recently established a Judicial Council on Cultural Diversity to advise and assist Australian courts, judges and court administrators to respond to the needs of its increasingly culturally diverse community. There may be much that courts in Australia and elsewhere can also learn from sharing information and experience about these issues with each other.
E-Filing Case Management Services in the US Federal Courts: The Next Generation: A Case Study
By John Brinkema¹ and J. Michael Greenwood²

Abstract:

The U.S. Federal Courts Administrative Office of the U.S. Courts (AOUSC) was responsible for developing the Case Management/Electronic Case File system (legacy CM/ECF) originally implemented in 1996 to service the federal courts. The AOUSC is presently developing its 2nd generation service (NextGen). The IJCA carried an earlier narrative of CM/ECF's evolution. This second IJCA article describes the approach taken to define and develop that 2nd generation CM/ECF system. This article reviews the methodology used for determining requirements; the new software tools and hardware technologies used; and the expanded functions and enhanced services being incorporated into the new product. Also included is an exploration of the various obstacles, problems, and organizational issues which occur when transitioning from a legacy system to one that is more modern and complex.

Keywords: Court Administration, E-Filing, Court Management, technology, Caseflow management, United States of America

1. Background & History of Legacy CM/ECF

A generation ago, the Case Management/Electronic Case File (CM/ECF) service became operational in the US federal courts. This service is the oldest, largest, continuous, integrated case management and e-filing system in the world. It was developed entirely in-house by a dedicated group of highly qualified and experienced programmers, systems analysts, computer scientists, and other IT professionals employed by the Administrative Office of the United States Courts (AOUSC), the U.S. Judicial Branch agency responsible for all administrative and management support of the lower federal courts. CM/ECF was subsequently expanded to include cutting-edge case information processing functionality for all 200 US federal courts at the appellate, district, bankruptcy levels and at several specialized courts. All 30,000+ court employees, over 650,000 lawyers who practice in the US federal courts and over 1,000,000 registered public users and organizations have relied on CM/ECF and PACER over the years. Presently, CM/ECF databases contain over 47,000,000 cases and well over 600,000,000 legal documents; approximately 2,000,000 new cases and tens of millions of new documents are entered each year, and the courts are transmitting over 500,000,000 court notices to case participants and interested parties annually.

CM/ECF success and expansion has helped define the standard for electronic filing, and it has become one of the largest (if not the largest) electronic depository of PDF-stored legal documents. These electronic files and documents are the permanent and official records for the courts. Readers interested in a review of the overall objectives, design and...
implementation strategies, core functions, and software and hardware components for legacy CM/ECF, are encouraged to review an earlier related article published in IJCA.7

2. History of NextGen CM/ECF
Throughout the continuing development and expansion of legacy CM/ECF over the past two decades, various hardware, telecommunication, and software upgrades have been made to make the service more reliable and efficient. Increased user sophistication and dependency on electronic documents and automated court services have created ever greater demands for additional capabilities and services.

A formal modification request (MR) process was implemented for legacy CM/ECF to handle requests for fixes, enhancements, and new functions and services being made by the increasing number of diverse users and interests; i.e., judges, clerks, lawyers, paralegals, academics, and various organizations. While new capabilities and functions were introduced incrementally, the primary focus over time was on the operational stability of existing services; in particular, fixing software bugs and making modest enhancements. Updated national releases for each type of court were typically 12-24 months apart. The growing complexity of the system made many courts reluctant to make major changes and additions since it could require substantial re-education and retraining of judges, court staff, and attorneys. In addition, many courts made local changes that were not incorporated into a national release; it would require substantial local staff work to merge the local changes into each of the national releases. Given the modest nature of the legacy CM/ECF upgrades, the backlog of MRs continued to increase substantially.

In recent years, U.S. Government budgetary constraints and resultant staff layoffs, notwithstanding the continuing demand for expanded services and functionality - a perennial issue almost everywhere - emphasized the need to reduce costs and reconsider options that, until recently, were unthinkable, such as sharing centralized resources. The introduction of new technologies such as tablets and mobile technologies and industry trends such as cloud computing and new programming languages have required court system developers to reassess equipment and software development approaches.

3. The NextGen Approach
In contrast to legacy CM/ECF, which started as a prototype experiment and grew as each additional court unit requested more complex functionality, the U.S. federal courts ultimately opted for a more formal, “waterfall” approach8 with heavy court participation involving the coordination of a dozen or more stakeholder groups, all of them collecting and assessing proposed new requirements, in a process that lasted several years.9

As a report on the process noted:

“What we heard was both reassuring and helpful. All groups reported a high level of satisfaction with our current [legacy CM/ECF] systems, and a desire that our next version not lose any current functionality. Whatever you do, don’t break it was a common refrain. That said, hundreds of suggestions for improvement came our way, and surprisingly, there was a remarkable degree of consistency among groups as to the core components that any new system should embrace.”10

Over 10,000 functional requirements11 were identified and documented by these groups. The approach called for requirements collected by the various committees to be combined and synchronized so that the requirements associated with similar functionality from the three court types could be combined into a single set of unified requirements acceptable to all three. Once new or revised major functional requirements were synchronized or clarified, (e.g., calendaring, judges
and clerks workspace\textsuperscript{12}, expert panels with members drawn from the three court types were created to complete the process of creating a single unified set of NextGen requirements.

The AOUSC contracted with a non-government consultant organization to review technical issues, evaluate architectural alternatives, and submit a study report for NextGen.\textsuperscript{13} This study paralleled the collaborative collection of requirements, conducted personal interviews and facilitated group sessions with court participants.

An Architectural Study Group was established as part of the consultant’s study. Guided by the vision of creating a successor to legacy CM/ECF that meets the evolving business needs of the courts, the goal was to develop a plan to collect information, and discover user and technical requirements, all at a very high level.\textsuperscript{14} The study report presented an architectural concept and a general guide to the key features for NextGen.\textsuperscript{15} Besides identifying myriad new functional requirements, the study also stressed system development processes and technical requirements that should be considered in defining NextGen’s functionality. A crucial recommendation was to leverage the investment in current CM/ECF; that is, don’t toss out the ‘old’ and start over completely. Other technical requirements stressed the importance of flexibility, local customization, standardized interfaces and sharing data among judiciary applications.

A significant portion of the consultant’s study consisted of a detailed alternatives analysis. The alternative recommended was that NextGen should be composed principally of off the shelf (OTS) components. The study suggested that “OTS solutions have been designed by vendors with the ability to customize them to meet the needs of particular users.”\textsuperscript{16} The AOUSC and Judiciary rejected this recommendation,\textsuperscript{17} preferring to continue along the development approach taken by legacy CM/ECF. Almost all development work would be done by AOUSC IT professionals assisted by contractors.\textsuperscript{18}

Although the primary recommendation of the study was rejected, the study clearly reiterated what was important to the end users: ease of use, security, customization, efficiency, integration with court and other judiciary applications, scalability, flexible calendaring, and improved performance.

4. Transition to NextGen
The transition from legacy CM/ECF to NextGen is one of the biggest challenges confronting the project. The more than 10,000 requirements enumerated for NextGen so far\textsuperscript{19} do not include the original requirements implemented in legacy CM/ECF for the trial courts which are still expected to be met in NextGen.\textsuperscript{20} The plans call for the transition from legacy CM/ECF to NextGen to be accomplished in measured steps that incrementally deliver the new functionality using the new technical environment. Old code and new code\textsuperscript{21} would co-exist, with old code eventually replaced by new, but not all at once. From the user perspective, the new functions will seamlessly integrate with the existing legacy system capabilities. When necessary, existing software will be repackaged, “wrapped”, or re-written using new tools. By adding new modules, replacing old modules, and refreshing old modules as necessary, in time, all of the functionality of legacy CM/ECF and the new NextGen requirements will be incrementally merged.

\begin{thebibliography}{99}
\bibitem{12} Workspace is a module that presents several windows each on a portion of a computer screen that permits a judge or clerk to view simultaneously various modules, such as a calendar, a docket entry, and a document, and easily switch modules.
\bibitem{14} The study ran for eight months and involved over 50 court visits, conference and workshops, meetings, interviews in person or by phone and teleconferences. Although focusing on technical issues, user functional requirements were also collected, duplicating previous work.
\bibitem{15} Those key features include an enhanced user experience, improved role-based user interface, more flexible and accessible report capability, automated workflow, centralized user registration and authentication, a single centralized and scalable architecture, and improved judge’s chambers functions.
\bibitem{16} Ibid, page xi.
\bibitem{17} The Judiciary discovered that successful OTS implementations involved either a great deal of customization to properly meet customer requirements, or that the customer needed to significantly modify its processes to accommodate the OTS product. In the case of the US federal courts, many of the 200 court units would require its own customization (i.e.; no OTS product that was evaluated had the configuration flexibility of legacy CM/ECF, let alone the configuration flexibility that would be required by NextGen). The Judiciary flatly rejected the concept of changing the courts processes to accommodate an OTS.
\bibitem{18} The Administrative Office of the U.S. Courts (AOUSC) has a section that developed and maintains legacy CM/ECF and is charged with developing NextGen.
\bibitem{19} Except for the appellate courts, as noted above, the full enumeration of detailed requirements will take several more years.
\bibitem{20} Many of the NextGen CM/ECF requirement definitions exist only in the code that implements them.
\bibitem{21} The new code would be developed using new programming tools, new user interface standards, and the new technical architecture. For example, NextGen employs Java, the Java Server Faces framework, web services and an SOA, and centralized cloud computing integrated into the national JENIE identity management and authorization infrastructure.
\end{thebibliography}
Besides giving the users the appearance of stability while delivering new requirements, another advantage of this measured transitional approach is that it avoids the urgency of mass user training, data conversion and other preparations that usually accompany more abrupt, organizationally disruptive, and radical new system implementations.

The initially proposed NextGen delivery schedule specified four to six major releases, in successive increments of approximately 18 months. Since the move from the old to the new is transitional, there is no clear, formal cut-off date for the old, or start-up date for the new. All courts continue to rely on legacy CM/ECF and no significant disruption of existing services is tolerable. The declaration of reaching NextGen is primarily a matter of subjective definition. However, there are two important factors that will determine when that point has been reached: (1) the extent to which users experience a new “look and feel” of the service, and (2) the extent to which new significant and meaningful functionality has seamlessly been delivered.

5. Review of US Judiciary Priorities and Needs for NextGen

Any viable electronic filing and case management system needs a comprehensive and integrated set of capabilities and functions to achieve a fully operational service. Appendix A lists most of these desirable services needed by the courts, litigants, government agencies, the legal and academic communities, and the general public. Different judiciaries will build systems with various levels of complexity based upon their political structures, social frameworks, and the historical and prevailing justice-related practices, needs and priorities, but they will require almost all these building blocks to achieve success.

To some degree, legacy CM/ECF addresses most, if not all, the capabilities and functions listed in Appendix A.22 NextGen is intended both to fill in the missing and to enhance the limited functionality (for example, judges workspace). Based on the NextGen requirements studies, the NextGen development group at the AOUSC prepared a development plan outlining thirteen functional areas that were prioritized by the federal judiciary stakeholders.23 The functions to be delivered are: calendar, central sign-on, bankruptcy case opening, workspace, judges review packet, appellate attorney docketing, reports/forms, noticing, bankruptcy claims, bankruptcy order processing, district electronic submission system, district court editing, and district court data exchange. These functions primarily focus on chambers and judicial needs, simplifying access and exchange of information among individuals and organizations, and providing better ad-hoc reporting tools.

Using the building blocks listed in Appendix A as a reference, the following section reviews the type of changes and new capabilities NextGen anticipates, and the obstacles or issues that NextGen has confronted or may yet confront.

5.1 Access Control

Legacy CM/ECF allows each court to regulate who had filing CM/ECF privileges, but a companion application, Public Access to Court Electronic Reports (PACER) was implemented nationally. CM/ECF and PACER accounts were maintained separately. Approximately 50% of trial attorneys who practice in federal courts litigate in more than one federal jurisdiction. As a consequence, they are required to maintain multiple credentials, one for each federal district or circuit in which they practice.24 Legacy CM/ECF also has multiple levels of restriction and controls for access to basic case information or documents, depending on the (i.) user’s role (judge, lawyer, or public), (ii.) the specific court, (iii.) the specific case, and (iv.) the type of docket activity. Generally, case information and documents are available to anyone, but the court or judicial official can activate various content restrictions either temporarily or indefinitely based on specific factors relating to the administration of justice.

One of the highest priorities for NextGen is to provide a central (national) sign-on (CSO) that permits an individual to maintain a single set of credentials for access to automated information services, regardless of the number of jurisdictions in which the individual practices. Where the original objective was to simplify access for practicing attorneys that objective has been expanded to extend this single credential for all authorized court personnel. This centralized registration service also maintains contact information, such as mailing and e-mail addresses, telephone and firm name/address changes. Each court still retains control of who can access what, and who may electronically file with the court. The CSO objective is to coordinate all user accounts, thereby increasing accountability and security and requiring a one-to-one correspondence between the individual user and NextGen CM/ECF activity.25 This new module will assist in ensuring that sealed cases and documents are only accessed by authorized personnel. It also will impose access restrictions to help remove any lingering concerns about security among some judicial officers.

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24 The thirteen US Courts of Appeals (appellate) have a central sign-on in legacy CM/ECF.
25 In legacy CM/ECF, a substantial number of users shared user identifications. CSO will prohibit any sharing.
CSO is included in the first release of NextGen, but it is very complex. While the concept of a centralized national account is a good idea, particularly for non-court personnel, many technical problems have emerged as a consequence of providing access authentication to judges and court personnel using the Judiciary’s JENIE infrastructure; the extensive security requirements; the dependencies among multiple servers and environments used to implement the required functionality; and the varying and differing rules for attorney filers among the courts. 

5.2 Calendars & Schedules
Legacy CM/ECF provides very limited calendar or scheduling capabilities. Because there was little agreement over mandatory functionality or what product was ‘best,’ most courts have implemented their own multiple partial calendars to keep track of various case and trial activities.

A new Calendar module is a high priority for NextGen. Analysts investigated acquiring a commercial calendar product that could be sufficiently modified to meet court needs. However, no commercial product could be identified that could adequately manage all calendaring and scheduling requirements required by the federal bankruptcy and district courts. Instead, the AOUSC leadership decided to build a specialized calendar module in-house. The challenge is develop a comprehensive integrated calendaring program for NextGen that incorporates court, case and other information but also identifies and verifies availability for all participants of a particular court event.

A totally customizable calendar would permit each judge and chambers staff member to create multiple calendar views (e.g., by date or date range, by case, by type of activities), and to control the level of access to a judge’s calendar by staff members. In addition, a mobile application will permit judges to import calendar information such as personal activities into the NextGen calendar. Any generated calendar can be saved, electronically transferred, or printed, depending on personal and court needs.

NextGen calendar enhancements are expected to be addressed in a later release such as an alert function that can notify judges and court personnel of last-minute filings either during or shortly before a hearing or proceeding begins.

5.3 Case Processing/Management
Legacy CM/ECF emphasized the electronic processing and management of all activities related to a case and the electronic docketing of these entries into the court’s official docket report. When possible, the originating submitter, such as the judge, deputy clerk, or lawyer, personally entered information into the system. Entries were automatically filed and disseminated, in most situations, to all parties in the case.

NextGen expands management capabilities beyond the individual case. It encompasses more sophisticated monitoring of case management for the entire judge’s or court’s caseload so that court resources (time, personnel, and costs) are managed more efficiently. In particular, NextGen expands upon status and tickler reports, more sophisticated pending motions reports of what is due when, and more sophisticated automatic docketing and noticing functionality from routine court orders.

Legacy CM/ECF for Appellate was originally implemented with attorney docketing modules that required the attorneys to download Java onto their computers. Because of vendor differences in supported versions of Java, a technical support issue ensued. NextGen Appellate rectifies this problem by implementing a docketing module more along the lines used by CM/ECF District and Bankruptcy, which do not require Java downloads.

5.4 Chambers, Courtroom & Judicial Support
Legacy CM/ECF offered judicial access to the judge’s official case files from any location inside or outside the courthouse. However, the emphasis was on clerk’s office productivity and streamlining administrative activities for the maintenance of the case record. For chambers use, judicial staff would extract materials and reports for the judge’s review. As judges have become more computer literate and have come to rely on the system, they have requested additional computer resources and more comprehensive access to various case materials oriented to their judicial needs, e.g.; multiple

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26 Creating a shared code base for all three types of courts who have diverse business and processing requirements has also proven challenging.
27 Legacy CM/ECF allows each court to generate case-related events and activities in a calendar.
28 Legacy CM/ECF had already developed for the appellate courts a specialized paneling and scheduling system.
29 NextGen provides various filters (selection criteria) to limit the number and type of calendar entries and control the content that the judge or staff needs to view at a particular time. Legacy CM/ECF calendars were sometimes overwhelming with too much information.
30 NextGen provides each judge with the ability to schedule non-case related activities, and to restrict access at various levels of refinement to the judge’s calendar.
screens at the judge’s bench, attorney’s tables, jury area, remote access to judge’s laptop and home computers, networking to staff while on the bench or travelling, and remote electronic filing functionality for opinions and decisions.31

Four new NextGen modules, Calendar (see above), Judge Review Packets,32 Workspace, and Business Object reports (see below), were specified to respond to these judicial needs.

NextGen will not modify the basic filing and case and document management services it currently offers. However, a specialized module, Judge Review Packets, has been developed to improve document and case activity workflow among chambers staff. Using rules specified for each judge, the module allows related documents in one or more cases to be packaged into electronic folders. This module, integrated into a general workload manager and rules engine application, will expand judges’ ability to more efficiently access the needed case and court information and to effectively distribute work activities and the preparation of judicial orders and decisions among support staff.

NextGen also provides an enhanced interface using Workspace, including a dashboard33 that can be personally customized to enable judges and court staff to display various NextGen functions on the same screen.

5.5 Data Exchanges & Case Transfers
Legacy CM/ECF allows other government agencies to extract court information primarily on a case-by-case basis using PACER. For a few agencies, a data extraction program operated nightly providing basic case data for each case. In recent years, CM/ECF has incorporated XML coding into the CM/ECF database.34 Within the court community, other organizations such as pre-trial services, probation, and financial services are not electronically integrated, thereby requiring duplicate entry of case information into other databases. Various court forms were modified to contain XML coding for more reliable and accurate transfer of data both into and out of CM/ECF cases. A substantial number of cases are transferred between trial courts, and trial courts electronically forward files of cases on appeal to the twelve courts of appeals.35 Presently, courts can review and extract case information and documents from the originating court’s CM/ECF database for entry into their database.

Although delayed until later releases, the expectation is for NextGen to allow government agencies and courts to automatically transfer critical case data between the courts and agencies using XML data interchange standards, thereby eliminating duplicate data entry and providing more timely accurate information. Major obstacles to this goal are the various legislative- and executive-branch laws, policies, and regulations that could prolong and delay implementation.36

5.6 Filing, e-Forms & e-File
Legacy CM/ECF implemented electronic case filing and case files for all lower courts in the federal system. Forms could be filed as ordinary documents, but the information on the forms would have to be entered separately. To facilitate bankruptcy case opening for attorneys, a case upload feature was implemented that allowed data to be uploaded as a separate file along with ordinary documents to minimize manual data entry.

NextGen plans to offer extensive electronic filing and on-line forms to two large groups of bankruptcy litigants: individuals representing themselves – see the Self-Help and Pro Se section below – and parties required to file claims in bankruptcy litigation. Forms have been designed which allow for XML data to be embedded in the documents. This functionality enables the filed documents to be processed electronically and to extract the data without requiring manual data entry.

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31 These tools are also known as electronic bench (e-bench) which has already been adopted in many US federal trial judges courtrooms and chambers.
32 Judge Review Packets is a specialized on-line program that permits each judge to automatically customize – also with manual overrides -- the collection of related documents, case information, status and ticklers, and personal notes, for easier review and decisions. This module can also establish workflow routines among designated chambers staff based on the type of docket and document submissions for a case.
33 Dashboards are screen interfaces that may look like an auto dashboard with different segments of the screen displaying different sets of information.
34 Extensible Markup Language (XML) has come into common use for the interchange of data over the Internet; it defines a set of rules for encoding documents and data in a structured format which is readable by both humans and machines. Various industries and organizations have established XML standards for the automated exchange of information among disparate organizations and databases.
35 US federal courts handle multidistrict litigation (MDL) cases where civil actions involving one or more common issues are pending in different districts are consolidated to be handled by a judge in one court for pretrial and discovery. Every year, there are thousands of cases and case files transferred among the district courts, and between the district and appellate courts.
36 For example, the bankruptcy courts have well-defined forms required for initiating a new filing. However, major legislative changes to bankruptcy rules, new data collection requirements requiring changes to case management database structure, and revised paper forms have substantially delayed the introduction of these capabilities.
5.7 Legal Research
Legacy CM/ECF provided simple linkages to national and international commercial databases\(^{37}\); hypertext links to other case documents stored in any CM/ECF database can be included in the case documents.

NextGen implements a mechanism that converts pure-text legal citations in any electronic document to Internet links to major on-line legal publishers.\(^{38}\) This feature will only be enabled for judiciary users, and it will be used primarily by judges and law clerks.

5.8 Reports, e-Queries & e-Analytics
Legacy CM/ECF offered every court a substantial variety of reports with various selection criteria.\(^{39}\) However, each jurisdiction decides which reports to offer their personnel and the public.\(^{40}\) For special or ad-hoc extraction of case information, a commercial reporting tool was provided to each court.\(^{41}\) For decades, a substantial amount of case information - particularly when a case is opened and closed – has been transmitted by the local jurisdiction to the centralized AOUSC Statistics Division.\(^{42}\) CM/ECF provided the capability to more efficiently and accurately transfer that statistical information electronically.

Many courts were disappointed with the commercial ad-hoc reports tool provided in legacy CM/ECF because it required special expertise and IT staff assistance to prepare the reports. Court officials demanded a NextGen reporting tool that allows non-technical court personnel to produce specialized reports, provides easier and faster production of court-wide or nation-wide reports, and possibly offers graphic presentation of information, particularly for case management reports. To reduce costs and streamline overall national data collection and statistical reporting, the AOUSC also decided to create a national enterprise data warehouse (EDW) for all the courts and central administrative services. All national and ad-hoc reports will access the EDW.

The AOUSC selected a commercial report package, Business Objects, with the expectation that it would be simpler, faster, and more flexible to use. To demonstrate the combined capabilities of Business Objects and EDW, three heavily-used reports were programmed.\(^{43}\) To date, the testing results have been mixed. The reports have superior flexibility in the customization of the final format and presentation of information. However, there are several problems: the reports take substantially longer than comparable legacy CM/ECF reports, and the creation of an ad-hoc report still requires too much training and technical expertise for judges or chambers staff.

5.9 Security
The physical architecture of legacy CM/ECF was primarily guided by security concerns: first, separating the external Internet side of the system from the internal secured court side, and second, ensuring that the Internet side could not access the private court side unless specifically allowed by the system. This security architecture, at least to date, has been very successful; notwithstanding thousands of attempt to ‘hack’ CM/ECF, none have been successful.

While NextGen employs the basic external/internal architecture, the mechanism for transferring data between the external and internal is different, taking advantage of the service-oriented architecture of NextGen. The goal is implement security that is comparable to legacy CM/ECF but offers better performance and greater flexibility. The security picture has changed since legacy CM/ECF was first designed. Internal attacks are becoming more common; these hacking attempts originate from the secured court network side, initiated either by trusted persons or through previously successful attacks from within the secured court side, and preventing them must be addressed.

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\(^{37}\) For many decades, two commercial legal databases (Lexis/Nexis and Westlaw) have had agreements with the US courts to provide all U.S. federal courts full access to their data bases.

\(^{38}\) This feature was originally developed for appellate courts by a court employee in the Court of Appeals for the Fifth Circuit.

\(^{39}\) There are over 150 standard national reports and queries provided to the US courts, but each court decides which reports to offer their personnel and the public.

\(^{40}\) A common problem is that not all courts offer the same set reports to the public. For example, the docket activity report is not offered by five district courts, and the judgment index is not offered by 11 district courts.

\(^{41}\) Crystal Report Writer was provided to each court’s technical staff.

\(^{42}\) These are known as Judicial Statistical Reports; for example, A JS-5 report is submitted when a case is opened, and a JS-6 is submitted when a case is closed. This information is used to generate the Annual Report of the Director of the AOUSC which includes statistics of the business of the U.S. Courts.

\(^{43}\) These were Standard Docket report for appellate courts, Aged Motions report for district, and Docket Activity report for bankruptcy.
5.10 Self Help & Pro Se

For pro se filers, most courts presently restrict or prohibit opening cases and initiating docket entries for documents or actions online. Presently, pro se users either enter case information electronically at the courthouse or mail their paper filings which, on receipt, are entered by court staff.

NextGen extends the case upload functionality of legacy CM/ECF bankruptcy by implementing the filing of data-enabled bankruptcy forms. NextGen incorporates an electronic Self-Representation (eSR) module, which permits individuals without legal representation in bankruptcy proceedings to efficiently and accurately complete electronic filings and submit them to the court. The bankruptcy forms have embedded XML NIEM-based tags that allow automated data extraction from the uploaded forms, reducing manual data entry on the part of both the filer and the courts. Providing eSR is a high priority objective, but unfortunately recent federal procedural rule changes, major mandatory modifications in the design of the forms and new requirements to add additional case information have forced a significant postponement in the timetable for development of this module.

6. Key Technology Strategies

Several key technologies are being implemented in NextGen.

6.1 Centralization

By far, the most radical change from legacy CM/ECF is the move to centralization. Since the early 1980s, the federal courts’ case management systems have run on computers located in the courts; the courts were responsible for running those computers. NextGen will be centralized; all computing resources and applications will be centrally located, and responsibility for the physical operation of the systems will rest with AOUSC IT support staff, although the courts will still be responsible for the installation and operation of applications themselves. Court users will access the centralized systems via networks. Although the concept of centralization had been suggested to the courts before, the courts had vigorously rejected the idea; however, severe budget crises have since forced them to reconsider. By taking advantage of economies of scale for hardware, software and staff, enormous cost savings can be achieved. There are risks to centralization if AOUSC central staffs fail to deliver the same level of service and reliability individual courts have historically provided. To ameliorate the risks, the AOUSC created two data centers (roughly east and west) with the load balanced between them. If one center crashes, the safety functionality of the overall system transfers all functionality to the other center. In addition, the national DCN, secured court system network that connects the courts to the centralized systems, was augmented with alternate circuits that more than doubled the bandwidth while adding to the reliability of the communications infrastructure.44

Another advantage of centralization is the ability to share hardware and software resources. The centralized data centers have been configured to allow for cloud computing: on-demand network access to a pool of shared configurable computing resources. Rather than each court operating its own physical computer server and associated resources, computing resources are accessed through and provided as needed from the cloud. Each court appears to have its own resources (sufficient capacity to handle the work and securely isolated not only from other courts but from uninvited external intrusions), while the physical computers and resources are collectively shared.

6.2 Architectural Design

On the software side, a Service Oriented Architecture (SOA) is employed to further facilitate sharing.45 SOA provides a very flexible way to share computing resources, as well as scale performance (more than one instance of the service) and handle failure modes (redirect service calls from failed services to alternates). SOA has the potential to achieve significant savings.46

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44 The original DCN was built using network services from national and local phone carriers. While studying how to improve network reliability, it was noted that most network outages were due to failures in the local carriers’ facilities, not the long-haul network, nor the ‘last mile’ physical connection to AOUSC or court facilities. The solution to improved DCN reliability (along with bandwidth) was to contract with an independent network provider, particularly bypassing the local phone office.

45 A SOA allows loose coupling between software components so that a single service (e.g., take data and format a report) can be shared by multiple users. Since the exchange of data from user to service back to user uses a network, the caller of the service and the service do not need to be on the same physical machine; in fact they do not need to be in the same data center.

46 For example, if NextGen were decentralized, the cost of a commercial data formatting library would have been more than $1.5M for 200 local copies. Centralized, NextGen only needs 4 copies (two per site), accessed as services.
6.3 Data Warehouse
Another shared service is ad hoc reporting. NextGen employs a rather novel approach for a subset of its reports. In real time, data is transferred from a transactional database to a data warehouse. Reports can then be run against the data warehouse using a report writer or other business process tools.

6.4 Programming Language
There was a paucity of programming languages and web library options for web development when CM/ECF was first conceived (circa 1994). Today there are many, with NextGen being developed in Java and using several libraries and frameworks. CM/ECF demonstrated that open-source software was a viable alternative. Most of the software development tools are open source, but have commercial support, e.g., RedHat. Other purely commercial software libraries, e.g., the database, are employed where there is no proven open-source alternative.

6.5 Application Development
As noted earlier, the approach to developing NextGen was largely “waterfall” which entails (1) collect requirements, (ii) go away and code, and (iii) then deliver to user. Even with a great deal of involvement with users and other stakeholders, there remains the risk that what is delivered is not what the user expects. NextGen has adopted an “agile development” approach to minimize that risk.47

6.6 Data Exchange
Because of the high priority of system integration, a data exchange standard based on NIEM (National Information Exchange Model)48 was implemented; deploying NIEM is mandatory for exchanges outside the Judiciary and recommended for exchanges within the Judiciary. The NIEM standard was extended to allow for Judiciary-specific data. A standard for filing data in bankruptcy was published based on forms and NIEM mark-up data. The eSR pro se filing system was implemented using NIEM mark-up. The NIEM-based bankruptcy forms allow data to be easily extracted from the filings for additional processing, for example, verifying whether filers are eligible for a particular class of filing based on information that they submit.

6.7 Access Control
In spite of the decentralized nature of the Federal Judiciary, many court and public users use NextGen services from several courts. For legacy CM/ECF, a filing attorney must register with each court to obtain access to CM/ECF. PACER users, by contrast, have a centralized registration and authentication scheme. As discussed earlier, NextGen implements a unified registration and authentication system for all court, attorney and PACER users that eliminates the multiple registrations requirement.

6.8 Experiments
Before committing itself, the NextGen project experimented with various technologies that were not as mature, or “not sure things.” Besides experiments that proved the above-employed technologies, the NextGen project experiments reviewed business process rules engines, web portals, user interfaces, national text search, mobility, and data and system integration standards. Several experiments reviewed how to reuse software, particularly how to leverage the existing legacy CM/ECF code base for NextGen.

7. Commentary
At the time of this writing, NextGen is still under development. The initial proposed release includes only a small proportion of the functional requirements collected since the project started in 2009. What we have seen is impressive. But it is too early to proclaim NextGen as a completed system. However, we can review the processes and plans that have led to the first release.

7.1 Schedule
The NextGen project is at least two years behind its original schedule. Like most very large projects, parts of the original plan have been tossed aside and milestone dates have been revised. Some of the adjustments are normal to any large project; most, however, represent serious management issues that have adversely affected the project and pose a serious risk to its eventual completion.

47 The value of the “agile development” approach was highlighted when in final testing a module of Workspace, developed using the waterfall method, was rejected; this after going through requirements collection, several functional reviews, implementation and implementation reviews, and mock-ups. Workspace is being revised using an agile approach.

48 NIEM, an XML language, is a United States data exchange standard developed by the U.S. Department of Justice in cooperation with Federal, state and local governments for the exchange of justice, law enforcement, public safety and emergency information.
7.2 Size of Project

In the application development business, big is bad. Big projects have a notorious history of failures. Because NextGen qualifies as an enormous project that entails significant, potential for failure, concern within the federal courts’ IT community about the technical viability of NextGen is mounting.

Big projects require a significant investment of time and effort during which the need for changes and modifications to initial plans is virtually inevitable. The entire process can be complicated by other unrelated changes such as reshuffling the larger organizational framework within which project development transpires.

A key task of the analysis phase is sizing the project. The developers used an ad hoc methodology based on their experience with adding modification requests (MRs) and extending legacy CM/ECF. Unfortunately, creating a new system like NextGen with a different architecture, different development tools, and different technologies is enormously challenging. Those planning the development schedule failed to take that into account, resulting in a gross underestimation of the magnitude of the project. The technical term for project planned and undertaken with schedule and staffing projections that either discount or are oblivious to the actual size of the project is “Death March”. It is a testament to the NextGen development staff that they have achieved as much as they have under these constraints. The problems with Death March projects are the follow-on activities; the staff is mentally exhausted and may lack the motivation and the interest in completing post-implementation enhancements, adjustments, and modifications.

7.3 Reorganization

In the course of the NextGen project but unrelated to it, the AOUSC underwent major top-to-bottom organizational restructuring. An entirely new organizational framework for the systems development function was created comprising half a dozen new branches. Simultaneously, the existing systems development organizational structure was awkwardly inserted into that new framework. Highly cohesive and well-functioning teams of IT specialists were broken up, responsibilities and authority redistributed, and job assignments modified. The reorganization was mandated in 2013 and as of the second quarter of 2015, key managerial positions remain staffed with temporary incumbents; developers cite difficulty in determining who is responsible for what. The impact of the reorganization, coupled with an unrealistic project completion schedule, has culminated serious staff morale issues and the loss of several key managers, developers, and analysts. Given the importance of NextGen, it is surprising that senior management did not consider the impact of the reorganization of the systems development function on viability of completing NextGen.

One of the goals of the AOUSC reorganization was to do away with the 'stovepipes’ that had evolved over time, hampering coordination and communications between AOUSC offices. Ironically, the coordination and communications appears to have worsened rather than improved as a consequence of the reorganization. Staff reshuffling and redistribution of responsibilities has fractured both formal and informal staff communications networks and diluted institutional knowledge and expertise across the scope of the new organization, replacing highly experienced incumbents in pivotal positions with newly hired outsiders. Furthermore, the loss of highly competent professional career staff as a consequence of the reorganization has resulted in the AOUSC forfeiting the collective benefit of centuries of institutional knowledge and experience.

As a by-product of federal budget sequestration, the reorganization resulted in a significant reduction in the total complement of Judicial Branch employees, including those at the AOUSC. As a consequence, the development of NextGen is substantially being undertaken by contractors. Contractor turnover is common. Because expertise in new technologies is important to contractors, contractors do not usually stay long at a job but regularly seek out new opportunities involving new technologies. The consequential loss of continuity negatively impacts productivity.

Development has also been hampered by the challenges of working with of a new distributed architecture and several untried technologies. Responsibilities for various parts of the distributed NextGen are spread across several organizations which must be integrated for the full system to work. As noted above, in spite of the reorganization to effect better cooperation, stovepipes and inter-organizational mistrust are still present. The lack of good coordination is particularly evident in difficulties implementing new and complicated technologies, such as central sign-on and the data-warehouse-based reporting facilities, all of which involve multiple organizations.

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50 Key staff replacements have largely come from outside the Judiciary. As one of the authors noted, the success of legacy CM/ECF is primarily because the project staff had extensive experience working for the Judiciary.

51 In 2011, the U.S. Congress mandated severe automatic budget cuts (sequestration) if certain budget negotiations failed; they failed, so the 2014 U.S. Government (and Federal Judiciary) budget was significantly reduced.
NextGen is being delivered as a centralized service. As noted above, this is intended to save a great deal of money and reduce the staffing load on the courts. However, a side effect of centralization is the centralization of responsibility from the courts and their local staff back to the AOUSC, a reality the latter does not seem to fully grasp. We would expect a much stronger customer-service orientation designed to ensure that the centralized service is at least comparable to the services provided by local staff to their courts.

7.4 Defining and Development of Functions
The NextGen project chose the “waterfall” model for development: collect, analyze, implement, integrate, and deliver requirements. The requirements collection phase spanned more than three years, orchestrated by teams of analysts and court staff. During collection, requirements were not fully evaluated or prioritized; there was no formal systematic process. There was relatively little involvement of the implementation team. The result is that the individual requirements collected, ranging from the trivial to the extremely complex, were not in a form that the implementation team found useful or particularly informative. The requirements needed to be revised, reanalyzed and merged because the three categories of courts generated separate requirements using different document formats. There was also no feedback to the analysts and court staff about the feasibility or cost analysis of the requirements. The result of the requirements collection phase was a list comprising more wants than carefully vetted and defined requirements\(^{52}\) that could be used directly by the implementation team.

7.5 Non-Court Participant Needs
Litigators and other non-court stakeholders external to the Judiciary did participate in the requirements definition process. For those involved in litigation in multiple jurisdictions, the Central Sign-On module is highly desirable. The expansion of electronic XML-embedded forms for self-help filings and automated docketing from bankruptcy forms will also be much welcomed. The other major concern for non-court government organizations, litigators, and the public is the substantial variation in local federal district judicial procedures, rules and practices. Courts maintain local discretion in local rules and procedures, but litigants and the public want greater consistency across jurisdictions particularly in the use of terms in docket entries, screen prompts, or reports,\(^{53}\) all of which most courts are adamantly opposed to. The Judiciary has not commissioned any studies nor proposed any national standards to alleviate any of these problems.

7.6 Technology Issues
On the technology side, there have also been challenges. Some relate to understanding the inevitable idiosyncrasies of the new tools and technologies. In some cases, the technologies have simply not worked well.\(^{54}\) The technology experiments weeded out some problematic technologies before the project depended on them, but some fragile technologies were included because of the need to integrate infrastructures. Tying disparate technologies together is hard, made all the harder when cooperation issues arise. By far the biggest technical problem has been the lack of real system architecture: a description of the whole system in terms of its parts and their relationships. With such a large implementation staff working in different organizations on different phases of the project, understanding how things fit together is essential. There are fragments of system architecture and documentation, but nothing describes the whole. The consequences of such a gap were evident, for example, in the difficulty of finding the source of a failure because the operations staff responsible for fixing the problem was unaware of the existence of a network service component that had failed. The consequences will also be felt when the project implements additional components designed to interact with the existing system.\(^{55}\)

This lack of architectural planning is particularly observable in the absence of core functions, such as a general application program interface (API) which would allow access to, and filing of, documents, and the setting of case data.

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\(^{52}\) In the technical sense, a requirement is a well-defined, testable specification. Many of the wants collected were technically vague, such as ‘as fast as possible’ or ‘user friendly’ or ‘kitchen-sink’ specifications such as ‘user defined report writer.’

\(^{53}\) There is little consistency among courts is how party names, types of documents, or abbreviations are entered into the official dockets or indexes, nor consistency in which national reports are offered in all jurisdictions. One of the goals of NextGen is to concentrate court differences in locally defined tables and database entries creating a ‘veneer’ covering a set of standard components shared by all courts and court types. This provides some degree of consistency across courts and simplifies the support issues for AOUSC developers, but not to the degree desired by external users.

\(^{54}\) A commercial product procured to replace some open source products has been a major source of bugs and performance issues.

\(^{55}\) The importance of starting with an overall architecture cannot be over-emphasized, especially for a large project whose development spans several releases over several years. If there are not at least rudimentary considerations of what modules will be implemented and how they will interact with other modules, it is almost certain that significant rewrites of existing modules will be necessary, incurring costs and project delays.
(such as schedules) by users without knowing the details of system implementation. Such an API would allow the AOUSC to greatly expand the number of people who could use and expand NextGen.

A large number of technical APIs have been implemented for internal use, to facilitate the transition from legacy CM/ECF to NextGen, but no general APIs have been created to handle docketing and user-level data access. This lack of APIs severely limits even AOUSC developers; for example, there is no general API to implement user docketing from inside the Calendar module; the user must leave the program and bring up a different interface.

8. Conclusions

8.1 US Federal Courts NextGen Project

Any significant court system automation project entails risks. Upgrading and modernizing well-established automated court case management and e-filing systems can be a formidable undertaking. The circumstances related to the US federal courts NextGen – huge number of new requirements, potentially unrealistic user expectations, concurrent massive AOUSC reorganization, substantial staff turnover and retirements, implementation of new software tools and commercial products – are indicators of uncertainty and substantial risks in the progress of NextGen.

It is surprising that, except for the Appellate attorney docketing module, there has been relatively little pressure to deliver NextGen sooner rather than later. In one sense, this is a testament to CM/ECF; even in its current state, it largely meets the needs of the courts. In another, it perhaps is the realization on the part of the courts that a system with 10,000 new requirements, even introduced over 4-6 releases, would be too difficult to quickly incorporate into a judicial system that is known for its measured approach to change.

NextGen is a work in progress. The Judicial Branch has taken some steps to address the challenges described above; more should be done. Then, too, there is the question of whether the misdirected realignment to date of the development organization and its talent pool can be remediated. We are concerned that insufficient attention is being paid to this component on which the success or failure of so much of the project rests.

8.2 Electronic Case Management & E-Filing Projects

The NextGen project as it stands now does offer lessons to anyone considering implementing an electronic case management and e-filing project:

- maintain organizational stability: don't massively reorganize; don't break-up development teams; value institutional knowledge during major development phases
- watch out for the common causes of project failures: such as underestimating project size and complexity; unrealistic schedules; untried technologies; accepting vendor promises, excessive budget increases, development staff turnover
- let users define the requirements that the users see; the developers should be allowed to define the rest; involve all types of users; in particular those who actually need to use the service.
- manage requirements: differentiate between user 'wants' and real requirements; manage user expectations; don't be afraid to say 'no' (or at least 'not yet'); don't try to implement all the requirements all at once; prioritize; agile development works better than grand design or waterfall techniques
- make sure there is real and continuous communications between all the analysts, developers, implementers, support teams and other players; avoid stovepipes; a detailed architecture design is essential here
- understand the advantages and risks of employing new technologies and new ways to deliver services; but manage those risks
- encourage national and international data and document exchange standards
- failures are normal, plan for them; commercial products are not automatically superior to open-source or locally built software.

Our intent in sharing this ongoing narrative of the development of a successor system to the highly successful CM/ECF system is to raise awareness, both nationally within the U.S. and internationally of the perils and risks associated with enormous enhancement and modernization projects, even in a country such as the U.S. where automated systems are among the most highly developed in the world.
Appendix A: Building Blocks for a Case Management & E-Filing System

**Access Control** (Restrict access by court, case, case type, case participant or role, case docket entry or document such as single sign-on)

**Attorney Services** (Offer attorneys case management services and/or court data that can be integrated into attorney/firm system)

**Calendars & Schedules** (Display the court hearings & calendars to litigants and public; integrated with scheduling of cases and personnel)

**Case & Document Management, Index, and Search** (Electronic storage, indexing, search and organization of case documents - typically PDF-text or PDF-image - to appropriate cases, filings, events, and statuses)

**Case Initiation** (Electronic submission and acknowledgement of new case filings and payments into the court case management system (CMS); integrated with electronic filing)

**Configurable Tables** (Permit each local court to configure system to conform to local practices and processes)

**Case Processing/Management** (Electronic docketing and process from case initiation through case closing, such as automated docketing and review, event workflows, work queues, scheduling, report generation, electronic notifications and notices, payment processing, and indexing and linking of parties, docket entries and documents)

**Chambers, Courtroom & Judicial Support** (Judge's virtual desk/bench for chambers, courtroom, home, off-site; access to all resources that support the judicial officer’s decision-making process including flexible data presentation)

**Court Services** (A directory that provides various information and related court services to the public (e.g. certified copies, electronic record checks, transcripts, contact information, etc.)

**Data Exchanges & Case Transfers** (Data to/from law enforcement, motor vehicle, and other government agencies, other courts, and high-volume litigants using industry standards such as XML, PDF, and NIEM)

**Filing, e-Forms & e-File** (Capability for attorneys, self-represented litigants, and other participants to electronically file, access case documents, receive notices and forms, and interact with the court through the Internet)

**Full-Text Search** (Ability to easily access and view case and document information across the judiciary)

**Judicial Automated Assignment & Conflict Resolution** (Automatically assign and reassign judges to cases based on random assignment and other factors, to reduce case assignment conflicts)

**Mobile** (Support for mobile devices, such as tablets and smart-phones, to receive and transmit information to case management system).

**Legal Research** (Judicial access to commercial, government, and intra-court information and decisions)

**Noticing** (Electronically generate and distribute court notices using e-mail, text messages, RSS feeds, or social media to parties of case events and updates)

**Payments** (Electronic payment of filing fees, fines etc. via credit/debit card, bank transfer or other third-party)

**Portal** (Court, litigants, and public access to case dockets, court files and related court services via the Internet)

**Public Access** (Make available via dynamic search tools party-case index, public dockets, judgments, and other special reports for public use)
Reports, e-Queries & e-Analytics (Produce standard and ad-hoc (configurable) reports for users such as statistical, service and answer, deadline and scheduling, quality control, attorney/firm, speedy trial, etc.)

Scheduling (Attorneys and litigants can query and schedule court actions on line, as defined and controlled by the case management system)

Security (Protects the hardware, software, and court information from illegal or improper use)

Self Help & Pro Se (Litigants access procedural guidance, create forms and documents via online instructions & samples)

Signature (Allow judges, court staff, attorneys, and parties to sign court documents electronically)

Utilities (Capabilities to allow court personnel to create, edit, modify, link, delete, verify, or track any entries)

Appendix B: Glossary of Technical Terms

Various technical terms encompassing computer hardware and software are mentioned in this article.

Agile Development – A software development methodology that emphasizes frequent delivery and software updates to the customer so they may see how their requirements are have actually been implemented.

API – An API (Application Programming Interface) is a set of programs that allow programs to interact or act on behalf of one another.

Bandwidth – The volume of information transmitted on a communications line.

Cloud Computing – Computing resources (computation and storage) delivered on demand, like electricity.

Data Warehouse – Computing facilities, data storage and algorithms designed to handle large amounts of data.

DCN – Data Communication Network is the private network connecting all US federal judiciary entities.

Frameworks – Software that provides generic functionality that is customized for a specific application by user written configuration files.

Gadgets (portlets, widgets) – Small application seen in a window or screen that deliver specialized, but independent information (like a clock or a calendar).

JAVA (Java Server Faces) – The Java programming language includes many libraries like Java Server Faces that are designed to make it easier to build user interfaces for web applications.

JENIE – JENIE is the Federal Judiciary’s identity and authentication infrastructure.

Load Balancing – Splitting the computation load between two or more computers so that none of the computers are responsible for the entire computing load.

NIEM – National Information Exchange Model (NIEM) is a standard for adding tags to data documents so that individual data elements can be easily extracted and processed.

Open Source Software – A software licensing model which requires that changes to Open Source Software be freely shared.
SOA – Service Oriented Architecture is a software architecture that employs separate modules (services) that communicate using networks.

Stovepipe – An organization structure which restricts the flow of information, inhibiting cross-organization communications and resolving problems.

XML – Extensible Markup Language is a flexible, extensible, and human readable data tagging standard.

Waterfall Development – A software development methodology that emphasizes staged development: requirements collecting, analysis, programming, testing, and finally delivery to the customer.

Web Services – A service accessed using web technologies (e.g. Internet protocols).
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The Judge On Facebook; Neglecting A Persistent Ritual?
By Paul van den Hoven  

Abstract:
In many social realms, social media are employed by institutions to establish direct relations between their representatives and their clients or customers. In this article I explain why the civil law judge cannot be expected to begin using social networking sites to advance the transparency of the judicial decision-making process and establish a relatively open, form-free interaction with his or her 'clients'. The hybrid character of social media does not allow judges to utilize this form of communication to open up the 'backstage area', revealing the actual complex dynamics of the decision-making process, and transparently connecting the judicial 'onstage' performance in the courtroom session with the judicial 'onstage' performance when issuing a decision. On the one hand, social networking sites are direct, interactive, informal, and personalized communications media; but on the other, they are publicly available, open and basically perpetual record sites. Their direct, interactive, informal and personalized character is highly compatible with the multimodal, form-free self-representation of the modern judge in the courtroom. However, the media's public character makes them also part of the public performance of a judge issuing a decisions. This performance is characterized by a unimodal, formal self-representation. Legal sociologists as well as discourse scholars stress how heavily this continual process of public judicial self-representation is part of a persistent ritual that conflicts with direct, interactive, informal and personalized communication.

Keywords:  Judiciary, communication, legal sociology, civil law judge, social media, self-representation

1. Introduction

What would it be like if it were standard procedure in Dutch administration of justice to transparently communicate a court's decision by having a judge upload an interactive page to Facebook or some other widespread social networking site? In many realms, social media are employed by institutions to establish direct relations between their representatives and their clients or customers. In the Dutch judiciary, a debate ensues about the legitimacy of the administration of justice in the modern society, resulting in, amongst other things, a 500-page report of the Wetenschappelijke Raad voor het Regeringsbeleid (Scientific Council for Government Policy) (Broeders et al., 2013) about the desirability for more transparency in justice. Although this report also includes voices that doubt whether increased transparency is the answer to the supposedly decreased legitimacy, it may nevertheless be interesting to reflect on a system in which the bench uses social media to give the general audience as direct and complete an insight as possible into its working methods, considerations, procedures and operations.

Imagine what this could look like: a judge, acting as the responsible 'case-manager', publishing a decision in the form of an interactive page on Facebook, recording the entire procedure – onstage in the courtroom as well as backstage in the black box of the courtroom offices – making all non-confidential materials available, and inviting comments. Let us imagine the following format.

1 Prof. Paul van den Hoven is Professor Language and Communication at Utrecht University. His email-adress: p.vandenhoven@uu.nl.
2 I want to thank the anonymous reviewers as well as the editor for their vital comments; they really helped me to articulate the analysis.
3 These terms onstage and backstage refer to the theatrical metaphor that Erving Goffman developed in The presentation of self in everyday life (1973, first published in 1959). In social interaction, as in theatrical performance, there is a front region where the actors (individuals) are on stage in front of the audiences. This is where desired impressions are highlighted. There is also a back region that can also be considered as a hidden or private place where individuals can set aside their role or identity in society. Using this analogy the judge performs twice on stage: during the courtroom session and when presenting her or his (written) opinion. In between there is an backstage episode, taking place in the back-offices of the court, invisible for the 'audience' (the public) during which deliberations take place, a decision is reached, the opinion is produced, often in complex administrative routines. Transparency can be defined as an insightful and predictable relation between onstage appearances of the principal actors. If transparency is suboptimal it may be improved by re-enacting the backstage area as if onstage. Social media are known to enable this re-enactment (Sternheimer, 2012) and can therefore be considered fit for this purpose.
Anchoring the case
1. At the top of the Facebook ‘page’, we find core information about the court; in the left-hand margin there is a small number of buttons linking users to core information about legal tenets relating to the case, and to an outline of the standard court procedures.
2. The page links to statistics for this type of cases: how many of such cases are tried per year, what the outcomes are, what the differences between the courts are, and so on.
3. Options are provided to later add links, updating the page with information on further legal or social developments in this case.

The decision as such
4. The core content of the page can roughly resemble a written judicial decision, although all the information that is not relevant for a broader audience (such as the names of the parties, the account that formal prerequisites are met, and so on) is hidden behind hyperlinks, to be accessed as pop-up screens if one so wishes. The judge is encouraged to insert relevant images and spoken declarations in the main text.

Access to the ‘front-office’
5. In relevant places in the text, there are links to the filed arguments of the parties to advance opportunities to get a ‘non-judge-mediated’ access. The arguments of the parties may be built on multimodal materials; the parties are encouraged not merely to tell, but if possible and preferably to demonstrate their legal dispute in the context of the social problem that keeps them divided.
6. In relevant places, the text links to episodes of the video-recorded court sessions, providing access to the first, front-office performance of the judge in interaction with the parties.

Access to the ‘back-office’
7. The page links to a timeline graphic that records the handling of the case, front-office as well as back-office: who has been working on this case, when, for how long, and doing what?
8. The page links to a graph of the timeline that displays who has been working on the writing of the decision, when, and how? The text of the decision reveals its own back-office origins, at a minimum defining the case processing standard steps for this type of cases which are automatically generated by the system, and which parts are specifically written for this opinion.

Access to the judge
9. In the top right-hand corner there is a photo of the judge, which can be clicked for a brief introduction of the judge, written by the judge him or herself, frequently updated to show other social media activity and links.
10. The judge uploads a video clip in which he or she summarizes his or her opinion and adds his or her evaluation of how the court’s actions resolved the legal dispute and how these actions relate to the underlying issue that keeps parties divided.
11. The judge as the responsible ‘case manager’ explicitly invites ‘visitors’ to like or dislike the publication as a sign of public support. The audience is invited to add comments.

In this article, I explore why this still rather common idea appears to be at odds with certain essential features of administering justice, in particular in the civil law tradition. This explanation is rooted in the hybrid character of social networking sites. Social media sites are on the one hand direct, interactive, informal, and personalized, but on the other hand they are open public sites and basically perpetual. Their direct, interactive, informal, and personalized character is compatible with the multimodal, ‘actor network-embedded’, form-free self-representation of the modern judge in the courtroom, discussing issues that keep parties divided. But the media’s public character makes them also part of the public performance of a judge issuing decisions. The image of the judge here is currently characterized by the unimodal, ‘punctualized’, formal self-representation. I will argue that this self-representation of the judge accounting to the public is

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4 I adopt this concept of actor-network from Actor Network Theory (Latour, 2005). In this theory, the construction of meaning is in and of itself considered the product of an element of heterogeneous networks of human and non-human, material and semiotic entities, existing in a constant making and remaking.

5 Punctualization is a central concept in ANT. Temporarily, or for certain purposes or in certain contexts, parts of complex dynamic networks may be considered, treated, approached, or even function as a kind of input-output unity, its further network connections being ‘neglected’, its internal complexity being treated as a black box. John Law writes (1992): “Punctualization is always precarious; it faces resistance, and may degenerate into a failing network. On the other hand, punctualized resources offer a way of drawing quickly on the networks of the social without having to deal with endless complexity”. In the administration of justice we see the judge represented in the written decision as Judge, a substitute for the social and institutional complexity of the processes in the back-office. Making the black box transparent, as the Facebook judge is supposed to do to a certain extent, affects this image of the Judge (see section 4).
part of a persistent ritual that renders it incompatible with direct, interactive, informal and personalized communication. Therefore utilizing social networking sites to increase transparency by connecting the courtroom performance with the judicial ‘onstage’ performance when issuing a decision, partly revealing the backstage decision making processes, is as yet not an option.

In section 2, the two contrasting ‘onstage’ self-representations of the administration of justice will be discussed. In the courtroom during the hearings, one observes the flexible use of many modalities of communicating (multimodal), the judge showing awareness that the conflict results from complex dynamics determined by a large network of human and non-human actors (‘actor-network embedded’), often deliberately using and allowing free formats in the interaction between participants (relatively form-free).

However, in conveying the adjudication, judges tend to restrict themselves solely to (written) verbal argumentative discourse, working towards one final paragraph in which the legal issue is decided (unimodal), thus hiding the insights of complex back-office processes in a black box emblematically represented by the Judge (punctualized), and the entire process leading up to the decision being sublimated in the Judge applying Law on Facts, almost entirely determined by formalisms (formal). We see this unimodal, punctualized, formal face reflected in press-mediated representations. It also dominates when the judiciary presents itself in public (section 3).

In section 4 the sociological explanation for this dual self-representation is reviewed, more specifically the explanation provided for the dominance of the unimodal, punctualized, formal self-representation when accounting to the public for what is done. French legal sociologists (Latour, Bourdieu, Legendre) as well as discourse scholars (Mazzi) develop a sociological and semiotic perspective on this ritual of universalization.

In section 5 we will return to the Facebook proposal. By now we can understand this as a proposal that increases transparency, but conflicts with the necessity of an ideologically and sociologically embedded ritual of the judiciary. From the analysis, it follows that the relation between the judiciary and social networking sites as a means to enhance transparency will have to be ambivalent, as will be the relation between the judiciary and all proposals to increase transparency that are incompatible with the performance of the persistent ritual of universalization.

1. The Image of the Administration of Justice in Court
The administration of justice is traditionally symbolized by the blindfolded Lady Justice, a sword in the one hand, balance scales in the other, referring to the act of administering justice. Another image might also be suitable: a person resembling the two-faced Janus, though without any negative connotation. The one face is the face of the judge presiding over court sessions; the other face is that of the decision maker as she or he appears in her or his written decision. The one face is open, inviting and empathic; the other face is formal, detached and stern. Obviously, our imaginary Facebook publication would partly reflect the first face and therefore profoundly affect this second face. That is why it is important to try to understand the underlying dynamics that determine the current two-faced identity.

First, we focus on the empathic image presiding over court sessions. Courtroom procedures result from dispute that originates in the outside world. Additional time periods and events are added to the dispute that obviously maintains numerous relations with extra-courtroom discourses. Afterwards, but also simultaneously with the court room actions, the dynamics may continue elsewhere. This ‘open network’ in which the dispute is embedded is recognized and acknowledged by (Dutch) practicing judges in general, and even more specifically among single-speaking judges: judges in administrative law, police court judges, cantonal judges (‘kantonrechters’), magistrates of the juvenile courts, and so on. It is recognized explicitly in Dutch administrative legal procedure, due to a project called ‘De nieuwe zaaksbehandeling’ (‘the new (way of) case processing’), where administrative judges are instructed and trained to expand beyond the legal issue that parties bring to court, and to explore and investigate the underlying issue that keeps parties divided. The process is defined and must be completed through specific techniques employed in preparation of and during the court sessions: the judge being active, open, listening, investigating, and if possible mediating between parties. An administrative judge in a one judge session in the Netherlands, particularly in his or her approach to the civil party, will often employ an almost form-free interaction, giving a lot of explanation or inviting the representative of the administrative body to do so. The judge may show signs of compassion to some extent, propose directions for a solution, and may directly raise issues that touch upon the underlying problem.

This first image (largely the result of consistent self-representation) can be observed on a daily basis in Dutch, one judge single hearing sessions. Several cases, which are considered relatively straightforward in a technical legal sense, are dealt with in a single morning or afternoon, each case scheduled to take up no more than about 30-45 minutes.
Rephrased in more technical terms, such courtroom performances make use of numerous flexible semiotic modalities and rather free forms of narration in which a plurality of human and non-human ‘actors’ can find a place. Courtroom procedures are thus far-removed from what one may characterize as unimodal, punctualized, formal discourse. This is not to say that all ‘actors’ that co-determine the network can and will be overtly discussed. The assumption of the judge being ‘unconnected’ in whatever sense with the issue, specifics of the case, the parties and with underlying issues is usually maintained, as is the assumption that procedural ‘actors’ such as time pressure, court policies affecting judge and clerk, the interrelation between them, and so on, do not influence the dynamics of the network. However, characterizing the front-office processes as actor-network embedded indicates a luminous contrast with the second face, to be discussed in section 3.

Generally speaking, the front-office performance of the judge is appreciated, according to the significant results of a long series of customer satisfaction surveys held in the Netherlands. In six surveys held between 2002 and 2011, all with large numbers of respondents, professionals as well as lay persons were asked about their experiences immediately after their participating in a court session. They all showed constant high scores on questions concerning the front-office procedures. It is clear that these data do not show a decrease in legitimacy. Scores reporting clients’ evaluation of many aspects of the procedure stay constant or slightly increase. The onstage, front-office image of the judge is mostly well-appreciated.

2. The Public Image of the Administration of Justice

Mediation can be inappropriate for settling a dispute (for which there may be many reasons) and a judicial decision on the legal issue may be required. That is the moment where ‘the box closes’. Parties are sent home, and physically leave the court. The files are sent to the back office and a period of silence ensues. Some weeks later, the ‘backstage’ judicial face appears onstage again, in the form of a written decision, as parties often waive a right to require an open court session where the decision is read. Barring infrequent exceptions, this second performance can be characterized as predominantly unimodal, punctualized and formal.

Civil law judicial written decisions share a standardized format. The first part focuses on the history of the process and the formal legal issues involved. What follows is the identification of the ‘factual’ issues. After this, the formal, often paraphrased arguments of the parties are summarized and recorded, along a legally relevant criterion. Relevant legislation and jurisprudence are mentioned, mostly in few selective paraphrases. If complicated, this format is repeated for each issue and structured to record the argument, issues of the matter in controversy. At the end of the treatise, we get the decision. The decision is first presented as a conclusion, resulting from the arguments, and is subsequently repeated as a declarative statement, constituting the valid legal position. Formalisms dominate the opinion, in particular those that hide interpretative elements, making abundant use of nominalizations and passive constructions. The order is predominantly that of positions leading to a conclusion; seldom will a standpoint be conveyed first and argued for thereafter. The court is sometimes visible as an actor, but the judge as a person is absent in the opinion. All in all, as far as the black box of administering justice is made seemingly transparent, one can observe a mechanism of deductive logic, subsuming established facts under valid rules, resulting in inevitable inferences (Mazzi, 2007; Van den Hoven, 2011). In this way, the judge monopolizes the narrative and all dynamic network relations are seemingly absent; basically the opinion does not overtly show any dynamics at all.

The administration of justice most often and specifically presents itself ‘publicly’ in these judicial decisions for individual cases. However, although a portion of these documents are published, they are hardly noticed by the general public. Speaking about ‘public image’ is therefore meant in a technical sense of the judge performing the declarative act of creating a written judgement geared to the legal community. This is clearly indicated in the double presentation of the decision, as a conclusion from arguments as well as a declaration of the legal findings.

More relevant for issues concerning legitimacy is the representation of the judge and the judiciary in the public media, because that image is visible to an audience at large. Here, the image the administration of justice presents of itself (self-representation) in the public media is largely buried by the mediated image constructed by journalists.  


7 Another complication is that there may be an inference between representations of the judge in fictional television/ films and actual representations of judicial practice in the media. This is one of the main issues investigated in the Judicial Images Project (see below).
Dutch newspapers, magazines, TV shows, relevant Internet debates and responses in social media shows a massive media attention toward the administration of justice, dominated in particular by criminal law. Though often triggered by high-profile cases that draw attention of the public media and by viral social media hypes around individual cases, the discussion tends to immediately generalize the issue. Thus a specific sanction in a criminal case, for example, may result in general and predominantly critical opinions on the sanctions policy in general.

In 2010, seven Dutch newspapers published as many as 18,242 articles about the adjudication of justice, 7.3% of the total number of articles, many with a length above average (Ruigrok et al., 2011). The press-mediated image is very much that of the punctualized, formal face in front of the formal judicial written decision. Journalists typically jump in at the moment a high-profile decision is rendered, so the formal written judicial opinion tends to be their focus. Reports about a new or ongoing trial seldom focus on the judge(s) but instead on the suspect, the circumstances or the issues. There may be a self-perpetuating mechanism working here: journalists, like most citizens, and even law students, are socialized in accepting the punctualized face as the ‘officially valid face’ and tend to interpret what they observe and report from within this framework. This official face is legitimately available as it is consistently communicated by the institution itself in its written decisions. Journalists may readily accept it as it ‘explains’ why the administration of justice is so distant from ‘what lives in the society’.

Content analysis reveals that most of the articles appear to be slightly negative in character (Ruigrok et al., 2011: 25). It is here that the public legitimacy issue seems to originate (although, because these results are arrived at through automatic content analysis and many articles deal with negative phenomena such as crime, one must be careful in interpreting these results). What is perhaps most significant is the diversity of criticisms. All aspects of the institution are criticized: its content analysis and many articles deal with negative phenomena such as crime, one must be careful in interpreting these results). What is perhaps most significant is the diversity of criticisms. All aspects of the institution are criticized: its...
when orally conveying the decision, thereby largely confirming the ‘second face’ due to framing and the positioning of the camera). Also, they provide some information about the social context of cases, showing a partial image of a network-embedded face.\(^\text{10}\) Judges acting in judicial decision making processes are almost invisible.

A wide impact can be observed in the case of popular non-fiction television programs that show judicial front-office practice. Here a question is whether we can consider this as actual images or as mediated examples. The most popular show of this kind in the Netherlands is De rijdende rechter. Formally speaking, we are not dealing with the trial level judicial administration, but with binding mediation, inspired by the American TV show The People’s Court. In this show, cantonal judge Frank Visser decides small cases. The program does show the front-office face. However, it also confirms the back-office punctualized face. After hearing the arguments of the parties to the dispute (usually next-door neighbors) and visiting the location relevant to the case, the judge rather abruptly ends the hearing, promising to decide soon. Then there is a shift of location to the studio, where the judge gives his decision on the case, and closes with a standard phrase: "This is my decision and you'll have to accept it". He briefly introduces his verdict, but does not elaborate on his decision any further. Both the abrupt ending and the final sentence predominantly confirm the punctualized face of the decision maker.

A much more advanced type of TV show is De Rechtbank. Here a variety of cases are dealt with, filmed in several courts in the Netherlands. We are shown excerpts from the front-office sessions. Parties give their comments. And, significantly, the judges give a brief comment. This certainly opens up the black box somewhat. However, the real back-office remains closed. Comments are exclusively given by the judges; the actual ‘production process’ stays invisible. The preparation of the case before the session, the deliberations, and the recordkeeping and participation with the court clerk all remain invisible. The actual decision making disappears in time-ellipses and the dynamics of the bureaucracy are absent. The step made is substantial, and the program will certainly have a positive impact by giving the judges a face, but at the same time it confirms the image of the Judge as the gatekeeper of Justice.

With regard to the presence of individual judges on social media, our main topic, we predominantly observe absence. One of the reasons is a functional one. Judges tend to assume a relation between a high social media profile and for example the chance to be challenged in future cases or increased risk of cyberstalking (Keyzer et al. 2013). There are, however, some judges with a personal face on Twitter for instance. Most famous in the Netherlands – but largely among peers and media professionals it seems – is “Judge Joyce”, an administrative judge with about 7500 followers\(^\text{11}\). But Judge Joyce exercises restraint when it comes to her own cases and courtroom practice. Some judges actively investigate how open a judge can be in this respect. An extreme example is the Romanian judge Cristi Danilet. Besides being very active on Twitter, he runs Facebook pages, a YouTube channel and a blog\(^\text{12}\). But even Danilet, although occasionally commenting on issues that relate to decisions made under his responsibility, never crossed the borders of a direct reference to decisions he was involved in himself.

In sum: in public media, in journalist-mediated representation, as well as in self-representation, the unimodal, punctualized, formal face of the Judge dominates.

3. The Persistent Ritual

Summing up so far, we see that judges show two faces in dealing with individual cases: the multimodal, network-embedded, form-free self-representation of the modern judge in the courtroom and a unimodal, punctualized, formal image when accounting publicly for decisions made. In journalist effectuated images, we see that as yet the punctualized, formal representation dominates. Both are valid, sincere, and serve their own specific goal. The courtroom face represents the recognized participant in an open, complex, socially embedded process. The public face represents predominantly the institutionalized authority applying the Rule of Law on the established facts of the case, often characterized as distant from society, closed (punctualized), somewhat alien (formal, unimodal).

To understand ‘the judge on Facebook’ we need to recognize the persistency of this second public face. Even though nowadays the tension between the two images has increased due to impressive developments regarding the front-office face, the second face seems frozen and adamant. This remarkable feature is discussed by legal sociologists as well as discourse scholars. It is explained as representing the judge as a participant in an ideologically constructed process,

\(^{10}\) See for example https://www.youtube.com/watch?v=qOVuu8jWHe0. The court of Gelderland seems most advanced and active, posting a new item on average every 3 or 4 days, https://www.facebook.com/rechtbankgelderland; also compare https://nl.facebook.com/Rechtspraak.\(^\text{11}\) https://twitter.com/judgjejocye, \(^\text{12}\) https://www.facebook.com/cristi.danilet?fref=ts; https://www.youtube.com/channel/UCS3V19zWLTjfv9Uc0G0bgz; https://cristidanilet.wordpress.com/; http://www.cristidanilet.ro/
the construction of judicial authority (Heritier, 2014). The judge’s formalistic, ritualistic, emblematic discourse format can what he believes to be a general framework of how power is constructed. He considers the discourse format essential in his decision she or he represents the rhetoric of the Rule of Law.

Although these quotes do not cover all the issues (Latour in this case, studying this specific institution, focuses on decisions concerning rather fundamental points of law), they do illustrate aptly the discrepancy between the modus operandi in the front and that in the back office, and the dynamics that lead to the characteristic of the self-representation in the written justification. He uncovers this as a discrepancy (or as he would probably prefer to call it, a dynamic transition) between practice and ideology. These dynamics of the legal institution as well as its self-perception and corresponding self-(re)presentation, are based on the modernistic Enlightenment ideology of an anonymous, abstract Justice, with a claimed right to preserve its discourse monopoly, and demanding that this monopoly be respected, even by the legal subjects being judged about. This claim is based on the Platonic metaphor that legal Truth is ‘found’ instead of a legal decision being the product of a constitutive act of a subject embedded in a huge actor-network. When a concept of True Knowledge is presupposed, legal authority implies a reasonable claim on a discourse monopoly; Truth can only be told in one single way. Such Truth is at odds with mediation; True Justice is all-embracing and therefore punctualized and formalistic; and importantly, the unimodal verbal, emblematic, non-interactive mode is an integral part of that formalism. Exactly this metaphor is also called upon by Mazzi (2007) to explain the discursive legal writing format of judicial written decisions as well as by Van den Hoven (2011) to explain the extreme resistance against reform of these discursive structures.

Pierre Bourdieu in his study of the legal field (1986) explains the endurance of these rhetorical formats on a deeper level. He considers – consistent with his theoretical framework – the juridical field as the site for a competition for monopoly of the right to determine the law. In this competition it is essential for the judiciary to symbolically emphasize the total separation between its judgments based upon the law and naive intuitions of fairness. Control of the legal text is the prize to be won in interpretive struggles. This competition between interpreters is constrained by the fact that interpretations “se présentent comme l’aboutissement nécessaire d’une interprétation réglée de textes unanimement reconnus” (1986:4); “can be presented as the necessary result of a principled interpretation of unanimously accepted texts” (1987: 818). In a section titled La force de la forme, Bourdieu pithily formulates the function of what he calls a rhetoric of autonomy, neutrality and universality: “Forme par excellence du discours légitime, le droit ne peut exercer son efficacité spécifique que dans la mesure […] où reste méconnue la part plus ou moins grande d’arbitraire qui est au principe de son fonctionnement.” (1986:15); “As the quintessential form of legitimized discourse, the law can exercise its specific power only to the extent […] that the element of arbitrariness at the heart of its functioning […] remains unrecognized.” (1987: 844). In the courtroom the modern judge leads a dynamic process of problem solving; in the public presentation of her or his decision she or he represents the rhetoric of the Rule of Law.

The psycho-analytically inspired sociologist and historian of law Pierre Legendre places this emblematic behavior into what he believes to be a general framework of how power is constructed. He considers the discourse format essential in the construction of judicial authority (Heritier, 2014). The judge’s formalistic, ritualistic, emblematic discourse format can

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13 I do not fully agree with Latour’s description of the scientist, observing how conceptual systems are ‘saved’ by absorbing empirical tensions too, but I do consider his characteristic of the judicial practice evocative.

14 Legal construction is ‘rechtsvinding’ in Dutch, literally justice-finding (finding of law, conclusion of law – *Kluwer Juridisch-economisch lexicon*).

15 I will not elaborate here on this claim about the ideological foundation of the European system of the administration of Law. See Israel (2001), Toulmin (1990).

16 See Dezalay & Madsen (2012) for an excellent introduction in this framework directly related to Bourdieu’s La force du droit.
be said to represent his unique connection to that which cannot be known without interpretation, his unique prerogative to interpret the Law to determine Justice. Legendre claims that this mechanism can be observed in the writing of the Corpus Iuris Civilis under the emperor Justinian, in the writing of the Corpus Iuris Canonici under Pope Gregory VII, right up to Kelsen’s Grundnorm, the establishment of fan cultures, global branding, modern management, and, as we can see, modern courtroom practices. It is a necessity of ritualized standardization.

Judges have truly and deeply internalized this second face, just as they honestly practice the other contrasting multimodal, network-embedded, form-free face in the courtroom. However, when the two faces at the two levels create conflict, the theoretical explanations reviewed here clearly predict that the second face will persist. Proposals for innovations always need to justify themselves against the ideology underlying ‘the punctualized face’, the internalized model of Justice Done.

4. The Judge on Facebook
This analysis and reflection finally leads us to an answer to the initial question: why does our judge’s participation on Facebook intuitively appear to be at odds with certain essential features of administering justice and what does this teach us about the place of social media in the administration of justice in a more general sense?

Social media platforms have a double identity. On the one hand, they are fast, direct and interactive. Much of the communication uses free formats, in design as well as in voice. Messages follow each other up rapidly, participants jump in and out. At the same time, however, they are public and basically perpetual. The Internet storage capacity is virtually unlimited; contributions can be forwarded, copied, embedded in new contexts. The occasions where participants have underestimated this public side of their Tweets, Facebook posts, blog comments, and so on are numerous. On the one hand social media connect to the multimodal, depunctualized, form-free, front-office public face, but at the same time they relate to the unimodal, punctualized, formal records face.

We find this reflected in the Facebook proposal. On the one hand, it is a straightforward continuation of the front-office face of the judge in individual small cases. It fully fits into the idea of increased transparency. Indeed, it opens up the black box to a higher degree than the TV program De Rechtbank does (but it is conservative in that the responsible judge controls the publication from the side of the institution). For that reason it should be warmly embraced. On the other hand, however, due to the double identity of social media, such a publication is inevitably also part of the public face of judge. It belongs to that part of the judge’s identity that requires emblematic, ritual behavior. This seems incompatible with the multimodal, network-embedded, interactive and informal identity of social platforms, even if the black box essentially remains closed. Of course, one can develop a more ‘traditional, punctualized’ presence on Facebook. Choosing that side of the dilemma confirms the second face to the public at large.

If we go back to the Facebook-procedure outlined at the beginning, we see that some elements create a tension between the two identities of social media platforms. The informal, interactive character conflicts with the emblematic, ritual behavior required. Items 7-8 somewhat open up the back-office and items 9-11 reveal something of the judge as the decision maker, but more important seems to be the clean break from the ritualized formats. Reflecting on the imaginary proposal makes clear why the relation between the administration of justice and the social media is necessarily ambivalent; ambivalent not in a shallow way, but deeply rooted in the double face that, as yet, seem inherent to the civil law administration of justice.

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Combining A Weighted Caseload Study With An Organizational Analysis In Courts: First Experiences With A New Methodological Approach In Switzerland

By Prof. Dr. iur. Andreas Lienhard, Mag. rer. publ. Daniel Kettiger, MA Daniela Winkler and lic. iur. Hanspeter Uster

Abstract:

Using different methodological approaches of weighted caseload studies results in case weights that indicate the current performance of a court. However, as the case weights are often used in allocating resources or cases, the results of a weighted caseload study may be contested with the argument that it is not clear whether they are based on an average good performance or whether higher or lower values could be assumed if operational management were optimized and/or qualitative aspects taken into account. Suitable methods therefore usually include quality adjustments of the case weights. Also, the case weights can be validated using benchmarking. In Switzerland there is a general lack of workload measurement in courts. Therefore, in an analysis of the courts and the cantonal public prosecutor's service (PPS) of the Canton of Basel-Stadt another method of validating case weights has been applied: the combination of a weighted caseload study with an organizational analysis. This paper introduces the new methodological approach in Switzerland and outlines preliminary methodological findings.

Keywords: Weighted caseload study, workload assessment, organizational analysis, court management, methodology

1. Introduction

Using the weighted caseload methods described in various reports and publications results in case weights which illustrate the current performance of a court. However, as case weights are often used in allocating resources or cases, the results of a weighted caseload study may be contested with the argument that a bad performance of the court was measured and the court could perform much better if the judges and clerks worked more efficiently and/or the organization was changed. Suitable methods therefore usually include quality adjustments of the case weights. In countries where benchmarking court performance is possible, a cross-validation of the weighted caseload study may be carried out to provide a better analysis of the performance of the court. In Switzerland, there is a lack of workload measurement in courts. In response to this, in an analysis of the courts and the Public Prosecutor’s Service (PPS) of the canton of Basel-Stadt, the weighted caseload study was combined with a comprehensive organizational analysis. This methodological approach was applied for the first time in Switzerland. This article presents an overview of the methodology used and outlines the preliminary methodological findings.

2. The Problem of Validating Weighted Caseload Studies

2.1. Quantitative methods for investigating workload

Determining case-related workload

When conducting weighted caseload studies, different methodological approaches may be applied to quantitative analyses of case-related work. They include:

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1 Andreas Lienhard is Professor of Constitutional and Administrative Law at Center of Competence for Public Management, University of Bern. Daniel Kettiger is External project director / senior researcher at Center of Competence for Public Management, University of Bern. Daniela Winkler is Research assistant / PhD student at Center of Competence for Public Management, University of Bern, Schanzeneckstrasse 1, CH-3012 Bern, daniela.winkler@kpm.unibe.ch, +41 61 631 53 01. Hanspeter Uster serves as lawyer, Büro Hanspeter Uster, Arbachstrasse 60B, CH-6340 Baar.

2 See LIENHARD / KETTIGER (2011).

3 Case weights or weighted caseload values represent the average amount of work time used for processing cases of different case categories.

4 See KLEIMAN / LEE / OSTROM (2013), p. 244.
1. **Measuring the time taken for procedural sequences:** This is probably the best known method and in the USA, it is the most commonly used for obtaining case weights. This method involves using time records to measure the time spent on case-related work at each important procedural stage in predetermined case categories. The first step is to define the key elements and/or phases in the procedure of a specific case category (i.e. the workflow pattern). The second step is to ascertain how often these elements occur on average when processing a case in a specific case category (e.g. ordering an exchange of submissions, questioning the parties, etc.). The third and last step is to use time measurements to determine how much working time persons involved in the judicial process spend on average on the procedural elements concerned. The total of the average times spent on each main element then corresponds to the weight per case.

2. **Measuring the time per case:** An alternative approach to determining case weights involves recording the entire working time spent on dealing with a specific case. For example, in a study at the Swiss Federal Administrative Court, all judges and clerks of court recorded their case-related working time over a period of seven months. This method then allows the court to average the total amount of work per case in a specific case category so that a case weight per case category is obtained. The disadvantage of this method when compared with the first method is that the case proceedings as a whole are regarded as a “black box”. It is not possible to ascertain the workload involved in specific elements of the proceedings or procedural steps. For this reason, in the study at the Federal Administrative Court, the case-related working time was recorded in two separate stages: the instruction or evidence-gathering stage, and the actual judging stage. Self-reports to measure the time spent per case and the time taken for procedural sequences is regarded in the court-related research as highly reliable.

3. **Time estimates:** To obtain case weights, one can also work with methods based on time estimates for specific case categories. In some cases, an estimation process according to the Delphi method is also used. With this process, it is also possible to determine either (a) the time spent on individual key elements of the procedure or (b) the entire time spent on a case in a specific category. In the Delphi method, the amount of work is first estimated by external experts or by the judges themselves. They can then reassess and revise their estimates in each additional round, based on the estimates of the other experts (often two to three iterations). The Delphi method was used in various federal states in the USA such as Alabama, Arkansas, Georgia, Maryland, Michigan, Pennsylvania and South Dakota. The advantage of this method is that it can be used by small courts with a very small caseload. The weakness of the Delphi method however is that it only provides answers to specific, narrow questions. It leads to a convergence in the estimated values and it gives the illusion of scientific precision however it relies on estimated values that are based on the personal assumptions of experts who are often not impartial.

What is common to all three of these methods for weighted caseload studies is that they use recorded or estimated working time value in hours, days or percentages of full-time staff. They all aim to determine the workload in relation to a full-time equivalent. A common reference parameter in the USA is the so-called “judge-year”. In a study conducted on behalf of the former administrative court of the Canton of Lucerne, however, the case weights were expressed as the percentage of full-time staff per case, on the assumption that this would be the most suitable output parameter for all the sectors in which caseload management is used.

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5 This applies at least in the USA; in Germany work has also been done using this method, see BUNDESRECHTSANWALTSKAMMER (1974a), p. 184 ff., ANDERSEN (2002), p. 56 ff.; for more information on the PEBB§ system see RIEDEL (2013).
15 The judge-year value is the term for the average time that a full-time judge can spend each year during office hours on case-related work (total effective working time minus time spent on non-case-related work and minus absences that count as working time), see STENTZ (1988), p. 380; CAYLOR (2000), p. 38.
Determining non-case-related workload

In addition to the actual case-related workload, i.e. the average time worked on processing a case in a specific category, the working time that is not spent processing cases (“non-case-related working time”) is also normally examined. Usually a distinction is made between four types of non-case-related work:17

1. **General (non-case-related) administrative activities**: This includes all administrative work and the work of the court management board not related to case processing or case-related court sittings, such as meetings of court management bodies, committees and project working groups. It can also include work related to the management of subordinate staff such as job interviews, staff appraisal meetings, etc.

2. **Education and advanced training**: This includes all non-case-related activities related to personal and professional education and training such as time spent reading the latest literature and case law, participating in seminars within the court or in external training events, conferences and symposia.

3. **Public service activities**: This includes all activities for the state and society such as participating in hearings conducted by parliamentary committees, lecturing work at universities, attending meetings with other courts or with lawyers associations etc.

4. **Private activities**: This includes unproductive time on business trips18, vacation, short breaks or absences due to illness.

Different methodological approaches can be applied to determine the non-case-related workload including:

1. **Calculation**: The non-case-related workload is calculated by taking the difference between the entire effective working time and the recorded case-related working time. The advantage of this method is that it involves hardly any additional work or costs to the court. The disadvantage of this method is that the non-case-related work is a “black box” and accordingly no itemization of the non-case-related working time is possible.

2. **Recording**: The staff of the court record their case-related working time as well as their non-case-related working time each day in itemized, predefined categories. At the end of the nominated study period, the average working time spent on each category of non-case-related work and for each staff function is calculated. The advantage of this method is that the non-case-related work can be itemized and calculated according to the predetermined categories. Additionally, this procedure makes it possible to validate the values obtained for the case-related work. The disadvantages are that it requires additional effort and may involve additional cost to the court.

3. **Estimation**: The non-case-related working time is estimated in a procedure analogous to that used in the study of the case-related work.

Although the data on non-case-related work cannot be used directly in the allocation of staff or of cases, it allows conclusions to be drawn that are of general significance to the management of courts. This data also assists courts to assess the overall resources required.

### 2.2. The Problem of Case Weights as Values for Planning

Irrespective of the method applied (see section 2.1), the case weights obtained in principle represent actual values.19 A case weight indicates the average amount of work involved at a specific court at a specific time for processing a case in a specific category. Case weights are primarily of use in relation to the allocation of resources and the allocation of cases within the court.20 For planning activities, such as the allocation of resources, desired values should in principle be assumed. As actual values, the case weights obtained using the methods described are inherently unspecific in that it is not clear whether they are based on an average good performance or whether higher or lower desired values could be assumed if operational management were optimized or qualitative aspects taken into account.21

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18 In the USA, work-related travel is often regarded as its own category of non-case-related work, see Wisconsin Director of State Courts Office (2006), Appendix 1, p. A-1.
19 This applies in particular to the method of measuring using a time study (see Section 2.1). When making estimates using the Delphi process (see Section 2.1), the value obtained can also contain a “desired dimension”; see e.g. OSTROM/KAUDER (1997), p. 93.
Current practices indicate that the case weights obtained can be assessed in various ways with regard to their suitability as a planning value for the allocation of resources and cases:

1. **Comparison/benchmarking:** If case weights are available that have been obtained using the same method from another similarly organized court that is subject to the same procedural legislation, the values for the individual case categories can be compared. If there are considerable discrepancies, these must be investigated in more detail. If the case weights are largely comparable, this indicates to a certain degree that both courts at least perform according to an operational average.

2. **Quality adjustments:** The case weights obtained are verified using qualitative methods. The quality adjustments developed by the National Center for State Courts (NCSC) and widely used in the USA involve the use of both site visits to courts and surveys. The site visits consist of structured interviews (groups or individuals) and/or focus groups with judges and court staff in relation to the workload and the possibility of optimizing internal procedures. The surveys are often internet-based and known as ‘sufficiency of time’ surveys, in which all or a random sample of court staff are asked to identify particular tasks, if any, where additional time would allow them to handle their cases more effectively. These time surveys also include questions on non-case-related duties, as well as space for judges and clerks to comment freely on their workload. On the basis of these additional investigations, if need be, a case weight (desired value) can be fixed that diverges from the value obtained (actual value) so as to take greater account of the quality requirements of the court in relation to the allocation of resources and cases.

3. **Combining the weighted caseload study with an organizational analysis:** In parallel to ascertaining the case weights, a comprehensive analysis of the court’s organization is conducted. In contrast to quality adjustments, the focus can be extended beyond issues of operational and judicial processes to cover the entire spectrum of the performance and organization of the court. The validation of case weights is therefore open-ended in relation to the results and adjustments, both upwards and downwards, can be made to the values based on the organizational analysis.

3. **The Swiss Case**

3.1. **Context of the Study of the Justice System in the Canton of Basel-Stadt**

The introduction of the new Civil Procedure Code (CPC) and the Criminal Procedure Code (CrimPC) in January 2011 required all Swiss cantons to make changes to the organization of their justice systems. These changes led to uncertainties with regard to staffing needs at the courts and in the PPS of the canton of Basel-Stadt. In response, in September 2011 the cantonal Court of Appeal and the cantonal government commissioned a weighted caseload study and an organizational analysis of the cantonal Court of Appeal, the civil court of first instance, the criminal court of first instance and the cantonal PPS. The objective of the weighted caseload study was to provide information on the workload and time involved in case processing and non-case related work. The aim of the organizational analysis conducted in parallel was to ascertain whether the courts and the cantonal PPS fulfil their tasks under the law within an appropriate organizational framework and through suitable procedures. It was also envisaged that the review of the organization of structures and workflows would give information on the potential for optimization.

The data was collected between March 2013 and February 2014 and was evaluated from March to July 2014. The final report was presented in February 2015.

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23 A situation in which the performance of the court used for comparison purposes and the performance of the court being studied are both poor (below-average) cannot be completely discounted.
27 In contrast to the "Sufficiency of Time Survey", where the primary question is whether more time should be allowed in order to guarantee the quality of the judicial process, see Ostrom/Kleiman/Lee/Roth (2013), p. 14; Tallarico/Douglass/Friess (2013), p. 9 f.
3.2. Design of the Weighted Caseload Study
The weighted caseload study was conducted by measuring the time taken for procedural sequences (see section 2.1) and non-case related work using self-reports. All judges and employees of the courts, as well as the magistrates and employees of the cantonal PPS involved in judicial or prosecution activities made their own records of all case-related and non-case-related work from 4 March 2013 to 28 February 2014 using the relevant recording tools. The non-case-related work was recorded in 11 categories while the case-related work was recorded by noting the time taken to complete each task categorized according to a predetermined procedural sequence, the specific case category as well as the function of the person recording the time. This enabled the study to illustrate firstly the workload of a person in a specific function for an average case of a specific case category. Secondly, it made it possible to show what percentage of the entire work a person in a specific function did at which stage of the proceedings.

In certain fields which had a large number of cases, special studies were carried out so that the investigations did not place an undue burden on the work of the courts and the cantonal PPS.

3.3. Design of the Organizational Analysis

Organizational Analysis

There is no generally recognized method for the organizational analysis of state authorities or public administrations, as far as can be seen. Traditional approaches to analyses of businesses or consulting based on management models cannot be applied indiscriminately in the public sector – and even less so in courts – and ideally can only be used as a source of methodology. Given this starting position, one option is to carry out an organizational analysis based on the elements which, according to expert opinion, are found both in business management organizational theory, such as the new St. Gallen Management Model and the Swiss doctrine on public management, and are relevant to the internal workings of the organization concerned. These elements are strategy, structure, potential and culture.

The efforts being made in academic circles and in the relevant professions towards optimizing court management have recently highlighted a range of elements of good court management, which can be summarized as follows: strategic principles; client-friendliness; employee satisfaction; management structures; management support; management instruments; caseload management; controlling; quality assurance and development; and certification. Moreover, these elements can all be assigned to the fields of structure, potential and culture.

In the study conducted in the canton of Basel-Stadt, the strategy element was omitted in line with the mandate. The organizational review was therefore conducted based on three organizational elements: structure, potential and culture.

1. Structure: This encompasses structural organization, workflow management (i.e. core processes) as well as management support instruments.
2. Potential: This covers human resource issues such as the allocation of staff, professional potential and employee satisfaction as well as space issues and information technology.
3. Culture: This includes management and communication/information.

In order to identify the specific issues that an analysis and evaluation of the organization of the Basel judicial authorities permit, both traditional tools from business management and management consulting and tools from quality management were used. The latter are found primarily in quality assurance systems, in particular the Common Assessment Framework.

30 See e.g. SCHWAN/SEIPEL (2002), p. 115 ff.
31 See e.g. CHRIST (2006), p. 137; BOYNE (2003); see also the overview of literature on variables of administrative performance in EBINGER (2013), p. 82 ff.
33 See SCHEDLER/PROELLER (2011), p. 19 ff., in particular Figs. 1-3, p. 21; THOM/RIITZ (2008), in particular Fig. 5, p. 42.
34 See e.g. LIENHARD (2009); KETTIGER (2003), p. 173 ff.; Parlamentarische Verwaltungscontrollistelle (2002).
35 See for more detail LIENHARD (2009); experts in the USA envisage a similar holistic approach to court management, see Conference of State Court Administrators (COSCA) (2008), p. 3 and List of Indicators COSCA, p. 6; see also ALBERS (2008).
36 The procedure corresponds to that used by the CCPM in reviewing the organisation of the Canton of Solothurn’s Prosecutor’s Office; in a comprehensive study of the state of court management in Switzerland in 2012, the CCPM used a similar structure for the fields considered, see LIENHARD/KETTIGER/WINKLER (2012), p. 5.
37 More recent administrative research indicated that job satisfaction and active organisational commitment of employees has a directly positive effect on the performance of the organisation, see EBINGER (2013), p. 73 ff.
38 According to a recent study, certain aspects of management have a direct influence on the performance of public administrations, see EBINGER (2013), p. 275 ff.
(CAF)\textsuperscript{39}, ISO 9001 (DIN EN ISO 9001), the Trial Court Performance Standards (TCPS)\textsuperscript{40}, CourTools\textsuperscript{41} and the questionnaire from the European Commission for the Efficiency of Justice (CEPEJ)\textsuperscript{42}.

What is particularly important as far as efficiency is concerned are the internal interfaces and interfaces with other authorities. Special significance was therefore accorded to the inter-organizational and intra-organizational interface question.

The organizational analysis is based – in the sense of methodological triangulation\textsuperscript{43}, i.e. with a basis in various methods – on the three methodological pillars of a document analysis, interviews and feedback loops. In addition, when designing the research procedure, experts made additional visits to the courts and the cantonal PPS.

Document Analysis
For the document analysis, the courts and the cantonal PPS provided the experts with numerous documents relevant to organization and management. The documents included organigrams, functional diagrams, work rosters, standby duty lists, regulations, directives, guidelines, house regulations, process diagrams and workflows, job descriptions, as well as complete case statistics for 2011 and 2012. They also provided information on the current staffing numbers (full-time staff expressed as percentages for each category of staff).

Interviews
A total of 53 interviews were carried out. They were conducted under the principle of actor triangulation\textsuperscript{44} as personal interviews and structured according to a set of questions. The interviews were evaluated in anonymized form based on an aggregation of the responses to each question, for each court and for the Cantonal Prosecutor's Office. The interview partners were selected according to the principle of actor triangulation: All functions, organizational units and hierarchical levels were adequately represented. In addition, attention was paid to achieving gender balance in the selection.

Feedback Loops
Feedback loops were carried out both in relation to the summarized results of the interviews and in relation to the draft of the final report. They were conducted in the form of workshops with the support groups from the courts and the cantonal PPS, so as to meet the demand for a learning process and as a formative evaluation.

3.4. Preliminary Methodological Findings
An initial methodological evaluation shows synergies between the weighted caseload study and the organizational analysis.

The organizational analysis, which was conducted in parallel to the workload assessment, showed – in accordance with the terms of reference (see section 3.1) – whether the courts and the cantonal PPS in the Canton of Basel-Stadt are suitably organized and whether they have suitable procedures in place to carry out their tasks. It further provided information on the potential for optimization.

As a result of the study, the organizational analysis highlighted that:

- In many areas the case weights obtained may be used as a starting point for planning resources. In individual areas, however, the values have to be adjusted because there is still serious potential for optimization or because the judicial authority is already clearly overburdened.
- The degree of the excess burden can be estimated fairly accurately based on the analysis of the interviews.\textsuperscript{45}
- In the Basel case the organizational analysis helped to get to the bottom of case weights determined in the caseload study that revealed to be invalid using a mathematic cross-check. The information gained from the interviews and from analyzing documents revealed that persons of one division temporarily helped out to deal with

\textsuperscript{39} A quality assurance approach for public administrations commissioned by the EU and developed on the basis of EFQM; see http://www.caf-zentrum.at/de/file/11407/download (accessed: 01.06.2015).
\textsuperscript{40} A system for measuring performance and quality developed in the 1990s in the USA by the National Center for State Courts (NCSC); see CASEY et al. (2003), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=433 (accessed: 01.06.2015).
\textsuperscript{41} A system of performance indicators developed by the NCSC in the USA, which provides courts with a balanced overview of the performance and quality of their activities; see http://www.courtools.org/ (accessed: 23.02.2015).
\textsuperscript{42} The CEPEJ has devised a questionnaire to investigate the quality of the justice system and the courts; see CEPEJ (2008).
\textsuperscript{43} On methodological triangulation, see BERG (2001), p. 4 ff.
\textsuperscript{44} I.e. taking account of all functions and levels when selecting interview partners.
\textsuperscript{45} See LIENHARD/KETTIGER/USTER/WINKLER (2015), p. 86.
the work of a specific function in another division. The information of the organizational analysis proved that the case weights were correct and only the result of the cross-check was distorted. 46
• Qualitative aspects of the judicial process can be identified and shown.

The weighted caseload study also supported the organizational analysis:
• It was possible for the various fields of judicial activity to show, in table-form, which function, in how many cases, conducted specific procedures and how much working time was spent on this work in total and on average. This type of overview makes it possible to see whether suitably qualified staff are carrying out the tasks concerned and whether the existing legal and practical options for delegating tasks are being used within the organization. In specific terms, this allows a check to be made, for example, on whether concurring statements in the interviews that suspects are normally questioned first by persons holding a specific position at the cantonal PPS are in fact true.
• Recording the non-case-related working time also provides information, for example, on the extent of project work (involvement in projects within the court, e.g. IT projects) that is carried out by people in specific functions. 47

In the case in question, this combination of a weighted caseload study and an organizational analysis provided a good integrated quantitative and qualitative analysis which resulted in a general overview of the state of the courts and of the cantonal PPS. As a result, a certain sustainability in the study work can be expected. If in the future certain organizational changes in a specific area are made at a court (ideally based on the recommendations of the study), the quantitative effects in particular on the workload can be examined by conducting a weighted caseload study using the same method but limited to the area or division in question.

4. Conclusion
A preliminary evaluation of the experiences described suggests that combining a weighted caseload study with an organizational analysis has proven its value and that using the organizational analysis for the qualitative validation of a weighted caseload study represents an alternative to conventional quality adjustments. In addition, synergies are created between the two studies. However, the quality adjustments in widespread use in the USA can probably address questions of workload and of possible adjustments to the values obtained in more detail than an organizational analysis, as they focus solely on the issue of workload. An organizational analysis also tends to involve more work and expense than quality adjustments, but offers added value over and above the analysis of the workload. However, a weighted caseload study ideally should be part of a more comprehensive analysis of the organization concerned – and vice versa. In this respect, it is obvious to combine a weighted caseload study with an organizational analysis; a weighted caseload study itself only covers a specific part of the functioning of an organization.

What is now required – in particular as part of the project on "Basic Research into Court Management in Switzerland" 48 – is to make a more thorough examination of these findings. In particular, clarification is needed as to whether the design of the organizational analysis should be changed to tailor it better to the needs of the workload assessment – and vice versa.

However, an important aspect of court management, which demonstrates both qualitative and quantitative elements, can neither be investigated with conventional workload assessments nor with the combination of a weighted caseload study and an organizational analysis: the issue of the length of judicial proceedings. Reaching a judgment within a reasonable time is one of the key indications of quality and performance in the justice system. 49 Accordingly this aspect must be integrated into a combination of the weighted caseload study and the organizational analysis as part of the methodological development; it may be that further research will indicate a link between timeliness and the workload.

A greater challenge is to link findings from weighted caseload studies and organization analyses with the quality of the judgments or of the prosecution. Here again, there is a considerable need for further research. 50

47 See e.g. LIENHARD/KETTIGER/USTER/WINKLER (2015), p. 93.
48 See http://www.justizforschung.ch (accessed 01.06.2015).
49 See for example PALUMBO (2013), p. 9: "Also, as emphasised by the adage 'justice delayed is justice denied', timeliness is a prerequisite for achieving justice." See also the documents on judicial time management published by the SATURN Centre on the Website of the European Commission for the Efficiency of Justice (CEPEJ), http://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp (accessed 01.06.2015); VAN DUIZEND (2011).
50 On the required consideration of the quality of judiciary activity in performance assessments, see for example WALTER (2005), para. 27; TSCHÜMPERLIN (2003), p. 93.
Bibliography


Troika’s Portuguese Ministry of Justice Experiment: An Empirical Study on the Success Story of the Civil Enforcement Actions
By Prof. Dr. Pedro Miguel Alves Ribeiro Correia and Susana Antas Videira

Abstract:
This article deals with the measures implemented by Portugal. It is based on objectives set out in the MoU signed between this country and the IMF/EC/ECB Troika, for the justice sector at the level of civil-enforcement actions. The work comprised conducting an empirical study on the quantitative advantages achieved by the implemented measures. Future work should extend the type of analysis presented, not only to other sectors of activity, but also to other countries intervened by Troika: Greece, Ireland, and the less-known and less-covered cases of Spain, Cyprus, Hungary, Latvia and Romania.

Keywords: Troika; Memorandum of Understanding (MoU); Portuguese Ministry of Justice; Civil Enforcement Actions; Public Policy Evaluation.

1. Introduction
As is recognized by all, Europe is going through a very harsh experience in its collective life.

The global economy has become increasingly integrated. The widespread opening of existing markets to new sources of goods and services has been made possible by more effective systems of transport, as well as by the unparalleled development of communication and information systems. This represents a sharp qualitative change in the nature of the economy. At the same time, we have become a world without boundaries, where the largest companies are truly global or even a-national.

Moreover, the indeclinable progress achieved in the computer and telecommunications fields – currently considered the engine or the soul of economic development – and problems related to the regulation of financial markets, enable the operators to intervene, continuously and in real time, almost anywhere on the globe, seemingly free from compliance with any effective normative or legal constraint.

A power of this dimension appears to have no parallel in history. Hence, it is tempting to affirm that economic globalization, the proliferation of social risks, the acceleration of network interactions, the obstacles in knowing and understanding the outcomes of decision-making and subsequent uncertainty as to the future are realities difficult to assimilate by a rule of law model that seems stunned by the vertigo of an evolution that it is struggling to more fully control.

The historical situation of our time may be characterized as “an anguished exasperation, followed by a profound non-spiritualization” (Montoro, 2000, p. 172). In this brand-new, multidimensional, international order, the State, the companies and the citizens face many challenges. As Friedrich Hayek persistently observed, the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and space (Hayek, 1973, 1978, 1979). In the same vein, Chester Barnard also held that the main concern of organization was that of adaptation to changing circumstances (Barnard, 1971).

Portugal, in particular, went through a difficult phase in the past few years. The Memorandum of Understanding on Specific Economic Policy Conditionality, (MoU) (Portugal, 2011), signed on 17 May 2011 between Portugal and the European Commission, the European Central Bank and the International Monetary Fund, has envisaged, for the justice sector, a wide range of measures designed to:

1 Prof. Dr. Pedro Miguel Alves Ribeiro Correia is Professor at the School of Social and Political Sciences (ISCS), University of Lisbon (ULisboa), Consultant for the Legislative Policy and Strategic Planning Area of the Directorate General for Justice Policy (DGPJ), Ministry of Justice, Portugal. He can be contacted at the following address: Instituto Superior de Ciências Sociais e Políticas, Rua Almerindo Lessa - 1300-663 Lisbon, Portugal. Telephone: +351 96 414 76 71. E-mail: pcorreia@iscs.ulisboa.pt. - Susana Antas Videira Ph. D., Master Degree and Licentiate Degree in Law, University of Lisbon (UL); Professor at the Faculty of Law (FD), University of Lisbon (ULisboa); Director-General of the Directorate General for Justice Policy (DGPJ), Ministry of Justice of Portugal.
a) Improve the functioning of the judicial system, which is essential for the proper and fair functioning of the economy, by ensuring effective and timely enforcement of contracts and competition rules;

b) Increase efficiency by restructuring the court system, adopting new court management models and reducing the slowness of the system by eliminating court case backlogs and by facilitating out-of-court settlement processes.

These measures, described in the MoU, were fully and timely complied with during the execution of the financial assistance program.

In this context, in order to reform the justice system and to make it more efficient and fairer, Portugal has assumed, as a priority, the challenge of reducing case backlogs resulting largely from problems related to the enforcement of judgments: the reinforcement and restructuring of the enforcement agents’ roles; the enhancement of the powers of supervision of the entity responsible for the follow up; supervision of and disciplinary action against these professionals; reform of the insolvency and company rescue regime; restructuring the judicial map and the functioning of alternative dispute resolution means; the fight against the pendency of high value (over one million euros) tributary cases; and the establishment of a quicker civil case adjudication process designed to solve the controversial material issue without binding the judicial actors to formalisms that often prove to be useless.

Given this extensive list of commitments, the activity developed, either at legislative or at institutional level, to implement the measures and the objectives agreed upon with the international instances, was extremely intense, and significantly changed Portugal’s judicial structures.

Now that the financial and economic assistance program has been completed, we can affirm that, apart from its darker side, the country’s financial situation and the crisis have been surpassed. A window of an almost unique opportunity has been open to political decision-makers, citizens and companies. Economic, cultural and political elements meet in order to dare to reverse the structural problems of the society and, in particular, of the justice system.

This article neither seeks to provide an analytically closed text nor aims to focus on the customary socio-economic dimensions that may help to understand why Portugal required international economic and financial assistance. The article does provide a statistically sound and objective account of the Troika’s Portuguese Ministry of Justice experiment. The authors anticipate that their analysis will provoke empirical and theoretical research and debate on these subjects, both in the academic and the judicial systems communities.

2. Framework and Objectives
The reform of the enforcement action, developed in recent years, resulted in a complex organizational system marked by a lengthy processing circuit that made enforcement service burdensome and counterproductive. The objective was to significantly reduce the existing civil backlog by streamlining that process to enable the completion of enforcement cases within a more reasonable time frame, thus responding more timely to the social and economic expectations of affected litigants.

Portuguese society has been plagued by over-indebtedness at both the family and the commercial levels, resulting in painful consequences and low saving levels. Linked with easy-terms credit and low levels of national economic prosperity and productivity essential to generate real wealth, these issues have collectively conspired to mortgage the country’s financial future. At the time the MoU was signed, Portugal was suffering from high levels of defaults in meeting financial obligations on the parts both of companies and individuals, generating significant increases in debt collection and the litigation associated with it.

Enormous increases in the quantity of civil enforcement actions compared with total pending civil cases at the courts (Directorate General for Justice Policy, 2013b, 2013c, 2014a, 2014b, 2014c, 2014d), prompted in-depth reforms in debt recovery process. One reform entailed disposing of enforcement actions considered unfeasible, leaving the courts free to focus on resolvable enforcement actions. A quick and effective method was established to attach or freeze bank accounts by electronic means, safeguarding all the interests and rights of the debtors but providing the quick satisfaction of the creditors on terms that, up to then, had never been attained.

Indeed, with the new Civil Procedure Code (CPC), that has entered into force on September 2013 (Portugal, 2013b), the system of debt-recovery, a crucial component of a competitive judicial system, was substantially modernized and streamlined. From among all the measures designed to simplify and deформalize debt collection adopted by the law in force, the inclusion of bank accounts in the electronic regime is perhaps the most significant change, even though it has long been planned but never implemented due to countless technical difficulties. Articles 749(6) and 780 of CPC, (Portugal, 2013b), requires the Bank of Portugal to provide the enforcement agents with information on bank accounts opened in the name of a certain debtor. These articles also granted enforcement agents the authority to electronically block designated debtors in court cases from depleting existing bank balances in their accounts once certain conditions are observed and within the limits required to protect their legitimate interests. Use of this authority has simplified and accelerated recovery of debts due, and, at the same time reduced administrative overhead and other costs.
Another area, where the simplification of the civil procedure was most evident was the way of lodging an enforcement action and recognizing the uselessness of bringing a new enforcement action when one already had been initiated and been declared in a court ruling. In these cases, it is no longer necessary to bring an action to turn effective what the court has already declared. This mechanism, now regulated by article 85 of the new CPC, (Portugal, 2013b), is the link many thought was missing between a declaration of a right and its enforcement; now the amended law prohibits it. In the domestic legal order, we now have a clear distinction between the summary and the ordinary form of enforcements for payment of fixed amounts, provided for in article 550 of the new CPP, (Portugal, 2013b). This ends the apparent simplification of the form of the enforcement action that was nothing more than just that: a simplifying appearance. The previous regime propagated that there was only one form of the enforcement action, the processing of which varied according to various circumstances. The law in force clearly marks the steps that have to be taken in each of the aforesaid procedural forms.

Another formalism countered by the new CPC is the existence, in the legal order, of enforcement actions that are still alive but should no longer be, either because (i) they have already produced the desired effect and the creditors are regularly receiving their due payment, or (ii) they are not deemed justifiable as the debtors do not have assets able to satisfy the creditors. Thus, the legislator took care to clarify that be it due to the inexistence of the debtor’s assets or due to the fact that the attachment of periodical incomes is ongoing. The new Civil Procedure Code, while maintaining the causes for the extinction provided for in the previous regime, has added three new situations that enable precisely the reduction of the backlog in the civil courts, by tackling those situations that increased the pendency, in an unjustifiable manner. Article 849 of the new Civil Procedure Code (Portugal, 2013b), adds to the causes of extinction the following situations:

a) In the attachment phase, if no assets likely to be attached are found within three months of the notification stating the beginning of the diligences for the attachment and, if neither the creditor nor the debtor indicate assets able to be attached within 10 days, the enforcement action terminates;

b) As regards the attachment of rents, allowances, incomes or salaries, once the period for the objection ceases and has neither been decided upon nor declared inadmissible and if no assets likely to be attached are identified, the enforcement agent, after ensuring that the payments related to his/her remuneration and expenses are made, adjudicates the amounts falling due and notifies the paying entity to convey them directly to the creditor, thus terminating the enforcement;

c) In a competition of creditors, whenever there is a plurality of enforcements over the same assets, the full suspension of the second enforcement determines the extinction of the enforcement, without prejudice to the fact that the creditor may require the renewal of proceedings as soon as he/she designates concrete assets to be attached.

The purpose of the procedural simplification did not, however, slacken the legislator’s concerns with the safeguard of the most legitimate rights of the debtors; this reform has also to strengthen the guarantees due the debtors. To illustrate, it should be noted that one of the most relevant measures taken at the enforcement action level as regards the reinforcement of the debtors’ rights, was the enforcement loss of strength in private documents, thus ensuring the guarantee against unjustified enforcements, so often grounded in writings of a very questionable understanding and validity. The non-feasibility of private documents conveys a greater legal safeguard to enforcement actions, avoiding objections to be raised whenever private documents and their underlying relation must be discussed. For the sake of the legal certainty and safety, the private documents that imply the constitution or the recognition of an obligation must be formally recorded or authenticated by a notary or by other competent entities or professionals, so as to ensure their validity as enforcement titles.

Moreover, under the new Civil Procedure Code, private persons may now resort to court officials to collect non-professional debts up to ten thousand euros. If they are workers, such possibility is extended to the enforcements designed to recover uncollectable labor payments not to exceed thirty thousand euros.

In line with the simplification and procedural de-formalization concerns, the legislator has not forgotten, as is indeed necessary, to enhance the mechanisms of access to justice.

An operational working group was set up in 2011. In addition to the competent services within the Ministry of Justice, several outside entities with responsibilities in the enforcement action scope were involved, including the High Council of the Judicature, the Chamber of Solicitors, the Specialty College of the Enforcement Agents, the Commission for the Efficiency of Enforcements, and the Commission for the Follow up of Court Assistants (CAAJ) tasked with following up on enforcements in Portugal and assessing proceedings that could be adopted in a concerted manner. The purpose was to allow the classification of all existing enforcement actions, including those considered unnecessary, either because (i) the debtor has no assets to repay creditors or (ii) the payments due to the creditor are being made. This collective effort enabled consensus on many measures that were adopted, resulting in recent quarters in a decrease in the number of enforcement actions that have streamlined civil case processing in the Portuguese judicial system².

² This group has furthered an extensive set of operational, administrative, technical and legislative measures, that go from the development of new functionalities in the computer support systems to the courts’ and enforcement agents’ activity, the promotion of new work methodologies and reorganization of human resources, training courses for enforcement agents and their follow up
After a lengthy era spanning at least two decades of steady increases in the number of pending enforcement cases, statistical data for 2013 reported a favorable decrease in the number of pending enforcement cases.

Some readers have sought to develop a theoretical perspective to frame the content of this article. The literature on the subject is significant and growing. The most persuasive are (i) the new public management perspective (see, for instance, Lane 2000; Gomes, 2007; Pekkanen, 2011; Frederickson et al., 2012), and (ii) the theories of judicial governance (see, for instance, Ng, 2011; Frederickson et al., 2012). Other prospective academic approaches include (i) a macro-model approach of the judicial system (see, for instance, Tin, 1999; Bell, 2006; Smith, 2008; Ambach and Rackwitz, 2013), (ii) concerns for power separation and the erosion of judicial legitimacy (see, for instance, Stephenson, 2004; Langbroek, 2008), (iii) demand pressure and human resources productivity (see, for instance, Ng et al., 2008; Walsh, 2008), or (iv) the permanent notion of crisis in judicial systems (see, for instance, Campbell, 2013). However, the authors again stress that the objectives of this article consist in making available and circulating a statistically sound, theoretically neutral account of the Troika’s Portuguese Ministry of Justice experiment to stimulate subsequent empirical work and theoretical debate on these topics. Readers are encouraged to resist any prior theoretical framework temptation until they have completed this article.

3. Methodology

Empirically, this study examines civil enforcement actions in Portugal’s first-instance courts from two perspectives. The first, analyses geographical information and is based on data gathered from 217 first-instance county courts (the most atomized geographical units of judicial territorial jurisdiction in the Portuguese territory). The second perspective analyses the behavioral temporal evolution of this case type and is based on data from a 78-month sample occurring from January 2008 to June 2014. Forty-one of these 78 months precede Troika’s arrival in Portugal (January 2008 to May 2011); the remaining 37 months postdate Troika’s arrival (June 2011 to June 2014). The raw data used comprises the numbers of new, completed and pending enforcement actions, in Portugal. It was released to the public by the responsible government agency, the Directorate General for Justice Policy (available at http://www.siej.dgjp.mj.pt). In addition to these three original variables (new, completed and pending enforcement actions in the first instance courts in Portugal), three other compounded indicators lie at the core of this analysis: procedural balance, clearance rate and disposition time.

and the conception of a set of specific legislative measures that focused on identified problems that the system needed in order to release the courts from unviable cases. From among these specific legislative measures, it should be noted the Decrece-Law 4/2013, of 11 January (Portugal, 2013a), that has approved a set of provisional measures to fight the backlog pendency. These provisional and urgent legislative solutions were absorbed into the new Civil Procedure Code and included such measures as: termination of the proceedings for lack of attachable assets in enforcement actions initiated before September 15, 2003 (old enforcement actions); termination of the proceedings for lack of procedural impulse from creditors and debtors; and termination of the proceedings for lack of payment due to enforcement agents. At the same time, as a result of this group’s work, and together with the High Council of the Judiciary, it was possible the constitution in Lisbon, Porto, Vila Nova de Gaia, Maia and Oeiras, of specialized teams to streamline debts up to the value of 10,000 €, to fight against overdue civil enforcement actions, to regularize the pendency and streamline the processing of the cases. These specialized teams allowed for a significant amount of work to be done, without requiring permanent allocation of resources, necessarily scarce in an economically and financially intervened country.

The counties of Palmela (in the mainland) and of Lagoa (in the Autonomous Region of Azores) were set up (by law) but never became operational because their cases are processed in courts located in neighbouring counties. Therefore, there is no geo-referenced data for these counties.

According to the Directorate General for Justice Policy, a completed case is “a case upon which a final decision has been given, either in the form of a judgment, sentence or order in the relevant instance, irrespective of the res judicata decision”. See, for instance, the footnotes on completed cases and the practical applications of this concept in some documents elaborated by the Directorate General for Justice Policy (2011, 2012, 2013a). According to the Directorate General for Justice Policy, pending cases are “[…] cases that, having entered the courts, have not been completed, that is, have not had a final decision, either in the form of a judgment, sentence or order in the relevant instance, irrespective of the res judicata decision. Pending cases are thus cases that are waiting for certain actions or diligences to be carried out either by the court, by the parties or by any other entity. Some cases may even be waiting for certain facts to occur or for a time limit to run its course. For instance, a suspended case is a pending case regardless of the cause of such suspension”. It is also important to note that “a pending case is not necessarily a delayed case, an example of which, are the cases that are being processed within the legal time limits”. See, for instance, the footnotes on pending cases and the practical applications of this concept in some documents elaborated by the Directorate General for Justice Policy (2013b, 2013c, 2014a, 2014b, 2014c, 2014d).

Cases that were transferred, attached, incorporated or joined to other procedures and those sent to another entity were withdrawn from the data pool, as they do not correspond to new cases in the courts but simply to internal transfers within the judicial system; they do not reflect meaningful demand or supply data regarding the system.

Cases that were transferred, attached, incorporated or joined to other procedures and those sent to another entity were withdrawn from the data pool, as they do not correspond to new cases in the courts but simply to internal transfers within the judicial system; they do not reflect meaningful demand or supply data regarding the system.

The negative values correspond to a favourable procedural balance (more completed cases than new ones and therefore a decrease in the pendency). The positive values correspond to an unfavourable procedural balance (more new cases than completed ones and therefore an increase in the pendency).

The values higher than 100% correspond to a favourable clearance rate (more completed cases than new ones and therefore a decrease in the pendency). Values lower than 100% correspond to an unfavourable clearance rate (more new cases than completed ones and therefore an increase in the pendency). This indicator has the advantage, in relation to the procedural balance...
The calculation formula of these indicators, for a certain period $t$, is as follows:\(^1\)

\[\text{Procedural balance}_t = \text{Number of new cases}_t - \text{Number of completed cases}_t\]

\[\text{Clearance rate}_t = \frac{\text{Number of completed cases}_t}{\text{Number of new cases}_t}\]

\[\text{Disposition time}_t = \frac{\text{Number of pending cases}_t}{\text{Number of completed cases}_t} \times \text{Number of days}_t\]

The test Shapiro-Wilk (Shapiro and Wilk, 1965) was used to try out the experience of normality in the distribution of monthly data in each category (pre-Troika and post-Troika group of months)\(^2\). The absence of normality invalidates the application of the main parametric tests comparing two sets of data, thus it was necessary to apply the Mann-Whitney test (Mann and Whitney, 1947) to determine whether these two sets of data (i) came from the same population (null hypothesis) or (ii) originated from distinct populations (alternative hypothesis)\(^3\). In any of these statistical tests, the level of significance used was 0.05 (5.00%).

4. Results
The analysis presented in this section is divided into two parts. The first is devoted to the presentation of descriptive statistics that constitute a consistent and growing body of evidence of positive results in terms of indicators relating to civil enforcement actions in the period after Troika’s arrival to Portuguese territory. The second part, in turn, uses a set of mathematical tests, so that it is possible to obtain a confirmation free and unbiased by statistical evidence to that effect.

4.1. An Accumulation of Evidences – Descriptive Statistics
Figure 1 shows the evolution of the number of incoming and completed civil enforcement actions in the courts, in Portugal, between January 2008 and June 2014.

Before initiating a more careful reading of the data, it is essential to note the existence of a strong seasonality. This seasonality is noted at the level of the incoming civil enforcement actions but even more so at the level of the resolved ones, with particular emphasis on the month of August, the default judicial vacation period.

To mitigate this phenomenon to obtain the clearest reading of the underlying trends, the authors adjusted the data series that assumed the seasonal factor, the co-existence of trends in the data, and alterations in the value of the variance over time\(^4\). The evolution of the number of incoming and completed civil enforcement actions, adjusted according to the seasonality, between January 2008 and June 2014, is plotted in figure 2.

\(^{10}\) The lower the value, the more favourable it is.
\(^{12}\) The Shapiro-Wilk test was chosen given that, in each category, the number of observations did not exceed 50.
\(^{13}\) The output of the Mann-Whitney test may also be interpreted as being a test to the existence or not of differences in the medians of the two sets of data.
\(^{14}\) The adjustment process comprises three steps: removal of seasonality, removal on any linear data trend, and a variance-stabilizing transformation. The process starts by taking logarithms of each of the original data series (incoming cases and resolved cases). Subsequently a regression analysis is used to identify the linear trend on the logged data. The residuals are then calculated (differences between the logged series and the logged trend). The seasonal factors are calculated next (averages of the residuals for each month). The seasonal factors are subtracted from the original logged series in order to attain the logged seasonally
Figure 2 – Incoming and completed civil enforcement actions, adjusted according to the seasonality, between January 2008 and June 2014

Source: prepared by the authors.

All the composite indicators presented below (procedural balance, clearance rate and disposition time) are calculated based on the values of incoming and completed cases adjusted according to the seasonality and to the values relating to pending cases\(^{15}\).

Figure 3 plots the procedural balance, adjusted according to seasonality, for the period in question. Immediately evident is a change in trends since June 2011, a change especially marked since the beginning of 2013, about a year and a half after the start of the adjustment program. In effect, of the 78 months considered in the analysis, 23 showed favorable procedural balances – months in which the number of completed cases was higher than the number of incoming cases and resulted in a decrease in the pendency equivalent to that same balance). Of these 23 months, 22 (or 95.7\%) were recorded in the period after the arrival of the *Troika* to Portugal (May 2011).

Figure 3 – Procedural balance for the civil enforcement actions, adjusted according to seasonality, between January 2008 and June 2014

Source: prepared by the authors.

Figure 4 compares the geographical distribution, by district, of the procedural balance for the civil enforcement actions in Portugal’s courts of first instance for the periods before and after the arrival of *Troika*.

Considering that in both maps shown in figure 4, the same scale and the same symbols were used in the representation, the differences observed are substantial. Between early 2008 and the end of May 2011, only eight of the 217 districts had favorable procedural balances (below 0), corresponding to a percentage of 3.7\% of the total. By contrast, between the beginning of June 2011 and the end of June 2014, 131 of these 217 districts had achieved a favorable procedural balance (below 0), corresponding to a percentage of 60.4\% of the total, amounting to an increase of 56.7 percentage points compared to the previously recorded value.

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\(^{15}\) Contrary to what occurs with the incoming and completed civil enforcement actions, the time evolution of the number of pending enforcement actions does not suffer the effects of seasonality and it was not necessary to adjust them. Data on pending cases will be presented later in this article.
In turn, figure 5 shows the clearance rate, adjusted for seasonality, in the period under review. Similarly to the verified in the procedural balance, a change is clearly evident in the trend, approximately from June 2011, even more emphatic since the beginning of 2013\textsuperscript{16}, about a year and a half after the start of the adjustment program. In fact, of the 78 months considered in the analysis, 23 reflect a favorable clearance rate (i.e., above 100%, resulting in a decrease in pendency). Of these 23 months, 22 (or 95.7%) were recorded in the period after the arrival of the Troika.

\textbf{Figure 5 – Civil enforcement actions clearance rate, adjusted according to the seasonality, January 2008 to June 2014}

The comparative geographical distribution, by district, of the clearance rate for the periods before and after the arrival of the Troika to Portugal, is shown in figure 6.

Considering that in both maps shown in figure 6 (as in figure 4) where the same scale and the same symbols are used in the representation, the differences observed are substantial. Between early 2008 and the end of May 2011, only eight of the 217 districts had favorable clearance rates (above 100%), corresponding to a percentage of 3.7% of the total. Contrary to this reality, between the beginning of June 2011 and the end of June 2014, 131 of these 217 districts had a favorable clearance rate (above 100%), corresponding to a percentage of 60.4% of the total, amounting to an increase of 56.7 percentage points compared to the previously recorded value.

\textsuperscript{16} Even including four months with clearance rate values higher than 200%, that is, the number of completed cases is more than twice the number of incoming cases.
Figure 6 – Civil enforcement actions clearance rate – Jan 2008-May 2011 (left) and Jun 2011-Jun 2014 (right)

Source: prepared by the authors.

Figure 7, in turn, shows the disposition time, adjusted according to the seasonality, in the period under review. It is also clear, similarly to the verified regarding the previously shown indicators, that there is a change in the trend, approximately from June 2011, which also becomes especially marked since the beginning of 2013, about a year and a half after the start of the adjustment program. In fact, of the 78 months considered in the analysis 23 showed a disposition time under 1,500 days. Of these 23 months, 21 (or 91.3%) were recorded in the period after the arrival of the Troika.

The comparative geographical distribution, by district, of the disposition time for the period before and after the arrival of Troika to Portugal, is shown in Figure 8.

Considering, once more, that in both maps shown in figure 8 (as in figures 4 and 6), the same scale and the same symbols were used in the representation, the differences observed are substantial. Between early 2008 and the end of May 2011, only 68 of the 217 districts had a disposition time of 1,500 days or more, corresponding to a percentage of 31.3% of the total. Contrary to this reality, between the beginning of June 2011 and the end of June 2014, 175 of these 217 districts had a disposition time of 1,500 days or more, corresponding to a percentage of 80.6% of the total,
amounting to an increase of 49.3 percentage points compared to the previously recorded value, suggesting celerity gains, in this types of cases.

Figure 8 – Civil enforcement actions disposition time – Jan 2008-May 2011 (left) and Jun 2011-Jun 2014 (right)

All these results converge, as shown in figure 9, contributing first to stabilization enforcement actions in Portugal (from the beginning of 2013). A careful review of figure 9 suggests that it is not a mere coincidence; Portugal’s compliance with the objectives set in the MoU after the arrival of the Troika and the beginning of the respective adjustment program, in May 2011 achieved favorable results that intensified after an 18-month period of work and system stabilization. Taking as a reference point the maximum reached in 2012, by June 2014 we had already achieved a decrease of more than 210,000 cases from the pending backlog. The measures, despite having taken some time, have been effective.

We next explore the validity of the assertion that the values of these indicators, for the periods before and after commencement of Portugal’s judicial system’s effort to achieve the objectives set out in the 2011 MoU, have different statistical properties; such differences cannot be attributed merely to the usual variability of the phenomena under study.
5. Beyond Reasonable Doubt – Statistical Evidence

Although for any of the six main variables in question (incoming cases adjusted for seasonality, completed cases adjusted for seasonality; pending cases; procedural balance adjusted for seasonality; clearance rates adjusted for seasonality and disposition time adjusted for seasonality) the data revealed a normal distribution simultaneously for all 41 months before the arrival of Troika to Portugal (January 2008 to May 2011) and for the 37 months after the arrival of Troika to Portugal (June 2011 to June 2014), the use of the comparison test of two means (Gosset, 1908) has not proven adequate.

Therefore, and as mentioned in the point relating to methodology, it was decided to apply the Mann and Whitney test (1947) to determine whether these two sets of data come from the same population (null hypothesis) or if, instead, they originate from distinct populations (alternative hypothesis). The results of the Mann-Whitney test for the six variables listed above can be found in Table 1.

Table 1 – Results for the Mann-Whitney test, grouped by “period before the arrival of Troika” and “period after the arrival of Troika”

<table>
<thead>
<tr>
<th>MANN-WHITNEY test value</th>
<th>Incoming*</th>
<th>Completed*</th>
<th>Pending</th>
<th>Procedural balance*</th>
<th>Clearance rate*</th>
<th>Disposition time*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Z value</td>
<td>-1.436</td>
<td>-6.950</td>
<td>-5.188</td>
<td>-5.629</td>
<td>-6.049</td>
<td>-5.549</td>
</tr>
<tr>
<td>p-value (2-tailed)</td>
<td>0.151</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
</tr>
</tbody>
</table>

Source: prepared by the authors.

* Values adjusted for seasonality.

The null hypothesis occurs only in the variable corresponding to the incoming civil enforcement actions, adjusted for seasonal effects (p-values=0.151>0.05). This means that only for this variable can one assume that the two data sets come from the same population. For the remaining five variables, the null hypothesis is rejected (p-values<0.05), and the alternative hypothesis that the two data sets do not come from the same population is validated.

Interpreting these results is extremely interesting. On the one hand, it is possible to conclude that over the 78 months analyzed, there was no significant change in society’s demand for prompt resolution of this type of cases. The difference of about 906 units in the median of the incoming cases adjusted for seasonality (median of 21,720 incoming cases by month before the arrival of Troika to Portugal and of 20,814 incoming cases a month after the arrival of Troika to Portugal) is statistically significant. However, the same cannot be said of the supply of the judicial system in this particular case. The difference of about 8,438 units in the median of the completed cases adjusted for seasonality (median of 15,548 completed cases per month before the arrival of Troika to Portugal and of 23,986 completed cases per month after the arrival of Troika to Portugal) is particularly clear based on statistical evidence of a substantial increase in the supply. This profound change in the supply is reflected in turn in the results obtained at the level of the remaining composite indicators presented in this study.

In terms of procedural balance adjusted for seasonality, the difference of about 14,772 cases in the medians (median of +6,531 cases per month before the arrival of Troika to Portugal and of -8,241 cases per month after the arrival of Troika) is also marked and shows that there is statistical evidence towards a substantial improvement in the procedural balance at the level of the civil enforcement actions. This improvement is not merely quantitative, but qualitative as well, in the sense that in the months prior to the arrival of Troika to Portugal the median procedural balance was positive (hence, unfavorable) and in the months following the arrival of Troika it turned negative (hence, favorable, indicating a reduction in the number of pending actions).

Considering, in turn, the clearance rate, adjusted for seasonality, the difference of 45.1 percentage points in the medians (median of 71.2% before the arrival of Troika to Portugal and of 116.4% after the arrival of Troika) is relevant and enables us to draw the conclusion that the statistical evidence indicates significant improvement in clearance rates of civil enforcement actions. This improvement, as is the case with the procedural balance is not merely quantitative, but qualitative as well, in the sense that in the months prior to the arrival of Troika to Portugal the median

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17 Shapiro-Wilk test (Shapiro and Wilk, 1965).

18 The p-values for the sets of months before and after the arrival of the Troika to Portugal were, respectively: incoming cases adjusted for seasonality (0.002; 0.000); completed cases adjusted for seasonality (0.657; 0.000); pending cases (0.001; 0.000); procedural balance adjusted for seasonality (0.009; 0.107); clearance rate adjusted for seasonality (0.515; 0.017); and disposition time adjusted for seasonality (0.012; 0.754). We recall that the null hypothesis of the test assumes that the population follows a normal distribution, so any p-value of less than 0.05 implies the rejection of the null hypothesis and the acceptance of the alternative hypothesis that the data do not follow a normal distribution. In none of the variables under consideration the pair of p-values was simultaneously higher than 0.05.
clearance rate was unfavorable (less than 100%) and in the months following the arrival of Troika they became favorable (more than 100%, also indicating a reduction in the number of pending actions).

In terms of the disposition time adjusted for seasonality, the difference of 743 days in the medians (median of 2,166 days before the arrival of Troika to Portugal and of 1,423 days after the arrival of Troika) is extremely relevant and supports the conclusion that the is statistical evidence reflects a significant improvement in the disposition time for civil enforcement actions. This improvement suggests obtaining important celerity gains of the system in terms of civil enforcement actions (effectively, the reduction of 743 days in the disposition time corresponds to a reduction of more than two years in this indicator).

The results presented above concur overall with the results obtained in terms of pendency, which begin to be clearly visible about 18 months after the start of the assistance program. However, the relatively low starting point and the sharp rise in the number of pending cases over the months prior to the signing of the MoU between the Troika and the Portuguese State result in a difference of 178,627 units in the medians of the pending cases for each of the periods (median of 1,053,059 pending cases before the arrival of Troika to Portugal and of 1,231,686 pending cases after the arrival of Troika). Once again it is possible to draw the conclusion that there is statistical evidence to the effect that the two sets of data do not come from populations with similar characteristics.

6. Discussion and Conclusions

In May 2011, when the Portuguese institutions started the sectorial works in the justice area to pursue the objectives set out in the MoU, the judicial system was struggling with rampant increases in the number of pending enforcement actions, a phenomenon certainly not unrelated to the severe worsening of the socio-economic and financial situation of the country. The increase in the number of this type of pending cases was accompanied by unfavorable readings in almost all major indicators commonly used to measure the effectiveness, efficiency and quality of European judicial systems.

In June 2014, it was observed that the situation was radically opposed, after an objective, methodical and not biased reading of the data. On the one hand, and as an extremely positive data, it appears that statistically there were no changes on the demand of society for such solutions to conflict resolution. The importance of this fact derives from the care that was put in the design of the measures implemented, which proved to be endowed with neutrality at this point, neither encouraging nor discouraging the social agents (economic operators in particular) to resort to court-based litigation. Furthermore, the system’s supply increased significantly, reflecting the values obtained in indicators such as procedural balance, clearance rate or disposition time. Lastly, the combination of these two factors, maintenance of the demand levels and increase of the system’s supply levels (and consequent reflex on the indicators of efficacy, efficiency and quality) led first to the stabilization in the number of pending civil enforcement actions and, some 18 months after the beginning of the works, to its sharp decline.

While it is true that one should not be tempted to succumb to the reasoning fallacy post hoc ergo propter hoc, the truth is that the measures listed in the point regarding the framework and objectives, seeking to achieve the qualitative and quantitative results described throughout this article and, given a ceteris paribus scenario, with the absence of any other plausible explanation for the observed phenomenology, allow us to connect the last missing causal link in all the arguments advanced.

On the basis of the empirical study of the available data and the resulting data, we conclude that under the Memorandum of Understanding on Economic Policy Conditionality co-signed by Portugal, the European Commission, the European Central Bank and the International Monetary Fund, the justice sector and, more specifically, the processing efficiency in civil enforcement actions achieved a significant public policy implementation success story for Portugal.

We suggest that future efforts on this issue follow two alternative paths. The first is to undertake similar empirical studies on other sectors of activity belonging to the public sphere whose objectives were clearly set forth in the MoU. This will enable a broader view of the actual success of the adjustment program for Portugal. The second is to undertake empirical studies of a similar nature on the justice sector and/or other sectors, in other countries where the aforementioned international institutions have recently intervened in similar fashion. It will, thus, be possible to determine whether the successful story resulting from the experiment carried out in the justice sector in Portugal was the exception or, assuming consistent results, is the rule in other countries that have been the target of various types of assistance and intervention: Greece, Ireland, and the less known and less covered cases of Spain, Cyprus, Hungary, Latvia and Romania.

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A Statewide Examination of Mental Health Courts in Illinois: Program Characteristics and Operations

By Arthur J. Lurigio, Monte D. Staton, Shanti J. Raman and Lorena Roque

Abstract:

This study represents the only broad-based, statewide evaluation of mental health courts (MHCs) conducted to date. Data were collected from 2010 to 2013 at each of the nine active MHC program operating in Illinois at the start of the study. The purpose of the study was to compare and contrast the adjudicatory and supervisory models of each established Illinois MHC program by utilizing a variety of research methodologies. A four-year recidivism analysis of case-level data from three Illinois MHCs was also conducted. Illinois MHCs were largely characterized by the '10 essential elements of an MHC', such as voluntary participation, informed choice and hybrid team approaches to case manage clients. Results of the recidivism analysis suggest that MHCs compare favorably to other types of probation. Overall, findings revealed that Illinois MHCs are delivering services effectively and efficiently in a well-coordinated, client-centered team approach. Differences found among the MHCs are not evidence of significant variance from the model, and instead represent responsiveness to the unique culture of the court, the niche-filling character of the program, the expectations of the program stakeholders and the nature and extent of the local service environment.

Keywords: mental health courts, Illinois, mental illness, criminal adjudication, recidivism

1. Introduction

Fundamental changes in mental health laws and policies have brought criminal justice professionals into contact with the seriously mentally ill at every stage of the criminal justice process. Police arrest people with serious mental illnesses (PSMI) because few other options are readily available to address their disruptive public behavior or to obtain much-needed treatment or housing for them. Jail and prison administrators often struggle to treat and protect the mentally ill; judges grapple with limited sentencing alternatives for PSMI who fall outside specific forensic categories (e.g., guilty but mentally ill); and probation and parole officers scramble to secure scarce community services and treatments for PSMI, often striving to fit the mentally ill into standard correctional programs or to monitor them with traditional case management strategies. When the mentally ill are sentenced to community supervision, their disorders complicate and impede their ability to comply with the conditions of release and compound the difficulties of prisoner reentry.

First established in Broward County, Florida, in 1997, mental health courts (MHCs) were developed in response to the apparently escalating numbers of PSMI who were involved in the criminal justice system. Based on the principle of therapeutic jurisprudence and modeled after drug treatment courts (DTCs), MHCs proliferated throughout the first decade

1 Arthur J. Lurigio is Professor of Criminal Justice and Psychology at the Department of Psychology and Department for Criminal Justice and Criminology, College of Arts and Sciences, Loyola University Chicago, Room 235 of Sullivan Center, 1032 W. Sheridan Rd., Chicago, IL 60660. Monte D. Staton is Assistant Professor of Criminal Justice and Criminology at the Department of Criminal Justice and Criminology, Ball State University, North Quadrant Room 278, Muncie, IN 47306. He can be contacted by (773) 392-0412 or mdstaton@bsu.edu. Shanti J. Raman is director of Grant Development at the Center for Health and Justice, Treatment Alternatives for Safe Communities, 1500 N. Halsted Street, Chicago, IL 60642. Lorena Roque is involved with the Center for the Advancement of Research, Training and Education, College of Arts and Sciences, Loyola University Chicago, Room 235 of Sullivan Center, 1032 W. Sheridan Rd., Chicago, IL 60660.

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of the 21st century, growing in number from a reported four operational programs in late 1997 to more than 400 by 2013, and active in nearly every state. The precipitous growth of such programs—also known as problem-solving or specialty courts—was spurred by federal support from the Bureau of Justice Assistance’s Mental Health Court Program. This program has accorded dollars, training and technical guidance to more than 100 MHCs in more than 40 states. The common goals of such courts include diverting offenders from incarceration, reducing recidivism and enhancing public safety and the quality of clients’ lives.

MHCs are designed to serve the challenging, multifarious and extensive service needs of PSMI. MHCs provide treatment and programming through comprehensive case management strategies, which draw on permanent partnerships with community-based agencies and a wealth of providers through a brokered network of interventions. Most employ a team approach to supervision, with dedicated stakeholders (prosecutors, defense attorneys, probation officers, mental health professionals), individualized treatment plans, voluntary and informed program participation, specialized dockets and caseloads and highly involved and proactive judges who preside over frequent court hearings and non-adversarial proceedings. Satisfactory program completion is defined by predetermined criteria. Clients are motivated to succeed by the threat of sanctions and the promise of rewards.

2. Current Research
Representing the only broad-based, statewide evaluation of MHCs conducted to date, the current research examined the adjudicatory and supervisory models adopted by each active MHC program in Illinois established by 2010. The investigation consisted of a series of data collection strategies pursued over a three-year period in close collaboration with the Research Unit of the Illinois Criminal Justice Information Authority (ICJIA). The study also involved a variety of data-collection tools and methodologies. Finally, the evaluation drew from previous research on MHC programs and dovetailed with the efforts of the Illinois Mental Health Court Association (IMHCA) and the recently convened Illinois Association of Problem-Solving Courts (IAPSC).

Overall, the purpose of this research was to provide a comprehensive assessment of MHCs in Illinois, which were in various stages of development. The investigation also featured preliminary recidivism analysis for three of the MHCs, which exemplified different types of programming and operations. The primary goal of the study was to create a composite of current MHCs in order to inform future studies and practices. Although this research did not include a comprehensive evaluation or comparison of program outcomes, it did yield a fully descriptive snapshot of the first nine MHCs established in Illinois. The research was intended to sharpen and expand knowledge of MHC programs in the state, thereby enhancing the ability of state officials to render appropriate decisions regarding MHC operations and services.

2.1 Methodology
The evaluation of Illinois’ MHCs was performed in stages, with overlapping data collection procedures. The first phase of the research was structured to yield a snapshot of MHC programs in the state: jurisdictions in the planning stages of MHC implementation; those with operational programs; and those still deciding whether an MHC was feasible or warranted based on clients’ needs for services and the availability of local resources to support court operations and client interventions. All 23 court jurisdictions in Illinois were contacted for the screener survey. Two survey approaches were employed. For those jurisdictions that were in the planning phase or that had decided an MHC was not feasible, different telephone surveys were conducted, with a separate set of questions developed for each circumstance. For those jurisdictions with an operational program, a comprehensive written questionnaire was administered to examine program implementation and client characteristics.

Given the critical role of services in client recovery and adjustment, the second stage of the evaluation involved a telephone survey of major providers in a wide variety of service domains. The survey questions were primarily closed-ended and standardized to enhance the understandability and applicability of the questions, and to structure the analyses and interpretation of the data.

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8 Council of State Governments (2), supra note 6.
The next stages of the evaluation involved on-site triangulating data collection procedures in the nine operational MHCs: court observations, focus groups with program staff members and archival analyses. Interviews with MHC clients and recidivism analyses were also conducted in three programs, which were carefully selected for this purpose due to the distinctive nature of their location, size, program structure and client population.

2.2. Findings

2.2.1. The MHC Landscape in Illinois

In the spring of 2010, 19 of the state’s 23 (83%) court circuits participated in the screener survey. At the time of the study, six courts reported no plans for MHC implementation; six were in the planning process to establish an MHC; and nine had operational programs. From the spring of 2010 to the spring of 2014, the number of operational MHCs grew from nine to 21, an increase of 133\%\(^9\). At the time of the screener survey, the nine operational MHCs served a total of 302 participants, of which 46\% were women. The survey found that in Illinois MHCs, most participants (58\%) were white. However, African Americans were overrepresented among participants relative to the local population, whereas Latinos (measured as an ethnicity) were underrepresented. These disparities were replicated in subsequent data analyses, and in some MHCs, the disparities were quite pronounced.

2.2.2. Jurisdictions with no MHCs

Despite the possible benefits of the MHC model and its philosophical underpinnings, a few judicial circuits in the study were disinclined to pursue the implementation of such a program. Among the surveyed jurisdictions that eschewed the creation of an MHC, decisions were rendered after careful consideration of client needs and community resources, particularly mental health services and other treatment options. With regard to client needs, respondents concluded that the number of criminal justice-involved PSMI had failed to reach the critical mass necessary to justify the establishment of a specialized court in order to address the problems of such offenders. With respect to the community resources, participants noted the dearth of both funds and providers necessary to treat PSMI. Some emphasized the relative paucity of dollars dedicated to the purchase of mental health services, which are typically underfunded when compared with drug treatment services for offenders.

Jurisdictions with little or no interest in launching an MHC were smaller and were also rural in composition; these characteristics were generally conflated. Courts in rural areas of the state served smaller populations and therefore had fewer PSMI and correspondingly fewer resources to meet their treatment needs. The dearth of mental health services and practitioners in rural areas of the country has been noted in national studies.\(^{10}\) In jurisdictions without MHCs, ad-hoc efforts were undertaken to respond on a case-by-case basis to assist defendants (pre-adjudication) and offenders (post-adjudication) with mental illness.

2.2.3. Programs in the planning process

Unlike respondents who voiced no plans for an MHC, those in the planning process were all located primarily in large, metropolitan court circuits and counties. Overall, the planning processes in all counties were lengthy, deliberate and collaborative. In some instances, the planning teams sought support and consultation from colleagues in their own or other criminal court systems or from MHC experts in the state. The planning teams also referred to established models of MHC structures and operations. These teams were quite inclusive involving judges, state’s attorneys, public defenders, sheriffs and police administrators. In a few cases, the impetus for an MHC was the recognition that clients in local DTCs also suffered from mental illness (i.e., the clients had co-occurring disorders) and could therefore benefit from psychiatric services as well. The most reluctant members of the planning teams were usually representatives of the State Attorney’s Office or the County Board. The former were typically concerned about public safety issues and case dismissals. The latter were worried about financial constraints, particularly in the aftermath of the draconian cuts in state services for people with behavioral healthcare problems.

2.2.4. Operational MHCs

All nine of the operational MHCs were in urban counties as defined by Office of Management and Budget\(^{11}\) criteria, and five of the programs were located in one-county judicial circuits. The first MHCs in Illinois were implemented in 2004 (MHC 5 and MHC 8), and the most recent MHC in the study period was implemented in 2008 (MHC 9). Most of the


\(^{10}\) President’s New Freedom Commission on Mental Health, Achieving the Promise: Transforming Mental Health Care in America, Author, Washington, DC 2003.

jurisdictions with operational MHCs actually performed a formal needs assessment before launching their programs, and consulted with experts to help design the programs. All of the jurisdictions involved law enforcement administrators in the planning and creation phases of their MHC programs.

Owing in part to the support, advocacy and proactivity of the ICJIA and the IAPSC, program development profited greatly from the advice and experiences of other MHCs in the state. A supportive network of cooperation and information-sharing contributed to the rapid growth of MHCs in Illinois. The transmission of knowledge and expertise led to uniformity in court structures and operations. Most Illinois MHCs were generally characterized by the following 10 essential elements of an MHC:12

Element 1: Broad stakeholder planning and administration of the program.

Element 2: The selection of target populations that address public safety and the link between mental illness and criminal involvement. Statutory exclusions of potential participants based on charges (e.g., sex crime and arson) and diagnosis (e.g., no primary substance abuse disorder, developmental disabilities, or traumatic brain injury). Clients can be convicted of felonies and (or) misdemeanors.

Element 3: Psychiatric assessment occurs before acceptance. Participants are linked to services through direct partnerships with agencies or brokerage arrangements.

Element 4: Terms of participation that include mandatory supervision and mental health treatment. Separate dockets for people with mental illness (Axis I and II and co-occurring disorders).

Element 5: Voluntary participation and informed choice. Legal competence is determined before referral. The public defender is consulted in decisions to enter the programs.

Element 6: A wide range of treatment and service options to meet clinical and habilitation needs.

Element 7: Signed client releases that allow staff to review and utilize information about treatment histories and current status.

Element 8: Hybrid team approaches to case management with judges, attorneys, probation officers, mental health professionals and Treatment Alternatives of Safe Communities (TASC) case managers who provide supervisory and brokered treatment services.

Element 9: Regular court hearings, which varied in frequency among jurisdictions. Phased supervision with graduated reductions in intensity as clients progress through the program without incident or rule-breaking. Contingency case management strategies are applied (rewards and punishments [almost all involving jail time or increased reporting and community service hours]).

Element 10: Programs collect data on outputs (number of defendants screened and accepted) and outcomes (number of clients successfully completing the program).

Models of Illinois MHC operations are in many respects highly traditional. Program staff members function as a courtroom work group with a judge at the helm. Indeed, judges are the predominant figures in each of the operational MHCs, and are intensely hands-on during hearings and are the instrumentalities of client change. Assistant state’s attorneys are the gatekeepers, who screen all referrals for client eligibility and acceptance. Public defenders represent the legal rights and interests of clients, and serve as client advocates and adversaries (in a legal sense) to the assistant state’s attorneys. However, the MHC programs are generally designed to be non-adversarial, and instead utilize a team approach. Probation officers monitor the conditions of MHC supervision and chart client progress.

Court administrators, also known as program coordinators and managers, are the linchpins in court operations. Private attorneys are never regular MHC team members, as these are state-organized, non-adversarial court programs. Nevertheless, in some programs, private attorneys did attend staff meetings at specific times when their clients’ cases were discussed. In three jurisdictions, liaisons on the MHC team identified and approached potential referrals, worked with participants not yet released from jail and monitored participants who had returned to detention. Mental health professionals and addiction specialists, including TASC case managers, are responsible for assessments, service provision and sometimes case management and supervision.

12 Council of State Governments (2), supra note 6.
A variety of sanctions were employed with participants at all nine MHCs. These included communicating verbal praise and admonishment, lessening or increasing the frequency of court appearances and imposing or removing community service hours. In one MHC, clients were rewarded at each hearing by allowing them to draw from a multi-colored bowl, called the 'fish bowl', which contained rewards such as chips, candy, gift cards, movie tickets and other small items. As noted above, jail time was meted out as a sanction in eight of the nine MHCs; however, one MHC staff member explained that the program never used jail as punishment for participants, viewing it as an inappropriate sanction for PSMI. As also suggested above, the roles and responsibilities of MHC personnel were generally circumscribed. Nonetheless, MHC staff often discussed working together and remaining flexible in order to 'get things done' for clients (coalescing around client needs).

Staff members frequently mentioned teamwork as the key component of program and client success; staff collaboration was consistently apparent at case staffings. Judges and assistant state's attorneys participated heavily in team building, staff meetings and case hearings. The MHC workgroups were close-knit teams with sometimes dissolvable and interchangeable roles and functions. 'Functional crossovers' frequently occurred with probation officers acting as managers/service providers and mental health workers and TASC case managers as rule enforcers. These crossovers were accomplished through frequent communication. Therapeutic jurisprudence reigned supreme: client well-being, recovery and adjustment were of paramount importance at all times in all MHCs.

Despite a wealth of commonalities, the nine MHCs also had notable differences. For example, two of the programs accepted only felony cases; one exclusively employed a pre-adjudication model; and four employed a mixed pre- and post-adjudication model. Two other programs adopted a deferred or reduced sentencing model. Primary referral sources can be jail staff, public defenders, or pretrial service workers. The length of time between program referral and acceptance varied significantly among the programs, from one to two weeks to two to four months. The size of the programs also varied, from five (MHC 1) to 102 (MHC 5) participants. Staff in most of the programs explained that criminal justice and mental health information for each potential and existing client was freely shared among all work roles, which was possible because defendants signed waivers. In contrast, in the largest MHC, the judge and public defender reported that they restricted the sharing of case information with each other and with other MHC staff.

2.2.5. Providers and Services

In general, operational MHCs in Illinois provided a panoply of services to clients, which ranged from case management and crisis intervention to inpatient and outpatient treatment in the areas of mental health and substance abuse programming and aftercare. Nearly all MHCs offered clients partial (day) hospitalization, and more than half offered clients inpatient hospitalization for substance use disorders and addictions. Among the different service types, the courts accessed services for their clients through direct partnerships with agencies and through brokerage arrangements with external agencies. These relationships differed by MHC and by the types of services found within and among the MHCs.

As expected, the majority of MHC clients received psychiatric/psychosocial assessments, case management services and outpatient mental health treatment. Crisis management, psychiatric inpatient and day hospitalization and residential substance abuse treatment were offered to fewer clients in fewer courts. Inpatient, intensive outpatient and outpatient substance abuse treatment were more common and were offered to a higher number of clients. The rates of client participation in outpatient substance abuse treatment varied significantly among the MHC programs.

Just as all the MHCs provided a spectrum of assessment and treatment services, the programs also offered a wide range of recovery support services to clients. These included housing, psychosocial rehabilitation, benefits enrollment and peer support. In addition, MHCs provided employment and educational services, as well as transportation and legal assistance. Clients were more likely to receive individual therapy than group or family therapy. Overall, half or fewer MHC clients utilized housing, employment and educational services.

All of the MHCs reported the implementation of evidence-based practices (EBPs) in their programs. The most common EBPs were, in descending order: cognitive behavioral therapy, motivational interviewing, integrative dual disorder treatment and supportive employment. The least common EBPs were, in descending order: assertive community treatment and illness management and recovery. More than half of the courts (56%) offered family psychosocial education and integrative treatment for co-occurring disorders. In addition, one-third of the MHC respondents also reported that they provided their clients with benefits assistance and dialectical behavior therapy, as well as housing and supportive employment services.

Respondents underscored the importance of maintaining fidelity to EBPs. Establishing program criteria and monitoring the implementation of those criteria helped in achieving adherence to the practices. Moreover, staff members were trained (and retrained) on EBP models and implementation protocols. In one court, an expert rated taped therapy sessions in
terms of client-staff interactions and other components of the EBP model. In other jurisdictions, EBPs were monitored relative to state guidelines or were subjected to fidelity reviews and model validation studies. One court mandated that service providers be accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF) or the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

2.2.6. Recidivism analysis

A recidivism analysis explored arrests and time-to-arrests in three MHCs that were carefully selected for this purpose due to the distinctive nature of their location, size, program structure and client population. Other outcome variables included probation violation and probation termination statuses. The analysis also incorporated client demographic characteristics, diagnoses and services received. The sample consisted of 210 offenders admitted to MHCs between January 2008 and December 2010. Survival analyses were conducted by county and examined the effects of age, gender and county on the number and nature of rearrests.

As displayed in Table 1, among the three counties, 31.4% of participants were rearrested for a felony only, while 52.9% were rearrested for a felony or misdemeanor offense. The highest number of rearrests occurred within the first year of post-MHC entry. Half were rearrested during probation supervision and nearly 40% after probation release (not mutually exclusive groups). These results compare somewhat favorably with those reported in a statewide study of probationers, which found that 38% were rearrested during probation and 39% were rearrested after discharge from probation (not mutually exclusive groups).13

<table>
<thead>
<tr>
<th>Program</th>
<th>n</th>
<th>Mean Years observed (SD)</th>
<th>Arrested - felony charges (%)</th>
<th>Arrested - felony or misdemeanor charges (%)</th>
<th>Mean Number of felony arrests (SD)</th>
<th>Mean number of felony or misdemeanor arrests (SD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>MHC 8</td>
<td>80</td>
<td>3.32 (0.92)</td>
<td>41.3</td>
<td>58.8</td>
<td>1.0 (1.6)</td>
<td>1.7 (2.8)</td>
</tr>
<tr>
<td>MHC 1</td>
<td>25</td>
<td>3.83 (1.24)</td>
<td>40.0</td>
<td>52.0</td>
<td>0.8 (1.1)</td>
<td>2.3 (4.6)</td>
</tr>
<tr>
<td>MHC 4</td>
<td>105</td>
<td>3.13 (0.84)</td>
<td>21.9</td>
<td>48.6</td>
<td>0.3 (0.7)</td>
<td>1.0 (1.4)</td>
</tr>
<tr>
<td>Total</td>
<td>210</td>
<td>3.29 (0.95)</td>
<td>31.4</td>
<td>52.9</td>
<td>0.6 (1.2)</td>
<td>1.4 (2.6)</td>
</tr>
</tbody>
</table>

Table 2 shows that the mean year survival times for a felony rearrest were 3.2 (MHC 8), 3.4 (MHC 4) and 4.4 (MHC 1). The proportion of clients who were rearrest-free four years after discharge was 52% in MHC 8, and 60% in MHC 4. In MHC 1, the largest program with 105 clients, this figure was 70%. Male clients were significantly more likely to be rearrested than were female clients.

The most serious challenge to MHCs is the paucity of resources and services, especially in the mental health arena. MHCs are strongly encouraged to register clients for federal entitlements through the Affordable Care Act (ACA), which provides those eligible with broad coverage for substance use disorders and addictions, as well as other psychiatric

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disorders. Jurisdictions with MHCs should follow the Cook County Court System’s lead in the successful enrollment of criminally involved persons in jails and on probation for CountyCare and ACA healthcare benefits.

3. Future research

Future studies of Illinois’ MHCs are recommended. Specifically, the screener survey of the 23 jurisdictions should be updated in 2015 in order to explore the current status of the courts by using the same three-survey approach: one for the original nine MHCs in operation to ascertain whether they have instituted changes in protocol, client composition, funding streams, or service provider networks; one for those that reported being in the contemplative or planning stages of program implementation to determine whether they have moved closer to or further away from the establishment of an MHC; and one for courts with no plans for MHC implementation to explore whether they have reconsidered the possibility of inaugurating such a program in their jurisdictions. All of the changes along the preceding lines would be very interesting to document for the state, as well as for the field in general.

Each of the nine original courts could also be asked to select a random sample of cases (size to be determined by power analyses) that have been discharged from the program for at least one year. With researchers’ oversight, a data collection form could be completed on each client; this data collection tool could be modeled after the instrument created for the Illinois probation outcome studies. In addition, if not already in place, each MHC should formulate a long-term data collection and evaluation plan to ensure that the court continues to function in accordance with proper court designs and protocols and in alignment with identified goals and objectives, including reductions in client recidivism. Additionally, a further study of the documentation of client data should be undertaken to determine whether standard data collection tools are being employed in all active MHCs in Illinois, and in order to create a statewide repository for such information. In September 2009, the Illinois Mental Health Court Database System was launched at the Illinois Integrated Justice Information System Summit and at the Statewide Judges Conference. These data could be highly useful in future process and outcome evaluations of MHCs in Illinois.

For post-adjudication programs, the ultimate questions are whether MHCs add value to the supervisory experiences of probationers, lead to reductions in rearrests and revocations and enhance the well-being and quality of life of their clients. For pre-adjudication programs, the ultimate questions also include whether the programs effectively (and truly) divert PSMI from further criminal justice processing and secure mental health and other services for clients to facilitate their recovery and habilitation. A federally funded study of probationers with mental illness was completed in Cook County in 2014. The research compared three groups of probationers with mental illness in terms of their perceptions of their experiences and their performances while on probation. The groups are PSMI on MHC, specialized mental health probation and standard probation supervision (the usual services and supervision).

This research could be replicated in other large jurisdictions in which the same outcomes are measured for MHC, specialized supervision (if a mental health unit is being implemented outside of Cook County) and standard probation clients with mental illness. An important aspect of the proposed replication is the exploration of the nexus between mental illness and criminality, as well as the effects of psychiatric treatment on recidivism. Several recent studies and literature reviews have suggested a paradigm shift in the conceptualization of these putative relationships.

As described above, MHCs in Illinois have been implemented in alignment with standard MHC structures and procedures. At the time of the study, the courts in operation appeared to be adhering to most of the essential elements

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14 National Institute of Corrections, Mapping the Criminal Justice System to Connect Justice-Involved Individuals with Treatment and Health Care under the Affordable Care Act, Author, Washington, DC, 2014.
17 Council of State Governments (2), supra note 6.
19 Ibid.
23 Council of State Governments (2), supra note 6.
that have been touted as the defining characteristics of a prototypic MHC/DTC, which are principally drawn from the literature on problem-solving courts. Hence, the answer to the question of whether MHCs are ‘working’ is affirmative. In general, they are delivering services effectively and efficiently in a well-coordinated, client-centered team approach that seems to be highly responsive to the individualized needs of clients. The differences among the MHCs are not evidence of significant variance from the model; rather, they represent responsiveness to the unique culture of the court, the niche-filling character of the program, the expectations of the program stakeholders and the nature and extent of the local service environment. The answer to the question of whether MHCs in Illinois ‘work’ is a somewhat tentative ‘yes’ based on the preliminary recidivism data collected in this study and reviews of previous research on such courts. 24

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The European Judicial Training Network And Its Role In The Strategy For The Europeanization Of National Judges

By Simone Benvenuti¹

Abstract:

This article addresses the building of a framework of European Judicial Training (EJT), notably the establishment, organization and functioning of the European Judicial Training Network (EJTN). After describing the EJTN and retracing its distinctive features – co-operation, decentralization, complementarity, targeting –, the article underlines its peculiar function within EJT, which reflects the role of EJT itself in the strategy for Europeanization of national judges. It concludes by discussing other strategic areas where important synergies with EJT can be improved for the purpose of judicial Europeanization, notably the enhancement of transnational judicial associations and the introduction of knowledge management tools in national systems. The article is based on the analysis of documents and scientific literature as well as on empirical research and semi-structured interviews conducted by the author in 2013 and 2014.

Keywords: judicial training, europeanization, judicialization

1. Introduction

In the last ten years, we have witnessed the growth of judicial training as a new policy field aimed at the completion of the European Area of Justice. In 2004, the Hague Program called for “the progressive creation of a European judicial culture […] based on training and networking”. Sure enough, attention to training of national judges dates back to the 90s² and then increasingly within the framework of the rule of law, conditionality set on the occasion of the 2004-2007 round of enlargement (notably, the creation of independent judicial academies³). Nonetheless, especially during the last decade, European institutions became fully committed to shaping a framework of European judicial training (EJT), meaning a training framework aimed at developing common training tools and bringing together judges from different Member States. Between 2004 and 2014 the Council, the Commission, the European Parliament together with transnational actors, converged in considering EJT as a strategic mean for achieving a working judicial space, as originally outlined by the Amsterdam Treaty and the Tampere Council. As the most apparent measure, articles 81 and 82 of the Lisbon Treaty provided a legal basis for activities relating to EJT. This trend has been further enhanced by the 2011 Communication on “Building trust in EU-wide justice: a new dimension to European judicial training”, in which the Commission outlined a massive project in relation to training: i.e. providing training to half of the legal practitioners of the European Union by 2020, for a total of 700,000 practitioners (around 80,000 magistrates).

In this framework, the European Judicial Training Network (EJTN) – an institution created between 2000 and 2004 which gathers together national judicial schools from the Member States – has been given a crucial role as a “hub” for the implementation of policy with regard to the judicial profession, connecting national and European institutions to define the training policies and standards and to coordinate national judicial academies. The EJTN, whose tasks were originally

¹ Simone Benvenuti is research and teaching assistant in comparative law at the University of Rome “La Sapienza”, where he obtained his PhD in “Theory of the State and comparative political institutions”. He has been CMEPIUS research fellow at the Faculty of law of the University of Ljubljana (2010-2011) and Marie Curie fellow at the Central European University in Budapest (2012-2014). He is currently visiting researcher at iCourts – Centre of Excellence for International Courts in Copenhagen. E-mail @ simone_benvenuti@tiscali.it

² The European Parliament adopted on 10 September 1991 a Resolution on the establishment of a European Law Academy, calling for the creation of the Academy and requesting the European Commission, the Council of the European Union, and the Court of Justice to support it. The original idea addressed training to judges and prosecutors, while the Resolution ended up covering all legal professions in public and private sectors.

framed within the broader enlargement policies, defines itself as the “the principal platform and promoter for the training and exchange of knowledge of the European judiciary”. Its establishment is connected to the objectives of spreading a shared European judicial culture and better coordination in judicial training in the EU. In the eyes of its founders, its task was to act as a forum for the exchange of experiences and as a European provider of training in the EU complementing the training provided by national institutions.

In this regard, it is useful at the outset to distinguish three levels of EJT policies. The first level is the very definition of judicial training as a relevant policy field and the selection of the main training priorities. The second level is the definition of training needs and standards within the prioritized areas and the coordination of training activities and the third, is the implementation, i.e. the organization and provision of training activities. Very briefly, EJTN centrality lies first at the level of the definition of training standards, although its activities also touch upon the first and third levels. Besides the EJTN, a number of institutional actors shape quite a complex, if not confused, institutional framework for EJT policies at these three different levels.

The political focus and financial pressures resulted in discussion of the extent of EU competence and the ability of the EJTN to coordinate an efficient framework for achieving the Europeanization objectives set by the Commission. It is therefore essential to bring into focus the functioning of the EJTN, which receives the greatest share of EJT funding, as confirmed by the implementation of the 2014-2020 Justice Program. Up to now, the efforts of EU institutions in relation to the EJT and EJTN have not been matched by equal attention on the part of scholars, although there have been important studies on other aspects of judicial training in the European area. This article aims to present the origins of the EJTN, its organization and its peculiar role in the EJT field (parts 2-4), as well as outlining its distinctive features (part 5). In conclusion, I discuss the two areas in need of improvement outside the EJT framework stricto sensu, which I consider essential in order to achieve the Europeanization objectives: networking and knowledge management (part 6).

2. The Establishment of EJTN

The origins of the EJTN date back to the adoption of the Bordeaux Charter in October 2000, providing for the creation of an informal network of national judicial training institutions (the Réseau de Bordeaux – Bordeaux Network – operative since the 1st January 2001). This was followed by the presentation, on the initiative of the French Government, of a proposal for the establishment of a European Judicial Training Network. The legal basis for the French proposal rested in articles 31 and 34(2) of the EU Treaty; this framed the EJTN in the context of judicial cooperation in criminal matters, explaining why the 2000 Bordeaux meeting involved only criminal law judges and prosecutors. While the European Parliament tried to broaden the scope of the Network to cooperation in civil and commercial matters (article 65 of the Treaty), the Council decided not to follow up the French initiative. It nevertheless encouraged the Association – created in 2004 under Belgian law – to establish close links with European institutions, and encouraged the Member States to support it.

4 At the very beginning, a stream of activities was devoted to helping national institutions of newcomers to assess and improve their training capacity, interview with Luis S. Pereira, EJTN’s Secretary-General, 22nd May 2013. This was made clear in the original French proposal on the establishment of the EJTN (infra par. 2), and further in the EJTN Charter.


8 Initiative of the French Republic with a view to adopting a Council Decision setting up a European judicial training network (2001/C 18/03), The Bordeaux Charter was adopted on occasion of a meeting organized by the French Ecole Nationale de la Magistrature (Vers un espace européen de formation judiciaire, Bordeaux, 12 octobre 2000) involving criminal law judges and prosecutors.

9 E. Stølskrubb (2008), Civil Procedure and EU Law. A Policy Area Uncovered, Oxford, Oxford University Press, p. 247. One interviewed judge, who was, at the time of the creation of the EJTN, seconded at the Slovenian Supreme Court (institution responsible
According to the EJTN’s former Secretary General, the Network is a very interesting example of a private association of public bodies. Its establishment is symbolic of the interpenetration between a bottom-up initiative and a top-down attempt by the European Parliament to institutionalize a training structure within the EU institutional framework. This attempt was not fully backed by the Council of the EU or by the rapporteur at the European Parliament, whose “restraint” was grounded in legal considerations (the absence of a clear legal basis in the Treaty). Sure enough, the refusal of the French initiative was not only due to legal considerations, but also to the opposition by some delegations, unwilling to legitimize a further nibbling of competences by EU institutions in a sensitive area for national legal identities. It was also stressed that the new institution could impair in some way the competencies of the previously established judicial networks for criminal matters and for civil and commercial matters. Although the result was the establishment of a private law association, the approach of the European Parliament demonstrated the growing attention to this policy area, revealing current problems in relation to the balance between the European and the national levels with respect to judicial training policies.

Since its establishment, the EJTN has been progressively “incorporated” into European governance. In 2005 it established a permanent Secretariat in Brussels; in 2006 the Commission granted it a monopoly in the coordination of judicial exchanges; in 2007 it was recognized as pursuing an aim of genuine European interest in the field of training (Council decision 2007/126/JHA, article 4); in 2009 it was recognized as a key stakeholder in furthering the EU e-Justice strategy; in 2014 it was given an operating grant to finance its functioning and its annual portfolio of training activities for the entire period of the 2014-2020 Justice Program.

3. Organization and Functioning of EJTN

At present, institutions in charge of judicial training in Member States along with the European Law Academy of Trier (ERA) are members of the EJTN. In addition, EJTN has “observers” representing candidate countries and EU institutions. The Network is based on the principle of horizontal dialogue and equality of members within the General Assembly. Nonetheless, as in any network, “leading” and more active institutions emerge, be it for prestige or just for financial or other practical reasons. From a financial perspective, Member States’ contributions are a drop in the ocean. As an example, article 4 (d) of the Council Decision 2007/126/JHA establishing the Program “Criminal Justice” for the period 2007 to 2013, introduced an operating grant to co-finance expenditure related to the permanent work program of the EJTN. In 2011, the grant covered 95% of the Network’s budget, while Member States contributed to the remaining 5% according to five different funding bands - the main contributors being UK, Germany, Italy and France. The total budget (including membership fees) was around € 6,000,000. This ratio, as well as the total sum of the operating grant, changed substantially over time. In 2009, the total budget was around € 1,000,000, of which 70% was covered by the EU operating grant and 30% by membership subscriptions. In 2010 it was raised to around € 3,500,000, of which 90% was covered by the EU operating grant and 10% by membership subscriptions. Between 2007 and 2011, the EJTN received around € 7,152,071.31 out of a planned annual budget of up to €9.5 million, i.e. 75% of the funds allocated. With the implementation of the new Justice Program, funding was raised substantially. The EJTN has been assigned an operating grant of € 7,880,000 for the year 2014.

In relation to members’ activism, a reliable criterion to gauge the most active members is the level of participation of national institutes in the Network’s activities, i.e. how many magistrates they “send”. Indeed, it is the training institutions’ task to bring participants in, while the Network provides training. Participation of members’ representatives in the sub-working group of the WG Program is also a useful indicator. Besides those already mentioned, active members are the Spanish, Dutch and Romanian academies, and the Academy of European Law in Trier.

at the time of judicial training, and therefore EJTN observer), thus describes the process of creation of the Network: «It was an interesting process, I was amazed to see that it was at least to a certain degree influenced by politics, but in the end I think that the result was extremely good», interview with Andrej Kmecl, Administrative court of Ljubljana, 6th June 2013.

G. Oberto, Schema ipertestuale di una relazione sul tema: la cooperazione giudiziaria in materia civile nell’ambito dei Paesi dell’Unione Europea. La Rete europea di formazione giudiziaria, available at: http://giacomooberto.com/csm/uditori/cooperazionecivile.htm, last accessed on 19 June 2013. Article 3.2(f) of the French proposal contained notably a reference to the European Judicial Network in criminal matters. In addition, the Council pushed the EJTN to “foster the consistency and efficiency of its members’ training activities,” and to “reinforce its autonomy and independence and increase its capacity to finance its activities”, H. E. Hartnell, “EUstilia: Institutionalizing Justice”, cit., p. 115

11 At present, EJTN has eleven observers; among them, one from the Council of Europe (The Lisbon Network) and one from the European Commission (DG Justice).

12 Interview of the author with Monique van der Goes, Director of EJTN’s permanent office in Brussels, 23rd May 2013.


14 Annex to the Commission Implementing Decision concerning the adoption of the work program for 2014 and the financing for the implementation of the Justice Programme.

15 The French École nationale de la magistrature organized in October 2000 the international conference that brought to the establishment of the network. Furthermore, after the rejection of the French initiative by the European Parliament in December 2000,
The EJTN has three Working Groups. The Group “programs” is devoted to all training activities – courses, seminars, workshops – except exchanges. This Group includes five sub-working groups composed of experts and trainers coming from different Member States (7/8 members per sub-group). The working groups focus on the jurisdictions of civil, criminal and administrative law (the latter dealing with different areas of law such as environmental and tax law, and not only administrative law in the traditional sense), on training of trainers, and linguistics. It is up to sub-groups to identify training needs and propose concrete training activities to the Secretariat, which allocates a budget for the activity in question. The budgeted activities are then submitted to the Commission in order to check the availability of funds within the framework of the operating grant; the European Commission usually does not object to the proposed activities. In order to define training needs, the sub-working groups get input from Network members that assess needs in different ways (contacts with the councils for the judiciary and trainers, feedback from appeal courts, reports on legal implementation, etc.). Training needs are nothing more than the sum of the most common training needs of training institutions whose realization is considered to have an added value if realized within the European platform, i.e. bringing people together from Member States. The EJTN has therefore a decentralized approach in the planning phase. Decentralization is a key-concept that also applies when it comes to the execution phase. Once the list of training activities in the budget is approved, EJTN looks for “volunteers” among its members; it is up to the member ‘volunteers’ to organize the planned activities, and not the task of EJTN to allocate them. Finally, the EJTN funds magistrates’ attendance at the training activities; magistrates coming from observer institutions may also attend the activities, but their participation is not – and cannot be – supported by the EJTN.17

While the Catalogue Program includes courses organized autonomously by Network members that are open to foreign magistrates (some of them being co-financed by the EU), all other activities listed on the website are managed by the Network.18 EJTN activities cover two main sectors. One concerns training activities: besides the exchange program started in 2006, the EJTN provides a platform for the promotion and coordination of a different set of training seminars (also for trainers), Themis competitions, and e-learning programs. The other pillar concerns the elaboration of training curricula and modules, and the selection of best practices for the use of training institutions.19

In 2012, the EJTN organized training activities for 2425 magistrates, rising to 2756 in 2013.20 Between 2005 and 2013, 9239 magistrates participated in training initiatives (apart from the Catalogue Program). As it is not difficult to find a sufficient number of magistrates matching the identified training needs, considering that altogether Member States have around 160,000 magistrates, the large majority of national magistrates and related training needs is not targeted. Therefore, it is not a massive program. The EJTN is indeed based on the idea of “testing” training actions to be developed at a later stage at the national level, or to undertake initiatives that cannot be organized solely at a national level.21 As the EJTN’s former Secretary-General put it, “…training […] developed at the EU level […] is targeted to a reduced number of people, should be seen as a complement of the training provided nationally, and should only be executed when there is an added value resulting from the exchange of experience of the practice of EU law among the magistrates coming from different members”.22

4. Expanding EJTN Activities: The Aiakos Program and the Pilot Project on European Judicial Training

The EJTN’s portfolio of activities has increased substantially since the Network was established. The most recent advance was the implementation of the Aiakos Exchange Program and of lot 1 of the Pilot project on European judicial training (“Study on best practices in training of judges and prosecutors”).

the steering committee of the then informal Bordeaux Network delegated ERA, the École Nationale de la Magistrature and the Spanish Escuela Judicial to approach the European Parliament, the Council and the European Commission to submit observations. Until 2005, the Academy of European Law provided for the secretariat of the Network.

16 Interview with Luis S. Pereira, cit.
17 Costs, including travel (up to a certain amount) and per-diem (including accommodation, meals, local transportation costs) are therefore borne by the EJTN. Whether judges, when participating in EJTN activities, are considered within or rather without their working hours, is a matter to be defined at the domestic level.
18 By including the activities on the Catalogue, training institutions accept at the same time the registration of any magistrate coming from other countries.
19 On the efficacy of training modules, see M. Krivickaite, “European judicial training in the field of environmental law”, in ERA Forum, 2014, 15, pp. 431 ss.
20 It would be interesting to analyze the number of trained magistrates among the different portfolios (for example, in 2012 250 magistrates have been trained within the Linguistics Program).
21 Interview with Amélie Leclercq, Seconded national expert at EIPA, 22nd May 2013.
22 Interview with Luis S. Pereira, cit.
Exchange is the original core of EJTN’s activities, aimed at enhancing mutual trust and knowledge through socialization. When the EJTN commenced operations in 2005, this was indeed the only program to be implemented at that time, by two members of the Network, the French école nationale de la magistrature and the Italian Consiglio superiore della magistratura. In 2006, the EJTN was granted the de facto monopoly in the implementation of the Exchange Program by the European Commission. Between 2005 and 2013 EJTN coordinated 5595 exchanges, with a steady rate of growth in participation in the Program since 2010.23

Aiakos is an exchange program for judicial trainees and young magistrates, inspired, subject to appropriate modifications, by the successful Erasmus Program.24 The Program has its political basis in the 2011 Communication of the European Commission and in the Council conclusions on European judicial training of October 2011, which invited the European Commission ‘to initiate a new exchange for newly appointed judges and prosecutors’. Different from the previously established training program, Aiakos is grounded on the reciprocity principle; it envisages one-week of training overseas and one at home, during which the visiting trainees take part in the same training session as their host counterpart.

In its pilot phase the Program is funded through an annual operating grant, until 2014. So far, 11 countries have participated in the exchange program on a voluntary basis that amounts to approximately 300 young magistrates per year but the idea is to substantially raise the number of trainees. The number of participating countries should also increase and the proposal of the Belgian institute to make participation mandatory by integrating it in the initial training programs of national institutions is under consideration. This raises – once again – the issue of the legal basis for European training activities, the present one not being considered sufficient to make participation mandatory. Further problems lie on the financial side (will co-funding be guaranteed in a period of harsh financial crisis?) and on the organizational side (do national training institutions have sufficient human resources to ensure effective exchanges?).

The Pilot project on European judicial training is a new tool implemented on the initiative of the European Parliament. It marks an essential change in the European Parliament’s approach towards European judicial training, that is to say a move towards a more decentralized approach ‘that fully respects the principle of subsidiarity and the judicial independence’.25 The Pilot project includes four lots aimed at identifying and promoting best practice in training of justice professionals and promoting cooperation between existing stakeholders, including those associations recognized as judicial networks at the European level whose creation is notoriously characterized by a bottom-up approach. The European Commission assigned the EJTN the implementation of the first lot concerning the study and selection of best practice in the training of magistrates.26

5. EJTN’s distinctive features: a summary

From its inception, EJT policies have undergone swift but non-linear evolution. This applies to the EJTN as well; whose identity took shape over the course of time. At the time of its establishment, it was not clear whether the Network should be characterized by a centralized or decentralized approach; whether it should act as a coordinating entity or a training provider (in the latter case directly challenging usual national and other transnational providers);27 whether its creation...
should be framed within a provisional enlargement policy or a more systematic strategy for the achievement of the European Area of Justice. Subsequent evolution clarified these aspects. By now, EJTN (and by implication the overall EJT system), is characterized by four key-concepts: co-operation, decentralization, complementarity, targeting.

Implementation of judicial training – definition of priorities, standards and needs – is the result of co-operation between the EJTN, its members and the European Commission as the funding entity, as well as “European-level professional organizations”. The EJTN not only is a network; it also operates as a network. Similarly, EJT is a highly fragmented field where cooperation among stakeholders is well developed and the EJTN plays, together with the Commission, a coordinating role. The above-described Pilot project is illustrative of this co-operative trend involving a wide array of stakeholders within, what still is, a highly competitive and fragmentary landscape.

The scope of judicial training objectives set by the Commission highlights the inability of the Commission itself to have an overwhelming influence, leaving a margin of action to the EJTN. In spite of its progressive “incorporation” into the system of European governance, the Network functions in a decentralized manner both in the implementation of training policy and the provision of training services. Thus, the EJTN coordinating role does not equal centralization. There is a decentralizing trend in the overall EJT system, in spite of the apparently centralizing approach of the Commission and some of its agencies (think, for example, to the European Asylum Support Office with regard to training in asylum law). The idea that EJT should be provided at the European level is indeed regressing. Member States have the main responsibility for judicial training especially from a European perspective. This trend is apparent in the attention to national best practice in the Pilot project and in the funding of national programs for judicial Europeanization (such as European Gaius in Italy, increasing the number of courses on European law). The centralist approach exemplified by the creation of the Academy of European Law in Trier (and partly also of the Centre for Judges and Lawyers at the European Institute of Public Administration in Maastricht) prevailed for some time. The conflict between the two approaches was apparent during the establishment of the EJTN. More recently, the establishment of a centralized body for EJT was the subject of little discussion. In the European Parliament Resolution on the role of national judge in the EU of July 2008, reference was made to a “European Judicial Academy” composed of the EJTN and the Academy of European Law, building on the experience of the European Police College. The proposal by the European Parliament was quickly dropped. There is no longer any question of the creation of a more centralized European Judicial Academy – and if a problem of centralization exists, this is more the consequence of a lack of interest and of Member States’ inclination to delegate responsibility.

Decentralization introduces the third key concept, i.e. the complementary nature of EJTN activities – and in general of EJT as such. EJT and the EJTN should not replace the responsibility of Member States to train magistrates in European law; European law has indeed to be considered an integral part of the national legal systems. Training provided by the EJTN is not – and cannot be – large scale. Keeping in mind that from 2005 to 2013 the EJTN organized exchange and training activities for around 14,834 magistrates, training objectives set by the Commission are unlikely to be attained. Sure enough, these figures do not take into account those activities organized by national training institutes through regional

are independent and autonomous from the Government and the Parliament can be indeed members of the Network. Member States that do not have a council or have a non-independent body are therefore merely observers.

28 The European Asylum Support Office (EASO) is an “independent” executive body whose managing board is constituted by the representatives of the national Governments and of the Commission. According to article 6 of the Regulation establishing EASO, the Office has been being granted a responsibility to train judges. This was seen as a problem, as EASO would have an “executive” approach and may carry out policies influenced by the European Commission. In addition, EASO competence in training exceeded also the boundaries set by the Lisbon Treaty, given that training concerned an area – administrative law – not mentioned by the Treaty. After its establishment, representatives of the European section of the International Association of the Refugee Law Judges (IARLJ), which had been invited to informally join the structure, raised the problem of independence, asserting that EASO could not train judges because it was part of the “executive” branch of the EU structure. Finally, EASO fully accepted this view – acknowledging the decisive role of judges in the determination of the agenda and the speakers. Interview with Boštjan Zalar, Judge at the Administrative court of Ljubljana, 3rd June 2013. S. Benvenuti, Who defines judicial training standards in the EU, and for whom? The case of the European Judicial Training Network (EJTN), Paper presented at the RC12 2013 International Conference on “Sociology of Law and Political Action”, Toulouse, France, September 3-6, 2013.


31 We can also keep in mind that from its creation in 1992 up to 2013, the Academy of European Law (ERA) provided European law training for around 100.000 among judges, prosecutors and other legal professionals; since 2000, around 11.000 magistrates participated in ERA’s training activities, W. Heusel, “The Academy of European Law (ERA) Experience with Judicial Training”, in European Parliament, The Training of Legal Practitioners, cit., p. 127.
Complementary character is acknowledged by the development of the concept of “European added value” (EAV). If judicial training in European law is primarily a national task, the transnational stage has to be involved only residually where there is EAV. The Commission agrees that its role is to give incentives (financial in particular) for common training measures having EAV and not to compete with Member States in the organization of judicial training in EU law. The concept of EAV, which was debated at the 2013 Conference on judicial training promoted by the European Commission, is therefore at the core of considerations about who is going to do what. ERA’s Director stressed that training needs/priorities having EAV are a “moving target”: they cannot be determined once and for all and the EAV – i.e. the usefulness of bringing together magistrates from different countries – has to be assessed empirically, having regard to the available resources. In addition, the EAV of a topic may lack a general character, being instead limited to a purely national context. This would be the case in new accession countries where EU (basic) training is still weak. Just after the accession of Croatia, the Croatian judicial academy did not have sufficient expertise in EU law; the only competent national context. This is where I am going to conclude.

To sum up, the actual situation seems to be one of a smoothly functioning decentralized system for the purposes of defining training needs and standards and implementing training activities. The European Union’s rhetorical and unrealistic approach to large scale training may actually turn into an effective process of Europeanization of national judiciaries through EJT. As a Slovenian judge (and EU trainer) put it:

EJT is «a good mirror of Europe with all the complications and all the misunderstanding and of course, at the end, the common goal. Because I think that, as far as I see, EJTN now functions quite smoothly, it is very efficient in its work and I am glad we have it». At the same time the very features of EJT and EJTN, and especially its smaller scale character, indicate the need to put EJT and EJTN in context, without mixing up means (EJT and EJTN) and ends (Europeanization of national judiciaries). This is where I am going to conclude.

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33 This does not seem to be the view of G. Oberto, G. How to Identify Judicial Training Needs? Suggestions and Experiences Drawn from National and International Training Programs, Presentation submitted to the “Menu for Justice Project” Workshop, organized by IRSIG-CNR (Istituto per la ricerca sui sistemi giudiziari del Consiglio Nazionale delle Ricerche), held within the Department of Political Science of the University of Bologna, Bologna, 29-30 March 2012.
35 Stimulating European Judicial Training, Brussels, 10th of April 2013.
36 Interview with Nella Popović, Office of International Relations and Projects of the Croatian Judicial Academy, 4th June 2013.
37 Generally speaking, teaching fundamentals of EU law (substantive law as well as EU judicial procedures) is a national priority, while updating in all specific areas of law as well as training on cross-border cooperation could be easily considered as having a European added value. Knowledge of Member States’ law is considered of little practical relevance although highly promoted. W. Heusel, What to fund by the EU, speech at the Conference on “Stimulating European Judicial Training”, Brussels, 10 April 2013.
38 Interview with Andrej Kmecl, cit. Satisfaction for training proved by the EJTN, in particular exchanges, has been expressed also by the person in charge of the Office of International relations and projects of the Croatian Judicial Academy.
 Judicial networks – i.e. networks of judicial professionals – have received a good deal of attention in many research activities during the last few years. Although there is a serious need for accurate empirical studies showing differences between networks and their actual impact, one can say that judicial networks are a forum in which informal discussion and exchange happens. The Commission included some of them as partners in the achievement of the Area of Justice, although mainly those representing supreme courts. Judicial networks contribute to EJT activities funded by the Commission, for example in the field of competition or environmental law, and are one of the sources from which EU law trainers are drawn. At least theoretically (research should be encouraged to investigate the actual impact), judicial networks play an important role as enhancers of convergence of national practices, linking the European and domestic level as well as the different national “compartments” at the domestic level. The Association of European Administrative Judges (AEAJ) works, for example, through specialized working groups where a limited number of judges discuss selected cases. In many cases, such informal training covers areas neglected by EJT (analysis of European jurisprudence through the lenses of national case law, procedural differences at the national level etc.). The usefulness of networking has also been acknowledged in particular, in those areas where cases are few and the legal basis is extremely complex (environmental matters or, to a lesser extent, asylum cases). Much of the judicial knowledge is indeed built not through training, but rather through daily work (learning by doing). Therefore, in those areas where judges cannot gather relevant experience, there is a need to share knowledge with other colleagues from other countries who may have already dealt with the same legal issues. As one judge put it when interviewed, “…”you need other ways to train, and there is nobody else who can tell you what goes on in such cases but your colleagues who went through it […] That’s why networking is so extremely important”. In fine, activities carried out by networks of judicial professionals have minor costs compared to professionalized training.

6. Conclusion: Synergies for Effective Judicial Europeanization

The complementary character of EJT brings the responsibility of Member States in providing a European education to their magistrates. Other aspects should be pointed out, laying down a strategy for achieving the objectives of EJT through synergy with measures to be adopted in areas related to – but outside the scope – of EJT stricto sensu. In this regard, it would be interesting to closely examine the allocation of funding in the 2014 Commission Implementing Decision of the Justice Program. This is not however the focus of these pages. In conclusion, I will pinpoint the relevance of two areas that should be enhanced: judicial networking and knowledge management.


40 Interview with Heinrich Zens, President of the Association of European Administrative Judges, Judge at the Austrian Administrative Tribunal 23rd April 2014. 41 As former EJTN Secretary General put it, while the jurisprudence of the EU courts is always present in EJTN's training seminars, it would be of interest to know some national case law; however this is almost impossible in a polity of 28 Member States, interview, cit. Wolfgang Heusel also held that knowledge of Member State law is of little relevance for European judicial training (in the narrow sense); W. Heusel, What to fund by the EU, cit.

42 Interview with Boštjan Zalar, Judge at the Administrative court of Ljubljana, 3rd June 2013.

43 Interview with Andrej Kmecl, cit.

44 Judicial networks generally organize low-budget initiatives whose main expenses are travel and accommodation, with the exclusion of heavy lecturing costs charged by professional institutes like ERA or EIPA.
For these reasons, judicial networks should be more vigorously supported. However no matter how important, mere support is not enough for improving the “descending” function of judicial networks.\(^{45}\) The ability to harmonize judicial practices is undermined by the weak link between network members and their national judiciary of origin.\(^{46}\) The impact of these activities may therefore be questioned in the following way: is knowledge shared within the network also able to spread outside throughout national judiciaries? Strengthening the link is therefore essential. Here, knowledge management tools, and particularly the creation of groups of EU law experts as court coordinators, can make the difference.

As for other knowledge management tools (legal databases and e-justice), the establishment of EU law coordinators aims precisely at enhancing communication and the spread of knowledge among magistrates. The Eurinfra project, developed since 2000 by the Dutch Minister of Justice and Council for the Judiciary, is the forerunner in this regard, establishing a network of court coordinators specialized in European law.\(^{47}\) One of these is the Italian European Gaius project, inspired by the Dutch Eurinfra project, whose second pillar involves the establishment of EU law expert judges. Similar initiatives have spread across Europe, showing how court coordinators can create synergies with transnational legal networks (and EJT activities). EU law court coordinators are usually involved in such activities, being selected for that purpose precisely because of such European involvement. One example is that of the Slovenian Administrative Court, whose judges are transnationally involved and where a contact judge for European matters (actively participating in networks) was established informally in 2005, on initiative of the Court president.\(^{48}\) A similar initiative has been launched in Croatia at the level of the Supreme Court, where a judge has been appointed to establish an EU law service.\(^{49}\) Another example is drawn from the Hungarian judicial system, where a new system of EU law coordinators in different fields of law has been established at the level of the National Judicial Council, institutionalizing the Association of EU law judges. Here too, judges involved in transnational activities coordinate this new entity.\(^{50}\) Incidentally, the system was established on the initiative of the current head of the National Judicial Council, who has been active in the transnational labor court judges’ networks.\(^{51}\) Where the idea of court coordinators has not been introduced (and the need for such a professional figure is not felt), a similar function may be exercised by judicial associations, such as, in the case of Austria, the Association of Asylum Law Judges, now absorbed into the Association of Administrative Federal Tribunal Judges.

Sure enough, establishment of this kind of instruments as well as their actual functioning can encounter resistance, due to the institutional culture that filters the specific understanding of the principles of accountability and independence. Discussion among judges may only be acknowledged with difficulty in countries where independence is conceived in absolute or individualistic terms. This is, however, an area where highly effective measures can be undertaken, and support is emanating from European institutions. In particular, the Parliament took the first steps in encouraging similar instruments, calling on the Commission “to foster and sponsor national court coordinators of European law and the emergent interconnection of the national networks of court coordinators”.\(^{52}\)

\(^{45}\) Judicial networks can be said to operate in two main directions, although sometimes not always distinguishable, which can be termed as “ascending” and “descending” dimensions. Firstly, networks are instruments of European governance, inasmuch they contribute to the definition of legal policies in the areas of their respective interest. An example is the ineffective Justice Forum established on April 2008, or the initiative on the reform of the preliminary reference procedure launched by networks of supreme court judges. From this perspective, judicial networks participate in the European policy-making process and (theoretically) influence outcomes at the upper - European - level. From a different perspective, networks act as filters between a complex and often contradictory EU legal system and its national judicial application (sometimes even acting as forums where the outcome of specific cases is “negotiated”), as well as standard-setters for judicial behavior. Here the activity of networks is directed at establishing legal meanings for the use of national judiciaries but also tools and know-how in general.

\(^{46}\) S. Benvenuti, The factors affecting the impact of judicial networks as devices for the Europeanization of national judiciaries, Paper presented at the UACES 44th Annual Conference, 1-3 September 2014, Cork.


\(^{48}\) Interview of the author with Jasna Šegan, President of the Administrative Court of Ljubljana, 3rd June 2013.

\(^{49}\) Interview with Branko Hrvatin, President of the Croatian Supreme Court, 19th September 2014.

\(^{50}\) Interview with Anna Csorba, Judge at the Labour Court of Miskolc, 27th October 2014. See also A. F. Tatham, “The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary”, in European Law Journal, 2012, 4, p. 585 s., who also stresses the importance of complementary devices for judicial Europeanization, beyond training.

\(^{51}\) A recent study realized on request of the European Parliament highlighted also reports other examples, such as the Spanish network of experts in EU law, F. De Rosa Torner, “The Spanish Experience: Network of Experts on European Union Law (REDUE), in in European Parliament, The Training of Legal Practitioners, cit., pp. 36-58.

\(^{52}\) Motion for resolution European Parliament resolution on judicial training – court coordinators (2012/2864(RSP))
Learning to Sentence: An Empirical Study Of Judicial Attitudes Towards Judicial Training In Romania
By Diana Richards

Abstract:

This paper aims to present an innovative type of empirical research in judicial studies. It focuses on assessing the attitudes and perceptions judges have towards the way they learn how to sentence throughout the course of their judicial careers. The first main assumption is that judges learn all throughout their lives, both through the formal training offered and other informal sources of learning (such as the practice of sentencing, or peer advice). The second main assumption is that the judges’ learning needs and perceptions towards training change as they gain more experience and they are exposed to various learning contexts.

So far the study was conducted in one European jurisdiction (Romania), totalling 510 judicial respondents ranging from 0 to 40 years judicial experience. This paper presents the findings with regards to their views on the judicial training they receive.

Keywords: judicial training, sentencing, judicial studies, experiential learning, lifelong learning.

1. Introduction

The study of judicial decision-making has its origins in the early 20th century American scholarship in political science and law. The judicial studies movement was a reaction against the traditional legal model of judicial decision-making, which saw law and legal rules as the only relevant factors in judicial decision-making. As judicial studies developed, new models of decision-making emerged. Initially the attitudinal model suggested that judicial decisions simply embodied judges’ personal attitudes. Later the strategic and institutionalist models acknowledged that judges act in more complex ways, and that other judges and institutional rules can affect and constrain judges’ decisions. But all of these models maintain that judicial decision-making is only about achieving judges’ policy preferences. In recent decades scholars have begun to acknowledge that the leading models in judicial studies are too narrow, and a more complex and holistic approach to understanding judicial decision-making is needed.

This study seeks to add an extra dimension to the empirical study of judicial decision-making by looking at how judges learn to make decisions in court. By looking at the components of the learning process, this study adds a developmental dimension to the study of judicial decision-making – because it hypothesizes that decision-making is not a static, unchangeable exercise, but evolves with time and experience. This aspect was inadvertently captured in some past empirical studies which also measured age or years in post, but that did not seem to prevent researchers from drawing

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1 Diana Richards is PhD Candidate at University College London. Her research is currently focusing on assessment of judicial attitudes towards formal judicial training. She can be contacted by: diana.richards@ucl.ac.uk. Address: UCL Laws, Bentham House, 4-8 Endsleigh Gardens, London WC1H 0EG, UK, telephone: +40 7551570859. - The author is incredibly grateful to the Romanian National Institute of Magistracy and to the Romanian judiciary for agreeing to contribute to this study. Additional thanks go to Professor Cheryl Thomas, UCL Judicial Institute, Dr Nigel Balmer, UCL Centre for Legal Empirical Research, and the UCL Laws faculty for the significant support and mentoring in designing and conducting this research. Finally, the author is very grateful to Dr Markus Zimmer and Prof Philip Langbroek, as well as to the two anonymous reviewers for providing insightful feedback on the piece.


generalised conclusions about factors that influence judicial decision making, without acknowledging that those factors might change with experience and with exposure to learning.

When thinking of the learning process judges have to go through, the first and foremost thing that comes to mind is the specific formal training judges have to undergo by virtue of being judges, a type of vocational training dedicated to adults. In most jurisdictions, newly-appointed judges have to undergo initial or induction training, while judicial training institutions also offer continuous training throughout the judges’ careers. Initial training is the training typically offered in continental civil law systems where the judicial trainees have a law degree (are professional judges, as opposed to lay judges) but are not required to have significant previous practical legal experience at the time of recruitment. For this reason, the initial training lasts longer (one or two years) and is meant to prepare the trainee for the judicial office by compensating for the lack of experience with a more intensive and longer theoretical and practical training. In contrast, induction training is available in jurisdictions (such as the common law jurisdictions) where judges are recruited among legal professionals who have already gained significant practical legal experience. Induction training is typically shorter than initial training. Because initial and induction training refer to different types of candidate profiles, a judge typically undergoes only one of these forms of training, never both. In addition, it is typically the case that judges are encouraged (or required) to update their skills and knowledge by undergoing continuous training offered by the judicial training institutes, which normally consists of subject-specific short sessions, organised either centrally or regionally. Continuous training anticipates that judges are expected to sign up for sessions regularly throughout their career, based on the assumption that one is never too old to learn something new but also on the assumption that, by keeping their know-how up to date, judges maintain their independence and relevance in society while making tough decisions.

To look at how judges are trained when they first begin their job, and to see if the training is indeed helping them learn how to do their job in court, is a key component in understanding how judges learn to judge – and the current study includes an attitudinal study of initial judicial training needs and expectations. But judges, like any other professionals, learn all throughout their professional lives. This phenomenon was captured by theorists of education when speaking of experiential education and lifelong learning, as well as by educational and governmental institutions when defining different types of learning. This, in turn, has three consequences for the current study, out of which the first two are key for the current piece. First, it made sense to not just look at initial judicial training but at various forms of continuous training as well, be it face-to-face or online, and to see if judicial experience correlates with a different perspective on the usefulness of various types of teaching methods or legal content. In that sense, it was expected that the continuous training vs. the initial training serve different purposes and have to employ different methods to address needs of professionals at different levels of their careers. This is already assumed by judicial training institutes when they design their sessions and pick their methods, but so far their intuitions were never externally validated by measuring what the participants actually expect. For this reason, the research design included respondents from all types of training (initial, induction, continuous) and also observed the entire variety of methods and content offered in all types of training.

Second, in having experiential learning as its fundamental assumption, the study had to take the developmental thesis a step further. It is not just that the initial training has to differ from continuous training in its deliverables, because it serves learners with no or with some prior experience; in fact it has to measure the degrees of experience and see, for instance, if judges who undertake continuous training at different levels of their career might still have significantly different needs and expectations from one another, even if they are included in the same category of learners. Because of this aspect,
two key variables were taken particularly seriously - the type and amount of experience gained, on one hand, and the type and amount of prior exposure to training, on the other – to determine whether they explain differences in perceptions towards all the forms of formal learning just mentioned.

The third consequence of a developmental approach to judicial learning that had impact on the manner in which this study was designed, but unfortunately cannot be treated in this article, was that it broadened the scope of “learning” to mean more than just “training”. While formal training is an important component in helping judges learn how to make decisions, one could hypothesise that there are other instances in which judges learn how to do their job, either by actually having to make decisions in concrete cases (learning by doing), by using a variety of tools in their practice (legislation, precedential outcomes in similar cases, guidelines, reports, recommendations) or by asking their peers for advice in difficult situations (peer learning). The findings pertaining to the informal aspects of learning will be treated in a future article for the sake of clarity.

While it has a dynamic and innovative conception of what counts as learning, and therefore a rather ambitious aim in terms of the variables it aimed to measure, this study had to narrow down its scope in two ways so as to become feasible. First, it decided to look at one type of judicial decision-making rather than try to muddle up very different types of judicial tasks. It chose sentencing as one of the key, incredibly difficult, tasks judges in criminal courts have to perform. On one hand, because there is purportedly a higher pressure to get things right in a criminal case than in other types of cases. On the other hand, because in sentencing the judge has to learn how to balance a myriad of aggravating and mitigating factors, as opposed to other kinds of decisions where the decision might include fewer elements. Some very insightful studies on sentencing were conducted so far, but they were conducted on small samples and/or they did not take the developmental, experiential element into account and therefore just offered a “snapshot”.10

Second, although an ideal study would be conducted in all world jurisdictions in order to be able to offer a more generalizable picture of judicial decision making, and perhaps even part of a longitudinal study initiative that would also account for time changes, the current study needed to start with one jurisdiction, with the hope that the following years will give opportunities for expanding the study to other jurisdictions. The jurisdiction studied is Romania. Why Romania? Romania represents an interesting case study for several, perhaps unexpected, reasons.

First, it has implemented a hybrid judicial appointment and training model during the last decade. It did not just focus on appointment of young, inexperienced judges, as civil law systems typically do. It also ran a parallel appointment and training route for experienced lawyers, akin to what common law jurisdictions run around the world. From the standpoint of comparative empirical legal research, this was a unique opportunity to study two categories of judges who have the same cultural and political background, but have very different life experience and working knowledge of the law. In other words, by studying the Romanian hybrid judicial system, one manages to compare the differences between common and civil law jurisdictions without having to worry, as in other comparative approaches, that there are confounding factors such as different political systems, or variable socio-economic factors, or different legal educational backgrounds between the respondents.11 Moreover, the two different subsets of judges – the young, inexperienced judges from the “NIM route”12 (comparable to judges from other continental European jurisdictions) and judges with prior advocacy experience from the “direct route” (comparable to new appointees from common law jurisdictions) – received training from the same trainers, on the same legislation and legal procedure, under the same educational vision of the leadership of the NIM. With so many societal and environmental variables controlled, one might perhaps draw the safe conclusion that the differences in attitudes between the two types of Romanian judges reflect differences in their advocacy and life experience in general.

Second, although rather recently turned into a democracy with independent judicial appointment and training bodies, Romania had benefited during the last decade from visionary and proactive young managers both in the Superior Council

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11 In fact, the age difference between “NIM route” and “direct route” judges is small enough to warrant that both types of judges were raised post-1989, therefore they experienced the same post-communist transitional democracy.

12 The NIM represents the Romanian National Institute of Magistracy, the institution in charge with the appointment and training of judges and prosecutors in Romania. In Romania, the “NIM route” represents the judicial appointment and training route whereby young law graduates with no significant practical experience are recruited, then trained for up to 2 years at the Institute.
of Magistracy and the National Institute of Magistracy. This translated into the implementation of the best appointment and training practices for the Romanian judiciary. This effort has been recently praised by the European Judicial Training Network (EJTN) in a report approved by the European Commission on the best training practices for judges and prosecutors throughout Europe. The EJTN has praised the Romanian NIM for good practices in four key areas: 1) the training needs assessment, 2) in providing a comprehensive package to deliver large-scale training on new legal instruments, 3) the recruitment and evaluation of judicial trainers, as well as 4) making training content available online.\(^{13}\)

While Romania is, both theoretically and practically, an interesting and timely case study for empirical research assessing judicial attitudes, it nevertheless is just a first, and hopefully not last, case study for the current methodology. The methodological framework of this study can be applied in any jurisdiction of the world — not just in a European, continental, or post-communist jurisdiction. The main reason is that the current research methodology is not jurisdiction-bound; it was designed to apply to any jurisdiction as long as judicial training is offered within that jurisdiction. The real challenge would not be in adapting the research instrument — but in making the correct interpretations as to what causes differences across jurisdictions, as potential confounding factors must be controlled for or at least identified. This issue needs to be addressed in future research.

There is one last important aspect of the research design that can initially puzzle a reader belonging to common law jurisdiction with adversarial practices, but it is very important in conducting this kind of research in inquisitorial systems and hopefully its value will become apparent. In inquisitorial systems, judges and prosecutors collaborate on discovering the truth in the case — and for that reason their rapport with one another is collegial rather than that between an umpire and a player with competing interests. In many inquisitorial systems around the world, it is considered not only normal, but also welcome, that judges and prosecutors are recruited and trained together. The birth of judicial studies took place in the United States where the adversarial nature of the justice system draws a stark distinction between the roles of judges and of prosecutors. For this reason, judicial studies are seen, by definition, as only including judges. Yet transplanting the judicial studies methodology into Europe has to take into account the specificities of many European judiciaries in order to be an accurate description of reality. While on the issue of who makes the final decision in a case, it is still the judge who has the final word, on the issue of judicial training, measuring the prosecutors’ attitudes towards the learning process at the same time as the judges’ gives an important vantage point from which to see if the particularities of the judicial role correlates with a significant change in attitude. For this reason, prosecutors were included as a secondary sample in this study. As it will be explained in the research design, prosecutors undergo the same selection process and get the same training as their fellow judges. While they do not constitute the main focus of this study, their insights are valuable when they differ significantly from their fellow judges, and that is an added, if not unexpected, strength of this study.

The following sections describe the research questions, the stratified sampling and the methodology employed in the study on the attitudes and expectations Romanian judges have towards the judicial training offered by the National Institute of Magistracy, while flagging up interesting differences in attitudes correlated with their various levels of experience.

2. The Research Design

With regard to formal training, the study was designed to measure whether judges\(^{14}\) with 1) different levels of experience and/or with 2) different levels of exposure to judicial training regard the various aspects of their formal judicial training differently. They were asked about their:

1. perceptions with regards to their (past) initial training, its adequacy as preparation for judicial service and its best training methods;
2. perceptions on continuous training, its overall usefulness and best methods;
3. reflections on the overall usefulness of (past) university law training in the light of current experience;
4. the perceived usefulness and feasibility of judicial skills training (judge craft); and
5. preference, if any, for different e-learning methods.

The idea behind the questions asked was, on one hand, to get a sense of the importance that various types of judges assign to the judicial training for their professional development, on the other hand, to identify more specifically those methods and content choices that judges, from their own experience, consider most fruitful in their learning process. Of course, as mentioned before, the main hypothesis of the study was that the respondents’ perceptions of the 5 themes

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\(^{14}\) The prosecutors were asked the same questions. Instead of “judicial craft” they were asked about the corresponding “prosecutorial craft” — the range of skills that they have to develop to best conduct their job.
above would be explainable through different levels of judicial experience as well as different exposures to training. In this sense, experience and exposure to training are the two main input variables of the study.

Sampling. Different jurisdictions offer different combinations of samples on these two input variables. As explained in the introduction, in common law systems, newly-appointed judges typically have significant legal expertise (typically as advocates, but not only) and have had time to observe sentencing in court, although they lack judicial experience. Moreover, in common law jurisdictions, training is not necessarily mandatory and it is not part of the recruitment process. In contrast, in civil law systems the newly-appointed judges do not need to have any practical legal experience, but they are required as part of the appointment process to go through initial training, which often includes supervised practice in court proceedings. The paradigms just described are extremes on a continuum and, of course, every world jurisdiction might borrow elements from both models, as it will be visible in the case study below. Indeed it has been noted that “many if not most European judiciaries now appoint at least some experienced professionals to the judiciary later in their careers, and their initial training needs are therefore similar to new appointees in common law systems. In addition, common law judiciaries are increasingly becoming ‘career’ judiciaries in which more appointments are being made from among younger, less experienced lawyers and where progress to higher judicial posts is not just possible but encouraged.”15

These differences between judicial systems are important to note here because they reveal that the variable of “experience” can be understood in at least three different ways, so it needed to be further refined in the research design: 1) prior judicial experience (experience on the bench), 2) prior legal experience (experience gained by practicing law) and 3) prior experience in criminal cases (since respondents are asked about their sentencing practice and they might have not spent their entire judicial career judging criminal law cases). Respondents were thus asked, where applicable, about their judicial, legal and sentencing experience.

Romania is a European, continental law jurisdiction, a rather typical example for Central and East European continental countries. Among a total population of 20 million, it currently has 6,949 judges and prosecutors, collectively called ‘magistrates’ and considered part of the judiciary. Judges and prosecutors undergo the same state exam in entering the profession and are trained together throughout their career. As described earlier in the introduction, this explains why, although the current study was focused on the professional training of judges, prosecutors were also included as a secondary sample, for both theoretical and practical reasons. The main practical reason is that prosecutors were present at all sessions where the survey was applied, so it would have been a mark of disrespect not to provide them with a copy of the survey while their colleague judges were filling in the questionnaire. The main theoretical reason is, as explained in the introduction, that prosecutors as a separate sample provide an interesting vantage point on the judicial training – one can now try to distinguish if specific judicial attitudes towards training could be due to the specific nature of activity as a judge or not.

In Romania, the study was meant to cover judges (and prosecutors) with various levels of judicial experience and having undergone all three possible types of judicial training – initial, induction and continuous training.

<table>
<thead>
<tr>
<th>Case study: ROMANIA</th>
<th>Experience</th>
<th>Training</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial trainees</td>
<td>no judicial or legal experience</td>
<td>Finished year 1 of initial training no continuous training</td>
</tr>
<tr>
<td>Induction trainees</td>
<td>no judicial experience, but at least 5 years of legal experience</td>
<td>Finished 2 months of induction training no continuous training</td>
</tr>
<tr>
<td>Continuous trainees</td>
<td>diverse levels of judicial experience (0 to 40 years)</td>
<td>45% had initial training 100% different amounts of continuous training</td>
</tr>
</tbody>
</table>

Methods. The study employs a mix of qualitative and quantitative methods. In the exploratory phase, observations of different types of judicial training sessions on sentencing were conducted as well as interviews with trainers and trainees.

of different types. Three interview guides were formulated for interviews with the three types of trainees. Since the NIM trainers are the same for all three types of training, only one interview guide was needed which included questions about all three types of training. The exploratory phase took place between January and February 2014.

The main phase consisted in a pen-and-paper large-scale survey containing multiple choice, rating and ranking questions, designed to be filled in by judges during their training sessions (10 minutes maximum). Three versions of the questionnaire were drafted to reflect the three main samples above. In addition, the prosecutors undergoing continuous training were given slightly adapted version of the questionnaire, although most variables and questions remained the same so they could be compared as a cross-sample. In total, each questionnaire had 20-22 questions and provided on average data about 113 variables. The main phase took place between February and April 2014. Various techniques for maximising the response rate were used, ensuring an overall response rate of 70% (510 surveys received). Out of all the questionnaires, 92% (470 surveys) were considered valid and ended up being used in the data analysis.

Data gathered. The following table summarises the data gathered in the first jurisdiction:

<table>
<thead>
<tr>
<th>DATA GATHERED</th>
<th>Observations</th>
<th>Interviews (trainees)</th>
<th>Interviews (trainers)</th>
<th>Surveys</th>
</tr>
</thead>
</table>
| **Initial training** | 5 sessions:  
  ✓ 2 seminars criminal law  
  ✓ 1 course criminal law  
  ✓ 1 course judicial psychology  
  ✓ 2 court simulations | 3 interviews | 2 interviews | 174 trainees |
| **Induction training** | 2 seminars criminal law (incl. 1 court simulation) | 2 interviews | 3 interviews | 27 judges |
| **Continuous training** | 4 sessions:  
  ✓ 2 criminal law  
  ✓ 2 criminal procedure | 4 interviews | 4 interviews | 116 judges  
  179 prosecutors  
  14 others |
| **TOTAL** | 11 observations | 9 interviews | 4 interviews | 510 responses |
| **Other** | 1 interview 2nd year initial trainee | 3 discussions with NIM directors |

2.1. Respondents by Profession. Out of the 470 responses considered valid and taken into account in the data analysis, prosecutors are distinguished from judges. For continuous training, this was straightforward as judges and prosecutors had different versions of the survey. For induction training, the 2014 generation only had judges. For initial training, trainees had not yet been assigned judicial and prosecutorial functions during their first year. They were nevertheless asked about their career option and that option was taken into account as a proxy for their likely profession. This split was used in all subsequent questions to verify if there are any statistically significant differences between judges and prosecutors in their perceptions.

While the main sample remains the judges’ sample, it was sometimes useful to look at how prosecutors responded, and whenever there are interesting differences they are mentioned specifically.
2.2. Respondents by Amount of Experience. Out of 468 respondents, 40% (188) have no experience in post (the initial and the induction trainees), while the rest (60%) have between one year and 35 years in the post, with 11.5 years of judicial experience on average (the mean was unbiased by the inexperienced ones). On average, judges have 12 years of judicial experience.

Since initial and induction trainees lacked judicial experience when surveyed, they were further asked about their legal experience prior to joining the judiciary in order to see if that variable makes a significant difference in their behaviour. All induction judges had prior legal experience (ranging from one to 17 years, with seven years on average), while only 23% initial trainees had prior legal experience (ranging from six months to eight years, with two-thirds having three years or less). The difference in legal experience between the two groups is, perhaps unsurprisingly, statistically significant. Induction trainees must have at least five years of experience when applying for judicial positions, while initial trainees must not. Those initial trainees who had prior legal experience (excluding internships) earned it either as police officers (47%), trainee lawyers or legal advisors (53%). In contrast, more than half of judges undergoing induction training have a police background (54%) while 39% have advocacy experience. As you can notice, advocacy and policing are the two main prior professions for judicial trainees in Romania.

Out of 446 respondents, 30% (134) had no prior criminal legal experience. The prior criminal legal experience of respondents ranges from six months to 40 years, with 10 years of experience on average. Averages vary across categories: while experienced judges are very similar to experienced prosecutors (mean 11 years of criminal legal experience), induction judges are less experienced (mean 6 years) and initial trainees even less so (mean 2 years).

In what follows a selection of findings pertaining to judicial training will be presented.

3. The Findings: Formal Training Perceptions and Needs

This part of the study aims to gauge the importance that different types of judicial training have/had on the subsequent career of judges and prosecutors. It contains both general questions reviewing the overall perceived usefulness of training and more specific questions concerning which training methods are fit for purpose. Below, both types of findings are presented; but apart from the descriptive results, the interesting aspects lie in the correlations found between these training perceptions and needs and other variables such as experience, role or background.

3.1. Initial Training

Out of 453 respondents, 307 (68%) underwent initial training, while 146 (32%) did not. For purposes of this research, induction training is considered initial training. While within NIM, the induction training is organised by the department of continuous education; we consider induction training a kind of initial training because it is dedicated to trainees with no prior judicial experience, just like initial trainees. Those who underwent initial training began their training between 1992 and 2013.

Ninety-three of those who have undergone initial training now consider it useful or very useful for their career. This suggests that initial judicial training is seen as a useful aid in preparing judges and prosecutors for their careers. Perhaps more interesting than the aggregated results are the correlations that were found between the respondents’ perception of initial training and other characteristics such as prior experience and further exposure to training. Figure 2 summarises these correlations.

The most important finding here can be summarised as “appreciation comes with experience”. Namely, experience seems to generally have a positive effect on the respondents’ appreciation of initial training; more experienced respondents tend to appreciate initial training more than inexperienced respondents do.

16 It is important to note here that this variable might seem ambiguous when being corroborated across samples: it means either ‘amount of sentencing experience’ (for judges with experience) or ‘amount of exposure to sentencing’ (for prosecutors, who obviously do not sentence, but by being involved in criminal cases in court are exposed to sentencing, and for initial and induction trainees, who have no sentencing experience yet but might have had exposure to sentencing during their previous legal experience as advocates or police officers).
This rule seems to differ slightly between judges and prosecutors. Judges who have at least some *sentencing* experience and at least some *prior legal* experience before becoming judges tend to appreciate initial training more than those who have no sentencing or prior legal experience. The *amount* of experience itself does not seem to make a difference in the judges' case. In contrast, for prosecutors the amount of experience as prosecutors seems to make a difference in their opinions (it increases their appreciation for initial training).

From just looking at these correlations it is not clear why these significant correlations and these significant differences between judges and prosecutors exist. After looking at bivariate correlations, an ordinal regression analysis was run. The existence (or lack) of experience remained significant in explaining the difference in perceptions, while the variable profession (judge vs. prosecutor) was controlled for (Wald $\chi^2=36.647$, p.0, 95% CI, -1.935 to -.989). This means that respondents who have at least some judicial experience are significantly more likely to think initial training was very useful to them than those who have no judicial experience.

What needs to be noted though is that similar results were found for law school training as well: the *more experienced respondents are, the more likely they are to appreciate their university law studies* (see Figure 3 below). This is true for both judges and prosecutors. The fact that the same correspondences between experience and appreciation for initial training and university training were found suggests that, the more experienced respondents accrue, they more they appreciate their theoretical studies; trainees who are currently undergoing initial training or have just graduated are very keen to start earning practical experience and feel oversaturated with what they believe is “too much theory”. As it will be seen in the next section, this eagerness to get “their hands dirty” is confirmed by additional findings. When presented with the results, the management team of the Romanian NIM agreed that, from their experience, this is the attitude that they face with initial trainees.

There is no evidence that prior legal experience (before joining the judiciary) influences perception of university training, so this could lead to the conclusion that judicial experience per se affects respondents’ opinions unlike general experience in the legal profession. It seems to suggest that the legal knowledge acquired during university becomes more relevant for judicial actors as opposed to other legal actors. But this is not the only possible interpretation; it could also be that university law courses were better fit for purpose in the past than they are nowadays.

An ordinal regression model was also run, with the aim of controlling differences in profession and in verifying if judicial experience impacts on the perceived usefulness of university training. Indeed, it was not just that respondents with no experience tended to see university training as less useful than those with experience, irrespective of profession (Wald $=15.594$, p.0, 95% CI, -1.134 to -.382). It was also the case that the more judicial experience they have, the more appreciative they become (Wald $=42.562$, p.0, 95% CI, .081 to .151).

But what were the specific initial training activities that respondents appreciated most? All respondents were asked to rank nine initial training activities given their perceived impact on the respondents’ judicial practice. Figure 4 summarises preferences for the nine activities, ranked by the total number of respondents considering them among their top three

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17 In Romania, bachelor of law degrees entail a four-year curriculum.
choices. The chart below presents the aggregated preferences for initial training methods from all samples, although the differences between samples in their preferences were significant and will be discussed below.

Figure 4: Most appreciated initial training activities

<table>
<thead>
<tr>
<th>Activity</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
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<tbody>
<tr>
<td>NIM seminars on criminal law/procedure</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>the court internship (year 2)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>practical advice given by the trainers</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>learning for the NIM entry exam</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>practical exercises on writing court...</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NIM courses on criminal law/procedure</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>discussions with/advice from the peers</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>simulations/role-play exercises</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>learning for the NIM capacity exam</td>
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</tbody>
</table>

Overall, the NIM seminars, the court internship and the practical advice given by trainers during training are the top preferred activities, with more than 30% of all respondents placing them among their top three options. In contrast, the discussions with peers, the role-play exercises and the NIM capacity exam displayed low importance, with less than 15% of all respondents considering them among their top choices.

The main finding regarding preferences for initial training methods depending on experience and/or training is that, while for experienced judges and prosecutors NIM seminars and courses were the top two preferred methods, for initial and induction trainees the court internship was the most important training element. Is this difference caused by a difference in experience or a difference in training, or both?

A potential explanation is given by looking more closely at the correlations between different characteristics of the participants and their preference for the second-year court internship (Figure 5). What is key here to note is that participants with no judicial or sentencing experience are much more likely to consider the court internship important than those with at least some judicial experience. In other words, inexperienced trainees are very keen on getting practical experience as soon as possible, and this often supersedes their appreciation for other training methods. This seems to be all the more accurate for judges than for prosecutors.
The correlations seem to be reversed in respondents’ preferences for NIM seminars (see Figure 6): the more judicial and/or sentencing experience respondents have, the more likely they are to appreciate the value of the past NIM seminars on criminal law/procedure on their subsequent activity. In contrast to practice in court, seminars offer the environment where trainees can discuss legal stipulations and the principles/legislative reasons behind them, the procedural steps to take in specific situations and can ask the trainer about any ambiguities in interpreting the law. Unlike courses (i.e. lectures), the seminars have an intrinsically interactive character which, as considerable research has shown, is much more effective in adult education and training.

Why the mock trial exercises are so unpopular among Romanian judicial trainees is unclear. Mock trials are organised as part of the initial and induction training. The mock trial observations that took place as part of the exploratory phase showed that the standard of organisation was high, and the mock trials were of a high quality, with full involvement of the trainers and the management of the institute. Yet observations also hinted that, if given the chance, initial trainees would prefer having a day visit to court than going through a mock trial – although the trainees did not explain why when they voiced their preference to the trainer. The quantitative results seem to confirm that, indeed, mock trials are indeed among the least preferred initial training methods, and there is no significant difference between initial and induction trainees on this matter. This perception could be interpreted in several different ways.

First, it could be a matter of design: in a mock trial, only one of the trainees gets to play the role of the judge and another gets to play the role of the prosecutor. The large majority of trainees are not actively involved in the role-play, but rather passively observe and comment on the mistakes their peers made. The mock trials and the individual interviews with trainees seem to suggest that, on one hand, the trainee in the active role feels an enormous pressure under the scrutiny of peers and trainers, but at the same time deems that experience personally useful. On the other hand, the trainees who do not get the chance to play any judicial role seem frustrated by the mistakes their colleagues make. The 89% of the respondents who did not pick mock trials as their top three options might well be the ‘passive watchers’ who did not get the chance to benefit from the exercise. Second, an alternative interpretation is given by the trainees’ preference to go to court rather than go through a mock trial: in their ‘hunger’ for practical experience, they might see court visits as more ‘authentic’ in terms of providing them with the insights of ‘how it’s like to be a judge’ or ‘how a day in court looks like’. It may be that after seeing experienced judges and prosecutors in action, the trainees might be more receptive to participation in mock trials because they have some sense of how the roles are to be played.

These findings seem to suggest that the perception of judges and prosecutors changes over time, and the judicial institute does well to offer a mix of in-class and in-court methods of training. The inexperienced trainees have an obvious need for practical, in-court methods (such as the court internship or day trips to courts); and the training could be extended to include other similar methods such as job-shadowing. This preference is further reflected in the section on induction.

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When presented with the results in April 2015, the NIM management acknowledged that this could be a good hypothesis of why the mock trials are only preferred by some respondents (those who had an active role in the exercise) but not others.
training below, where induction trainees show their support for job-shadowing as part of the training. At the same time, more experienced respondents come to appreciate the specific in-class methods such as the seminars; interpretations of why this is the case are numerous, but correlation with other findings (regarding continuous training and e-learning) might suggest they tend to appreciate the law-oriented, dialogic activities where they get the chance to discuss the interpretation of the law and establish common understandings of what the law requires.

3.2. Induction Training
Respondents undergoing induction training (N 27) were further asked what suggestions they would have for the improvement of induction training. As mentioned in the very beginning, this particular dataset is comprised of newly-appointed judges, with no years in post, no prior criminal/sentencing experience, who have never gone through initial training or continuous training before.

According to the findings, most judges would like the induction training be longer (63%) and, in addition, they would like to be able to shadow a judge in their own court before beginning their own judicial activity (70%) (see Figure 7). The latter seems to support the interpretation that trainees without judicial experience are keen to maximise the amount of in-court experience and exposure before beginning their own activity.

The relatively low values for the rest of the suggestions lead us to infer that most induction trainees are happy with the gap between the two modules (89%), the amount of role-play exercises already taking place during the seminars (85%), the fact that they have to go straight into the judicial activity while there are being trained (78%) or the amount of document-writing exercises (67%).

Neither of these opinions was influenced by the amount of prior legal experience, or its type (with the exception of experience as lawyer for the desired length of the training). Surprisingly, the perceived usefulness of training also does not seem to correlate with these suggestions either. Finally, there is no evidence that these suggestions correlate with each other.

3.3. Continuous Training
Out of all respondents, 53% went through continuous training (while the other 47% represent the initial and the induction trainees). Of those who have experienced continuous judicial training, almost half (47%) completed from one to three training sessions, while 19% had not yet completed their first session when surveyed (see Figure 9 below). There is no
significant difference between judges and prosecutors in the amount of continuous training they receive. This means that judges and prosecutors benefit from equal amounts of training throughout their career.

![Figure 7: Amount of continuous training](image)

All the respondents were asked to imagine what would comprise an ideal continuous training session on sentencing. The question was meant to approach activities specific to continuous training sessions, while also being relevant to the sentencing practice. The reader might rightfully ask – why not ask just respondents who had already undergone at least a continuous training session? The main explanation ties into one of the fundamental variables of this study – prior exposure to training, which might account for part of the variability in perceptions. For this reason, even newly-appointed judges and prosecutors who never experienced continuous training were included so as to measure whether even minimal prior exposure to continuous training makes a difference. If this prior exposure made a difference, it was made visible in the following paragraphs. Figure 9 below presents the aggregated responses identifying the most popular training methods overall:

![Figure 8: Most useful activities in a continuous training sessions on sentencing](image)

The most popular method for a training session dedicated to sentencing would consist of discussing case studies where sentencing is problematic (61% of all respondents ranking it among top three methods). Such a method would not focus
on discussing sentencing guidelines or procedures in general or applicable to unproblematic cases, but would focus on those types of cases which can pose problems in practice.

Opinions of judges and prosecutors were split among the usefulness of discussing legal stipulations i.e. discussing the substantive requirements of the law for specific offences (50%), specific legal procedures (51%) and specific issues judges face in their daily sentencing (51%). Out of these, there were more respondents (30%) for whom discussing legal stipulations is of topmost importance among all activities, which could suggest its essential character for any judicial training on sentencing. The high preference for discussing legal stipulations (e.g. sentencing guidelines) relevant for sentencing can also be explained by the fact that respondents who have already undergone continuous training tend to prefer this method compared to initial and induction trainees who have not experienced this type of training yet, irrespective of their role.19

But although the methods above could seem equally preferable to respondents, a closer look at the significant correlations suggests that respondents of different types and levels of experience prefer one rather than another.

Experienced judges and prosecutors prefer discussing the law. The amount of experience (of those who have some) seems to be significantly negatively correlated with a preference for discussing the substantive law on offences, suggesting overall that the more experienced respondents are, the more they appreciate the necessity of this method in sentencing training.20 One interpretation is that the more legal experience (of all kinds) respondents have, the more they experience the ambiguity and interpretability of current laws and the more guidance they need in how to coherently interpret laws. This need was voiced by participants during the continuous trainings observed during this research. This is particularly true for a civil law country such as Romania where reliance on higher court precedent is not officially recognised or sanctioned. This issue of needing more policy and protocol guidance is accentuated by the enactment in 2014 of two new criminal law and criminal procedure codes that require judicial actors to carefully re-acquaint themselves with those codes and determine how to interpret and apply them without the informal benefit of an established jurisprudence based on precedent.

Respondents with prior advocacy/policing experience care about procedures. Interestingly, respondents who had prior legal experience before entering the judiciary are more likely to see discussions of legal procedures more useful than those with no prior legal experience. Moreover, the amount of legal experience seems to matter. Could it be because their past practical experience showed them that knowing and understanding the procedures is important in judicial decision-making and sentencing more specifically?

Inexperienced judges need to hear about other judges’ challenges. Inexperienced judges prefer discussing specific issues judges face daily in real cases, but no such correlation was found for prosecutors. This could suggest that it is the judicial experience sui generis that makes this kind of discussions less useful during continuous training. It could either be that experienced judges already enjoy these discussions in their own courts, with their colleague judges, so they do not feel the need to discuss them during NIM training. Or it could be that they become wary of discussing specific issues they face in their cases with their NIM peers, believing that would be inappropriate.

Simulations again prove unpopular. Surprisingly, only 33% of all respondents considered sentencing simulations/exercises their favourite learning activities. This finding can be corroborated with the previous finding that mock trials and simulations are not as popular in initial training as probably expected.

‘Legalistic’ versus ‘case-based’ sentencing training methods. If one looks at preferences across types of training (initial and continuous), there seem to be two clusters of respondents based on their preferences for training methods. The first cluster is composed of respondents who prefer ‘legalistic’ methods, which consist in analysing and discussing legal regulations pertaining to sentencing. In this sense, a very high correlation was found between respondents who prefer legal analysis of current law and those who prefer analysing procedural regulations. Moreover, fans of ‘legalistic methods’ are less likely to prefer ‘case-based’ methods, such as discussing issues encountered by judges, case studies, sentencing exercises, or landmark cases. Preference for discussing landmark cases is split among judges and prosecutors, suggesting a more hybrid nature of the method. Conversely, respondents who prefer one ‘case-based’ method, i.e. a method who use make of specific cases or examples to teach sentencing, are also more likely to also prefer the other suggested case-based methods (‘discussion-based’ methods are particularly correlated: case studies and landmark cases and real issues encountered by judges).

19 An ordinal regression model (Wald =8.801, p .003, 95% CI, .179 to .875) suggests that trainees that have not experienced continuous training yet are less likely to see a discussion of legal stipulations on sentencing useful.
20 Negative significant correlations were found with years in post (rho -.113 p.021), years in sentencing (-.105 p.034), and, more important, years of prior legal experience (-.335 p.030)
E-learning methods. All respondents were asked what an e-learning session should contain so that it would engage them throughout. There were no significant differences between the types of respondents. The only point where judges and prosecutors differed significantly was in their take on the existence of a forum where magistrates could exchange ideas and approaches, with judges considering the forum more useful than prosecutors.

Figure 9: Favorite e-Learning Methods

<table>
<thead>
<tr>
<th>What should an e-learning session in criminal law contain so it could engage you all throughout?</th>
<th>Percent of respondents (N = 384)</th>
</tr>
</thead>
<tbody>
<tr>
<td>direct access to the relevant legislation</td>
<td>66%</td>
</tr>
<tr>
<td>multimedia and visual explanations produced by trainers on various legal issues</td>
<td>54%</td>
</tr>
<tr>
<td>live training sessions held by trainers where I could ask questions</td>
<td>53%</td>
</tr>
<tr>
<td>a forum where I could discuss practical issues with other magistrates</td>
<td>46%</td>
</tr>
<tr>
<td>exercises and simulations through which I could verify my knowhow and intuitions</td>
<td>43%</td>
</tr>
</tbody>
</table>

Overall, all e-learning methods suggested were considered useful by at least 86% respondents, so we recommend their implementation on an e-learning platform dedicated to judicial training. The methods were ordered first and foremost by the ratios of respondents considering them essential, with direct access to relevant legislation being the top option (66% essential), followed by multimedia materials provided by trainers (54% essential) and live Q&A sessions with trainers (53% essential).

3.4. E-learning and experience. Surprisingly, years in post did not seem to make any difference in respondents’ attitudes towards e-learning methods overall. But by looking in more detail at judges’ vs. prosecutors’ experience, it seems having judicial experience does affect judges and prosecutors differently.

On one hand, it affects judges, but not prosecutors, in appreciating live Q&A sessions and access to legislation. First, judges with judicial experience are much more likely to appreciate live Q&A sessions with trainers than inexperienced judges. This is further reinforced and clarified if we look at judges with experience in sentencing; they are more likely to require live Q&A sessions with trainers where they could ask questions than those without experience. This is specifically true for judges but not for prosecutors. This could be because having experience in sentencing multiplies the issues and the problems a judge would address in an online Q&A session. This was anecdotally observed in live Q&A sessions as well. The Q&A sessions were the only e-learning method correlated with existence of judicial or sentencing experience.

Second, the amount of judicial experience seems to make judges more appreciative of given direct access to relevant legislation: namely, the more judicial experience judges have, the more likely they are to appreciate direct access to legislation. This is very much in line with the previous findings pointing out that more experienced judges look for ways to keep in touch with and discuss the law itself rather than worry about their practical experience.
On another hand, experience affects prosecutors, but not judges, in appreciating forums with magistrates. Among prosecutors with experience, those with more criminal experience and/or with more prior legal experience are significantly less likely to think a magistrates’ forum is a useful e-learning tool.

3.5. Judicial Craft – Can it be Taught? This findings report concludes with the responses received to a question regarding the possibility and effectiveness of judicial skills training. “Judicial craft” is typically defined as being separate from content-oriented training, focusing specifically (and exclusively) on the skills judges need to develop. To date, the Romanian National Institute of Magistracy opposes the idea that standalone judicial craft sessions can be useful and effective in isolation from legal content. Under this view, the Institute has not organised specific judicial craft seminars, but it incorporates skills training in its seminars and mock trials. This question was meant to test if and how do the opinions of the trainees themselves differ from what the NIM management thinks. But beyond that, it raises the more general question whether specialised skills-training can be regarded as feasible in the absence of legal content and separate from practical experience.

Judges and prosecutors undergoing continuous training were asked if they think they were offered enough opportunities to develop their “judicial craft”, in addition to the content-oriented sessions. The meaning of the expression was inferred through an enumeration suggesting what would count as relevant judicial skills (writing decisions, sentencing, dealing with expert witnesses). This enumeration was slightly adapted for prosecutors to reflect relevant prosecutorial skills which would make sense to them.

The answer choices offered aimed to reveal two aspects: 1) if the respondent thinks judicial skills can only be gained through experience, or judicial skills training would also help; 2) if the respondent thinks judicial craft can be trained, is he/she happy with the amount of training received so far. Out of 282 total respondents envisaged, 95% (267) responded to this question.

The most popular answer among respondents was that judicial skills can only be cultivated through experience (42%), so training is irrelevant and no amount of specialised skills training can help.

In contrast, 57% respondents seem to think judicial training can have a bearing on ‘judicial craft’. Among these, 22% would welcome supplementary skills sessions; 21% consider the training already supplied the necessary skills; and 14% think the training was not sufficient in developing my professional skills, but I’ve developed them during my initial practice.

21 “Beyond providing information in substantive law, judicial training and education also addresses what is usually referred to as “judge craft” – the specific skills judges need to do their job, including skills training in areas such as opinion writing, sentencing, dealing with certain types of litigants and evidence.” (Thomas (n 13) 16.) As an example, the English Judicial College has been conducting a specific “judicial craft” seminar (this year called “the business of judging”) (Judicial College, ‘Judicial College Prospectus 2014-2015’ 44 http://www.judiciary.gov.uk/Resources/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf accessed 9 March 2014.).

22 In that sense, even those respondents who think judicial craft cannot be taught (and can only come from experience) do not by this reject the usefulness of judicial training in general – they only reject the skills-oriented training but can still be appreciative of the content-oriented training.
14% consider the training was insufficient but no further training is necessary as the initial period of practice supplemented the training.

There are some significant differences between how the experienced judges and prosecutors regard ‘judicial craft’; while judges are more likely to think that ‘judicial craft’ sessions should exist and are much less likely to think the current training was sufficient, prosecutors think the training was enough to develop their skills.

The amount of judicial experience seems to influence the attitude towards judicial craft as well: more-experienced respondents are more likely to think that judicial skills can only be cultivated through experience; less-experienced respondents are more likely to believe the training was insufficient, but they managed to compensate during their initial practice. The difference between the two choices is that the less-experienced respondents seem to believe that the training provided them some important skills, while the more-experienced respondents seem to deny any merits of the training and claim these skills come exclusively through experience.

The amount of criminal experience seems to have no influence on judges, but it does nevertheless seem to make prosecutors more sceptical with regards to judicial craft training. More-experienced prosecutors claim judicial craft cannot be trained and can only be learned through experience, while less-experienced prosecutors claim the training was insufficient, but they managed to compensate during their initial period of practice.

Initial training seems to have an important bearing on the respondents’ attitudes towards judicial craft training. Those who benefitted from initial training are more likely to think that part of their judicial skills were provided by the training and part by initial practice while being less likely to think judicial craft can only be developed with experience. In contrast, respondents who have not benefitted from initial training are less likely to admit training played a role and more likely to claim judicial craft can only be developed with experience.

4. Conclusion – Summary of Findings

This article is meant to present some of the findings resulted from a European study on judicial attitudes towards judicial training. So far, one jurisdiction was involved and although the study enquires on a diversity of matters, ranging from judicial role, factors in sentencing up to informal peer support, this paper focused on the findings pertaining to the main theme, judicial training.

The key insights to remember:

1. Judges are overall appreciative of the initial judicial training they received, with 93% considering it useful or very useful. This insight confirms that judicial training is seen as a useful practice and every jurisdiction should consider maintaining (or implementing) it.

2. Judicial experience seems to generally have a positive effect on the respondents’ appreciation of initial training; more-experienced respondents tend to appreciate initial training more than inexperienced respondents. This suggests that training programmes that are not evaluated longitudinally or evaluated by only asking recent trainees about their current experience of the training might underestimate the impact the training has throughout the judges’ careers.

3. Similarly, the more experienced respondents are, the more they appreciate their university law studies. This suggests, again, that a study of perceived value of law degrees need to be done longitudinally and/or needs to involve alumni of various levels of professional experience to get an accurate sense of its value.

4. While for experienced judges and prosecutors NIM seminars and courses were the top two preferred initial training methods, for initial and induction trainees, the court internship was the most important initial training element. On one hand, inexperienced trainees are very keen on getting practical experience as soon as possible, and this often supersedes their appreciation for other training methods. On the other hand, the more judicial and/or sentencing experience respondents have, the more likely they are to appreciate the value of the past NIM seminars on criminal law/procedure on their subsequent activity. This difference in attitudes needs to be taken into account in both the design and the evaluation of training sessions.
5. **Mock trials** are unpopular among Romanian judicial trainees. Two possible interpretations: either mock trials are seen as less authentic than actual court experiences, or only a small fraction of trainees actually get to ‘play’ the relevant judicial role. The design of mock trials might have to be reanalysed. More qualitative research needs to be done to enquire on the reasons for why mock trials are unpopular.

6. 70% induction trainees would like the opportunity to **shadow a judge** before beginning their sentencing activity. This should be seriously taken into account in the design of induction-like (or crash-course) trainings.

7. During **continuous training sessions**, experienced judges and prosecutors prefer discussing the law, while inexperienced judges need to hear about other judges’ challenges. In addition, respondents with prior advocacy/policing experience care about procedures more than those without legal experience. This could suggest that different continuous training sessions could be devised for judges of different levels of experience; if they are common, they should pay attention to integrating all these activities in order to cater to all needs.

8. Judicial experience does not seem to make a difference in the respondents’ attitude towards the usefulness of various **e-learning methods**. The only exception is that experienced judges seem to need more online Q&A/feedback sessions with trainers; moreover, as they get significantly more judicial experience, judges also tend to appreciate direct online access to legislation. It is recommended that all these e-learning activities should be implemented on an online platform, as 90% of respondents agreed that they all are useful or very useful.

9. Finally, 57% respondents think judicial training can help with the development with **judicial craft**, while 42% think it can only be cultivated through experience. Experienced respondents are more likely to think that judicial skills can only be cultivated through experience. This supports the idea that a judicial institute must strive to offer judicial craft courses which would introduce the judicial trainees to the basics of judicial skills, while also emphasising the importance of practice in cultivating and improving the relevant skills in the long term.

The findings of this study would be all the more powerful and relevant if conducted in several jurisdictions. Therefore any opportunity to run the study again in new jurisdictions is welcome. Also very welcome would be any reference towards similar research conducted recently that might further inform the current findings, or discussions on the external validity of the findings as well as the degree to which they can be extrapolated to other jurisdictions. What hopefully can be concluded from this article is that this type of research can genuinely contribute to the design and assessment of judicial training programmes, by offering a rigorous and independent perspective on how they can be improved in the future.

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The Solution Economy: Getting Everybody into the Act
By Ingo Keilitz


In their book, The Solution Revolution, William D. Eggers and Paul Macmillan, remind us that when it comes to solving big social problems like unequal access to justice, corruption, lack of transparency and accountability, and loss of confidence and trust in our justice institutions, government is not the sole agent of change. We are witnessing, they write, a shift from a government-dominated model of problem solving to one in which government is just one of the players among many. Today there are non-governmental actors—citizen volunteers, social entrepreneurs, foundations, nonprofits, civil society organizations, and private businesses, both big and small, armed with new technologies and powerful collaborative tools—who collaborate with governments in finding solutions to serious social problems, thus blurring traditional divides between government, business, and philanthropic responsibilities.

Messrs. Eggers and Macmillan, senior figures at Deloitte, argue that in today’s climate of fiscal constraint, we cannot expect government alone to tackle entrenched social problems. By moving away from the traditional, unilateral top-down model for delivering services, governments in a “solution economy” act as enablers and integrators, focusing on desired social outcomes that everyone understands and values, thus opening heretofore closed doors to many new problem solvers. Trading in the non-traditional “currency” of performance data and societal outcome measures for specific solutions, justice institutions effectively move the important work they do beyond their own walls. This solution economy takes problem solving out of the hands of only government insiders, judges, prosecutors, defense attorneys, ministers of justice, and justice system executives and managers, as well as government contractors working on their behalf.

I recently learned about Al Varney, a community leader in Monrovia, Liberia, who is among the social entrepreneurs around the world helping to create a solution economy in the courts. With his recently-started project, a court monitoring system called the Open Justice Initiative, Varney is applying creative tools for social accountability, supported by training, design support, mentorship, and seed funding from Accountability Lab, an independent nonprofit organization.

Twice a week, volunteers monitor four magistrate courts in Monrovia and generate a justice “scorecard” that includes measures of the number of cases processed, whether the judge arrives on time, whether bond fees are returned to defendants, and whether a bulletin of cases is made public. The first comprehensive scorecard will be published soon in local newspapers to generate debate and discussion with Ministry of Justice officials. While the Open Justice Initiative is still in its infancy, its courtroom monitors have found that their presence alone has reduced late arrival of judges, curbed open illegal transactions in court (such as bribery), and increased attendance among public prosecutors.

Varney wants his Open Justice Initiative to solve the problem of an unresponsive justice system that does not allow ready access to justice in his community. He felt that if people wanted to have good justice, it was up to the community to monitor it. His plan is not to engage in a “witch hunt” and work at cross-purposes with the courts, but rather to collaborate with them to create an effective justice system.

The Solution Revolution is a compendium of examples of the solution economy at work around the world: crowdsourcing, crowdfunding, ridesharing, development of software applications, low-cost health care, preventing obesity, and developing renewable energy. The examples are couched in a framework of concepts and theories including a useful taxonomy of novel strategies (e.g., citizen “wave-makers” who solve social problems, “public-value exchanges,” and disruptive

1 Ingo Keilitz is Principal of CourtMetrics; Research Professor, Thomas Jefferson Program in Public Policy, and Research Associate, Institute for the Theory and Practice of International Relations, and College of William and Mary.
technologies). Individual citizens, corporations, charities, social enterprise work together, blending market forces with entrepreneurship and altruism to tackle tough social problems. “This economy,” write Messrs. Eggers and Macmillan, “trades in social outcomes; its currencies include public data, reputation, and social impact … The business models are unusual, and the motivations range from new notions of public accountability to moral obligation to shareholder value.”

Stemming perhaps from their traditional adherence to principles of judicial independence and separation of powers, many judiciaries throughout the world remain reluctant to bring other branches of government and other sectors of society into the act. They tend to go solo in their justice reform efforts. This might be changing and *The Solution Revolution* provides a useful template for that change.

When judiciaries and courts share responsibility and accountability for performance outcomes that address injustice on a broad scale—instead of focusing narrowly on internal operations using measures of resources, activities, and operations often not widely understood—they can help create an open economy for solutions. Collaborating with new actors outside of government like Al Varney, makes it possible for justice institutions to tackle entrenched problems of injustice with innovative approaches that would not be available to them if they acted alone. The common thread through a solution economy consists of shared values and mutual advantage. Performance outcome measures like the length of court proceedings and the level of court user satisfaction, become powerful collaborative tools, i.e., “currencies” in the solution economy.

Governments, justice systems, and individual justice institutions should ask themselves what “solvers” in the solution economy like Al Varney —citizen volunteers, social entrepreneurs, foundations, nonprofits, civil society organizations, and private businesses—share the values of justice and see mutual advantage in justice outcomes measured by specific performance measures. They can productively create opportunities for collaboration with these solvers.

If there is a weakness in *The Solution Revolution* it might be the authors’ rosy outlook on the promises of positive results, lower costs, and public innovation of a solution economy. What could possibly go wrong? Obstacles, traps, resistance to the solution economy -- what we euphemistically refer to as challenges -- surely are not limited only to a narrow view of institutional independence among judiciaries that fails to encompass comity, collaboration, and shared responsibility with the other branches of government and, especially, other sectors of society. For example, challenges that confront most reform, especially in fragile and violence-ridden countries, include what social scientists call elite capture whereby traditional leaders, local politicians, and other socially powerful people take most of the available resources for themselves. But perhaps we do not need another reminder that significant change is always a tough slog; the literature of justice reform is replete with volumes that are up to the task.

I came away from reading *The Solution Economy* not only inspired but also armed with many ideas for putting that inspiration to practical use. Other readers are likely to be equally rewarded.
A Treasure Trove of Information for Justice Reform

By Ingo Keilitz


Every two years over the last decade, member states of the Council of Europe -- from Azerbaijan to Iceland -- report on the efficiency and quality of their judicial systems, reports that are compiled and analyzed by the European Commission for the Efficiency of Justice (CEPEJ). The fifth biennial edition of CEPEJ's report, European Judicial Systems – Edition 2014 (2012 Data): Efficiency and Quality of Justice (hereinafter “Report”), was made public late last year. It is an evaluation of the judicial systems of 45 of the 47 countries in the Council of Europe (Lichtenstein and San Marino did not provide data). A significant advancement over previous CEPEJ's evaluations, the Report is a treasure trove of information that deserves the attentions of policy makers and justice professionals, academics and researchers, especially those that are reform-minded.

Issues addressed in the Report include not only “supply” side questions (e.g., Numbers of courts within and across countries over time? Public expenditures for courts, prosecution, and legal aid per inhabitant?), but also “demand” side questions (e.g., Number of land registry cases handled by courts, if any? How are courts actually performing in terms of their case clearance rates and case disposition times?) These questions and many more are answered in 500- plus pages of text and over 250 figures and tables divided into 18 chapters, as well as two appendices containing the survey in its entirety and an extensive note with general comments and question-by-question explanations of each of the 208 survey items.

The database for the Report consists of the responses to CEPEJ's 208-item survey by “national correspondents” of the 45 countries, supported by CEPEJ members, observers, and experts. CEPEJ has done extensive work to verify and to improve the quality of the data submitted by the member states including frequent contacts with the national correspondents to validate or to clarify the submitted data.

The individual national replies -- invaluable complements to the Report -- contain more detailed descriptions and commentary on the individual justice systems entered in the “comments” area of most of the survey items. The national replies are available in their entirety on the CEPEJ website devoted to these “country profiles.” They include, for most countries, survey responses over time, detailed commentary to survey responses, as well as the names and contact information for the local CEPEJ member and the national correspondent, as well as the identity and locations of pilot courts in the countries. These last features suggest enhanced local “ownership” of the evaluations of the individual justice system.

Interested readers can examine the Report at three levels of detail. First, they can begin at the highest level with the overview of trends summarized in Chapter 18 which include, for example, the following: (1) despite the recent economic and financial crisis, the development of judicial budgets remained a priority of public funds for a majority of governments,

1 Ingo Keilitz is Principal, CourtMetrics; Research Professor, Institute for Theory and Practice of International Relations, and Research Associate, Thomas Jefferson Program of Public Policy, College of William and Mary.
2 CEPEJ is a unique body made up of qualified experts from 47 member states of the Council of Europe. For an overview of the history of CEPEJ, see the article that appeared in these pages by Pim Albers, a special advisor to CEPEJ since its beginnings. Pim Albers (2008). “Evaluations of Judicial Systems: European Experiences.” International Journal for Court Administration, Volume I, No. 1, January 2008.
3 Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.
4 http://www.coe.int/t/dghl/cooperation/cepej/profiles/default_en.asp.
though there is uneven investment in judicial systems across countries; (2) emergence of “e-justice” and “e-courts” such as electronic filing, electronic databases of jurisprudence, electronic registers, electronic signatures, and automated case management systems; (c) simplified procedures, which are often less expensive and faster, both in civil (especially for uncontested claims) and criminal (for minor offenses) matters; (d) generally, courts are able to cope with the volume of cases but excessive length of judicial proceedings remains a major concern; and (e) a “glass ceiling” for women remain in 2012 a reality in the judiciaries.

Second, at a more in-depth level, much insight and understanding can be gained by a close reading and study of the Report including indicators of the governance, organizational structures, resources, operations, and performance of the justice system of the 45 countries organized into chapters – though the size and detail of the Report and its many figures and tables makes this no small undertaking. Further study and research can focus, for example, on a specific country, a single issue such as the enforcement of court decisions in criminal matters, or a comparative analysis across countries on one or more issues.

Finally, policymakers, practitioners, academics, and researchers who dig deeper into the data to gain insights that go beyond the borders of the member states of the Council of Europe are likely to be amply rewarded. For example, the Kenya Judiciary is making significant strides in the transformation of its judicial system with the launch of the Judicial Performance Improvement Project in 2012 supported by an investment loan from the World Bank. Using CEPEJ’s data and replicating its methodology in a relatively simple comparative analysis and benchmarking exercise, I was able to assess how the Kenya Judiciary’s efforts to build its capacity for performance measurement and management stack up against countries in the European Union (EU), the Council of Europe’s most important institutional partner, including 28 among the 47 states in the Council of Europe. Based on this simple exercise, I was able to conclude that the recent establishment of a system of performance measurement and management by Kenya Judiciary, including the creation of a directorate devoted to performance management, and regular monitoring and evaluation of court activities using standards and measures of efficiency and quality is exemplary and compares well with leading EU countries.

The Report is an invaluable resource for doing similar comparative analysis and benchmarking of judicial systems of countries that are not part of the Council of Europe. While this type of benchmarking is not necessarily a substitute for in-depth study tours of other justice systems, it merits a cost and benefit analysis.

The development and use of measures of justice and rule of law in global, national, and sub-national governance is increasing rapidly. There are arguments to be made for the superiority for evidence-based information in the CEPEJ 2014 Report compared to that of global indicators such as the World Justice Project’s WJP Rule of Law Index and the Human Development Index produced by the United Nations Development Program (UNDP), to name just two in an increasingly crowded field. The important factor that sets the CEPEJ Report apart from these global indicators is the source of data and who produced it or, to put it more pointedly, whose vision of justice it advances (i.e., international donors versus host countries or justice system exercising their legitimate authority). International justice development scholars argue and emerging research suggests that collaborative and “home-grown” assessments that are in alignment with local ambitions, and that source their data from host governments -- rather than from top-down, donor demanded program global indicators and evaluations produced by third parties -- are associated with more successful reform efforts.

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Book Review: Asian Courts in Context
By Markus Zimmer, IJCA Executive Editor


The Asian Continent encompasses circa 50 autonomous states and comprises the central and eastern portions of the Eurasian landmass, the world’s largest. Taken as a whole, the continent’s rich cultural, intellectual and political histories extend over tens of centuries, highlighted by the powerful Mongol Empire, the imperial dynasties of China, and the majestic Persian empires, among others. In the 19th and early 20th Centuries, key Asian states were invaded and conquered, then colonized. In the latter half of the 20th and early 21st Centuries, those states have largely reasserted their autonomy, and the more proactive and ambitious among them reversed their economic and political malaise to emerge as powerhouses on the global stage.

A key component of the institutional framework of these emerging states is the alliance of legal mechanisms and authorities that define, interpret, and apply the laws and administer justice. Within those alliances, two of the core elements are (i) the legislative power of government that formulates the positive laws of the state, and (ii) the judicial power that interprets and applies those laws and administers justice.

To contribute to global understanding of how these emerging Asian powerhouses established and construe the authority of the judicial power in their governments, Law Professors Jiunn-Rong Yeh and Wen-Chen Chang of National Taiwan University’s College of Law invited distinguished professionals -- law professors, adjuncts, lecturers, and a barrister -- to contribute articles setting forth the legal context, organizational structure, and administrative authority of the court systems in their home states. The invitation proposed a general framework of specific topics on which to focus. The two editors subsequently compiled the 14 articles into this useful and very interesting comparative anthology, adding an introduction and a conclusion.

The work is divided into two major sections; the first covers court systems in the advanced economies of Hong Kong, Japan, South Korea, Singapore and Taiwan. The second reviews court systems in what the editors classify as “fast-developing economies” that include Bangladesh, China, India, Indonesia, Malaysia, Mongolia, Philippines, Thailand and Vietnam. Governments in the more forward-looking of these states recognized early the merits for domestic economies of securing the confidence of the international investment community. To ensure access to their justice systems not only by their domestic business sectors but, in addition, multi-national corporations, they created specialized business-oriented forums such as commercial, intellectual property, international trade, bankruptcy, admiralty, and economic courts. Other domestic social and economic exigencies fostered the creation of other categories of specialized forums such as religious, labor, consumer protection, tax, small claims, traffic accident, family, coroner, and military courts. Hong Kong lays claim to the most unusual special court, the Obscene Articles Tribunal pursuant to the “Control of Obscene and Indecent Articles Ordinance.”

Unlike the indigenous court systems in developed western countries such as Great Britain, Germany, France, Netherlands, and the United States, systems whose evolution spanned a minimum of several centuries, gradually increasing in sophistication, maturity, capacity, and procedural complexity, those of most Asian states covered in this work were spawned much more recently and quickly. Although each had indigenous dispute resolution mechanisms, most were redefined when they were colonized and, subsequently, when they were founded as constitutionally based governments. Indonesia’s defining Act on Basic Provisions of Judicial Power became law in 1964. The constitutions of China and Japan were officially promulgated in 1947; South Korea’s in 1948; India’s in 1950; Singapore’s in 1965; the Philippines’ in 1987, and Mongolia’s in 1992. The emergence of the global economy prompted future-oriented Asian governments focused on economic growth to fast-track the design, organization and modernization, and accessibility of their court systems.
Each of the country-specific chapters includes details that confirm the uniqueness of these systems. The reader learns, for example, that Taiwan’s Code of Criminal Procedure sets no restrictions on the frequency with which the prosecution or defense is entitled to appeal. Neither are there limits on Supreme Court remands in a particular criminal case. Prior to passage of the Fair and Speedy Trial Act in 2010, a criminal case might be subject to myriad retrials spanning ten years or longer. Western arrogance often assumes, mistakenly it turns out, that the administration of pre-colonial justice verged on the crude and primitive. In India, the Bengal Regulation of 1772 mandated that in disputes regarding marriage, inheritance, caste, and personal status, judges should apply “the laws of the Koran with regard to Mohammedans and those of Shaster with regard to Hindus.” When the British colonial administration subsequently established its own courts, staffed by judges trained in and familiar with the style and process of common law, they engaged indigenous legal experts – pandits in Hindu law and kazis in Sharia law – as judicial advisors until the 1860s.

In Singapore, shortages of judges in the past prompted amendments to the Constitution that enabled the appointment first of “supernumerary” or “contract” judges, which enabled Supreme Court justices, among others, to remain on board in a temporary capacity after the mandatory retirement age of 65. Eight years later in 1979, the Constitution was amended to provide for the appointment of “judicial commissioners” from among the ranks of active practitioners for temporary judicial assignments ranging from six months to three years. A successive amendment in 1993 authorized the president to appoint judicial commissioners for even shorter terms and to adjudicate particularly complex and lengthy cases otherwise disruptive of court hearing schedules.

The Indian system currently faces enormous challenges that stem from its multiplicity of dispute resolution and other forums ostensibly created to supplement and to relieve enormous backlogs within all levels of the framework of India’s formal or regular courts. These fall into several categories or tiers, beginning with the quasi-judicial administrative courts authorized to hear matters relating to government pensions, social security, real property, etc. The third tier embraces a large assortment of alternative specialized forums with limited jurisdiction. These include family, labor, consumer, motor vehicle accident and women’s courts, the latter of which hear crimes against women. A fourth tier comprises informal forums where a formal link to state authority may or may not exist. Examples falling within this tier are rural village forums, women’s shelters, NGOs, legal aid offices and Tanta Mukta, Gaon Mohim or dispute-free village programs.

This patchwork of forums is neither ordered nor comprehended under any unifying national statutes or legislative mandates. Contributors to this proliferation and the quiet pandemonium that results from include the national government, state governments, and local authorities, culminating in a confusing hodge-podge of dispute resolution forums with overlapping jurisdiction; multiple inconsistent and sometimes conflicting procedural rules, protocols, and requirements; and frequently unclear authority, leaving litigants and lawyers unsure at times of where to file their claims. Moreover, in the regular courts, myriad judicial vacancies have exacerbated the challenge of processing huge caseloads in a timely manner, resulting in over 30 million backlogged cases, including over 66,000 in the Supreme Court alone as of January 2013.

In the Peoples’ Republic of China, the manner in which successive administrations approach the competing values of implementing the supremacy of the rule of law and maintaining the leadership role of the Communist Party has resulted in significant vacillation in how the Chinese Supreme Court approaches judicial reform. Its Second Five-Year Reform Plan (2004-2008) established 50 bold objectives for improving the country’s court system in areas such as increased professionalism, greater judicial independence and integrity, diminished corruption, enhanced legal and business education, and use of a national qualifications examination for judicial personnel. By March 2009, however, the Third Five-Year Reform Plan dramatically shifted direction to focus more on following the Party’s leadership and facilitating social harmony. Where the incumbent Chief Justice had graduated from a prominent university law faculty and had other practical legal qualifications, his successor in late 2008 had neither formal legal education nor judicial experience; his previous employment was as a Party Central-Legal Committee official, and he was appointed on the basis of his political and administrative background.
Although lengthy at over 600 pages, *Asian Courts in Context* is a valuable addition to a growing collection of academic texts which, increasingly, focus on the practical and institutional sides of the judicial and courts components of government. It would be a useful addition to law library reference collections in law schools, international law firms, international investment advisors, and multi-national corporations with subsidiaries or divisions in one or more of the countries represented. Law and political science faculty who specialize in court systems will find it an important addition to their personal libraries and might even consider it as the primary text for a graduate-level survey course comparing Asian court and justice systems.

To the extent that there are flaws, they are minor. The lengthy introduction includes numerous comparative analyses of the subject states, and some readers may grow impatient grinding through all of them. Moreover, some of the individual state chapters occasionally include discussions on topics that are incidental and diversionary. Overall, however, the editors have produced a work that not only contributes substantially to our understanding of court systems in Asian states but makes for an interesting read.
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