Palace of Justice
Seat of the Supreme Court of Justice of Argentina
Buenos Aires, Argentina
The \textit{International Journal For Court Administration} is an initiative of IACA's Executive Board and its diverse membership. The Journal is an effective communications vehicle for the international exchange of experiences, ideas and information on court management, and contributes to improving the administration of justice in all countries. The collective international experience of its Executive Board and Editors has been that every judicial system, even in countries in the earlier stages of transition, has elements to it that may be of interest to others. The variations in practice and procedure from one region of the world to another, from one court system to another, also reveal major similarities across all systems. IJCA serves as a resource for justice system professionals interested in learning about new and innovative practices in court and justice system administration and management, in common law, continental, and Shari‘ah-based legal systems throughout the world. The Editors publish two issues per year.

The Editors welcome submissions from court officials, judges, justice ministry officials, academics and others whose professional work and interests lie in the practical aspects of the effective administration of justice. To view the Editorial Policy and Procedures for Submission of Manuscript and Guidelines for Authors, visit the IACA website (www.iaca.ws) and choose IACA Journal.

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From the Executive Editor:

By Markus Zimmer

As civilization tentatively embarks on a new year, governments in many regions of the world report continuing adverse fallout from the global economic malaise. Their legislative leaders struggle to escape recession indicators that mark declines in commerce, growing unemployment, shrinking productivity, diminished public revenue and, for many citizens, deterioration in the quality of life. We in the justice community as elsewhere tend to presume that such deterioration is evenly distributed among populations irrespective of gender and age. Research indicates otherwise.

World Bank-sponsored research in a report issued in September 2007 reported that a 1% drop in economic productivity disproportionately increases infant mortality by 7.4 deaths per 1,000 girls versus 1.5 deaths for boys when the statistics for 59 countries in the developing world were averaged. In all likelihood, the impact of the more recent global economic downturn has exacerbated these outcomes. For girls who survive, other damaging impediments lurk in their future; as of 2012, UNESCO reported 39 million girls aged 11-15 out of school. As they reach their adolescent years, their presumptive right to learning is subordinated to their entry into domestic and reproductive roles with little or no opportunity to catch-up in later years. These gender-based tracks essentially eclipse aspirations in the international development community to achieve social justice and gender equality. The loss in potential is staggering. Gender-oriented progress reports in modern societies, where educational opportunity for adolescent girls takes precedence over traditional domestic and reproductive roles, clearly demonstrate their capacity to excel academically and professionally in virtually all disciplines, including law and justice. The barrier is opportunity, not capacity or intellect.

As we collectively embark on pursuing IACA’s vision of improving how court systems are governed, managed and administered, I urge my male colleagues to consider, acknowledge and take into account the enormous forfeiture of potential in the developing world as a consequence of these skewed priorities and to creatively inquire what we might do to influence and adjust them, directly or indirectly, in our professional and personal lives. These souls represent our grandmothers, our mothers, our sisters, our spouses, our daughters, our granddaughters -- those who nurtured and sustained us when we were helpless and vulnerable on either end of the age spectrum.

Courts exercise a critical role in achieving the ends of meaningful social justice. In our roles as judges, executives, managers, administrators, and other professionals, we can and should support efforts to provoke cognizance of the disproportionately adverse gender-based impact of economic downturns and the loss of capacity and contribution that result from it. And to the extent that our courts, as institutions, can diminish those losses, I respectfully suggest that we target them.
From The Editors:
Court Administration in a Time of Changes – IACA´s First Conference in Latin America – The Importance of Research

By Andreas Lienhard and Luis Maria Palma

The trying times we live in are characterized, in terms of public management, by a growing gap between the latter and the necessities it has to fulfill: around the world, many state agencies are frequently superseded in their ability to provide services in an efficacious and efficient manner, in front of an increasing and diversified social demand. The regulatory framework that rules their functioning sometimes explains -largely but not exclusively- the reason for this situation.

In the Era of Globalization, notions like "space" and "time" are under crisis: the Information and Communication Technologies –ICT- make it possible today to work remotely and in real-time in the creation of knowledge and, thus, to develop regularly many activities that were hardly imaginable two decades ago.

Although these opportunities are expanded in every moment, many things have to be done within public sectors -and within them, the judicial systems- to adjust and promote changes through research, leadership, teamwork and participation.

This issue of IJCA deals with these topics and points out the importance of research and knowledge transfer.

We deeply acknowledge the work of our reviewers, our English-language proof-readers, and our Technical Editor, Linda Wade-Bahr.

This Issue

The editors proudly present seven articles by authors from Australia, Italy, The Netherlands, Romania and the United States of America. Some of the works selected refer to experiences and best practices of judicial reform, while others enhance the necessity of developing academic and practical research on court administration, in order to improve oriented public policies and services consequently provided.

The description of how court administration has evolved in a particular country can be a very illustrative and practical way of learning for those who want to reform their own judicial systems. Richard Foster´s article on Australia’s case clearly explains it and highlights the great importance of cultural change, leadership and participation to promote and develop modernization processes. The core of it underlies the evolution of the role and profile of the court administrator, the importance of learning from the past and the constant attention to a world in continuous change, to meet the needs of users and the social demand of justice.

In the context of huge economic and financial crises, reality seems to impose on the public sector the necessity of providing more services despite the fact of gross budget cuts (in other words, “to do more with less”). Frans Van Dijk and Horatius Dumbrava’s work consider European judicial systems ongoing reform processes under those conditions, and the consequent challenge of facing bigger and increasing caseloads with less public expenditures. They also put the magnifying glass on a critical issue: the importance of improving the judiciary functioning is critical for civil society, but also for the economy.

In the aforementioned scenario, an interdisciplinary approach turns out to be more and more relevant to improve the quality of the services provided by Judicial Systems. A specific and highly relevant matter upon which this focus is being applied is that of the decision making process, thanks to the inputs of cognitive psychology and neuroscience. Pamela Casey, Kevin Burke and Steve Leben refer to the main characteristics and advantages of related efforts and the principles of procedural justice, as an effective way to increase compliance of court orders and positive public perceptions of the court system.

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2 For example, virtually research, teamwork, or writing an essay in collaboration with some person who is thousands of miles away, all within the virtual environment.
Pamela D. Schulz and Andrew J. Cannon emphasize the huge potential of the multidirectional communication among worldwide users enabled by social media. Besides of being a mean to create more ways for democratic expression, social media can facilitate the conditions to exercise influence on public policy and court administration. Courts can meet the challenge and improve their own methods of information and communication with civil society.

Ann Johnson and Bianca Radu analyze the judicial reform process of Romania through the creation of an institution, the Superior Council of the Magistracy as a way to improve the rule of law, also considering internal changes in the judiciary as a consequence of the activity of the European Court of Human Rights (ECHR). A series of semi-structured interviews to members of the Romanian Judiciary make this study particularly vivid.

Giancarlo Vecchi summarizes the results of a national program on dissemination of best practices within the Italian judicial offices, focused on management, internal functioning, ICT and relations with users. The conception of the program is of a “two way” nature that combines top-down actions of the central state administrations and bottom-up initiatives by local judicial offices. The importance of participation to legitimate reform processes is one of the highly relevant points of this effort, which also leads to conclude the need of a strong coordination on these kinds of programs to succeed.

The worldwide current scenario of judicial budget cuts is addressed by Jessica Vapnek, who proposes 21 concrete measures aimed to save costs in areas such as court operations, staffing and salaries, court and case management. Even when this article is mainly directed to readers from developing countries, it summarizes lessons from the past that include valuable experiences from US and Europe.

IACA’s First Regional Conference in Latin America
Latin American young democracies are dealing with most of the problems we regularly consider as current within judicial systems. With judicial reform programs that grow stronger and diversify as times go by, the region seems to be a fertile space for court administration, the discussion of its best practices and new ways to improve the judiciary organization, functioning and services.

Therefore, during May 29, 30 and 31, 2013, IACA will develop its First Regional Conference on Court Administration in the City Buenos Aires, Argentina.

Co-sponsored by the Attorney General’s Office of the City of Buenos Aires (http://www.mpf.jusbaires.gov.ar/), the event will take place at the facilities of the University of Buenos Aires –UBA- Law School (www.derecho.uba.ar/), with the participation of judges, prosecutors, public defenders and court administrators all over the region, North America and Europe.


Registration and more specific information are available at http://www.iaca.ws

Research Project “Basic Research into Court Management in Switzerland” started
To date in Switzerland there has been a widespread lack of empirical and theoretical findings on the modus operandi of the justice system and its interaction with society or with specific social target groups. In relation to its basic knowledge of its judiciary, Switzerland is far behind other countries in the world.

Developments in public administration have shown management in the judiciary will become a necessity in the future. Without a better basic knowledge of the judicial field, the development of specific management models for the judiciary will not be possible. Therefore, the main common aim of this project is to gain knowledge of the Swiss judiciary as a subsystem of the democratic society and as an organization.

This basic research is carried out with regard to the development of integrated management models for the administration of justice. In addition, it is expected that the research project will yield considerable methodological findings related to research in systems of justice. This will generate scientific added value; so far there have been hardly any solid and recognized methods for research into systems of justice.
The questions dealt with in this project are being approached on an interdisciplinary basis. Gaining an insight into the judiciary from outside involves studying the interaction of legal, sociological, macro-economic, psychological, historical and political science aspects. In addition, research into the functioning of the judiciary, its organizational impacts, internal processes and the interaction between the people working within the system can only proceed on an interdisciplinary basis.

The structure of the research project – following several recognized management models – is subdivided into the internal organization of justice and an investigation of the pertinent environment. The investigation of the internal organization will examine the elements of resources, processes, organization (structure) and culture. Accordingly, the research project consists of five interdisciplinary sub-projects dealing with specific questions. Internal coherence and external cross-linkage will be guaranteed by means of an overall project management team, a cross-sectional project and two coordination groups.

The research findings achieved through the three years lasting project will be presented in doctoral theses, articles in professional journals, academic working papers, reports from research workshops as well as in summarizing reports of the sub-projects and the cross-sectional project. The findings of the overall project will lead to a summarizing fundamental work on the subject.

In addition to the University of Berne (Leading House), the Universities of Zurich, Lucerne, St. Gallen and Utrecht (NL) as well as the Idheap (University of Lausanne) are involved in this interdisciplinary project.

First empirical results on the status of Court Management in Switzerland: IJCA Special Issue 2012. For more information: http://www.justizforschung.ch.
Towards Leadership: The Emergence Of Contemporary Court Administration In Australia

By Richard Foster, PSM

The leader is best,...
When his work is done, his aim fulfilled,
The people say, 'We did it ourselves'.

Lao Tzu (500BC)

1. Introduction
Australian court administration as we know it today emerged in the mid-1980s in response to a range of factors. This paper draws on the wisdom of pioneering court and judicial administrators to explain how the past has shaped contemporary court practices, and to explore the challenges for modern leaders in court administration.

The paper briefly sets out the recent history of court administration, including an examination of practices and roles prior to the beginning of reforms in the 1980s. The paper then chronicles the remarkable role that court administrators have played in responding to the demands of change, and their reinvention as educated and respected management professionals.

Discussion then turns to current court administration and the demands it places on its practitioners in areas including performance measurement, client centered services, financial management, relationships with the judiciary, external relationships and innovation. The subjects covered in this section have been confined to those areas where the author believes the leadership implications are greatest. The paper then looks forward, examining the implications of emerging trends.

Finally, the paper concludes that while the technical management skills demanded of the court administrator are important and should in no way be diminished, reflection on the past, present and emerging future shows that it is an aptitude for the intangible art of leadership that sets apart those who succeed in this role.

While much of this paper is written with the senior court administrator or chief executive in mind, many of its observations and conclusions can be applied to the profession of court administration more generally.

2. Recent History and Impetus for Change
The revolution in Australian court administration began in the 1980s, and had its genesis in a range of converging factors.

Prior to this time the Australian public service operated on a centralized, hierarchical and rule based model. Courts, deeply embedded in the public service culture, operated comfortably within this paradigm. Court administration largely involved following rules, processing forms, and rubber stamping. Early selection processes for administrative staff consequently reflected a bias toward applicants who could accurately fill in forms, file, and who had neat handwriting.

In the 1980s, governments developed expectations for the judiciary to take responsibility for the courts’ efficient operation. Rising caseload pressures were beginning to impose unacceptable time and financial costs on litigants, and citizens were becoming more aware of their rights to a professional, well-run court system. Meanwhile the North American experience...
of court reform, particularly case management and administration had “just reached Australian shores and was taking hold.”

Outside of the courts, new information and communications technologies were emerging, and government was beginning to embrace managerial reforms. The wider public service was becoming skilled in IT, contract management, accrual accounting and performance management, and applications for government funding now included business cases.

As the 1980s progressed, courts, though initially slow to embrace reform, realized that unless they shifted from paper based, traditional ways of working, they would struggle to attract good staff or efficiently meet caseload demands. In addition, traditional methods of bidding for funds based solely on judicial request were no longer adequate, and were increasingly rejected by those holding the purse strings.

3. The Nature of Early Changes

3.1 The 1980s
Response to the calls for change in court administration, not surprisingly, tended to be ad hoc. Differences between Commonwealth, State and Territory jurisdictions presented challenges for harmonized reform, and some administrators and members of the judiciary resisted amendment to their existing practices. However, there were others who embraced the need for reform, and it is from within these ranks that many leaders and pioneers of contemporary court administration appeared. As Gary Byron observes, the more accountable and transparent courts that exist today could not have been developed “without a responsive judiciary supported by the management and financial skills of competent court administrators.”

New relationships were forged between the judiciary and court administrators, leading to a fresh dialogue on management. Court administration was reviewed to take into account modern expectations of fiscal and staff management, while emerging technologies began to be absorbed into court practices. Importantly, the role of the court administrator adapted to reflect the necessity for new professional management skills.

New Working Relationships
The Australian Institute of Judicial Administration (AIJA) was formed in 1979 and attracted members of the judiciary interested in improving the operation of the justice system. Initially open only to the judiciary, the AIJA expanded its membership to include magistrates, tribunal members, court administrators, members of the legal profession and academia, and others with an interest in judicial administration in recognition of the “broader range of experience qualifications, insights and skills” they could bring to judicial administration.

The increased contact between the judiciary and senior administrators facilitated by the AIJA allowed for what Alastair Nicholson called “a cooperative and respectful relationship between the judiciary and court administrators”, and marked the beginning of a then unique collaboration between the judicial and administrative arms of courts. The early focus of the AIJA and its members was case management, technology, and communication.

Embracing Technology
Courts in the 1980s could not ignore the potential value of new technologies. For some the need to computerise was driven by the sheer volume of cases requiring management. For others the opportunity to replace uninteresting ‘rubber stamping’ roles with higher skilled jobs was attractive.

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5. Gary Byron AM, (former Director General of WA's Justice Ministry, former Director General of the New South Wales Department of Courts Administration), in-person interview by Theresa Layton, Canberra. April 12, 2012.
6. Laster, interview, 2012. Partly due to concern that the reforms could interfere with judicial independence.
8. Gary Byron AM, e-mail message to Theresa Layton, April 15, 2012
9. Gary Byron AM, e-mail, 2012
11. Byron, e-mail, 2012. “Many of these early developments were pioneered in the State of South Australia where the then Chief Justice of that State, the Honourable Len King was moved to observe that courts administration had achieved the status of a profession in its own right, in the practice of public administration.”
Despite the many benefits, the introduction of computers created its own challenges, not least of which required acquainting the judiciary with screen and keyboard. Gary Byron recalls an early AJJA education event where the main aim was to have the judges place their fingers on a keyboard for the first time.

_It was guerrilla management. We had to find the influential people, get them on board, and get them to persuade others._  

**Case Management**

Changing case management practices evolved in response to the pressures created by expanding judicial workloads and unacceptable delays in proceedings, and publications emanating from North America promoting new case-flow management systems and delay reduction began to influence Australian practices. It was increasingly acknowledged that the pace of litigation had to be controlled, necessitating new procedures and formal case management process. Senior court administrators were a key resource to the judiciary in developing these systems, combining a management perspective with an understanding of the broader judicial landscape.

**Professionalization**

The new reforms meant that the days of court administrators as entrenched, bureaucratic processors were a thing of the past. A senior court administrator in the new judicial world not only needed courts experience, but also a broader range of skills to fulfill their role, including an understanding of the law, and corporate management knowledge. In turn, administrators began to require that their staff have skills and qualifications relevant to the new procedural environment. Pioneering senior court administrators initiated relationships with academic institutions to establish university level qualifications in management in a justice environment. Policies were also developed linking qualifications to promotion in order to motivate staff to up-skill. Many senior court administrators led the charge by undertaking further studies themselves.

**Strategic Planning**

Reform of administrative processes included shifting corporate functions such as human resources, finance, and asset management in-house. These structural changes meant the employment of business professionals who brought with them a new perspective, including modern corporate expectations, particularly in the area of strategic planning. Corporate planning practices in the courts resulted, with senior court administrators re-skilling in the art of strategic and operational planning.

**3.2 Continuing Change - 1990s and 2000s**

By the mid-1990s courts were benefiting from a diverse range of skilled staff with management qualifications, and court administrators increasingly shared information and ideas through conferences, associations and networks which gradually expanded from jurisdiction, to state, to national and international levels. The judiciary also had wider skills in administration and management, assisted by the recruitment of members from legal firms where they had managed busy practices.

New public management reforms were taking hold, and public service organizations, including courts, were being reshaped by philosophies of lean government, performance measurement, customer focus, and the application of business models from the commercial sector.

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14. Warwick Soden, “Perspectives on the changing role of the judiciary in coordinating criminal justice” (paper presented at the Australian Institute of Criminology conference, Canberra, Australia, April 2003). 124. Soden writes that “The leading publication (American Bar Association 1986, Defeating Delay, Developing and Implementing a Court Delay Reduction Program) has been used as a guide in some courts in Australia, including, in particular, the Supreme Court of NSW and the District Court of South Australia.”
15. In the past there was an expectation that time in a job, rather than performance, resulted in advancement.
16. By the 1990s the Australian Court Administrators Group was established further facilitating the sharing of knowledge, ideas and experience between jurisdictions.
17. O'Donnell, M., Allan, C., & Peetz, D. (1999). The new public management and workplace change in Australia (Academic Paper. University of New South Wales, Sydney). New Public management represented a marriage between economic theories (public choice theory, transaction cost theory and principal-agent theory) and a variety of private sector management techniques. The former emphasised notions of user choice and transparency while the latter promoted the portability of professional managerial knowledge and the need to increase the freedom available to public service managers to generate results and improve organisational performance.
In the 1998 Access to Justice Report, Peter Sallmann referred to the “quiet but enormously significant revolution” that occurred as higher courts moved toward a more interventionist role in managing their workload. Speigelman also observed a “general acceptance of a greater role for the judiciary in case management”, adding that this had led to a degree of judicial intervention in proceedings “unheard of a few decades ago...” Changing judicial case management practices were supported by ongoing improvements in wider case flow management by the administrative arm of courts and the introduction of case management software.

The 2000s brought the next wave of reform, labeled “public value”, introducing concepts such as networked government, partnerships and public value. These reforms placed new demands on the court administrator, increasingly requiring them to be change managers, financial managers, negotiators, and client service experts. They were expected to build new relationships with government and stakeholders, while maintaining internal relationships, and supporting the judiciary.

4. Contemporary Court Administration and Its Implications for Administrators
The significant reforms to courts during the 1980s, 90s and 2000s created an administrative environment that demanded a uniquely skilled, experienced court administrator. It is to the contemporary court environment that this paper now turns, examining aspects of modern court administration in Australia along with the leadership implications for senior court administrators. In particular, a shift towards client orientation has required senior court administrators to not only manage the internal workings of the court in a corporate environment, but to provide strategic guidance taking into account the newly recognized needs of court users.

5. Client Orientation
With modern court administration, the Hon. Alastair Nicholson observes, comes the multiple challenges of “needing to understand the needs of court users, tailoring services so that people are not treated as numbers and providing services within our constraints.” This focus on client orientation has created new challenges and opportunities for senior court administrators.

Client orientation is inexorably linked to design. The registry creates a first and lasting impression for people accessing the judicial system. Comfortable seating in registries results in a positive experience for court-users waiting for service. Efficient queuing systems ensure court-users are served in a fair order, while partitioning of service counters protects privacy. Forms are designed to be simple and use plain English, and the internet is utilized to provide an alternative mechanism for users to access services off site. Court services are now also tailored to the needs of many client types including self-represented litigants, those from culturally and linguistically diverse backgrounds, indigenous clients, and those with mental illness.

A court-user perspective must be maintained despite the environment of tight federal and state budgets under the catch-cry of “doing more with less”. Creativity and inventiveness is required by court administrators to deliver these services within existing, or often diminishing budgets.

More challenging than the redesigning of physical infrastructure is inspiring in others the desired attitudes and behaviors toward court-users. Client orientation means staff must provide fair treatment and the right information to court users without judgment. For this reason, court staff who deal with the public are often recruited from service industries and ideally have a desire to assist others, are empathetic and enjoy problem solving. Senior court administrators are required to provide ongoing programs for training, mentoring and re-skilling for court staff, supported by practices to recruit and

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20. The concept of public value originated with professor Mark H. Moore (Harvard), who published Creating Public Value Strategic Management in Government, in 1995. In simple terms, it is the equivalent of stakeholder value for private organisations - public sector organisations are expected to understand and maximise public value.
22. For many the term client implies a willing participant. In many courts the term court-user is substituted.
23. For example, in the Parramatta Registry of the Family Law Courts, the waiting area is designed for children and families who wait for services around a large domed internal atrium that houses rabbits and hens.
24. For example, the Commonwealth Courts Portal, an initiative of the Family Court of Australia, Federal Court of Australia and Federal Magistrates Court of Australia, provides web-based services for clients to access information about cases before the courts and file document electronically (at www.comcourts.gov.au).
retain the right people. Where court users are dissatisfied with the handling of their case or the conduct of judicial officers, complaint handing processes allow investigation and possible redress. Complaints data is now also seen by most senior court administrators as a good source of information about potential issues in the court system.

6. Measuring Performance

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

The international framework for court excellence identifies the role of the senior administrator.

In most countries the head of courts are judges with a high level of judicial expertise. This does not automatically guarantee that they are also the best managers for courts. Excellent courts may also engage non-judge court administrators who are professionally trained in financial and organizational management and may encourage them, as well as the judges in leadership roles, to take part in courses to improve their management skills.

Performance measurement provides an important means for administrators to understand whether court resources are being used efficiently and effectively, and the responsibility for ensuring that data is collected, available, robust, and used appropriately to measure performance lies with the senior court administrator. The Productivity Commission identifies the benefits of measuring performance as upholding accountability, having access to performance information and encouraging ongoing improvements in service delivery. Performance indicators are also an important source of information to the Government on policy and program performance.

7. Financial Accountability

Federal courts, unlike most state and territory courts, have administrative independence. This autonomy enables money to be directed more innovatively, tailoring it to the needs of a particular court, and more importantly, to the court users and public it serves.

With autonomy comes the requirement to “demonstrate to Parliament, and ultimately the public, that they are using public funds wisely.” In Australia, it mostly falls to the senior court administrator to front senate estimates and other parliamentary committees to answer questions about overall performance and the court’s budget. Not only must court administrators be able to read and understand financial reports, work with financial managers and make the required links between budget and overall performance, but they must also be politically aware and able to manage the pressure of close public scrutiny.

Given the courts are now competing for the same scarce resources as sectors such as health and education, Government is constantly making tradeoffs and prioritizing limited funds between sectors. The days of courts being seen as special in the fiscal arena are long gone. Wade, McKinna and Laster observe that courts are at a disadvantage given the timing of court reform in Australia, noting that “the most significant period of transformation has occurred when governments are least receptive to extra expenditure.” To ensure the financial requirements and priorities of the courts are front of mind,

25. At times senior administrators must make difficult decisions to redeploy or terminate the employment of staff who are unwilling to embrace a client orientation.
26. Complaints regarding judicial decisions do not fall within these policies, since dissatisfaction with a court decision is only capable of being resolved by appealing from that decision.
28. These may include indicators of judicial performance required by the Chief Justice such as clearance rates, outstanding judgements, etc. for which the court administrator is not accountable for but does have an accountability for providing data if required.
32. State and territory courts have struggled particularly to maintain their portion of diminishing state budget funds.
the senior court official must stay close to decision makers in central agencies, while managing the expectations of a few in the judiciary who maintain the link between judicial independence and unconstrained funding.

8. Relationships with the Judiciary
The desired relationship between senior court administrators and the Chief Justice is based on “trust, mutual respect, tolerance, co-operation and a sense of common purpose,” observes Gary Byron.

> Each has a role to play; each has a contribution to make and between them, they should be a fairly formidable team.\(^{34}\)

To allow this relationship to function, it is important that the unique contribution of each party to the effective running of the court is respected. The higher levels of education and professionalism in court administration have assisted in generating greater respect for the role.

The senior court administrator has to acknowledge that the ultimate accountability for the court administration and policy setting sits with the Chief Justice, and it is the senior court administrator’s role to advise, assist and support them in executing those responsibilities. However, according to former Chief Justice of the Family Court, the Hon. Alastair Nicholson, when it comes to management issues, the Chief Justice should “expect to be involved in championing issues when required to but otherwise should not interfere”\(^{35}\) as the senior court administrator must have the license to administer the policies of the court and oversee day to day operations without undue judicial interference.\(^{36}\)

The role of assisting, providing wise counsel and supporting does not mean always telling the judiciary what it wants to hear. The days of forelock tugging are long gone. At times it means challenging ideas, educating and influencing. It means ensuring that the judiciary meet their administrative obligations and don’t hide unnecessarily behind veils of judicial independence or legislation. However, a successful senior court administrator will also be open to ideas and support the judiciary wherever possible. The execution of the role is understandably assisted by the many judges who have an appreciation of management imperatives and are themselves leaders in judicial administration.

To maintain positive relationships communication channels must remain open both internally and with other organizations. Senior court administrators often have a close working relationship with the Chief Justice with regular communication. This includes advising the judiciary of information provided by other people, although administrators must be cautious to not be perceived by interest groups as the primary mechanism for delivery of bad news. Managing communication channels may mean frequent travel or attending numerous meetings. Informal communication, such as the conversation in a corridor or the car park also provides invaluable opportunity for information about the overall health of the court to be passed on.

9. External Relationships
The modern senior court administrator must not only have an internal focus, but must be available to build relationships with a vast range of external stakeholders, including ministers, other court officers, government departments, not for profit organizations, and unions. Each relationship is different in its needs and boundaries, requiring the senior court administrator to adapt to the nature and style of relationship needed. They must take a long term view in building relationships, establishing trust through credibility and reliability, and should maintain respectful partnerships rather than hierarchical relationships bedded in power plays.

The Senior Executive Leadership Capability Framework states that as part of their leadership role, the senior executive “creates a sense of ‘interconnectedness’ with other departments and agencies, ensuring opportunities to share views and ideas.”\(^{37}\)

An example of this is the increasing acceptance of therapeutic jurisprudence in Australia which has seen courts working more closely with human services agencies to address social and personal problems from drug-abuse and addictions, homelessness, unemployment, mental health, behavioral issues and a lack of work-related and parenting skills.\(^{38}\)

\(^{34}\) Gary Byron, “Court Governance: The Owl and the Bureaucrat”, *Journal of Judicial Administration* 8, no. 3 (1999): P143.


\(^{36}\) For example, if members of the judiciary raise concerns about an administrative staff member, the Chief Justice would expect to raise the issue with the senior court administrator but then not interfere with how that person was managed.


Family law context, this has meant creating close working relationships with central agencies, legal aid, family relationship centers, mental health support organizations, child protection agencies and research institutions.

It is also part of the senior administrator’s role to manage relationships with ministers and members of parliament, and to provide the frank, honest, comprehensive, accurate and timely advice required under the Public Service Act 1999. The senior court administrator must develop and nurture these relationships. This does not mean simply reacting to information requests from members of parliament (such as answering questions from parliamentary committees or briefing a minister). The senior court administrator must also initiate meetings where necessary. For example, where a public statement reveals a minister’s misunderstanding of courts, the senior court administrator may seek a meeting to provide clarifying information. Interactions with ministers must be managed in consultation with the central agencies that are pivotal to the administration of courts.

The senior court administrator needs to also maintain a professional network, developing mutually beneficial relationships and working across portfolio boundaries to negotiate the best outcomes for courts.

10. Culture of Innovation
Public expectations of government service delivery are increasing. This is driven by comparison to private sector service improvements, but also by comparative improvements in public services nationally and internationally, and by demographic shifts in society. Innovation is now seen by government to be at the heart of good public administration. A high-performing public service is relentless in its commitment to continuous improvement. It never assumes that the current policies, processes and services are the best or only solution.

The International Framework for Court Excellence takes important notice of the need for innovation, stating that strong court leadership requires, among other things, an "...eye for innovation and a proactive response to changes in society." At its most effective, innovation in courts leads to new ways of delivering services, new administrative approaches and new systems. However innovation does not just occur, it must be nurtured.

To precipitate innovation, idea generation is required. For this, leaders must be outward looking and encourage others to be so. Courts must borrow, share, and generate ideas. In contemporary court administration, there are many structures that support these activities. Member organizations such as the AIJA and International Association for Court Administration provide opportunities through conferences, forums and networks. Ideas are also cultivated as a result of international relationships.

Innovation comes from all levels within Courts. While many senior court administrators in Australia have been working in Courts for a long time, it is important that they not become cynical. Senior staff must actively seek out new perspectives, particularly from more youthful recruits.

Courts are traditionally conservative, and the senior court administration will at times be required to push back against the risk adverse culture. However, recently published research by the Attorney-General’s Department acknowledges that many public sector innovations involve complex stakeholder and political management issues not found in the private sector. In many instances, the public will not tolerate mistakes or ‘trial and error’ in the public sector and consultation becomes key. The research found that the most successful innovation in the public sector occurs when an organization has control over the time needed to innovate and implement, and can reduce uncertainty associated with the innovation.

39 Public Service Act 1999, section 10(1)(f).
40 Australian Public Service Commission, Empowering Change, Canberra 2010, 1.
43 For example, since 2008, a formal partnership between the Supreme Court of Indonesia, the Federal Court of Australia and the Family Court has enabled courts in both countries to share experiences regarding case management, court administration, information technology, client services, supporting vulnerable litigants and access to justice. Such relationships inspire the haring of ideas and innovation. To prosper they require significant administrative support and the ongoing management of relationships at all levels, judge to judge and administrator to administrator.
44 Richard Foster, (2008, April 4). Young employees find their voices in the Family Court [Media Release]. Retrieved from http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Media_Releases/FCOA_Young_Employees. For example, in the Family Court of Australia, a Young Employees’ advisory group is established to contribute to achieving best practice within the Court and to harness their enthusiasm. Its aim is to “empower its young staff members to ‘shout’ and ‘share’ and enrich our workplace” and to gain a “youth perspective on certain issues.”
It further suggests that collaboration can be a success factor in public sector innovation. The senior court administrator must be able to balance these tensions if innovation is to occur.

11. Looking Forward
Over the last years, despite increasing demands and shrinking budgets, Wade, McKinna and Laster find the reform program has in fact “gained momentum.”

Court administrators in Australia must accept that they are operating in an environment of constant, and often complex, change. As technology allows courts to do more, government priorities change, the social environment shifts, and the demands of the public evolve. Managing multiple changes is the new way for all courts.

Some of the already emerging challenges are discussed below along with their implications for administrative leaders.

12. Harnessing Technology
The role of technology, and advances in technological tools continues to challenge and create exciting new opportunities for courts to improve the way they deliver services to court users.

…the range and variety of technological miracles that are occurring at this time should make us excited [observed the Hon Justice Michael Kirby]. They present great opportunities for law and other professions to reach out to the public they serve and to enhance efficiency, accuracy and quality of the services they provide.

The private sector is making use of advances in IT to deliver increasingly tailored and streamlined services to consumers and thus “amplifying demand for public sector providers to follow suit.” In many regards, courts are still heavily reliant on (and some would say addicted to) the paper files that form the backbone of case information. However, there are readily available technologies in areas such as customer relationship management, appointment and queue management, voice recognition, paperless workflows, and digital signatures that could streamline file management. Courts may struggle to deliver what is required within the resources available over the long term if they do not begin to embrace some of the new technologies. It falls to the senior court administrator to understand the possibilities, lobby for government funding, and to lead adoption of the technology internally.

13. Non-Adversarial Justice
Non-adversarial approaches and therapeutic jurisprudence are gaining momentum in Australia. Existing adversarial approaches are noted by the Hon. Alastair Nicholson as “too costly and don’t serve the public.” Non-adversarial justice casts a wide net and includes the related concepts of therapeutic jurisprudence, restorative justice, participatory justice, preventive law, comprehensive law, creative problem-solving, diversion, holistic law appropriate dispute resolution (including mediation, negotiation, conciliation and arbitration) and others.

So what does this all mean for the court administrator?

According to Stockwell, as the paradigm shifts toward non-adversarial approaches, it means changing court management practices, institutional arrangements and legal and other professional cultures. She observes that therapeutic jurisprudence principles are already informing the reform of court services with a view to increasing the amount of multi-disciplinary case management and collaboration.

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45. Dr Robert Kay & Dr Chris Goldspink, What public sector leaders mean when they say they want to innovate, research report prepared for the Attorney General’s Department and the Australian Public Service Commission Canberra, 2012.
49. The Australian Government and most states and territories in Australia have already enacted legislation that gives electronic communications the same status as written communications at law (both criminal and civil). However, since the validity of documents with digital signatures has never been challenged in court, their legal status is not yet well-defined.
For the senior court administrator, it will mean building closer and more collaborative approaches between courts and different professions, organizations and communities, as well as expanding the focus of education and training to include interdisciplinary approaches. Freiberg observes that even the physical design of the court can reflect non-adversarial justice and therapeutic jurisprudence in the way that courtrooms are “configured to promote respect for cultures or better communication between the participants.”

14. Evaluating Performance
In 1998, Professor Parker noted that while most Australian courts have a culture of continuous improvement, it is not matched by a culture of subsequent evaluation. This area remains a challenge for many courts with concepts such as program logic remaining foreign. Senior court administrators have an ongoing obligation to ensure systems are in place to gather robust, useable data to allow the evaluation of performance. This will become increasingly important as resources become scarcer and robust information is needed to make decisions about the best use of limited funds.

15. The Changing Workforce
In a recent speech, the Australian Public Service Commissioner identified a shifting workplace.

Rising education levels, changing roles, different attitudes toward authority and work, and greater demands for participation are all components of a wider social transformation in the workplace.

The court administrator must plan for an environment where double income families, often with caring roles for older parents and/or children, make up a significant part of the workplace. The increasing equilibrium of the workplace combined with a new expectation of fathers to spend time with their children has increased the need for a family friendly workplace. Meanwhile, the aging of the public service workforce brings with it challenges about how to both “retain access to experience” while “effecting generational change and managing organizational renewal over time.” At the other end of the spectrum, younger generations have different work expectations, anticipating more flexibility and fluidity in both how and where they work.

It falls to the senior court administrator to align the needs of the organization with the expectations of the workforce.

16. Conclusion
The revolution in court administration which began in the 1980s was rapid and gained enormous momentum. Over a period of 30 years the professional court administrator adapted to government, societal, technological and court driven reforms that fundamentally changed the way courts operate.

The skills of most senior court administrators were built in layers as successive waves of reform took hold. Court administrators are now more educated and skilled than ever before. They bring not only experience in courts but also management skills and an understanding of social sciences.

But these are largely technical management skills, and while their importance is not to be diminished, it is an aptitude for the darker art of leadership that distinguishes those who succeed in this role. This paper has drafted an informal nomenclature of court leadership. It describes the senior court administrator as a collaborator. As a person who inspires, influences, stimulates debate, persuades and challenges. As one who looks forward, thinks holistically, tolerates uncertainty, provides wise counsel, manages risks, works across agency boundaries and is flexible. They must have an aptitude for overcoming complex problems and hurdles. They create a workforce that is aligned to the needs and priorities of the organization. They understand that their role is tied to the Chief Justice who has the ultimate responsibility for a court’s administration.

It is not a role for the faint hearted.

Yet, with the greatest challenges come the greatest rewards. The work of the senior court administrator is intellectually rewarding, well respected, and provides the opportunity to build relationships with an exceptional group of people. And

53. Freiberg, Psychiatry, psychology, 18.
55. Program logic provides an agreed description of how a project or program is intended to work, sets out the context in which the project or program operates and is the basis for outlining the project or program’s expected performance and provides information for evaluation.
57. _Ib id_
the court administrator knows that when court users have a positive experience of a court it is not solely a reflection of their day in court or the outcomes of their case, but also a reflection on the quality of administration.

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Judiciary In Times Of Scarcity: Retrenchment And Reform

By Frans van Dijk¹ and Horatius Dumbrava²

1. Introduction
The judicial organizations of many countries in Europe experience major changes. Organizational structures are revised and digital technology is implemented rapidly. The banking crisis and economic recession have speeded up these developments, but they have also altered the emphasis: from quality of justice to efficiency. In many countries the economic problems have led to an increase of court cases, in a time when there are drastic reductions of public expenditure, including that of the judiciary. In Portugal and Greece, governments have entered into reform packages with ECB, IMF and EC that include drastic reform of the judiciary as part of a modernization of the public sector, in return for financial assistance. The judicial organizations of not only these two countries, but others as well face the challenge of improving the efficient functioning of the judiciary in the interest of society and economy while having to cope with increased case loads and reduced budgets.

The European Network of Councils for the judiciary (ENCJ), in which the judiciaries of most (aspiring) member states of the EU participate as members or, in case they do not have a council for the judiciary, as observers, is very much concerned about the impact of the economic crisis on the judiciary. In 2011 it passed the so-called Vilnius Declaration. This declaration on the one hand calls on the judiciaries themselves to innovate and on the other hand exhorts governments to enable the judiciary to fulfill its crucial tasks under the present difficult circumstances.³ The ENCJ instituted a working group to take an inventory of reforms taking place in European countries, to evaluate these reforms and propose recommendations. This working group has completed its report, and its analysis and recommendations have been endorsed by the ENCJ as a whole. As the chair (Dumbrava) and a member of the working group, we wrote the report, compiling the findings of the other members.⁴ Judicatures are already putting the report to good use.

This article focuses on the findings and recommendations of the ENCJ, and borrows literally from the report, as we want to recognize its findings. We combine this with a discussion of the relationship between the judiciary and the economy. The article starts with this subject and first discusses the relevance of the judiciary to the economy, then the impact of the economic recession upon the judiciary. Data for the Netherlands, in particular, are used to provide some insight into the magnitude of impact involved. We will also examine briefly the developments in Greece and Portugal. This discussion provides the backdrop for a review of the measures enacted to deal with the impact of the recession and of the wider reforms taking place. It should be noted that it is often not easy to demarcate both types of interventions. We will look at content as well as process of reform. In both areas we will summarize the recommendations of the ENCJ.

2. Importance of the Judiciary for the Economy
Three approaches are worthwhile to examine here. The first approach concerns the contribution of legal institutions to wealth creation and economic growth. In the past twenty years much empirical research has been done in this area. Current thinking is reflected in the latest global competitiveness report of the World Economic Forum.⁵ Institutions are not the only, but certainly one of the key factors that determine the wealth of nations. Institutions, in the definition of the report, are “the legal and administrative framework within which individuals, firms, and governments interact to generate wealth” (p. 4). The report argues that the quality of institutions has a strong influence on competitiveness and growth, and it provides references to supporting research. To capture this quality several indicators are used with respect to the judiciary: (1) judicial independence, (2) efficiency of the legal framework to settle disputes and, also (3) to challenge regulations, and (4) the protection of property rights in general as well as (5) intellectual property rights. 144 countries are scored on a range of indicators, including these five. Worldwide, the list of top ten nations is dominated by European countries such as Finland, Switzerland and the Netherlands (on all five indicators they are in the top ten), followed closely by the UK, Germany and the other Scandinavian countries. The only other country that appears in all top ten lists is New Zealand, with Singapore very close behind.

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¹ Van Dijk is director of Strategy of the Netherlands Council for the Judiciary. This article is based on his presentation at the 2012 Meeting of IACA in The Hague.
² Dumbrava is member of the High Council of the Magistrature of Romania.
It is striking that, while some European countries perform modestly (France, Estonia), others perform weakly (Spain, Turkey), and still others even belong to the worst in the world (several countries on the Balkan and in Eastern Europe, but also Italy in several important respects). These scores are subjective, based on the views of so called business leaders, and should be considered with caution. Nonetheless, they cannot be ignored.

When it comes to the actual impact on the economy, Van Velthoven reviewed the empirical literature. His study concludes that the influence of the legal infrastructure is determined primarily by the degree of protection by law of property rights and by the quality of the judiciary (independence, timeliness and expertise). He derived an estimate for the Netherlands: the high quality of the legal infrastructure of the Netherlands compared to the worldwide average accounts for 0.8% (percentage point) per year of long-term economic growth. This magnitude is consistent with an estimate for Italy where the opposite is the case. The Italian central bank has often noted that the inefficiency of civil justice is a source of injustice and hinders economic development. Specifically, Mario Draghi, now president of the ECB, has expressed this view. According to estimates of the central bank, the poor performance of the courts, in particular with respect to timeliness, reduces economic growth annually by 1.0% (one percentage point). This is an enormous percentage, considering that Italian economic growth was just 0.3% in the last ten years.

The second approach is much less ambitious and focuses on analyzing the direct economic benefits to be gained by removing bottlenecks, such as court delay. This approach does not claim to draw conclusions about wealth or economic growth in general, and takes a micro perspective. A study for the Netherlands is the only one known to us that provides estimates, and it dates back to 1998. Interviews with a broad range of users of the courts and their representatives showed the factors that led to major costs. Court delay was the greatest concern. To give a few examples, delay was reported as leading to postponement of investment and other profitable activities, and sometimes to the cancellation of these activities. Also, activities that harm other parties continue longer than necessary, and this is only partially compensated in the court rulings. Conflicts in the workplace continue longer than necessary, and disrupt organizations longer. If civil cases would be speeded up eight months and administrative cases by six months, the annual gains would be 0.1% of gross domestic product (GDP). Other bottlenecks were, for instance, lack of clarity of verdicts and legal uniformity, leading to uncertainty and more cases than necessary. Another very practical complaint concerned the long time parties and their lawyers often have to wait before their hearings start. The total gains to be reached were calculated at 0.25% of GDP. In other countries gains could be much larger. It should also be emphasized that this approach does not take into account the wider beneficial effects of court rulings on economic behavior in general, which indeed takes place under the so-called shadow of the law. The first approach incorporates this wider impact.

The third approach starts from the broad perspective of structural reform deemed necessary to overcome the current economic crisis. The troika of EC, ECB and IMF have reached agreements with Ireland, Portugal and Greece about structural reform. The plans for Portugal and Greece also provide an analysis of the functioning of the judiciaries of these two countries. With respect to Greece it is stated that the inefficiency of the judiciary has led to large backlogs of civil and administrative cases, and that these backlogs have a negative impact on private and foreign investment, entrepreneurship, exports and tax revenue. In Portugal backlogs and time-consuming procedures hamper the functioning of markets in several sectors of the economy. Specific attention is requested to ensure the effective and timely enforcement of contracts and competition rules. While these statements are of a rather general nature, the programs agreed upon are very concrete.

We conclude that the legal institutions, among which the judiciary plays a key role, strongly affect the economy. Measures that have a negative impact on the functioning of the judiciary will also affect the economy negatively.

3. Impact of Recession on Caseload

During economic downturns many companies as well as individuals get into financial difficulties and cannot meet their contractual obligations anymore. As a result, the volume of money claims as well as debt recovery and bankruptcies...
increase. Labor conflicts multiply, while the more extensive use of social security programs also leads to more cases. The number of family law matters and criminal cases may increase too. Consequently, as all but a few countries suffered in the crisis, the volume of civil and administrative cases increased in most countries. For instance in Ireland civil cases increased by 40% since 2006 and in Denmark by 35% since 2008. Table 1 shows the increase of civil cases in the Netherlands. Here, it has been statistically validated that the volume of cases increases during economic downturns and stabilizes in good times. Several countries also reported an increase in criminal cases.

![Figure 1. Volume of civil cases of first instance courts in the Netherlands. Volume in 2000 is set at 100.](image1)

It is difficult to document the impact of the crisis on caseload for the whole of Europe, as the downturn varies very much in timing. Also, we are still in the middle of an unfolding crisis, and it is therefore not possible to observe the cumulative effect on caseload of the whole crisis. The great recession of the thirties of the last century provides some insight into the effects. Figure 2 shows the influence of that recession in the Netherlands. While the institutional environment has changed since then, the figure shows that all types of cases can be affected and that increases can last very long.

![Figure 2. Volume of cases in the Netherlands during the great recession 1929-1939. Volume in 1929 is set at 100.](image2)

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10 These effects were reported by most judicial organizations in countries that suffered from the economic crisis, in response to the ENCJ questionnaire.
11 Responses to the ENCJ-questionnaire by the Court Administrations of Ireland and Denmark.
12 WODC, Capaciteitsbehoefte Justitiele ketens t/m 2016, [www.wodc.nl](http://www.wodc.nl), 2011.
13 Raad voor de rechtspraak, fact sheets, [www.rechtspraak.nl](http://www.rechtspraak.nl).
The increase of the number of cases has led to concerns about increased court delay in many countries.

4. Impact of Austerity on the Judiciary
As public deficits and debts got out of control in many European countries austerity measures were taken. In many countries the judiciary was not exempted. Again, it is difficult to give a precise overview of the budget cuts, because the crisis arose at different points in time in the various countries and the governments reacted very differently. Some judicial organizations have absorbed budget reductions of up to 20%, (for example: Ireland, the UK and Lithuania.15) In other countries budget cuts have not yet been implemented or have met with strong resistance by the Parliaments. For instance, in the Netherlands a proposal to fund the cost of civil and administrative cases solely by court fees was defeated. As noted already, budget cuts aggravate the difficulties of the courts trying to contain delay. The courts are in a double bind: more cases and less budget. The likely result is longer processing time, which is bad for parties, and also for the economy as a whole.

5. Measures Taken
The ENCJ working group has examined what measures affect the judiciary.16 This was done by means of a questionnaire among the ENCJ members and observers, and by in depth discussions within the working group. As not all countries responded, it was not possible to compile a complete overview.17 Still, we believe a representative picture has emerged. The typical measures will be discussed below. It should be noted that many kinds of measures have been taken to reduce expenditure in the short run.18 In several countries the salaries of judges and staff have been reduced (see below). Also, the recruitment of judges and staff has often come to a standstill, and in Belgium for instance, the appointment of new judges has been delayed. In some cases, no maintenance is carried out in court buildings and no equipment is purchased or replaced. This situation is expected to continue in many countries. Such measures are a threat to the performance of judiciaries as they are increasing court delay.

5.1 Reduction of Salaries19
The reduction of salaries of judges is discussed here in more detail, as this type of cost reducing measure is part of the public sector reform programs in several countries whose governments have been keen to include the judiciary. These countries include: Portugal, Spain, Lithuania, Latvia, Romania and Ireland. The salaries of judges and other employees of the courts have been reduced, sometimes by more than 20%. Also, related costs, such as the contribution to pension funds have been charged to the judges more than before. In most instances constitutional courts have considered or are considering the acceptability of these measures. In Ireland a referendum was needed to amend the constitution so that the salaries of judges could be reduced. Many other countries have frozen salaries, such as Poland and the UK. These measures are generally part of pay cuts or freezes impacting all civil servants, from which judges are not exempted, but usually judges are not more adversely affected. However, in Portugal and Slovakia salaries of judges were reduced more than those of civil servants.

A problem with the intervention into the salaries of judges is the potential threat it raises to the independence of the judiciary. Salary cuts can be used as individual or collective punishment. Another issue is that excessive reduction of salaries of judges could make the judiciary vulnerable to undue interference. It can also affect the quality of justice in that judicial bodies become less attractive as employers. It is known that some judges have resigned following the salary cuts. Salary reductions are emergency measures that, unlike the reforms discussed below, have the characteristic that they yield quickly which is an advantage, but they contribute in no way to the performance of the judiciary.

The widely shared view within the ENCJ is that as long as the reduction applies equally to all public sector salaries, judicial independence is not compromised. Despite this, the remuneration of judges should remain commensurate with their profession and responsibility, and therefore any reduction of remuneration should only be considered in extraordinary economic circumstance, and it should be strictly limited in time. Furthermore, it is widely felt that the salaries of judges as well as prosecutors should be determined by law, so as to guarantee judicial independence, and any review or determination should involve the judiciary itself. Such decisions should not be discretionary decisions of the executive.

15 Responses to ENCJ questionnaire by the court administrations of Ireland, UK and Lithuania.
16 Judiciary is defined here as the ensemble of judges, their legal staff and all administrative staff as well as governing bodies of courts and councils for the judiciary.
5.2 Reduction of Volume of Cases

Reduction in the number of court cases is an important issue in many countries. As argued above, the judiciaries of most countries are struggling with large and increasing caseloads and budgets that do not keep pace. There is also the belief that there are too many unmeritorious cases and in-case applications primarily motivated by delay tactics.

Increase of Court Fees

To reduce the volume of cases and also to generate more income court fees have been raised in many countries. The decision to increase fees is commonly made by the legislature rather than the judiciary. In some countries the increase is intended to reduce the number of unmeritorious cases or applications that are chiefly designed to delay proceedings and even to get them shelved indeterminately (Portugal, Greece, and Italy).

Other countries introduce such measures mainly to produce a greater yield (Latvia). Nowhere were rates considered that even come close to the rates that have been proposed in the Netherlands. If this proposal would have been adopted, the fees for civil cases would become higher than the actual cost price of proceedings. The proposal was, however, defeated in Parliament, but lower options are still under consideration. It is noted that in some countries the courts themselves determine the legality of increases, either by their role in checking the consistency of laws with the constitution or by interpreting European law.

Reducing the Volume of (appeal) Cases by Law

Another way to achieve a reduction of caseloads is to limit access to justice by law, for instance by setting a financial minimum for civil cases, such as in Germany. This approach seems to focus primarily on reducing the amount of appeals. In several countries, measures have been taken to simplify the appeal process, and thereby reduce the number of unnecessary appeal hearings. Norway and Austria provide examples. In the European judiciaries there seems to be a preference for various forms of leave arrangements, which allow judges to determine themselves which cases merit appeal, instead of mechanically applying legal provisions. There are many cases in which it is immediately clear that the decision of the court of first instance will hold. In those cases appeal hearings are a waste of time.

Expanding Alternative Dispute Resolution

Finally, in many countries Alternative Dispute Resolution (ADR) is promoted. Its success varies greatly. In several Eastern European countries, voluntary mediation seems not to be working: parties insist on a court decision. On the other hand, in the UK and Ireland pre-procedures are mandatory, at least in the sense that in court decisions it is taken into account whether a party has or has not seriously attempted mediation. Obviously, in these countries there is popular and parliamentary support for this approach. The Netherlands has taken an intermediate position. In the Netherlands, most disputes are traditionally settled out of court by negotiation. Mediation is not mandatory or controversial, but it is not used much. Surprisingly, ADR is often not evaluated from the perspective of the litigant. In general, evaluation is confined to the question whether ADR leads to less court cases. The issue of whether litigants are better off as a result of mediation, in particular, in terms of time, costs and quality of the outcome, is generally not addressed. One of the few exceptions is a study for the Netherlands. In this study it was found that, despite high success rates of mediation, it took more time and was more expensive on average, taking into account the adjudication of cases in which mediation failed. Reportedly, in Austria mediation leads to lower costs, taking all these factors into account. Apparently, the question of whether or not litigants are better off by using ADR has not been answered and depends on local conditions.

Reduction of caseloads by these three measures saves costs and, depending upon the budgetary system, may help to reduce court delay. It can also lead to the allocation of scarce resources to meritorious rather than frivolous cases. Extra revenue is raised when court fees are increased. The main disadvantage with higher fees is that such measures reduce access to justice: an increase in fees infringes the fundamental right of access to an independent and impartial tribunal established by law (art. 6 ECHR). Also, when substantial numbers of cases cannot be brought before the courts anymore, the protection of rights is not enforced in full, and this will result in damage to, for instance, the economy. Increased use of ADR may contribute to a reduction of caseload, but it is not guaranteed that litigants are better off.

The view of the ENCJ is that the reduction of caseloads must not be a goal in itself. Any measures, including increase of court fees, must leave access to justice intact. Measures aimed at discouraging frivolous cases are useful, providing such measures do not impede meritorious cases going to court. If court fees are increased, the financial circumstances of the parties have to be taken into consideration, either by differentiating tariffs or by legal aid. Regulating access to appeal

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20 ENCJ, 2012, op.cit., p. 9
should preferably be done under the auspices of the judiciary, taking the merits of cases into account, and not by mechanical legal rules.

5.3 Reorganization of the Courts

Most European countries are geographically consolidating judicial functions, thereby reducing the number of courts. These reorganizations are not only driven by financial reasons. Some countries do so to enhance the quality of justice. This is the case in Denmark, Norway and the Netherlands. These countries have not achieved net savings or do not expect to realize savings from reducing the number of courts. In most other countries it is expected that, besides higher quality, cost reductions can be reached by closing underused and sometimes even run-down courts, and shifting the cases to nearby courts. This is the case in Portugal and Greece, but also in countries as diverse as Austria, Ireland, UK, Poland, Romania and Turkey. In addition, the Netherlands, Poland and Turkey are consolidating the management of the remaining small courts to reduce the costs of management and overhead in general. In other countries, such as Belgium that has 320 courts, the revision of the structure is considered necessary, but consensus on specific measures has not yet been reached. Besides savings and quality in general, specialization, ensuring the minimally necessary number of judges, introducing new technology and improving timeliness are mentioned as motives for up scaling. Consolidation of courts has therefore advantages from the perspective of quality of justice (specialization) and timeliness (less delay due to absence of judges). These reorganizations all lead to larger travel distances for parties, and thus to the deterioration of geographical access to justice. It seems, however, that many judiciaries no longer attach much weight to this problem. Part of the explanation is that the physical presence of parties and other trial participants such as witnesses is becoming less important as the implementation of information technology, particularly video conferencing, is gradually becoming standard in large countries, and participation in a hearing remotely is not seen as a serious obstacle by many.

In some countries, such as the UK, the desirability of a visible presence of the judiciary in local communities is an important consideration, particularly in local criminal cases. As the saying goes “Justice must be seen to be done”. This argument is comparable to the periodic discussion of community courts in, for instance, the Netherlands, but it is not considered to be decisive. Finally, it is striking that many countries expect cost reductions while others do not. Obviously, local circumstances differ, but the risk also exists that the potential for cost reduction is overrated, and/or the time needed to realize these reductions is underestimated.

In the view of the ENCJ, consolidation of courts must be motivated by the need to provide high quality justice, and not solely by potential cost savings. Judiciaries should evaluate carefully whether net cost savings can be reached by merging courts, and must take into account that it could be many years before the desired savings can be effectively achieved. Consolidation of courts should be accompanied by increased utilization of ICT to reduce the frequency of necessary visits in person by parties to the courts. Also, ICT should be used to increase the visibility of court proceedings.

5.4 Reduction of Costs per Case

The measures discussed so far are the major approaches found in European countries seeking to reduce cost. Almost all countries are also working on simplifying and digitalizing procedures, however, mainly with the aim of shortening lead times and improving other aspects of quality. Still, this will result in lower costs per case.

Simplifying Procedures

A first aspect is the reduction of the number of types of procedures, as is occurring in Italy and is contemplated in the Netherlands. This is a step towards simplification of the procedures themselves and towards simplifying supporting IT systems. Concerning the procedures themselves, the common denominator is the introduction of simple and fast procedures, which allow the judge tight control. In such procedures the repeated exchange of documents and the postponement of cases become the exception. Also greater use is made of oral sentencing to avoid long, written sentences. In some countries attempts are made to prevent dysfunctional adversarial tactics by lawyers, for instance by punishing lawyers (financially) who cause unnecessary delay or who register frivolous cases.

Particularly interesting is the radical redesign of procedures, instituted as a pilot program in Ireland’s commercial court. The length of civil proceedings has been reduced to 9-12 weeks. In the Netherlands experiments are underway that pursue a similar result. Also, a new procedure has been introduced in administrative law there to speed up proceedings: within 13 weeks a hearing has to take place. At the end or immediately after this hearing the judge proclaims his decision. Only in very complicated cases further hearings are allowed. It is expected that the number of settlements will increase, and the duration of the procedure will be reduced to six months on average. Furthermore in several countries small claims

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24 ENCJ, 2012, p. 11.
procedures have been developed. These procedures have simplified procedures, strict format and low costs in common, and lend themselves for digitalization.

**Digitalizing Procedures**

These changes are often implemented in combination with the digitalization of procedures. Filing cases electronically and electronic exchange of documents with digital signatures are rapidly becoming common. The already mentioned commercial court in Ireland is an example of an integrated approach towards simplification and digitalization. The term "e-court" is spreading. Often this refers to small claim procedures such as in the UK, Poland and Ireland, but the use goes much further. Another promising area is electronic case tracking, which provides the capability of following the progression of cases on the Internet. In the Netherlands and Austria, such a system exists for lawyers who can monitor their cases on line, but not yet for litigants. At the High Court of Ireland it is possible for anyone to examine the status of cases on line, while in Romania everyone can consult the Internet site of the judiciary for information on parties, procedural delay and judgments.

Turning to the use of IT in courtrooms, in many countries the written record has been or is being replaced by audio and/or, as in Sweden, video recording. In this country, the appeal procedure is completely based upon the procedure in first instance. The appeal hearing uses the video footage of the hearing in the first instance. Hearing of the same witnesses again is not allowed unless important questions were not adequately addressed at the first instance trial. New or supplemental witness evidence is always allowed. Video conferencing is used in many countries, although the nature of use differs. In all countries, video conferencing is used to hear parties and others such as remote witnesses and to protect vulnerable or anonymous witnesses. In several countries, this is the extent of the use of video conferencing, but in countries with large travel distances, video conferencing is used more extensively, and leads to large efficiency gains for the parties. There is still a lot of debate about whether considerable information is lost when people are not physically present. In Latvia the judiciary has experimented carefully with both audio recording and video conferencing, and both techniques are now being introduced nationwide. In Turkey audio and video technology is used to avoid having to bring defendants in criminal cases from prisons to the courts.

Use of better IT systems can reduce the costs of the courts. The maintenance of a variety of IT applications, however, can be very costly, and integration can be much more cost-effective. One of the examples is the integrated court IT system that has been put in place in Turkey. This system incorporates applications that allow documents to be sent in electronically, the use of electronic signatures as well as the registration of cases.

**Stricter Case Management**

Case management is an important tool to increase the efficiency of court proceedings. In several countries (the UK and Norway among others) pre-trial conferences are held to plan proceedings. Early guilty plea procedures have reduced the delays in the second tier courts. In Ireland, Austria, Norway and the UK lawyers are required to identify in advance the witnesses whose testimony they want to present. In other countries conferences are more voluntary in nature. Another possibility is to have a first hearing of a case at a very early stage (in the Netherlands in administrative law). In this hearing the case is either decided immediately or, in more complicated cases, the further proceedings are scheduled based upon the issues that need to be clarified to decide the case.

All these measures individually, but in particular in combination, reduce the duration of court procedures and increase the efficiency of these proceedings. The efficiency gains that have been achieved or are envisaged by these developments have - to our knowledge - not systematically been calculated, but according to most observers these gains are very large, and offer the possibility of substantial and structural cost savings. As access to services in society in general has already largely been redefined as electronic access, judiciaries have to keep pace with this trend in society. Electronic access to justice is a necessity. It should be realized, however, that digitalization is a large, time consuming operation, of which the costs precede the benefits. Substantial capital investment is needed. The question that can be asked is whether the demands of a fair trial are still fully met by these simplified and digital procedures. In practice the judiciaries do not perceive this to be a significant problem. Most judges welcome these developments wholeheartedly.

In the view of the ENCJ, simplification of judicial proceedings, improvement of case management and introduction of new technologies offer the chance to modernize the administration of justice, thereby improving access to justice, quality of justice as well as efficiency. All judiciaries need to adopt innovative programs to reach these goals. As these innovations require the modernization of procedural law, these programs require the close cooperation of judicial organizations and government agencies responsible for the relevant legislation.

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5.5 Redistribution of Tasks

The basic idea of redistributing the tasks of judges and support staff to allow judges to concentrate on the core of their judicial tasks has been put into practice by various countries. In countries as diverse as Poland and Spain reorganizations are implemented in which judges shift work to administrative and legal assistants. In many countries there is room for improvement in this area: judges often perform relatively simple, administrative tasks that may just as easily be done by staff. They often perceive this as not satisfactory. Also, depending on the legal system, legal staff can be utilized to prepare cases and/or drafts of verdicts and/or to preliminary screen cases, to determine for instance, whether or not cases are eligible for appeal. In Ireland the high court successfully uses judicial fellows, (comparable with the US law clerks) to prepare cases. Another option is to delegate simple judicial functions to legal staff. This goes, however, against the independence of the judiciary, as only appointed judicial office holders – including lay judges – should make judicial decisions. Delegation of tasks to judicial office holders with a brief confined to simple judicial decisions is a distinct possibility. An example of this is the use of Rechtspfleger in German and Austrian courts.

The experience in the Netherlands and Spain has been that delegation leads to higher efficiency, only if judges trust their legal staff, and do not feel compelled to monitor their work intensively or redo much of their work. To ensure this a highly qualified legal staff is needed, but it also requires judges to adjust to working in teams instead of alone.

In the view of the ENCJ redistribution of tasks within courts allows judges to concentrate on their core judicial tasks, and this is an important goal in itself, apart from the cost savings that may be realized. To be effective, judges must be provided with all necessary support. They must be able to rely on their staff and this requires highly qualified staff.

5.6 Allocation of Cases across Courts and Judges

Optimization of the workloads of courts and judges has been identified as a priority matter for judicial reform in most of the responding countries. Many resources are wasted when some courts and judges do not have sufficient, full caseloads when other courts and judges have too many cases. In some countries flexibility exists in the allocation of cases across courts to equalize workload. The implication is that parties have to travel further, and in some countries the choice is left to the parties: either wait for their case to be heard in the court nearby or have their case immediately heard in a different court located at a further distance. An alternative to this approach is to have judges of other courts work temporarily at the courts that have too many cases, for instance, by secondments of judges. In Romania the national IT system of managing the files provides for case management and assignment across courts. It provides a random distribution system to ensure a balance in the distribution of cases between judges.

The ENCJ recommends that, while maintaining a transparent mechanism, the allocation of cases to courts and judges should be made more flexible in order to utilize the deployment of judges better.

5.7 Reducing Bureaucracy and Overhead

Reducing bureaucracy in general and centralization of support and administrative tasks are part of many of the discussed reorganizations. It must be noted, however, that quite a number of courts still lack the most essential information about processing time and backlogs of cases. Without this information proper and timely justice cannot be guaranteed. Courts need staff to gather and analyze data. Innovation and deployment of IT also require manpower outside the primary processes for the adjudication of cases. It has to be recognized that digitalization results in courts changing from organizations of people to organizations of people and information systems. This leads to a different staffing structure and to IT taking a larger part of the budget. In many countries, reducing overhead is considered possible by closing small courts, yet at the same time more high-quality business and IT knowledge is introduced in the courts.

In the view of the ENCJ, reduction in overheads is desirable, but must be carefully balanced with increasing needs to have adequate information about caseload and processing time.

5.8 Improving Budget Systems

In the judiciaries of most countries, there is no explicit link between the number and complexity of cases and budgets, with the result that both can easily diverge, and workload, lead times and case inventories get out of control. In this situation governments may be tempted to impose austerity targets, ignoring the consequences for court delay. This has happened in various countries. A disparate relationship between the number of cases and budgets is usually accompanied by the absence of clearly stated expectations with regard to what can be considered as a “regular production of judges”. In many

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countries, this state of affairs is viewed as no longer tenable, and workload measurement systems and methods of performance budgeting are implemented. The budgetary system of the Netherlands is often seen as an example: budgets are strictly based on projected output, differentiated by workload. This system has allowed the judiciary to expand sufficiently even under adverse economic conditions when caseloads rapidly increased.

It should be recognized, however, that many judges in the Netherlands feel that the system is too “technocratic” and constricting. Efforts are underway to simplify the system. Within the ENCJ the prevailing opinion is that a more businesslike approach to management and finance is desirable, as it promotes, on the one hand, the functioning of the courts, and gives stronger incentives for the efficient use of public funds. On the other hand, it promotes the independence of the judiciary by making one of the vulnerable links between the judiciary and the other state powers much more transparent: more cases means more budget; otherwise court delays will increase.

The ENCJ view is therefore that the funding of the judiciary should reflect its need to manage the caseload properly. Only in this way can timely justice be guaranteed. While it is recognized that funding based on output requires the measurement of output and processing times (workload measurement), such measurement systems need to remain simple, and the outcome measures should be used with caution to safeguard judicial independence. For instance, workload measurement norms should not be applied mechanically to individual cases. Furthermore, to ensure and strengthen the separation of powers, the judiciary should be closely involved at all stages in the budgetary process and should be responsible for the financial management of the courts individually and as a whole, within the budgets allocated to them.

6. Evaluation of Measures and Reforms
The discussion so far shows that, while in many countries reform of the judiciary is on-going, the economic crisis has led to additional measures, and has also speeded up reforms. To evaluate the merits of these measures, they should be evaluated against the core values of the judiciary. We distinguish three areas with respect to core values: first, access to justice: the right to see a judge at reasonable cost including travel cost and time and in a timely fashion; second, impartiality and independence; and third, high standards of professionalism.

Figure 3 provides a matrix of measures and core values and our assessment. This is to some extent subjective, and not all nuances are taken into account.

<table>
<thead>
<tr>
<th></th>
<th>Access to Justice</th>
<th>Independence</th>
<th>Professionalism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduction of salaries or freezing of new appointments</td>
<td>-</td>
<td>-</td>
<td>--</td>
</tr>
<tr>
<td>Reorganization of courts: re-drawing judicial maps/jurisdictions</td>
<td>-/0</td>
<td>0</td>
<td>++</td>
</tr>
<tr>
<td>Reduction of volume of cases by increasing court fees, by law or expanding ADR</td>
<td>-/+</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lowering costs per case: simplifying and digitalizing procedures and strict case management</td>
<td>++</td>
<td>0</td>
<td>++</td>
</tr>
<tr>
<td>Delegation of tasks</td>
<td>+</td>
<td>0/-</td>
<td>++</td>
</tr>
<tr>
<td>Flexible allocation of cases over courts and judges</td>
<td>+</td>
<td>0/-</td>
<td>0</td>
</tr>
<tr>
<td>Reducing bureaucracy and overhead</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Improving funding systems</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

Figure 3. Evaluation of measures against core values of the judiciary.

To advance the judiciary, the current short-term expenditure reducing measures are detrimental. Clearly, simplifying and digitalizing procedures in combination with strict case management is the best option, followed closely by improving funding systems and delegation of tasks. Redrawing judicial maps/jurisdictions has also a strong potential, especially if the negative impact on geographical access to justice can be mitigated by modern information technology.
7. Process of Reform

Content is not the only thing that matters. Brilliant ideas can be brought to nothing, if they are forced upon the people who are supposed to put them into practice. The responses to the ENCJ questionnaire showed that judiciaries (judicial councils, courts, judges) are often not sufficiently involved in devising a development strategy for the units involved, but rather the important decisions are drafted and adopted by the executive and legislative branches of government, and subsequently enforced. Moreover, decisions about budgets are heavily influenced by the ministers of Finance, especially when budget cuts are part of measures that affect the whole public sector. The reduction and freeze of salaries are a case in point. As the funding systems of the judiciary in many countries are weak in themselves, judiciaries are vulnerable to ill-informed outside interventions. Furthermore, ministries and parliaments are not always aware of the importance of a well-functioning, independent judiciary for society in general and the economy in particular. While supranational organizations such as EC, ECB and IMF express such awareness (see section 2), individual governments not always act accordingly. Consequently, the conditions for effective judicial reform are not met in most countries.

In the view of the ENCJ, the starting point for any reform must be the understanding that the principle of separation of powers is crucial to effective democratic government. It is essential to preserve this principle at all times to ensure good governance for all citizens in a safe, legal environment. One of the three branches of governance is the judiciary - the branch that is responsible for safeguarding the proportionate justice delivered to the citizens by the courts. While taking the separation of powers as starting point, it must also be recognized that judicial reform cannot be handled by the judiciary alone. Laws that regulate judicial procedures must also be revised. Judicial reform thus requires the cooperation of the three branches of governance, and it is necessary that the judiciary be involved at all stages of reform. It also has the hands-on experience others lack. In this process, the judiciary needs to be pro-active in recognizing the need and criteria for reform, to initiate discussions and present ideas. Finally, it is important that reforms are not driven purely by financial considerations, but by longer-term factors.

8. Conclusions

The judiciary is the key component of the legal institutions that provide the framework in which welfare and economic growth can be generated. Irrespective of the approach taken, research shows that its contribution to the economy is great. In some countries judicial reform is an important part of structural reform to overcome the economic crisis. The role of the judiciary is particularly important during economic downturns. In such periods the volume of court cases increases, while the pressure on public finance increases as well, endangering the budgets of judicial organizations. The combination of a larger caseload and lower budgets leads to acute increases of court delay, which then hampers economic recovery. In many European countries this is exactly what is happening, and it is a major concern.

As was shown, a variety of measures and reforms are being implemented, partly productive and partly counterproductive. Within the judiciaries of Europe broad consensus exists about the directions judicial reform should take. In nearly all countries judicial maps are being redrawn with the result that the judicial function will be concentrated in fewer courts, and judicial procedures are being redesigned with the aim of simplifying procedures, digitalization and stricter case management. Reduction of the volume of lawsuits is not in itself a goal, but the incidence of frivolous cases and delay tactics need to be addressed, while maintaining access to justice for all other cases, irrespective of the income of parties. It is also recognized that there is a need for better funding systems of the judiciary that guarantee its independence and promotes the efficient adjudication of cases. Finally, in many countries efforts are under way to better organize the courts. Redistribution of tasks, efficient allocation of cases over courts and judges, and reduction of overhead are cases in point.

The ENCJ notes that in many countries these reforms must be implemented with lower or at the best current budgets. That makes implementation difficult. Fundamental reforms take time, and their costs precede the benefits. Nevertheless, these reforms are the best strategy moving forward. Short term cost reductions such as large salary cuts do not contribute to necessary reform, and pose a threat to the functioning of judicial organizations. Judiciaries should take the initiative and supply the ideas for reform. They should try to convince governments that long-term reforms are needed, despite the fact that these reforms only gradually deliver cost savings. This choice is only possible if the starting point is shared, in the words of the Vilnius declaration, that "Every economic measure, however transitory it is, is likely to affect the judiciary, must preserve the essential role of justice in a democratic society. The judiciary must continue to guarantee, even in stringent economic situations, the fundamental right of every citizen of access to justice, effective protection of fundamental rights and the delivery of quality justice in a reasonable time."
**Trial by Tweet? Findings on Facebook? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts**

By Dr. Pamela D Schulz and Dr. Andrew J Cannon

**Abstract:**

The growth and exponential influence of social media challenging modern media outlets and the scope of participants is rivalling that of nation states. In addition the power of this media spectrum is forming another style of Public Square in cyber space and the demise of the spiral of silence. In turn this appears to be democratic input that can affect public policy and perhaps affects court administration and outcomes. This paper argues that while Courts must become more media savvy and modernise their methods of information outputs, it is also incumbent upon them to consider the theoretical impact and practices at work and how to ensure the delivery and dissemination of relevant responsive information and maintain the integrity and independence of Courts and the Judiciary.

1. **Social Media and a Brave New World**

Social media has been heralded around the world as the new way of sourcing information and communication and this new social world appears in some instances to be the predicator of a different style of democracy conducted by user generated content. The site *Facebook*, which is expected to have 500 million users by the end of 2012, and *Twitter* are larger communities than most nation states. The image hosting site *Flickr* also hosted more than 3 billion images in 2010 and photographs making the world famous libraries and museums pale by comparison. 75% of all internet users used social media in one form or another7. There are more than 1.5 million private blog sites on line. This is a profound change from the western cultural model of the management of power. This article discusses how courts, who are part of that power arrangement, should engage with this new media to ensure that their role as bastions of independent principled appliers of a rule of law is understood and appreciated in the broad community.

Western power arrangements have long been based on the nation state which claims a monopoly of power over people in a defined geographical area.iii Discourse in the community has been substantially directed by political, business and media leaders who have interconnected interests. So as to ensure that conflict is resolved peacefully and without threatening the position of authorities, the State intermediates the exercise of its power over citizens through the court system which also ensures that disputes between citizens can be resolved peacefully. In better examples the population exercises a degree of control over the powerful elites by the free election of the political leaders, the media discourse is lively and free ranging and the court system is fully independent of executive government.

There was a time when the work of courts was accepted without substantial criticism and the Attorneys-General of modern democratic states would speak up for and defend the courts. Those times are long past. The power of the nation state is declining as against large corporate interests, court systems are being privatizediv and parallel to this ownership of the traditional media has become increasingly concentrated at the same time as its influence is challenged by the fast emerging social media. Discourse around courts has increasingly focused on a ‘law and order’ rhetoric. Notwithstanding low crime rates and relative safety, politicians and media have manipulated fear of crime to gain public attention and courts have suffered collateral damage and sometimes direct attack in a discourse of disrespect about their work in controversial cases.v

To some extent the new media is still just an extension of the media spectrum of old but with a modern twist. That twist is to encourage andenthuse the users to log on and to consume media in its myriad contexts and platforms which are incredibly mobile. These contexts are now being designed to excite, enthuse and to disturb as part of what has been described in Australia as *infotainment*. vi This form of *infotainment* is now part of a spectrum that finds itself lodged between the cult of celebrity and the notion of the fear of crime that feeds what some journalists describe as the “hungry beast”vii, an ever hungry, and never sated, media that needs to fill a void 24 hours a day 7 days a week. The notion of media agenda setting by opinion editorial pages in large national dailies is diminishing. Well known media blog sites still attempt to keep the community scared or titillated and lead discussions on matters political and social, but increasingly they have lost control over community discourse which freely swirls around social media unconstrained by the control of nation state leaders. The current media climate is different from that of only a decade or more ago. The concept of mass

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1. Dr. Schulz presented a version of this paper at the International Courts Administration Conference in The Hague, June 2012.
2. Dr. Pamela Schulz is a part time lecturer in Graduate Studies in the School of Communication and International Studies at the University of South Australia in Adelaide. Dr. Andrew J Cannon is Deputy Chief Magistrate and Senior Mining Warden of South Australia and adjunct Professor at Münster University and Flinders University Law Schools. The authors acknowledge the interest and suggested sites provided for this paper by Markus Zimmer.
media where a passive audience would receive and respond to messages whether from news or from marketers has been overshadowed by the interactive form.

The issue for Courts is now clear. Should they allow themselves to shrivel under the increasingly strident and opportunistic criticism of their work by the declining nation state leaders, or should they consider ways in which this new but powerful method of communication in social media can direct and pull audiences so that they understand and value the courts as a bastion of integrity in a world of celebrity. Can this be a way of showcasing institutions of independent rigor in a world that is often at the mercy of public generated hatreds based on shallow discussion of distorted facts? To answer this question it is necessary to consider the implications of these fast emerging new social media discussions.

2. Implications of Social Media
What seems to be at work at present is the beginning of the end of the spiral of silence viii which at one time kept whole groups of people quiet and afraid to contest or challenge public policies and ideas and who did not speak out as the number of people who did not accept their view appeared to be in the majority. Members of a community do like the opportunity to be heard within what Habermas termed "the Public Sphere" but when that is offered it becomes clear that the more educated and ideologically motivated members of a community are likely to attend physically. The domination by business, political and media elites of traditional media discourse is an example of this phenomenon and often leaves the "silent majority" simmering with voiceless anger. The new public square at work in cyberspace gives often anonymous voice to personal points of view. ix Social media provides for those less inclined, or less educated and thus less confident to attend in physical spaces, opportunities to express their views within cyberspace. The growth of the citizen journalist has also exaggerated this in quick time with more and more blogs becoming the mainstay of the media cycle. People are keen to be seen as being heard in modern deliberative democracies and the voice of the people known within media by the term vox pop is truly representative of their points of view. This in turn then suggests that emerging communities of interest are gaining more power and influence via the new public squares offered by modern media and social media.x

It is interesting to see what they are discussing. Studies of uses and gratification theory into how modern users of the myriad choices of media platforms show that the various forms of digital media presently promote points of view of consumerism and consumption rather than being used to empower the users themselves. xi A quick snapshot using discourse analysis by the author Schulz especially prepared for this paper of the top trends and topics on twitter in April 2012 gives some insight into the use of this new technology.

3. Favored Subjects on Twitter

![Tweets by category chart]

<table>
<thead>
<tr>
<th>Tweets per 100</th>
<th>topic items</th>
</tr>
</thead>
<tbody>
<tr>
<td>vanity tweets by celebrities</td>
<td>0</td>
</tr>
<tr>
<td>song titles</td>
<td>10</td>
</tr>
<tr>
<td>jokes</td>
<td>20</td>
</tr>
<tr>
<td>personalities</td>
<td>30</td>
</tr>
<tr>
<td>TV programs</td>
<td>40</td>
</tr>
<tr>
<td>information fr organisations</td>
<td>50</td>
</tr>
<tr>
<td>politics</td>
<td>60</td>
</tr>
<tr>
<td>news commentary</td>
<td>70</td>
</tr>
<tr>
<td>other</td>
<td>80</td>
</tr>
<tr>
<td>information fr organisations</td>
<td>90</td>
</tr>
</tbody>
</table>
The topics most favored were celebrity and personalities while news commentary has climbed into the 20+% mark in addition to discussion of politics and other discussions. Although the chart above is just a snapshot and can change rapidly it gives a useful indication of the nature of this media traffic. This augurs well for news outlets and others who see opportunities to influence and use this to drive people to their on line news sites. Organizations are beginning to use the service to promote information to targeted audiences and this is currently running at around 10% of traffic.

Commentators on this cacophony of new voices in cyber public squares of citizen journalism are identifying different sources of discussion and emerging themes. The Panopticon theory of societal control contends that all major controlling organizations need a watch tower approach to viewing and scrutinizing the behavior and reporting on them. This concept was first used by Bentham in his work on prison reform and hospital surveillance techniques. Modern interpretations of this theory is that the mass media until recently has become the watch tower and then instructs a community on how to react by agenda setting. In a safer society that has become more risk adverse fear discourse has been used by the mainstream media to attract the attention of a public increasingly distracted by diverse sources of information, with a heavy focus on discourses of disapproval, tough on crime political debates and Law and Order as entertainment. Political commentary has become a game of catch the mouse as politicians are asked to rule in or rule out simplistic options and then if they make a mistake this is the story, not the substance of policy. However mainstream media is suffering diminishing returns as speed of light communication undermines the importance of the daily newspaper supporting the daily TV news services.

E juries, as the author Schulz calls the new judges of community events, and citizen journalists are now taking on the Panopticon role in greater numbers. This offers opportunity to participate without the problem of face to face debate and allows ideologically based information to be more widely disseminated preventing the Noelle-Neumann Spiral of Silence which had in the past kept people away from such topics. It now appears that open slather arrangements of information are expected and often are the predicators of news whether they appear to be true or based on innuendo or rumor. This may lead to major discomfort for celebrities faced with what the author Schulz calls as trial by tweets or blogosphere juries.

The tweets show the strong cult of celebrities, some of whom are purely narcissistic, while others use the attention they have to influence public opinion. Groups of people are now in a position to feel the power of having influence on outcomes where in the past this may have been denied to them and they are actively pursuing this choice. For the novice social media can be a minefield of potential error and may lead to mistakes in judgment on both a personal and professional level. This has already been well established with the downfall of some of these celebrities who did not think before adding information to blog sites or web pages or compromising themselves in public and being hurt when their frailties or more are exposed to public gaze.

Contested space theories hold that the media as selects and frames what can be seen or should be reported about traditional institutions such as courts. The media stand between administrators of the organization and its work and lead the public in their thinking. This has now changed with the growth of the citizen journalist who is now contesting media space with mainstream media. The organizations are at risk of being framed adversely, in an ill-informed discourse of disrespect unless they engage with this new social media.

According to Technorati Media, a social media information website, the difference in social media is the notion of users determining and setting the agenda, and that the content reflects that of the main client base. In addition the audience focused interactions means that the outreach is very diverse and encompasses a range of information and ideas that are not typical of one way communication processes that have been so comfortable for marketing and communications specialists in the past. These types of interaction are more in keeping with the two way communication model which advocates that in order for information to be truly absorbed and understood the organization, in addition to direct one way dissemination of information, should find peripheral routes of persuasion to connect with consumers and responsive two-way routes, to ensure key messages are being received. This approach encourages would be consumers of a message to inculcate it in as many ways as possible so that it finds the most appropriate connections and is understood and reinforced.

While the above gives a brief explanation of how the new social media is affecting discourse in modern society, courts and their judiciary and administration are mostly holding on to their own Habitus or cultural tradition that holds courts as separate, independent and above the fray. The question is whether in this new and constantly changing and challenging world of e-communication, they can afford to remain aloof as this will leave them misrepresented, diminished and ultimately irrelevant.
Now that the privileged few no longer control the discourse in modern democracies there is a view that being heard in modern democracies is vital. Although courts will not wish to attend rallies in the modern electronic public square should they consider using modern social media to inform and participate with the society of the citizens they serve within the justice system?

4. Social Media Innovation for Modern Instrumentalities

There is now a plethora of government and other government funded organizations that have taken on the challenge of Social Media as a form of strategic communication. Many government websites now have official Facebook and Twitter accounts but there room to doubt whether they are effectively using the push and pull strategy that has been identified as part of effectively using social media. The push strategy, which is described widely in marketing and communication literature, is the manner in which points of view are disseminated via various strategic tactics designed to get a point of view into the public domain while a pull strategy is designed to draw people and audiences toward an event product or concept. Social media is particularly valuable to encourage would be audiences to log on or respond to some “call to action” which is seen as a key to getting a targeted audience to react to a particular message. Mergel indicates that this networking strategy via the use of social media tools is:

‘highly interactive with a lot of back and forward between the agency and its diverse constituencies’. The new media directors usually have a sense of who is following them and who they want to reach. They are using Facebook, Twitter, etc., very strategically not only to control and direct messages to their audiences, but also to have their ears and eyes on the channels where the actual issues are being discussed that might be of relevance to their agency’s or department’s mission.’

Social media tools are not used merely for publishing purposes but it needs care to ensure they do not become a time sink of the already overworked IT staff, but rather as a strategic information sharing and knowledge creation tool involving social media champions from different content areas. However, the social media phenomenon that is sweeping the world has its limitations and must be seen in the context of the whole current media spectrum and not as an entirely different entity.

This now sets the tone for how Courts should view and use this emerging and powerful new communication tool.

It can be vital for courts to publicize decisions and modern media can certainly be effective for that. For example a court in Malaysia ordered an apology by tweet as reported on several blog sites (June 2nd 2011) in a defamation case. This in turn attracted substantial media interest. The push factor in putting out significant and important messages is a useful way in getting in touch with targeted users especially on Twitter where the concise use of 140 characters is the method of choice to present information quickly and efficiently. The problem for courts is that complex and difficult legal arguments, decisions and outcomes including sentences or significant decisions cannot be captured in a tweet. Some news organizations have pushed for tweeting to be allowed in court (Herald Sun Melbourne Boston Globe, etc.) and some news organizations around the world have “guest tweeters” chatting to an online and ever growing interactive audience. Although such reports may seem banal, they do engage an ever widening audience in the work of courts. Once engaged it is possible to then pull them to other court media sites that discuss issues more comprehensively. It is doubtful that the courts could afford specialist tweeters to distil such issues for speed of light transmission but they may be able to permit accredited media to do so and review their tweets to ensure the dialogue does not damage usual rules of propriety.

The Courts in England and Wales have issued a standard protocol in which tweeting, emailing and texting of messages from hand held unobtrusive devices is now permitted from courts under the direction of the judge and this is being mirrored in other parts of the world such as the USA and Australia (see Ramasatry 2010). Already however, the concept of mistrial and wrongful information looms large. At the time of finishing this article in September 2012 there has been the suspected rape and murder of a journalist in Australia. The publicity given to this by the media during the search for the offender engaged social media in a major way. When a Facebook page was established to assist in the search for her it attracted 120,000 likes, some of which assisted police in their investigation. When her body was discovered and an accused charged, 30,000 people took to the streets of Melbourne to express sympathy. Meanwhile details of earlier sentencing remarks about the offender with clear potential to prejudice his ultimate jury trial have been posted on Facebook leading the police to express concern about “a trial by social media” and how it might prejudice the trial. Facebook initially refused to take down the offending page. This is a good example of how traditional media can push a story but then it gains its own life on social media, with consequences that may affect the ability of the court system to deliver, in its terms, a fair trial. This problem may be less profound in civil code inquisitorial systems, because the fact finders are used to being well informed about the background of the accused but it challenges the common law jury trial method, where lawyers routinely keep information such as the offenders prior convictions from juries, on the basis that the prejudice outweighs any probative indication that the offender committed this new offence. The ability to censor this
information does not extend to the internet so that the new social media paradigm may make the exclusion of this information from the jury unworkable in notorious cases.

Again in Australia government and court orders for nurses to desist from strike action were challenged on Facebook and this generated such high levels of public support for the nurses as to challenge the credibility of the court orders. This clearly shows how the lack of control of information output and discourse can lead to mistrust and organizational or reputation problems as the government, and the court, struggled against the onslaught of public support for nursing staff.

Of course courts are increasingly using new media as a communication tool. Some courts tweet to connect with a target group of users who need information such as plaintiffs, defendants, legal counsel, or even jury members to report for duty. The Family Court of Australia has recently established a twitter feed and in the United States a court has ordered a virtual visitation to children by Skype for those parents who cannot afford to travel. The Courts Service Ireland web site in six languages provides good information about the work of the courts and up to date judgments on line, and an interesting on line small claims system. The United States Courts, in addition to comprehensive information about the work of the US Federal Court, has a regular news services and email alerts for important news items.

In addition there have been examples presented from the USA as indicated by Norman Meyer in his summing up as Chair of the Panel at the recent international IACA Conference in The Hague. He pointed out that several courts around the world had taken the initiative to proceed with innovative ways in connectivity for community. These included a range of activities such as:

- Information sharing about cases due to be before the courts
- Community outreach
- Publishing information with media jurors and staff
- HR Recruitment of staff
- Internal Communication

In Australia most courts have media officers to ensure an easy and accurate passing of case information to the mainstream media and maintain comprehensive websites. Despite this, in South Australia and elsewhere, the author Schulz has amply demonstrated that this accurate information has not deterred the mainstream media, encouraged by politicians bolstering their profile with ‘law and order’ scare campaigns, from running a discourse of disrespect about the courts. Left without correction it is clear that this will feed into the discussions in the social media community leaving courts denigrated and undermined.

Modern Communication Theory contends that social media cannot be ignored but must be considered as part of the broader media landscape. The opening point of this article resounds in this discussion. The new Facebook networks are a community that rivals the nation state and importantly are beyond the control of the nation state. The internet has escaped the monopoly of the control over force that the nation state paradigm of power has successfully exercised for several centuries. Whether they are tweeting, blogging or emailing the outcome is the same…the public are now in charge of how and when and what information is being passed on from consumer to consumer. This is very different from hotel or café gossip in a closed community. Here the comments, ill-informed or not, can reach an audience of tens of thousands, and remain on the net to later misinform, even though they may be later discredited.

All this article seeks to do is to identify the implications of the new media and to suggest some practical policies to respond to them. A fuller development of policy prescriptions will no doubt follow from experience in this fast developing field and may be the subject of a later article.

5. Practical Polices
The new media offers many practical opportunities for court communication with staff and users, challenges and opportunities in presentation of evidence and in making outcomes and reasons available to the broader public. When controversies erupt around a court decision it offers opportunities to engage in, or inform that discussion. Some comments follow about each of these.

Communication with staff and users
No doubt most courts already use email to for internal communication and diary management. New media offers opportunities to improve and broaden electronic communication with staff and users. Staff forums and blogs can be combined with new approaches to education through audio and video recorded information packets to better manage information dissemination to staff and to make it more interesting and interactive. The same techniques can be used with jurors. Similar techniques can be used to inform unrepresented court users and to brief lawyers on important policy
initiatives. Electronic access to court diaries, court files and court databases offers great advantages in providing necessary information in a timely way without using court resources that would otherwise be required to make it available by physical means. Parties and lawyers can be reminded of court dates by SMS, twitter or informing their Facebook page.

Most notions of service of documents are firmly rooted in notions of village or suburban life where a person lives at a stable address, as demonstrated by the fact that one’s address is commonly used as an identifier. It is doubtful how valid this is to highly mobile people who are likely to change employment and locations during the time whilst they engage with a court, and even less so with itinerant “couch surfers” who may successfully live for years without a permanent address. Concepts of valid service by notice on a Facebook page, or to a twitter account, or “whatever” (which is to say in modern parlance the next emerging communication fashion).

There are dangers in any changed method. Before a party or lawyer is permitted access to a court data base the information must be layered so that the privacy concerns of the particular jurisdiction are addressed. The author Cannon has published articles suggesting policies to manage this, from an Australian perspective, but the principle he suggests of designating data to separate levels and providing access to particular levels according to the needs and trustworthiness of the person can be adapted to any jurisdiction. Problems of ‘virtual service” are manifest in the uncertainty that one is dealing with the actual person and not a false identity or “atavar” of someone else. For now the remedy for this would seem to be that first communication should be by conventional physical means, with a clear stable identifier in addition to name, such as a date of birth (or perhaps in the near future some biometric identifier), and then to obtain consent from the person to use an identified electronic means for future communication.

**Presentation and recording of evidence**
The technology advances behind new media has made high quality video recording readily available. Most jurisdictions value oral evidence. Many then do not receive it until long after the events being described, by which time the memory has faded, and been changed by intervening events and new information about the original incident and other issues. In common law jurisdictions we permit lawyers who are partisan for one side to obtain statements from witnesses with the clear potential to introduce distortions and errors into later recollection. New technologies offer good opportunities to improve the integrity of orality by video recording a person’s recollection at the first opportunity. In criminal cases, if police are trained to ask open questions, they could be empowered to take evidence, the witness warned about the duty to tell the truth, and record all witness statements at the scene or when they first locate the witness and store the data file in a secure way to prevent editing or alteration. This video recording would be the disclosure to the defendants of the evidence against them and could be used as the start of the evidence of the witness if s/he is called at trial. This would save substantial police resources typing up statements and improve the integrity of the oral evidence. Likewise in civil cases the first interview by a lawyer of a witness would be more reliable if it was video recorded, rather than being interpreted into an affidavit form.

Another aspect of evidence is obtaining information from the internet. When discussing an outdoor scene of a crime or a motor vehicle accident should we allow a Google Maps satellite and street view to be used, with appropriate opportunity to clarify changes that may have occurred between the occasion under scrutiny and the time when Google took their image? To be realistic, if we do not, then jurors and other fact finders might look anyway on their Android or iPhones. In Australia a juror has been punished for independently finding information on the internet. It may be cheaper and safer to use appropriate internet information as a formal part of evidence than unrealistic prohibitions leading participants to do it surreptitiously. In jury systems the issue of juries informing themselves from the internet (“the Googling Juror” who “saw it on Wikipedias”) and even finding out about the defendant’s prior history from earlier media reports, or social media or even court websites is a constant challenge to the ability of courts to filter the information that juries are permitted to use to establish guilt. Clear rules to manage these challenges need to be developed. It may be necessary to permit more of this information to be made available to juries and trust them to diminish the weight they place on it, rather than pretending they can be quarantined from access to it.

Modern media has much to offer to better explain complicated scenarios, spatial relationships and to make technical evidence more accessible. Once courts permit its use the issue of who pays the cost arises. It is a risk for courts to invest heavily in technology which may not be used and will soon be out of date. Relying of parties to supply technology may unfairly advantage a well-resourced technically literate party over an unsophisticated poor party. This suggests that courts need to make small investments in mobile technology, and renting technology as required, rather than attempting to equip multiple court rooms with standing equipment. They do need to invest in training so that when technology is used, it works.
Courts should also record and keep the record of all public proceedings because modern media puts discreet recording cheaply into the hands of all members of the public and modern software permits easy editing of the recording. Short of confiscating all phones and electronic devices at the door, which would be a demanding and alienating process, it is not possible to prevent private recording of public court proceedings. Having a complete court recording of the process will be essential to discourage and disprove any misrepresentation of what happened in court.

**Communicating outcomes and reasons to the general public**

The work of courts is crucially important to mediate power in evolving society arrangements so that the rule of law is maintained, but experience in the State of South Australia, where the authors live, demonstrates that the traditional media and the political establishment cannot be trusted to fairly inform discussion about the work of courts.**xxxviii** It follows that courts should ensure that the community is accurately informed about their work. Modern media offers multiple opportunities to do this, and courts around the world already use some or all of these methods:

- Courts should maintain a well formatted webpage that is accessible to all current media to provide good background user information and current materials on judgments and rulings of public interest.
- Judgments in matters of public interest can be streamed by a live feed to the internet and by traditional video media at the same time as they are distributed in written format. These judgments can be recorded and placed on the court website as podcasts, video feeds to stream and download and in written format to read and download. This requires judges to give thought to their audience which will be much larger than the lawyers appearing before them and the appeal court in the future. Reasons need to have readily accessible summaries which read well, with necessary long technical analysis of facts and law separated for the more determined viewer or reader to access as they wish.
- The court webpage should include good *push* strategies, such as in the US Federal courts and the Australian Family Court to send out email and news alerts. *Push* information should be provided in multiple formats. By engaging in social media the courts will present a modern face to the world and their work will be seem more relevant to the younger generations.
- Courts should have an adequately resourced communications specialist (not necessarily a journalist) to advise on the development and maintenance of a whole of community communications strategy. This will include educational materials for the public and instructional materials for court users. The court communications specialist will need skills of analysis of social and mainstream media trends of comment as well as a sound understanding of mainstream journalism. The discipline of discourse analysis as well as journalism is desirable.
- The communications specialist will need to maintain good relations with mainstream media to ensure that reporting of decisions is accurately presented and well informed as well as the knowledge to monitor social media discourse.
- Courts should consider tweeting and other social media live reports on high profile cases by approved users. The communications specialist should review their tweets to ensure that they are appropriate and do not offend sub judice rules or prejudice fair trial.
- Because tweets cannot possibly convey the nuances of legal complexity part of the *push* strategy will be to insist that approved tweeters attach links to court information sites for more extensive information. This should achieve a *pull effect* to bring the social media community to court web site information.

**Correcting errors and engaging in controversies**

This article argues that courts can no longer trust existing leaders or elites to respect or properly represent them. Once they maintain their own communications strategy the question quickly arises how they should manage misrepresenting of their work by politicians and the media and ill-informed discussions in the social media. Judges who decide individual cases have always kept clear of engaging in the controversy that may attend their decisions. This is desirable to retain their detachment and to be answerable to the appeal court under reasoned careful analysis, not swirling populist discourse. In traditional media the communications specialist can go a long way to achieving fair reporting by direct contact with journalists and their subeditors who may have skewed the meaning of an original fair article. However, sometimes media discussion is damaging the institution of the court, and it should consider ways to respond to these broader issues. One method is to have a respected retired media judge who can be a go to person to comment in traditional media and should have access to skills in social media to engage in key internet discussion groups.

It is essential that courts expect and encourage community interest. Courts do not need to be liked but they do need to be relevant and respected. They can expect media derision and disapproval of direct engagement with communities and social media suggested in this article as it challenges their hegemony over the selection and mediation of the information that is given to the community.

This is described by the author Schulz as the *Discourses of Disapproval and Disrespect*.xxxix
Courts have a core role to play as institutions that test claims and find factual reality and then apply established principles to them in a rigorous way. In an increasingly connected world, where gossip and sometimes ranting of ill-informed opinion is now widely available on line, this role of factual certainty and intellectual integrity must be even more important than it was when most public discourse was mediated through traditional media dominated by those in positions of influence. Courts and lawyers were part of those dominant groups. Now that oligopoly over community discourse is breaking down, if courts remain aloof from the social media fray, they risk being diminished by opportunistic mainstream media and political attacks which are amplified in the social media pack. The challenge is to use and build on communication techniques discussed in this brief analysis to ensure courts are heard and valued in a way that does not compromise their primary devotion to a properly applied rule of law.

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i For example Kaplan AM and Haenlein M (2010) ‘Users of the World Unite: The Challenges and Opportunities of Social Media’ in Business Horizons Vol 53 pp 59-68 report that in 2009 the online social networking application Facebook had more than 175 million registered users.

ii Ibid. citing Forrester Research.

iii Max Weber, Politik als Beruf a lecture at Munich University January 1918, published in Gesammelte Politische Schriften (Muenchen, 1921) pp 396-450.


vi Kirby The Hon Justice Michael AC CMG (2001) ‘The Judiciary in Federation Centenary Year : good news, bad news, no news’ 11th AJA Oration in judicial administration 22 June Banco Court Supreme Court of New South Wales Australia AIJA Publications Melbourne, p.5.

vii An information news program on the ABC in Australia was named Hungry Beast. For more information see: http://www.abc.net.au/tv/hungrybeast/well-here-then/index.html


xii The Medill School of Journalism suggests this is one of the hottest buzz words in academia in media studies today… for example see Source Watch as a site promoting this form of citizen generated media http://www.sourcewatch.org/index.php?title=List_of_citizen_journalism_websites (accessed 4April 2012).


xvii Bennett et al (2009), op cit.


xxvi For an article about this case see http://www.guardian.co.uk/world/2011/jun/02/malaysian-tweet-apology-defamation (accessed 23d April 2012).


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The Effect Of EU Anti-Corruption Measures On The Romanian Judiciary
By Ann Johnson and Bianca Radu

Abstract:

This study is an examination of a changing judiciary in an emerging democracy. As part of the conditions mandated for European Union (EU) accession, Romania has been urged to demonstrate movement toward greater rule of law (Romania, 2008). One way in which Romania has responded to this objective is through the creation of the Superior Council of the Magistracy (CSM), a judicial body separate from the executive branch.

Additionally, changes are occurring to the Romanian judiciary as a result of the European Court of Human Rights (ECHR) power to remand cases that are inconsistent with the European Convention on Human Rights (Janis, 2000).

This qualitative research involved an attitudinal study based on semi-structured interviews of members of the Romanian judiciary. This research is unique because, although many studies of the population’s perception of corruption are available, this study involves the suggestions of members of the Romanian judiciary themselves.

1. Romanian Historical Background
After more than 40 years of communist rule in Romania, in 1989 the bloody Romanian revolution led to more than 1,000 deaths and the overthrow of Nicolae Ceausescu (Jan. 26, 1918-Dec. 25, 1989). Ceausescu, president of Romania from 1965 until his execution on December 25, 1989, ruled Romania in a totalitarian manner using fear to maintain control (Gallagher, 2005). During Ceausescu’s rule, prosecutors had much greater power than judges and were used as a tool of the government to keep political opponents in line and to protect allies from accountability for engaging in corrupt practices (Gallagher, 2005; Freedom House, 2005).

Initially after the 1989 revolution, many of those involved in the second power tier of the communist system gained control of the government in Romania (Gallagher, 2005). In the period after the fall of communism, Romania experienced economic stagnation due to corrupt practices in government (Gallagher, 2005). The initial lack of reform created an environment of “poor rule of law, widespread corruption, societal frustration, conflicts and distrust in state institutions” (Transparency International, NIS, 2005, p.11). Thus significant progress in the rule of law did not occur in the legal system during this transition period.

1.1 Romanian EU Accession History
In 1999 Romania began accession talks in hopes of joining the EU in 2004. As part of these discussions regarding accession, Romania came under pressure to reduce corruption, and formed an anti-corruption strategy in 2001 (Transparency International, NIS 2005, p.10).

Because of a lack of preparedness due to corruption in the areas of the judiciary and public administration, Romania missed joining the EU in 2004 (Gallu, 2006). However, Romania was able to become part of the EU in 2007 (Gallu, 2006). As part of the accession requirement for Romania to join the EU in 2007, the European Commission (EC) issued a moratorium on corruption and imposed the Cooperation and Verification Mechanism (CVM) mandating that Romania comply with anti-corruption mandates; absent such compliance, the EC could use special safeguards included in the accession treaties that could lead to a refusal to recognize court decisions by the ECHR or to cut EU funds (Commission to the European Communities, 2008). The safeguard clause was to remain in effect in Romania for the first three years of EU membership (Bulgaria, June 28, 2007). However, in 2009 although the CVM was about to expire, the EC concluded that more progress needed to be made in the areas of judiciary reform and corruption (Stephan, Tapalaga, & Inoita, 2009, p.19). A new assessment was conducted in Summer 2011 (Commission, Interim Report, February 18, 2011). In this report the EC stated that much progress had occurred but that further progress needed to be made in anti-corruption efforts in the Romanian judiciary (Commission, Final Report, July 20, 2011).

1.2 Superior Council of Magistracy
Romania has responded to the EU mandate to demonstrate movement toward greater rule of law with the creation of the CSM, an independent judicial oversight body. After the 2003 revision of the Constitution in June 2004, Romania followed the Latin European model of establishing the CSM as a separate body in the judiciary elected by magistrates (Alistar,
The CSM has the responsibility for recruitment, career development and sanctioning judges and prosecutors (Alistar, 2007). Sanctioning judges is now solely the purview of the CSM as a mechanism to avoid political interference (Freedom House, 2005). Furthermore, appointing judges now involves an examination procedure administered by the CSM through the National Institute of Magistrates (NIM) to ensure knowledge and competency (Dumitru & Ungureanu, 2011).

This structural change was intended to create judicial autonomy from the Ministry of Justice (MoJ), which is under the control of the executive branch and has traditionally had responsibility for criminal matters (Freedom House, 2005). This modification has the potential to create greater autonomy for the judicial branch as well as to provide a symbolic demonstration of the government’s willingness to provide institutional mechanisms to ensure independence of the courts (Alistar, 2007).

2. Research Question and Methodology
The research question for this study examines whether members of the Romanian judiciary believe that the development of the CSM designed to make the judiciary more independent has actually resulted in a more independent judiciary, thus providing a check on corruption.

This qualitative research is an attitudinal study based on semi-structured interviews of members of the Romanian judiciary. This study includes interviews with 23 judges throughout Romania in Cluj-Napoca and Bucharest, at all levels of their careers and includes magistrates from the Tribunal, which are courts of first instance, Court of Appeals and Supreme (High) Court. Their answers were coded and analyzed to determine patterns and themes, then cross-referenced by experience and gender. The data was then analyzed using a Rational Choice, neoinstitutional framework incorporating current theory which applies when domestic actors follow EU conditionalities to determine which factors have influenced behavior.

Because Romania is a country of networks, where people often do not trust people they do not know, the ability to contact the judges was often a result of connections. Therefore, this study does not involve a random sample. However, the lack of unanimity in answers given indicates that a variety of opinions were represented.

3. Summary of Interview Results
The results of the interviews were mixed regarding the effectiveness of the CSM. Overall, the magistrates agreed that the CSM is a good system and they preferred it to the previous system where the MoJ, controlled by the executive branch, had oversight of the judiciary. The magistrates felt more secure and freer from political interference because, after the change, only the CSM could terminate, promote or discipline magistrates.

However, the magistrates did not believe that the CSM was as helpful as it could or should be. Part of the impediment to the effectiveness of the CSM was that many in the Romanian government did not see the judiciary as a separate branch. For example, many magistrates stated that the other branches of government used media sources to discredit the judicial body and put pressure on judges to decide cases with a particular outcome. Also, nearly every judge said that because the MoJ, instead of the judiciary, controls the budget for the judiciary, the CSM was less effective than it would ordinarily be.

Exams graded on the basis of objective criteria are given to judicial students for the initial appointment as a magistrate and an interview process exists for the Court of Appeals and the Supreme Court. Magistrates agreed that the initial appointment process for becoming a magistrate was fair. However, no magistrate thought that the process to become promoted to the Court of Appeals or the Supreme (High) Court was transparent. Most magistrates indicated that although perhaps the written exam for promotion to the higher courts is fair, the criteria for what is considered a good interview and promotion process is very ambiguous. Furthermore, no magistrate found the process for transferring magistrates from one court to another to be transparent.

When asked about the overall quality of the rule of law in Romania, the magistrates generally thought that the quality of judicial opinions and jurisprudence was improving. Some believed this improvement was a result of the establishment of the CSM, whereas others believed that this was a result of the ECHR.² The CSM requires each judicial decision to have certain elements. The CSM evaluates magistrates based on the quality of these judicial decisions. The magistrates agreed that judicial opinions have become more accessible to the public, but improvements could still be made in this

² Now the ECHR has the power to remand cases back to Romania that were in conflict with the European Convention on Human Rights. Articles 8-11/14 ECHR (Janis, 2000).
accessibility area. Cases are also now catalogued in a computer system called European Criminal Record Information System (ECRIS), but this system is not entirely complete and is difficult for the public to navigate. Also magistrates indicated that a lack of civic education exists in Romania, so the public has trouble understanding judicial cases and tends to trust talking to people with whom they have a connection as opposed to reading published formalized information.

Most magistrates also complained that they were overworked and underpaid and stated that a lack of resources was the reason that cases took a long time to resolve, and that there were sometimes problems with clarity and accessible language of opinions.

Magistrates further complained that the code law in Romania is ambiguous. One magistrate commented that the Romanian legislation changed three times in one summer. Some of the ambiguity was a result of the Romanian transition from communism to capitalism, then accession to the EU.

When asked whether the CSM has increased integrity within the judiciary, magistrates thought that the primary way in which the CSM had an effect on corruption was that it monitored judicial opinions and was able to discipline judges. Furthermore, magistrates believe it helps that there is random assignment of cases to magistrates. However, generally magistrates did not think that the CSM had changed the level of integrity and the court culture as much as have personnel changes such as the introduction of younger judges with transformed expectations and new supervisors.

4. Theoretical Framework

4.1 Data Analysis through a Rational Choice/Neoinstitutional Lens

In Formal institutions and informal politics in Central and Eastern Europe; Hungary, Poland, Russia and Ukraine, Meyer defines institutions as stable patterns of interaction in social relations (2008). Formal institutions are based on explicitly defined rights, duties and norms (Meyer, 2008). Institutional theory provides that institutions give order and provide normative orientation for behavior (Meyer, 2008). In communist systems, a monopoly of power existed. As a result of this monopoly, a socialization process occurred to evade pressure from the state and to obtain economic goods through personal contacts (Karklins, 2005). This situation created an unofficial way of doing things, and informal networks emerged with particular operational rules which have caused "neoinstitutional" patterns (Karklins, 2005, p. 76).

Neoinstitutionalism, where informal rules and networks become stronger than formal rules and institutions, often occurs in post-authoritarian societies (Meyer, 2008). The population uses these informal rules and networks to trade favors to survive (Karklins, 2005). Under neoinstitutional theory, these informal practices become legitimized instead of laws. This process is also known as path dependency (Meyer, 2008, p. 73).

Rational Choice Theory assumes that people will act in such a way to advantage themselves and their group and that institutions are shaped around what will bring the most benefit to the actor in both formal and informal interactions (Meyer, 2008, p. 20). This approach clarifies how choices are structured when people decide how to behave in certain situations (Karklins, 2005).

Magen and Morlino in "European Union transformation strategies and the rule of law in weakly governed states" flesh out how choices are made in such societies. The authors contend that the depth to which states choose to comply with EU mandates is multifaceted and occurs in stages. Magen and Morlino assert that rule adoption, rule implementation and rule internalization are layers of impact in the EU membership conditionality model (2008). They define “rule adoption” as the transposition of EU mandated rules and standards into domestic laws and the restructuring of institutions according to EU rules (Magen & Morlino, 2008). "Rule implementation” means the acceptance of transferred rules, beyond formal adoption by elites (Magen & Morlino, 2008). According to Magen and Morlino’s model, implementation involves complying with the adopted rules but does not necessarily involve valuing a democratic society and rule of law. These value transformations occur at the rule internalization stage (Magen and Morlino, 2008, p. 14).

3 Moreover, a new generation of Romanian magistrates not trained under Communism has emerged. Magistrates believed that this situation has negative and positive implications for the rule of law. Young judges are less experienced and have a greater degree of difficulty relating to the parties. However, a greater number of magistrates have traveled abroad and are bringing influences of other court systems back to Romania and applying principles of the ECHR (Bogdan, 2008, p. 27).

4 However, the degree of neoinstitutionalism and the strength of these networks increase with the historical level of brutality (Karklins, 2005).

5 The ideas published in Magen and Magen’s 2008 APSA conference paper “European Union transformation strategies and the rule of law in weakly governed states” were later discussed in International actors, democratization and the rule of law: anchoring democracy (2009) Routledge: Oxford Abingdon.

6 Because the challenge still involves implementation of adopted rules, the internalization stage will not be discussed here.
4.2 Effectiveness of Conditionalities
Rational Choice calculus plays a part in whether the domestic elites, the CSM and the magistrates themselves all act in a neoinstitutional or a rule based manner. Magen and Morlino also use Rational Choice Theory to explain the implementation of laws that are adopted as part of conditionality for EU accession (2008). As suggested by Magen and Morlino, EU conditionalities mandated by the CVM can tip the Rational Choice calculus of government elites from neoinstitutional behavior to acts promoting democratic legitimacy including transparency and integrity. Thus what “rational” action is chosen depends upon the prevalence of neoinstitutionalism versus the strength of EU conditionalities. However, Magen and Morlino argue that for conditionalities to be effective, they must be credible, making the choice to comply with conditionalities as opposed to other preferences “rational” action (2008 p. 32). Magen and Morlino contend that conditionalities are often at their most credible in the beginning stages (2008).

There has been some indication of the effectiveness of the conditionalities. After Romania’s accession to the EU, when Romanian judicial decisions conflict with the European Union Convention on Human Rights, the ECHR may override Romanian judicial decisions (Daglita & Bodgan, 2007). The ECHR has, in fact, remanded cases by the Romanian courts decisions that are in conflict with EU law instructing the Romanian courts to issue decisions that are consistent with EU law (Daglita & Bodgan, 2007). However, despite the EU enforcing mandates in these ways, numerous problems still exist within the judiciary.

Magen and Morlino state that where the cost of compliance for domestic elites is high, conditionalities by international bodies such as the EU are less effective, because strong veto players are not likely to fight to eliminate public sector corruption. Thus, despite less favorable treatment from the EU, those in power are less likely to sacrifice privileges that are most important to them to improve transparency in government. Reforming the judiciary in Romania is high politics and involves strong veto players (Magen & Morlino, 2008, p. 28). Therefore, the existence of an independent judicial check on the executive and legislative branches in corruption cases is particularly high politics in Romania because it challenges long held norms. Not surprisingly, the other branches of government often have difficulty accepting the judiciary as a separate branch. The MoJ still controls the budget, making independence of the courts difficult to attain.

Despite these challenges, progress has been made in incremental amounts. The greatest areas of success include appointment of judges and the issue of more clearly written legal opinions that are catalogued in a computerized database with a search engine. Areas in the judiciary that require greater reform include transparency in the promotion procedure for judges to higher courts and autonomous control of the judicial budget. However, progress in both of these areas has been impeded by strong neoinstitutional influences.

4.3 MoJ Control of Finances and Separation of Powers
The first issue discussed involves MoJ control of judicial finances and the impact of separation of powers in Romania. The magistrates interviewed universally complained that the MoJ refuses to turn over financial control of the courts to the judiciary. Because finances determine the autonomy and power of courts, the changes in rule of law required by the EU can only occur to a certain point without financial backing. Thus the courts are responsible for complying with EU rule of law mandates, without being given control of the resources to do so effectively. This lack of power of the judiciary may stem from how others in government regard judges. Many magistrates indicated that the other branches of government have trouble viewing the judiciary as a separate branch. The following quote illustrates this phenomenon:

“In Romania there is only a theoretical separation of power. The legislature tries to dominate the other branches and the executive tries to control the judiciary because he has the financial resource to do this. The judicial system has no power so it is like a small puppy that tried to make others happy to get a bone. The perspective of the politicians is different from the judges’ perspective. This is why the judges went on strike and try to bring on the public agenda that judges exist who have rights and responsibilities.” (Judge 10)

Magistrates note that the CSM could be progressive in improving independence and efficiency of the judiciary, but it is difficult without the cooperation of the other branches, and specifically they complained about the MoJ’s failure to provide resources.

Now the MoJ can decide only financial issues but MoJ has a lot of power because it has the money. This is a big issue and one of the causes of the judicial strike. It is a good thing to have the CSM. (Judge 1)

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7 In September 2009, the Romanian judiciary went on strike (Pop, 2009). Judges indicated the lack of ability to control their finances was the main reason for the strike.
The MoJ decides on the number of judges and does not improve financing. The MoJ could get more funds from the EU to help the judiciary but does not. The MoJ could be much more proactive. The judges do not have much power. Not too much is up to them as there are systematic problems. (Judge 6)

Where change brought about as part of the conditionalities from an international body involves high politics and strong domestic veto players, compliance is less likely to occur (Magen & Morlino, 2008). Control of finances and judicial reform are, by nature, high politics and members of other branches who have an investment in the status quo will typically be strong veto players (Mendelski, 2011).

Magen and Morlino contend that veto players within a national government dilute the effect or subvert the goals of legal reform and the adoption of EU requirements and that there is “considerable evidence of deliberate ‘emptying of content’” (2008, p. 29). Some authors refer to the phenomenon as de jure vs. de facto implementation (Transparency International Global Index, 2008).8 Gallagher argues that countries that are resistant to compliance make superficial changes to appear to comply with EU accession (2005). In the Report of Progress under the CVM, the EC required Romania to “[e]nsure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of the Magistracy” (Europe Commission, July 22, 2009). Allowing for an independent judiciary with a separate oversight body, such as the CSM, without financial autonomy creates a situation where it appears as though the CSM is in control of the judiciary, (Magen and Morlino’s adoption stage) and thus responsible for its progress in judicial reform, without enough power to be entirely effective and produce results (Magen and Morlino’s implementation stage). Consequently, because government officials are reluctant to turn over finances and control of the legal system from the executive branch to the judiciary, this area is typically met with resistance in post-communist governments. Overcoming neoinstitutionalism administration of the judiciary in Romania can be an uphill battle requiring continuous pressure by the EU. Some magistrates state that the most significant changes to the judiciary actually occurred at the beginning of the accession process to the EU, where Magen and Morlino opine the conditionalities are most credible (2008). Immediately after conditionalities are made is when progress is rigorously monitored and expectations are high (Magen & Morlin, 2008). Many of the magistrates were concerned that, now that Romania has joined the EU, pressure for judicial reform will lessen.

4.4 Media Pressure/ Pressure from Other Branches of Government

The magistrates universally complained about facing pressure from the media. However, upon greater inquiry, it appears that the media is used as a vehicle by the other branches of government to influence the population to discredit and put pressure on how judges decide cases (Mendelski, 2011).

Politicians do not want to accept a third power. That is why in the last two or three years politicians say there are problems with the judiciary. Politicians do not understand the role of the judiciary and the separation of power. They do not understand the independence of judges. (Judges 10)

It is unclear to what extent the creation of the CSM mitigates media pressure from other branches. However, after the creation of the CSM, the executive branch cannot actually terminate judges, so the mere existence of the CSM as an institution, does provide some insulation for the judges despite external media pressure.

5. Clarity and Quality of Jurisprudence

5.1 Standardization of Opinions

One area in which EU pressure has affected the Rational Choice calculus to decrease neoinstitutionalism is the increase in overall clarity of judicial decisions and improvement of jurisprudence.

[In the last few years the quality of arguments has improved a lot. Before the arguments were three or four pages. Now the arguments are much longer and more complex including all aspects of the decision, legal analysis, exceptions, comparative analysis and analysis of the legislation. Judge 11.]

Now that the criteria for judicial opinions are more transparent, standardized and catalogued and these standards are used by the CSM to evaluate judges, the Rational Choice calculus is more likely to deter judges from neoinstitutional

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behavior and favoritism in deciding cases. The CSM evaluates judges based on the quality of their decisions, using specific criteria. Now that judges are required to produce more standardized opinions, it is easier to determine which factors are involved in making the decisions (Alistar, 2007). Furthermore, protection from interference in court cases by the other branches of government has caused greater autonomy and provided for improved written opinions because judges feel less pressure from others in government and are less susceptible to interference with cases.9

Judges indicated that the computerized case catalogue system called ECRIS has created greater accountability in the judicial system (European Commission, 2011). ECRIS reduces the need for informal channels (neoinstitutionalism) to navigate the court system to be able to locate legal decisions and orders (i.e. having to know a court clerk to obtain information about a case). However, magistrates indicated that the ECRIS system leaves room for improvement because it is neither entirely user friendly nor complete (but it is important to remember that the cataloguing system is in progress).10

5.2 Citizenship
It is also notable that although the writing of cases has become somewhat clearer and the cases are now catalogued, vast discrepancies exist within the Romanian population in levels of civic education and computer literacy. Because Romania is a neoinstitutional society, many people may not trust what they see on the internet and only trust what they hear personally.

Further, magistrates indicated that an even greater level of discrepancy in civic education exists between urban and rural populations. One possible solution to citizens’ distress in navigating the judicial system is to improve clarity by making the language of decisions more accessible, but, again, attaining this goal requires additional training, returning to the dilemma of control of judicial resources.

Furthermore, clean government requires active citizens (Karklins, 2005, p.72). However, for citizens to be active, they must understand what is occurring and the legal avenues to address their concerns. Consequently, in Romania, decreasing neoinstitutionalism not only requires improvement in the judiciary, but also public trust. Awareness and understanding are necessary for democratic legitimacy (Meyer 2008, p. 76). Thus, civic education, clearly written cases, a user friendly case catalogue system and citizens’ confidence in the information that they receive are all necessary elements to increase the legitimacy of the judiciary.

Magen and Morlino’s theory of when conditionalities from an international body (such as the EU) are likely to be adopted and implemented partially explains the increased clarity of judicial decisions. The format of judicial opinions is an area that is relatively low politics compared with judicial control of finances or promotion of judges to powerful positions (Magen & Morlino, 2008). Further, now that Romania is part of the EU, greater pressure exists for standardization of documents. However, magistrates believe that lack of judicial resources as a result of the MoJ refusal to turn over finances to the court has hindered the judiciary’s ability to be efficient and effective in issuing clear decisions in a timely manner.

5.3 Clarity in Law
In a case law system, judges interpret statutes in written judicial opinions. Judges who encounter the same issues in the same jurisdictions are required to follow precedent (prior decision making rationale), so in the common law system, laws (statutes) may be more general and have enough flexibility to cover new circumstances that arise. However, in the code law system that exists in Romania and many European countries, numerous codes exist for every situation foreseeable to the legislature, and the judges apply these codes directly to the cases before them (Dagalita & Bogdan, 2007).

5.4 Code vs. Case Law System
Many magistrates mentioned that a lack of clarity in legislation is a significant obstacle to improving jurisprudence. Because Romania does not have a case law interpretation system, it is particularly important to have comprehensive and clear code law (Dagalita & Bogdan, 2007, p. 27). Magistrates explained that some ambiguity in legislation is a result of the change from communism to capitalism, and then, the changes necessary for Romania to comply with EU law

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9 In addition to the creation of the CSM, many judges credit the ECHR for improving jurisprudence.
10 Many magistrates stated that the CSM is not responsible for the establishment of the ECRIS system-but some greater clarity of jurisprudence can be attributable to the CSM as judges are evaluated on specific criteria in the judicial opinions they write. Also transparency is generally increased with issuance and availability of public documents.
Romanian judges are usually obligated to directly follow the code law system and have little discretion in these matters. However, recently the practice of following code law has changed now that cases can be appealed to the ECHR and Romania is responsible for upholding the principles of the EC (Bogdan, 2008). The change in jurisprudence may lessen the judiciary’s dependence on the legislature.

The ECHR required mandatory case law. Decisions are now better and more uniform. Romania was censured for not explaining reasons for decisions. There is now an overall improvement. (Judge 2)

In the area of improving the quality of overall jurisprudence, it appears EU conditionalities have made a difference, particularly criteria for decisions and random distribution and cataloguing of cases. Again, the lack of resources, as well as unclear legislation, hinder progress. However, to the extent possible within the control of the judiciary, implementation of EU mandates is starting to occur as transparency in the law increases.

Magistrates were also generally concerned about competency and training within the judiciary. Competency problems are often mistaken with corruption by members of the public. These competency issues in formal judicial proceedings are partially influenced by the history of neoinstitutionalism because Romania used to be a less formal society with less standardization. Again magistrates are concerned that power politics result in a lack of resources and in an insufficient number of judges to manage the case load.

6. Appointment and Promotion of Magistrates

6.1 Transparency in Appointments of Magistrates and Judicial Independence

It appears that the establishment of the CSM has reduced the neoinstitutional factors that occur in the appointment of magistrates to the judiciary at the entry level. The way in which one is appointed a magistrate is standardized as the result of an examination (administered through the National Institute of Magistrates under the CSM) (Dumitru & Ungureanu, 2011). Also magistrates stated that they have additional independence because they cannot be terminated from the magistracy by another branch of government.

6.2 Lower Political Value of Appointing Magistrates Equals Greater Compliance

By standardizing the assignment of magistrates to the judiciary, the CSM has implemented the adopted EU mandate of increasing transparency in the judiciary. Magen and Morlino’s theory also explains how the adoption and implementation of international conditionalities has influenced the procedure for the appointment of judges (2008). Entry level judicial appointments are not extremely high stakes politics. Initial assignment of magistrates is probably of less concern to the domestic elites than the promotion of magistrates to the more powerful positions in the judiciary (Mendelski, 2011). Therefore, although transparency regarding promotions is less likely to be both adapted and implemented, it is significant that there is no need now to have connections to become a magistrate. Further, it is important to note some change has occurred given that Romania used to be a society of strong political patronage (Gallagher, 2005).

6.3 Lack of Transparency in Transfers and Promotions

Although the magistrates did not believe that punitive transfers occurred to influence how magistrates decide cases, some thought that decisions regarding which magistrates receive desirable transfers were not transparent, so favoritism could still occur.

Neoinstitutional factors greatly affect judicial promotions when magistrates seek to advance to the more powerful position of Court of Appeals Judge or High (Supreme) Court Judge. The criteria for the interview and the results of the exam for promotion are ambiguous and not transparent. Magistrates appear to have a unanimous view of transfers and promotions, but little hope of movement toward greater transparency.

6.4 Overall Effect of Conditionalities and Neoinstitutionalism on Magistrates’ Careers

In neoinstitutional societies, rule of law measures may be adopted but not successfully implemented. Although transparent measures for appointment of magistrates appear to have been implemented, this implementation does not seem to have occurred for promotions (Toma, 2006). Thus the question “[H]ow real is the change?” is particularly relevant to Romanian procedures for judicial promotions (Magen and Morlino, 2008 p. 26). Magen and Morlino’s theory

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11 Rather the judge is concerned with evidentiary matters (i.e. guilt or innocence) that are the responsibility of the jury in the U.S. system. The magistrates have much power in individual cases but not to reconcile ambiguity in laws.
explains this discrepancy between fairness in appointment and promotion. Who is promoted to the Court of Appeals and the Supreme Court is high politics and of great importance to the political elites in the country. Consequently, strong domestic veto players exist in the domestic elite. Transparency requirements for promotions to higher level judicial positions conflict with political culture and vested interests in Romania. Thus, although adoption of EU standards has occurred, the more contentious implementation stage, requiring transparent promotion rules has not occurred. Returning to the Rational Choice analysis, it appears that the EU conditionalities for transparency in the judiciary are not severe enough in relation to the pull of neoinstitutionalism to tip the Rational Choice calculus in the area of judicial promotion transparency. Compliance with judicial reform mandates has occurred to the point where the judges are initially appointed and magistrates are protected because they can only be evaluated or terminated by the CSM. However, Romania is not complying with implementation of standards for judicial promotions because political concerns could make it more “rational” not to comply with transparency standards.

Magen and Morlino argue that whether or not institutions may be effective enough to change culture depends on sustained enforcement and costs to the interest of those in power (2008). The interviews revealed magistrates were concerned that, now that Romania is in the EU, enforcement may lessen confirming Magen and Morlino’s assertion regarding conditionalities.

6.5 CSM and Anti-Corruption Measures Within the Judiciary
Magistrates expressed mixed views about whether the CSM plays a role in anticorruption measures within the judiciary. It appears that the CSM improved judicial integrity because the judges are able to evaluate cases without fear of political interference (cases involving prosecuting corruption of other members of government). Within the judiciary (corruption from the judges themselves) the CSM’s primary way of lessening corruption is evaluating magistrates based on how the opinions are written. Thus to a degree, monitoring occurs with standardized criteria for decisions and greater transparency. Consequently, although the CSM does not have a formal role in reducing judicial corruption, these standards for judicial decisions may reduce the pull of neoinstitutionalism.

7. Factual and Theoretical Conclusions

7.1 Factual Conclusions
Despite the establishment of the CSM to oversee the courts, the other branches of government often do not treat the judicial branch as autonomous and refuse to give up power. In particular, the MoJ, under the executive branch, continues to control the court budget. Although the judges have petitioned to have the judicial branch oversee court finances, the MoJ refuses to make this concession. Furthermore, the media has also been used by the other branches of government to weaken and undermine the judiciary, demonstrating the strength of neoinstitutionalism and power grabbing politics. Moreover, the CSM does not take on the role of publically protecting judges, illustrating the limitations of domestic institutions formed in response to EU conditionalities. However, now that only the CSM is responsible for judges’ careers and the judges cannot be terminated or demoted by the executive branch, the effects of neoinstitutionalism are mitigated. EU pressure has influenced Romania in the area of transparency of judicial decisions, so there are clear criteria for judicial opinions. These decisions are categorized and publically posted on a computerized system called ECRIS. This transparency is also likely to tip the Rational Choice calculus of the judges away from neoinstitutionalism, steering the judges from favoritism to more objective decisions. Random distribution of cases also helps to reduce the effects of neoinstitutionalism as people are less likely to receive preferential treatment from certain judges (Toma, 2006). Some magistrates attribute this change to the CSM, others attribute them to the ECHR. However, many magistrates also complained that ECRIS needs improvements and that the public is distrustful of the judiciary and in need of greater civic education.

One aspect in which the CSM does not have much control for improving jurisprudence is in the clarity of law. Romania is a code system rather than a case law system, so judges do not have as much power to reconcile discrepancies. Sometimes the legislature drafts laws to interfere with corruption cases. Here neoinstitutionalism influences government actors more than the effect of EU conditionalities. (However, many judges are influenced by EU practices and are taking court practices from other countries back to Romania, which is beginning to counter balance court practices developed in the communist era in Romania) (Mendelski, 2011).

In the career track of judges, the effect of neoinstitutionalism is mixed. For the initial appointment of judges, the CSM has reduced the effect of neoinstitutionalism as there is a standard procedure and test for hiring magistrates. However, judges felt that there are no standard procedures for transfers and that favoritism can occur. There is little transparency for promotions to the more powerful positions such as the Court of Appeals and the Supreme Court, where the promotion process involves an interview without standardized criteria. Where the issue is high politics, EU conditionalities are less
likely to be effective (Magen and Morlino, 2008). Because these more powerful judicial positions involve high politics as opposed to the initial judicial appointments, the effect of EU conditionality is not strong enough to counterbalance the effect of neoinstitutionalism.

Although the CSM does not generally actually take on the role of preventing corruption because only the CSM oversees the career of judges, there is greater independence for magistrates to make decisions in anticorruption cases and less fear of political interference and retaliation from other branches. Consequently, the effect of neoinstitutionalism has been reduced.

7.2 Affirmation of Magen and Morlino’s Hypothesis
This study focused on the performance of a particular institution, the CSM, created in response to large scale international efforts to increase integrity and the rule of law. The data gathered from the interviews appears to support Magen and Morlino’s assertion that for conditionality to be effective, sustained enforcement needs to occur, particularly where the area involves high politics.

The results of this study also tend to support Magen and Morlino’s argument that it is more difficult to change areas of high politics where there are greater costs to the elites. For example, impartiality of initial appointments of magistrates is lower politics, so change was possible with more limited conditionality. However, the higher level judicial appointments and the MoJ’s control of the finances are high politics, and thus conditionality has not shifted practices in these areas.12 The cost-benefit analysis to elites may not have favored compliance with EU conditionality in the area of promotions. Magen and Morlino discuss the notion of “empty compliance” where laws to comply with international mandates are adopted by creating implementing national bodies, but these agencies are not allowed to function properly (2008). This “empty compliance” has occurred in some ways with the creation of the CSM. The CSM has made progress in oversight of the judiciary, but the MoJ still controls the finances. This situation strains the legitimacy of the courts to function in a democracy (Meyer 2008). Thus, Romania’s partial success in judicial oversight demonstrates the point at which the effectiveness of conditionality ceases to overcome the power of high politics to elites.

Works Cited


12 Whether conditionality is sustained with the EU putting pressure on Romania may be questioned as the European Commission extended the reporting period (Commission, Interim Report February 18, 2011).


1. Introduction
A compelling and growing body of research from the fields of cognitive psychology and neuroscience provides important insights about how we process information and make decisions. This research has great potential significance for judges, who spend much of their time making decisions of great importance to others. For most judges, this research literature is not part of their judicial education.

This article reviews cutting edge research about decision making and discusses its implications for helping judges and those who work with them produce fair processes and just outcomes. It builds on a 2007 American Judges Association paper that encouraged judges to incorporate the principles of procedural justice (see side bar) to help ensure a decision-making process deemed fair by litigants. Procedural fairness increases compliance with court orders and is critical to positive public perceptions of the court system.

Implementing procedural-justice principles in the courtroom demands the judge’s “mindful” or conscious focus and attention. Understanding how the brain processes information and the various factors that can influence decisions and courtroom behaviors is a first step to practicing more mindful decision making that is consistent with the principles of procedural justice.

Key Procedural-Justice Principles

Voice—Litigants have the opportunity to participate in the process and offer their perspective.

Neutrality—Litigants believe the judge is neutral, makes decisions based on rules rather than opinions, and applies rules consistently.

Respectful treatment—Litigants are treated with dignity and feel their problems are taken seriously.

Trust—Litigants perceive the judge is sincere and caring.

2. The Science of Decision Making
At any point in time, an individual is bombarded with a host of sensory information. Most of it is processed “behind the scenes” with little or no knowledge on the part of the individual. Much like a computer continues to work in the background while a word-processing program is on the screen, individuals constantly process a barrage of sights (e.g., the glare on the computer screen), sounds (e.g., the click of the keys), smells (e.g., the coffee on the desk), and other information—sorting, categorizing, and storing it—even as the they intently focus on a specific task (e.g., reading a case file or writing an opinion).

This dual system of information processing is the mechanism by which judgments and decisions are made. Neuroscientist Matthew Lieberman has identified different areas of the brain associated with each system by neuroimaging. The

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1 Pamela Casey is Principal Court Research Consultant of the United States’ National Center for State Courts. Kevin Burke is a judge of the Hennepin County District Court in the State of Minnesota, and Steve Leben is a judge of the State of Kansas Court of Appeals in the United States. Both Judge Burke and Judge Leben are past presidents of the American Judges Association. This article is based on a white paper adopted by the AJA in 2012. The authors thank Dr. Ingo Keilitz for his editing of the original paper for publication here. They also thank Dr. Jenny Elek, Dr. Keilitz, and Dr. Robert Rust for their substantive contributions to the development of the original paper.


4 Matthew D. Lieberman, Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach, in SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES 44 (Joseph P. Forgas, Kipling D. Williams, and William Von Hippel eds., 2003). Scientists are still exploring whether there are two different systems, multiple systems, or multiple processes that make up one system, but most agree on “processes that are unconscious, rapid, automatic, and high capacity, and those that are conscious, slow, and deliberate.” Jonathan St. B. T. Evans, Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition, 255 ANN. REV. PSYCHOL. 255, 256 (2008). This article relies on Lieberman’s model because of his extensive work mapping areas of the brain and because the labels he uses are more descriptive of decision-making processes than, for example, Daniel Kahneman’s system 1 and system 2 labels. Compare Burke and Leben, supra note 2, and Lieberman, with DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).
based on the individual’s experiences with the world. The individual learns over time how to distinguish different objects, people, actions, and situations based on features that coalesce into patterns. These patterns, referred to as schemas, help the brain process information quickly and efficiently. Based on prior experiences, for example, individuals know that a red octagon in the distance means “stop.”

The reflective, controlled system relies on deliberative intention and effort to perform a task. Memorizing a new phone number or computer password requires concentration. Once the phone number or password is repeatedly practiced, however, it becomes a readily accessible schema that comes to mind with little effort. For a judge with a domestic-violence docket, for example, a bit of study up-front would teach the judge the elements of domestic battery—with no need to look it up again as each case is called.

While the reflexive system can process information on an ongoing basis, the reflective system has a limited capacity. It works for a while but eventually runs out of gas. Thus the brain is somewhat miserly about its use of the reflective system. This “principle of least effort” means that decision makers initially tend to rely on the automatic retrieval of schemas to process incoming information and engage the reflective system only when motivated to do otherwise by, for example, learning a new skill or solving a complex problem.

Gary Klein refers to this reliance on schemas as recognition-primed decision making. His premise is that we develop schemas that we subsequently use to size up a situation and decide how to move forward. For example, a firefighter does not enter a burning building and proceed to analyze all the potential options for action. Rather, the firefighter instantaneously takes in a variety of information about the current situation and matches it to a response option that has worked in similar situations in the firefighter’s past. The initial option may not have been the best option if there had been enough time to generate and analyze all possible options, but it usually works. Judges, particularly when confronted with large dockets, heavy calendars, or pressing “emergency” motions, can tend to use the same process as firefighters. Sometimes using the first option that works rather than the optimal option will be satisfactory—but not always.

Reflexive decision making works for countless choices an individual makes throughout the day. And in some instances, such as those requiring a quick decision in an emergency situation, as in the firefighter example, the reflexive approach might be better than a more deliberative, reflective approach. The problem with reflexive decision making, however, is that sometimes the underlying schemas are based on inaccurate information (e.g., assuming two events that occur together are related, as in superstitions), are only partially correct (e.g., stereotypes), or are applied incorrectly (e.g., using a gesture that is misinterpreted in another country). Two prominent examples of schemas that can lead to inaccurate decisions are cognitive heuristics and implicit biases.

2.1 Cognitive Heuristics

Heuristics are schemas based on only part of the information available—letting us make decisions more quickly. Research shows that reliance on heuristics in some circumstances can lead to more accurate decisions and judgments than reliance on more rational models. But heuristics also can be faulty in a variety of ways, leading decision makers to jump to conclusions and make errors in solving problems. And since heuristics operate in the world of unconscious, reflexive processing, we can easily make errors without recognizing the source of a faulty decision.

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9 See Desmond Morris, Gestures, Meanings, and Cultures, YouTube (Jan. 29, 2011), http://www.youtube.com/watch?v=fRQSRed58XM, for some common examples of cultural differences in interpreting gestures in a video by Desmond Morris.
11 Kahneman, supra note 4.
Anchoring is one of these heuristics. For example, a person is likely to give a higher or lower estimate of damages if a particularly high (or low) figure is introduced. That number—even if far off the mark—tends to act as an anchor around which later estimates are formed.

In a classic study, participants were asked to estimate the number of African countries in the United Nations after witnessing a researcher spin a wheel of fortune that landed on one of two numbers. The wheel of fortune was rigged to stop only on the numbers “10” and “65.” The median response of participants who saw and wrote down the number “10” was 25 countries; and the median response for participants who witnessed the number “65” was 45 countries.

Do judges who are trained to follow procedural rules designed to minimize the influence of irrelevant information succumb to anchoring? In a series of studies with German judges, Birte English and her colleagues examined whether criminal sentencing decisions could be influenced by anchors that judges knew to be irrelevant. The anchor was presented in several ways: (a) by a journalist’s question about the sentence, (b) by a prosecutor’s acknowledged, randomly determined sentencing demand, and (c) by a prosecutor’s sentencing demand obtained by the judge throwing a pair of loaded dice. In all cases the judges’ decisions were influenced by the anchors. The judges sentenced more harshly when exposed to the higher rather than lower randomly determined anchor.

Another heuristic is the reliance on small and unrepresentative samples of the population to make decisions. Individuals frequently view small samples incorrectly as representative and adjust their expectations accordingly.

Uri Simonsohn and Francesca Gino, who studied the influence of this heuristic, postulated that individuals who make a set of decisions every day would try to align each daily set of decisions to reflect their overall distribution of decisions. To test this hypothesis, the researchers reviewed data from over 9,000 interviews in which interviewers scored the qualifications of the interviewees. They found that interviewers’ daily subsets (small samples) of scores tended to reflect their overall distribution of scores (population). Even though on a given day four interviewees, for example, may all have been deserving of a high score, the interviewers will be reluctant to score all four highly, and the interviewees will be more likely to be ranked lower to conform to the interviewer’s overall population scores.

Simonsohn and Gino ask us to imagine, for example, a judge who must make dozens of judgments a day. Given that people underestimate the presence of streaks in random sequences, the judge may be disproportionately reluctant to evaluate four, five or six people in a row in too similar a fashion, even though that “subset” was formed post-hoc.

More evidence that judges are susceptible to heuristics comes from a series of studies by law professors Chris Guthrie and Jeffrey Rachlinski and Judge Andrew Wistrich. They explored judges’ use of five heuristics: (a) anchoring, (b) framing—the same information presented differently (e.g., the glass is half full versus half empty), (c) hindsight—the sense that specific outcomes were more predictable once the outcomes are known, (d) representativeness—ignoring statistical base-rate information, and (e) egocentricity—overconfidence in one’s abilities. They found that judges’ decisions were influenced by each of these heuristics.

For example, when some judges were told about a clearly meritless motion to dismiss for lack of jurisdiction in a diversity case (based on the idea that damages were less than $75,000), judges who were aware that such a motion had been filed awarded a lesser damage amount (30% less overall) than judges who did not know about the motion to dismiss. But they also found that judges showed less susceptibility to the framing and representativeness heuristics than other experts and laypersons, and, in a subsequent study, that hindsight did not affect judges’ decisions in a specific scenario involving a probable-cause determination.

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14 Uri Simonsohn and Francesca Gino, Daily Horizons: Evidence of Narrow Bracketing in Judgment from 10 Years of MBA-Admission Interviews, PSYCHOLOGICAL SCIENCE (forthcoming).
15 Id. at 10-11 (citing Thomas Gilovich, Robert Vallone, and Amos Tversky, The Hot Hand in Basketball: On the Misperception of Random Sequences, 17 COGNITIVE PSYCHOL. 295 (1985)).
2.2 Implicit Biases

Implicit biases, another type of schema, also threaten fair processes and just outcomes. They are based on implicit attitudes or stereotypes that operate below the radar. Research shows that even individuals who consciously strive to be fair and objective can nonetheless be influenced by implicit biases. 19

Scientists use a variety of methods to measure implicit bias, but the most common is comparing individuals' reaction times in response to pairings of two stimuli that are strongly associated (e.g., elderly and frail) with two stimuli that are less strongly associated (e.g., elderly and robust). Project Implicit, begun in 1998 by researchers from several U.S. universities, offers web-based reaction-time tests, referred to as Implicit Association Tests, in over fifteen areas such as weight, age, race, and religion that anyone can take. 20 A review of the results of over 2.5 million tests taken between 2000 and 2006 revealed the pervasiveness of implicit preferences for socially privileged groups such as white over black and straight over gay. 21 Research also shows that implicit biases can influence decisions in a variety of real-life settings such as employers hiring job applicants, police officers deciding to shoot, healthcare workers providing medical treatment, and voters making voting choices. 22

Research by Rachlinski and his colleagues suggests that judges may be influenced by implicit bias. 23 They found, for example, a strong white preference on the Implicit Association Test among white judges. In keeping with the general population findings of the Implicit Association Test, the black judges showed no clear preference overall (44% showed a white preference but the preference was weaker overall). The researchers also reported some evidence that implicit bias affected judges’ sentencing decisions, though this finding was less clear. Importantly for judicial decision making, the researchers found that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.” 24

3. Mindful Judicial Decisions

Scientists agree that most behaviors and decisions result from a combination of both reflexive and reflective processes. The question is the extent to and ways in which the two processes work together for any particular decision. 25 Several researchers postulate what psychologist Jonathan Evans refers to as “default-interventionist” models of judgment and decision making. 26 These models propose that initial intuitive or reflexive responses are generated, which are then modified or endorsed by the reflective system. The reflective system routinely endorses the initial responses, reserving more deliberative, effortful processing to when the individual is motivated to do so and working memory and time are sufficient. 27

In most situations, default processing is good enough. But in the courtroom, where individuals face possible restrictions of liberty and judges consider other life-altering issues—such as family preservation, personal safety, economic security, and adequate housing—fair processes and just outcomes demand a more deliberate approach. Given that most behaviors and decisions result from a combination of both reflexive and reflective processes, are there ways to lessen the effects of faulty heuristics and implicit biases? One step is to understand some of the causes of diminished decision-making abilities, which include fatigue (like sleep deprivation), other depleted resources (like glucose levels), multitasking, mood, and fluency (i.e., ease of processing information).

24 Id. at 1221. For judicial-education resources on implicit bias, see PAMELA M. CASEY, ROGER K. WARREN, FRED L. CHEESMAN II. & JENNIFER K. ELEK, HELPING COURTS ADDRESS IMPLICIT BIAS (2012), available at www.ncsc.org/libreport.
26 Evans, supra note 4, at 266.
3.1 Effects of Fatigue, Diminished Resources, and Multitasking

We all know that fatigue, depleted resources, and multitasking lower performance. Researchers Yvonne Harrison and James Horne reviewed studies on the effects of sleep deprivation and identified several effects including poor "communication, lack of innovation, inflexibility of thought processes, inappropriate attention to peripheral concerns or distraction, over-reliance on previous strategies, unwillingness to try out novel strategies, unreliable memory for when events occurred, changes in mood including loss of empathy with colleagues, and inability to deal with surprise and the unexpected."\(^\text{28}\)

Blood sugar (glucose) fuels the brain, and research shows that reflective processes demand more fuel than reflexive processes. When glucose levels are low, individuals have a tendency to rely more on reflexive decision-making strategies and have more difficulty summoning their reflective system to check their decisions.\(^\text{29}\)

This research may explain the findings of a recent study that examined decision fatigue among Israeli parole-board judges.\(^\text{30}\) The study found that the experienced judges' decisions fluctuated based on when cases were heard during the day. Cases heard early in the morning and just after breaks (with meals) were more likely to end with a parole grant than cases heard shortly before breaks and at the end of the day. That is, decisions tended to default to the status quo of denying parole as the number of cases increased until judges took a break. Because each break included a meal, it is not possible to say with certainty that it was the meal and not the "timeout" that affected subsequent decisions. But research in this area suggests that the meal replenished glucose stores and thus contributed to the change in "default" processing in cases following a break. In either case, the study suggests that "judicial decisions can be influenced by whether the judge took a break to eat."\(^\text{31}\)

Finally, multitasking involves the rapid switching from one task to another. Done in milliseconds, the brain postpones one task and sets up for the next.\(^\text{32}\) For more than 97% of the population, this task switching has a cost in performance.\(^\text{33}\) Despite numerous studies to the contrary, however, most individuals think that they are good at multitasking and more efficient as a result. Many judges are the same; even if they concede that multitasking has a cost, many judges are quite good at articulating that—for them—the cost is negligible and worth it.

As noted, researchers consistently find diminished performance by those who multitask. For example, psychologists Jason Watson and David Strayer tested the performance of 200 individuals on a driving simulation task, a cognitive task involving memorization and basic math problems, and a dual-task condition involving both the driving simulation and the cognitive tasks.\(^\text{34}\) Performance measures on the individual tasks were significantly better than those in the dual-task condition.

Task switching in the courtroom has the potential of distracting the judge and reducing performance, but it also carries with it the sense that a judge is not fully engaged with the matter at hand. A central tenet of procedural fairness is that the judge is an active listener. If the judge seems distracted with other matters, litigants will not feel that their voice has been fully heard. A recent study by Harvard psychologists demonstrated the importance of giving people voice.\(^\text{35}\) The researchers found that regions of the brain associated with reward are activated when individuals are allowed to talk about themselves.

3.2 Effects of Mood

Mood affects the way we process information, with those in a positive mood generally more likely to engage in reflexive, automatic processing and those in a negative mood more likely to engage in more reflective, deliberative processing.\(^\text{36}\)

\(^{31}\) Id. at 6890.
\(^{34}\) Id.
One explanation is that positive moods enhance the default processing approach—the status quo—and negative moods inhibit it. In many instances, individuals “default” to reflexive processing; thus positive moods often are associated with reflexive processing. If things are good, there is little motivation to engage in more effortful processing. Reliance on stereotypes comes easily. A negative mood, on the other hand, signals a problem that requires more focus and attention.

Researchers Kimberly Elsbach and Pamela Barr suggest that different moods are more suited for some purposes than others: “[P]ositive moods are best suited for decision-making tasks that are interesting or require creativity or efficiency, while negative moods are best suited for decision tasks that are effortful and/or require careful consideration and analysis of a number of different issues and potential outcomes.”

It is possible for individuals to override their spontaneous reliance on reflexive processing when in a positive mood by being more vigilant. Research shows, for example, that specifically instructing individuals to pay attention and holding individuals accountable for their decisions can induce more effortful processing.

### 3.3 Fluency

Fluency refers to the ease with which we process information. People generally consider information that is processed more fluently (i.e., is more easily understood) as more accurate and true than less fluent information. This holds true for a range of sensory and cognitive information. For example, information written in an easy-to-read font is considered more accurate than the same information written in a more difficult-to-process font. Likewise, information that is familiar, easier to pronounce, and easier to retrieve from memory is judged more true and likeable and individuals express more confidence in it, whatever its actual content (and accuracy) may be. Much of advertising is based on the idea of fluency.

Psychologist Adam Alter and his colleagues demonstrated that fluency is associated with reflexive information processing and disfluency is associated with more reflective processing. In one of their studies, they asked participants to complete the Cognitive Reflection Test, a series of three questions that seem to have initially easy answers but, upon further reflection, require more systematic processing to obtain the correct responses. The researchers gave some of the participants in the study the questions in an easy-to-read font and other participants received the questions in a difficult-to-read font. Those in the latter disfluency group answered more items correctly. The researchers suggest that the difficult font served as a cue to the reflexive system that the task would require more effort to process. Those in the easy-font group had no clue that more effortful processing was required.

Nancy Pennington and Reid Hastie demonstrated the potential effects of fluency in a courtroom setting. They found that when individuals read case materials and were asked to come to a decision at the end (similar to the typical juror’s task), the individuals develop narrative stories to understand the evidence. The researchers manipulated the order of the evidence provided, making it easier or harder to develop a coherent narrative. Consistent with the research on fluency, they found that the ease in creating a narrative story affected “perceptions of evidence strength, judgments about confidence, and the impact of information about witness credibility.” Decisions shifted in the direction of the narratives that were easier to construct.

### 4. Becoming More Mindful

Almost everything a judge does involves processing information and making decisions. So if they are to improve their performance as judges, they must focus on improving the performance of those tasks. Doing so can offer additional benefits as well. One aspect of being more mindful is finding ways to relieve stress, which can interfere with information processing and decision making. Some judges may regard job stress as part of the job, but job stress can lead to

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37 Jeffrey R. Huntsinger, Gerald L. Clore, and Yoav Bar-Anan, Mood and Global-Local Focus: Priming a Local Focus Reverses the Link Between Mood and Global-Local Processing, 10 EMOTION 722 (2010).
41 Adam L. Alter and Daniel M. Oppenheimer, Uniting the Tribes of Fluency to Form a Metacognitive Nation, 13 PERSONALITY AND SOC. PSYCHOL. 219 (2009).
diminished physical health. Of course, consistent with the themes of this paper, stress also can lead to a diminished capacity for good decision making.

The remainder of this paper suggests some strategies that may help judges be more mindful and make better decisions. First, they might do well to focus on the higher purpose of the proceeding and properly deciding a case with a real impact on someone, not just processing a court docket. Second, they could formalize and critique heuristics used to make repetitive but important decisions. For example, a judge might consider what specific factors are leading to bail decisions or probation conditions: Are they based on accurate information? Third, they could become more mindful and periodically “read the dials.” Am I tired? Is noise from outside the courtroom a distraction? Is a break in order? Fourth, decision aids, like checklists, may help. Finally, they might benefit from feedback and fostering accountability.

4.1 Focusing on Purpose

Sometimes the sheer press of business makes it difficult for a judge to focus on the individual case. The primary purpose of court work becomes moving cases as opposed to hearing them. It is hard to be mindful when the focus is on getting through a docket, signing orders, writing opinions, preparing a speech for a local community group, and any number of other responsibilities that fall on a judge’s shoulder.

Taking time—even just a few minutes—to bring full attention to the matter at hand offers a check on reflexive, automatic decision making and a step toward ensuring a fair process and a just outcome. Administrative Judge Judy Harris Kluger makes this point in her reflections about working in the busy New York City Criminal Court:

For a long time my claim to fame was that I arraigned 200 cases in one session. That’s ridiculous. When I was arraigning cases, I’d be handed the papers, say the sentence is going to be five days, ten days, whatever, never even looking at the defendant. At a community court, I’m able to look up from the papers and see the person standing in front of me. It takes two or three more minutes, but I think a judge is much more effective that way.

Judges who see their work not as the volume of the cases they move in a particular day, but rather as their contribution to a fair and just court system are likely to find more satisfaction and meaning in their work. Judges who see themselves as cogs in the machinery of the system may benefit from remembering their contributions to the larger system goals.

4.2 Formalizing Decision Heuristics

Although the law may assume that decision makers review and weigh all relevant information in a systematic manner to reach an optimal judgment, research demonstrates that this is not the case in practice. In a study of bail decisions in England and Wales, researchers found that a simple “matching heuristic” explained decisions better than a more complex, integrated model of decision making. The matching heuristic relied primarily on three factors: bail decisions could be predicted 92% of the time in one court, for example, by relying on (1) whether the prosecutor opposed bail, (2) whether a previous court imposed conditions or remanded in custody, and (3) whether police imposed conditions or remanded in custody. If the answer was yes to any of these, the magistrate’s decision was to deny bail. In another study, the findings showed that magistrates’ beliefs about their decision-making process differed from their practice (i.e., relying on a simple heuristic).

Clement McDonald observed that physicians often rely on a subset of information and extrapolate based on experience to make diagnoses and treatment decisions. He notes that the lack of scientific information available on some drugs and diseases, for example, requires doctors to develop heuristics. Rather than ignoring the use of heuristics, he calls for the medical community to formalize them. “Exposing these heuristics to critical review so that they can be clarified, improved, and standardized may reduce practice variation, thereby making it easier to optimize the care process,” he writes.

In the same way, judges can consider the “rules of thumb” they may be using to process their cases, whether traffic, small claims, family, civil, or criminal. Are there specific factors that cause one judge to put the defendant in custody at sentencing while another does not? Does a defendant’s marital status have any bearing on a bail decision? Taking time to

45 Id.
46 Id. at 81.
reflectively identify and rely on decision heuristics that are transparent and predictable across cases and judges, could go a long way to enhancing litigant perceptions of fairness.\textsuperscript{51}

4.3 “Reading the Dials”

The principles of procedural justice require focus and attention, which may be hard to come by if a judge is tired or hungry, is multitasking, or is not in a mood to engage in effortful processing. Taking stock of such distracting factors serves as a reminder that more concentration may be necessary. Sometimes little annoyances may become irritating distractions and unwittingly raise the level of tension in the courtroom. Sometimes the judge just wants to “push through” the remaining cases when a break would be best for all.

Periodically “reading the dials” helps identify distractions and potential ways to lessen their effects. For example, does the temperature in the courtroom need to be adjusted or noise in the hallways reduced? Is it time for a break? Some judges and lawyers have adopted a practice of “mindfulness” to strengthen their ability to read the dials.\textsuperscript{52}

Harvard researchers describe the practice of mindfulness as meditation that “encompasses focusing attention on the experience of thoughts, emotions, and body sensations, simply observing them as they arise and pass way.”\textsuperscript{53} Other researchers note that “mindfulness is thought to enable one to respond to situations more reflectively (as opposed to reflexively).”\textsuperscript{54}

A common meditation practice involves sitting quietly and concentrating on the breath. Individuals try to identify when their mind wanders from focusing on the experience of breathing; and, once they do, they return the mind’s focus to the breath. As they practice this sequence over and over, they gradually learn to recognize the thoughts and emotions that pull their attention away and are able to regain focus more easily. Research by psychologist Amishi Jha and her colleagues shows that the ability to focus attention is evident after just thirty minutes of practice a day for eight weeks.\textsuperscript{55} As with physical exercise, the longer individuals practice mindfulness meditation, the more skilled they become.\textsuperscript{56}

Bob Stahl and Elisha Goldstein offer another mindfulness practice to help individuals take a quick look at the dials. They refer to it as the STOP meditation.\textsuperscript{57} The STOP acronym reminds individuals to:

- Stop what they are currently doing,
- Take a deep breath and focus on the sensation of breathing,
- Observe what they are thinking, feeling, and doing, and
- Proceed with new awareness.

Judges can use this quick pause throughout the day, especially when they find themselves getting distracted, bored, or overwhelmed. The pause helps to refocus attention and reaffirm the priority to ensure each case is given a fair process.

Attorney Douglas Codiga expressed concern that judges and attorneys’ misconceptions about mindfulness being mystical or otherworldly, requiring a commitment to Buddhism, or amounting to just another stress-reduction technique would lessen its potential to impact the field.\textsuperscript{58} Contrary to these misconceptions, he argued that mindfulness is compatible with legal principles of reason, analysis, and skepticism; does not conflict with preexisting religious beliefs and requires no

\textsuperscript{51} Gerd Gigerenzer, \textit{Heuristics, in HEURISTICS AND THE LAW 17} (Gerd Gigerenzer and Christoph Engel eds., 2006).


\textsuperscript{55} Amishi P. Jha, Jason Krompinger, and Michael J. Baime, \textit{Mindfulness Training Modifies Subsystems of Attention, 7 COGNITIVE, AFFECTIVE, AND BEHAV. NEUROSCIENCE 109} (2007).


\textsuperscript{57} See STOP meditation demonstrated at \url{http://www.youtube.com/watch?v=EiuTpeu5xQc}. \textit{See generally ELISHA GOLSTEIN, THE NOW EFFECT: HOW THIS MOMENT CAN CHANGE THE REST OF YOUR LIFE} (2012); BOB STAHL AND ELISHA GOLSTEIN, A MINDFULNESS-BASED STRESS REDUCTION WORKBOOK (2010).

commitment to Buddhism; and, in addition to reducing stress and improving lawyering skills, mindfulness would help legal professionals develop insights regarding their entire lives.

4.4 Using Decision Aids
At first blush the idea of using a decision aid, like a checklist or a benchcard, may seem mundane. But compelling lessons from other professions such as health care and aviation demonstrate their incredible potential for improving performance. Physician Atul Gawande, for example, tells the story of how simple checklists (requiring such simple steps as washing hands with soap and fully covering the patient with sterile drapes) implemented in a Michigan hospital intensive care units saved over 1,500 lives and an estimated $175 million dollars in costs. 59

Judges sometimes use checklists to decide substantive issues, but judges might also benefit from having procedural checklists. 60 In busy courtrooms with crowded dockets, a judge can easily fail to cover an essential piece of information that a defendant must be told before a plea may be voluntarily entered. When using checklists, however, judges should be careful also to follow the principles of procedural fairness and not simply cross off items on a checklist. For example, it is important that the defendant actually understand the rights he or she is giving up, not just answering “yes” to a series of questions obviously intended to get an affirmative response (“Do you understand?).

Other tools based on evidence-based practices, such as risk and needs assessments, can be helpful to judges in making sentencing and probation-revocation decisions. 61 Research demonstrates that standardized, objective assessment instruments enhance decision making across a wide variety of professional decisions. 62 Researchers Stephen Gottfredson and Laura Moriarty suggest the following reasons, in part based on reflexive processing, for the superiority of statistical methods of prediction compared to intuitive methods: decision makers may not use information reliably, may not attend to base rates, may inappropriately weight predictive items, may weight items that are not predictive, and may be influenced by causal attributions or spurious correlations. 63

4.5 Seeking Feedback and Fostering Accountability
Because feedback is essential to learning and developing expertise, judges might seek and courts could benefit from providing opportunities to obtain feedback. Judges seldom know the results of their decisions. Even when a judge’s decision is reviewed by an appellate court, the lag time between making the decision and getting appellate feedback diminishes the value of the information. Individuals benefit the most when feedback is immediate.

Judges also cannot improve their decisions when they do not know what is and is not working at a systemic level. Does the court have access to outcome data on, for example, pretrial release, sentencing, and probation revocation decisions? What are the trends in the data? What cases most often result in failure to appeal or rearrest, and what decision heuristics might be guiding the cases? The court could also collect information on litigant satisfaction using a survey such as the National Center for State Courts’ CourTools Access and Fairness Measure. 64 The results of the survey would indicate whether judges’ assessments of their practice of procedural fairness principles are consistent with litigants’ experiences.

Judges also could be videotaped periodically or observed by a mentor or colleague. A neutral observer more likely will be able to identify mistakes in reasoning or instances where procedural fairness practices could be strengthened. 65

Finally, accountability can lead to more effortful, reflective processing of information. Researcher Eileen Braman explains:

60 For examples of substantive-law checklists, see Guthrie, Rachlinski and Wistrich, supra note 17, at 40.
63 Id.
65 Brest and Krieger, supra note 7, at 635.
Put another way, accountability tends to heighten accuracy motivations. When we know others are watching, we want to “get things right” and we also strive to use appropriate decision criteria to avoid criticisms that may be raised down the line.  

One suggestion for holding judges accountable is to require that they provide an explanation for their decision, preferably in writing. Guthrie and his colleagues argue that “the discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions.” Research also shows that individuals who were required to justify each step in a decision process performed better.  

To the extent that judges ask themselves “why” at each point in their decision process and consider alternatives, their decisions will be the result of more effortful and deliberate processing. And to the extent that they are willing to engage in obtaining and using feedback from others, as discussed above, they will enhance a culture of accountability.

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67 Guthrie, Rachlinski and Wistrich, supra note 17, at 37.
68 Baumeister, Masicampo, and Vohs, supra note 26.
21 Cost-Saving Measures For The Judiciary
By Jessica Vapnek

Abstract:

Courts around the world are increasingly facing budget cuts and funding shortfalls. Budget problems are particularly acute in developing countries, where courts need to increase efficiency and access to justice while also managing resource limitations. International development agencies and donors expect measurable progress to justify continued funding of judicial reform projects. Yet, as rule of law efforts in developing countries improve public perception of courts and streamline court administration, more cases may be filed. Greater use of the courts puts greater strain on court resources, triggering the need to implement cost-saving measures while maintaining effective court administration.

This paper outlines 21 measures that courts can implement to reduce costs. Specific examples from developing countries are presented wherever possible, with additional examples drawn from the United States and Europe. Although this paper is intended mainly for audiences in developing countries, the issues facing those courts are similar to issues addressed through court reforms in the United States over the past 50 years. For this reason, examples of cost-saving measures from developed countries such as the United States may be directly applicable or could be used as starting points to spur further cost savings innovation in the developing world.

Section I of this paper explains the context for the implementation of judicial cost-saving measures, and raises some issues for reflection. Section II sets out specific judicial cost-saving measures, dividing them into three categories: measures that address court operations; measures directed at staffing and salaries; and measures that relate to court and case management. Section III discusses ways that countries and judiciaries can generate ideas for new and innovative cost-saving mechanisms.

1. Implications of Judicial Cost-Saving Measures

There is little doubt that implementation of cost-saving measures can make courts more agile and well-organized. Court systems and staff can benefit from inward reflection and identification of steps to reduce non-essential spending and eliminate redundant processes. In this way, many courts may see improvements in efficiency and accountability. Regular evaluation of court spending holds court administrators more accountable for their expenditures and expense reporting. Improvements can yield more streamlined, transparent, and economical procedures and administrative structures.

But courts rarely cut costs solely to increase efficiency for efficiency’s sake. Courts implement judicial cost-saving measures in an environment of increasing scarcity: budgets are trimmed and courts must cut costs like other government departments. But cutting costs in the courts is unlike cutting costs in other sectors. Courts in many jurisdictions are independent and intentionally removed from the political process, and therefore have no avenue to advocate for themselves or for preserving their budgets. More importantly, reductions in court funding can have deleterious societal costs. Due to funding cuts and concomitant staff and service reductions, court users can experience undue delays or outright denial of due process or access to justice. And in an environment of legal uncertainty, investment can decline.

Thus there is a need to proceed with caution when reducing court costs. Some cost-saving measures may be inevitable where courts are faced with budget limits. The key is to implement only those measures that are essential, and keep them in place only as long as necessary. Courts may find it useful to introduce easier, less disruptive, and less controversial measures first. This will reduce backlash from court employees and the public. Campaigns designed to raise public awareness and educate court personnel on the implications and importance of cost-saving measures can reduce the negative reaction and generate interest in complying with the proposed modifications to court operations. Once initial changes are made, courts and the public can begin to see the value of cost savings and efficiency improvements which can foster interest in other cost-saving innovations. Freezing and lowering salaries, imposing furloughs, and postponing filling vacancies, however, should be used as a last resort and only as temporary measures. The effects on morale, efficiency, and responsiveness can be long-lasting once judges and staff work too long and too hard in an environment of austerity, and the implications for access to justice are grave.

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2. Types of Cost-Saving Measures

2.1 Operational Measures

Courts can implement operational changes to cut costs. These measures involve modifications to how, where, and when the courts conduct routine administrative activities.

1. Reduce Operating Expenses

To deal with decreases in budgets allocated to the judicial system, courts in jurisdictions such as Greece, Lithuania, Slovenia, England, Wales, and the United States have opted to freeze or reduce operational costs.\(^3\) Relatively simple steps include energy-saving measures such as turning off lights and fans when rooms are unoccupied and resource-saving measures such as requiring that attorneys provide copies of documents submitted to courts so that courts do not have to spend time and supplies making copies.

Other cost-cutting measures include relocating courts to less expensive land or buildings and hiring less expensive vendors and contractors. In Serbia, after threatening to outsource mail services elsewhere, court officials successfully negotiated with the postal service to reduce the cost of delivering notices of service and process by registered mail.\(^4\)

Evidence from court workload studies shows that courts with one or two judges are significantly less efficient than larger courts.\(^5\) Courts can close court locations with caseloads that do not justify full-time judicial services, although it is important to study whether residents of the area—which may be a remote rural location—do not then face prohibitive transportation costs to access courts that are now farther away.

Courts can also shift responsibilities and costs onto litigants, although this too can have deleterious effects on access to justice in poorer jurisdictions. Parties filing civil complaints rather than the courts can be made responsible for serving respondents with copies of complaints and for issuing certificates of service of process. When respondents file answers to complaints with the courts, respondents can be required to serve plaintiffs with copies of the answer.

To supplement cost-saving measures, courts can generate funds through user fees to support budgetary needs. User fees that can be applied to the judiciary budget include filing fees, penalties, and fines.\(^6\) Care should be taken to publicize the fee scales to reduce the possibility of corruption.

2. Centralize and Share Court Operations

Centralizing certain back-office court functions can cut costs and increase efficiency. Centralization minimizes duplication of operations within courts or between different departments of large courts, streamlining communications, standardizing administrative activities, and conserving staff, space, and office supplies. Some processes that may be centralized include payments, collections, human resources, procurement, training, auditing, emergency preparedness, and information technology management. The New Hampshire courts established a centralized customer service call center to replace customer service offices and free up court staff for case processing.\(^7\)

Courts can also share costs and services for operational and administrative functions. In Florida, the state courts, state attorneys, public defenders, and other justice sector agencies share costs on a pro rata basis for state-funded court services, including court reporters, court interpreters and translators, and experts.\(^8\) Rhode Island and Iowa bankruptcy courts have partnered to maintain each other’s operations in the event of a temporary closure.\(^9\) Library services are another area where courts can share costs.

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\(^8\) Fl. Stat. §29.018 (2010).

3. Use Technology for Administrative Tasks

Another way to achieve operational savings is to shift to technology-based systems where practicable. Mechanisms to streamline court processes include electronic filing of documents and pleadings, electronic case and document management systems, digital records for transcripts and files, and videoconferencing technology. Full implementation of these technologies can eliminate up to 60 percent of court clerical work, saving on payroll expenses and allowing staff resources to be allocated to other functions.

Electronic filing systems are less costly than paper filings that require printing and binding equipment and shelving space. Electronic filing systems also reduce labor costs associated with document review and can enhance efficiency by facilitating document location and retrieval. Electronic case and document management systems allow administrators to shift recordkeeping and scheduling functions away from overworked staff. Replacing court stenographers with digital audio or video recording of judicial proceedings can also cut staffing and document management costs.

Videoconferencing technology for virtual meetings, staff trainings, and court hearings is another area of savings for courts. Furthermore, use of videoconferencing for remote arraignments, remote testimony by expert witnesses, and interpreters not available locally saves on transportation costs for courts and court users alike. Geographically dispersed courts in particular benefit from videoconferencing, as it saves the cost of transportation of prisoners and witnesses. In Minnesota, judges in the rural Ninth Judicial Circuit are encouraged to use videoconferencing for civil cases.

Challenges for successful implementation of technology-based systems, particularly in developing countries, include deficiencies in technical infrastructure, shortages of technically competent personnel, and limited budgets for ongoing maintenance and operating costs. Prospective users of new technologies in developing countries may not be highly computer literate and may also require extensive training. For technology-based systems to be effective, they should not automate existing disorganized administrative systems. The first step before implementing an electronic system is implementation of a well-organized paper system to be used as the basis for the electronic version.

The adoption of technology to serve administrative functions in courts should be accompanied by thoughtful review or development of efficient information tracking and file management processes. Although cash-strapped judiciaries may fear the high initial outlays to implement electronic systems, cost-benefit analysis may well show that the efficiency gains overall will pay for the expensive up-front costs within only a few years.

4. Use Technology to Publish Legal Information

Courts can disseminate codes and laws, court decisions, legal research materials, and legal commentaries using CD-ROMs, DVDs, and online databases, which reduces publishing costs. Although scanning past legal cases and other older documents requires a significant initial expenditure, courts realize long-term cost savings once all records are centrally accessible in electronic format. Access to legal information in electronic format increases efficiency for judges and court staff by allowing for quick searches, consistent records, and more comprehensive research. It also increases access to justice for the public who can follow the progress of court cases filed and retrieve information about laws, court operations, and the legal system in general.

A number of developing countries have embraced technology despite budget limitations. Afghanistan, Côte d’Ivoire, and Haiti are looking into centralizing criminal records to reduce the burdens on court staff and increase efficiency and transparency. In Afghanistan, the lack of a nationwide information system allows dissatisfied parties to re-file the same case in the next province, leading to inefficiency and negative public perceptions of the legal system. The World Bank worked with the Albanian courts to develop a computerized, Internet-accessible database for Supreme Court decisions and a similar database for Albanian legislation. Belize, too, has made its Constitution and legislation available on a government website for many years. In 2009, Vietnam released for the first time a CD-ROM and online version of its benchbook, a manual providing information about laws and legal procedure. With future revisions to be emailed to courts, Vietnam’s benchbook has become an essential tool for training judges.

10 Flango et al., supra note 5, at 39.
11 Id.
13 USAID, supra note 4, at 34.
15 USAID, supra note 4, at 35.
5. Cut Court Hours
Another way that courts can cut costs is to limit their hours of operation, although reducing court hours limits litigants’ access to the courts. The only additional argument in favor of reducing court operating hours is that court staff can use the extra time to process backlogged court files and meet any mandatory deadlines required by law, such as the processing of criminal cases. In the United States, as of July 2011, courts in 22 states had reduced their hours as a cost-saving measure.17 The San Francisco Superior Court in California cut the operating hours of its clerks’ offices by one hour per day as a response to budget cuts.18 Florida court clerk offices, facing a 7 percent budget cut amounting to $31 million, reduced hours open to the public by 1.5 hours per day.19 As noted earlier, these types of cost-cutting measures should be viewed only as temporary measures to address budget shortfalls, and should be reversed as soon as the pressure eases.

6. Improve Judicial Budgeting
Changing the way court budgets are developed and executed can generate cost savings. For example, decentralizing some budget analysis functions from central administration to local courts can allow for more efficient and responsive budget review. Reviewing court operating budgets using regularly updated local information helps refine spending decisions to more accurately allocate funds to areas of need, and can help identify areas for further cost savings. In Rwanda, the Ministry of Finance and Economic Planning sets the overall judicial budget, incorporating input from lower courts,20 which are responsible for developing and reporting their spending priorities. Similarly, Tetra Tech DPK’s USAID-funded project in the Democratic Republic of Congo is helping build the capacity of provincial courts to accurately generate budgets which are conveyed to the central authorities responsible for developing the overall judicial budget. More accurate budgeting and advocacy led to a 300% increase in the budget allocated to the judiciary in 2011, although the actual disbursement of the budgeted amounts was less successful.

2.2 Staffing and Salary Measures
Staffing and salary changes should be implemented with caution, as they are unlikely to improve the efficiency of court administration. Instead, they will lead to curtailing of court activities, reductions in court services available to the public, and morale effects on remaining staff. For this reason, the cost-saving measures presented in this section should be considered only as a last resort and temporary response to judicial budget cuts.

7. Cut Court Staff and Use Existing Court Staff More Efficiently
Administrative, clerical, and security positions performing redundant or nonessential functions can be eliminated. Creating cross-trained teams of staff rather than specialized positions can offset staff reductions. This can reduce turnover rates, create greater time and resource efficiencies, and increase job satisfaction. Keeping customer service offices and trial courts open while consolidating back office work may also preserve access to justice. This has additional effects of achieving economies of scale and making full use of the current staff. In Alabama, Minnesota, Oregon, Utah, and Vermont, courts have eliminated positions that are no longer necessary, low priority, or no longer affordable and reallocated staff to functions where there are greater needs.21

8. Freeze or Reduce Salaries
In 2011, courts in 42 U.S. states froze the salaries of judges and court staff, and courts in 13 states reduced salaries.22 In New York, where judges have not had a salary increase since 1999, nearly 10 percent of judges leave the bench annually.23 This can reduce expertise within the judicial system and decrease efficiency in court administration. Additionally, in some countries, especially developing countries, salary reductions for judges and court staff may have the potential to increase corruption as bribes are sought to generate lost income. In some jurisdictions, laws may prohibit the reduction of judges’ salaries to ensure independence of the judiciary, such as the US Constitution’s protection of salaries for federal judges.

21 Flango et al., supra note 5, at 34.
22 NCSC, supra note 17.
9. **Impose Furloughs**
Another cost-saving measure to be implemented only temporarily is to require that judges and court staff take paid or unpaid furloughs. This can negatively affect access to justice by delaying case processing, but it can be an effective temporary measure to reduce payroll expenses. In 2011, 21 U.S. states imposed furloughs for court administrative staff with pay reductions, while 10 states imposed analogous furloughs for judges.²⁴

10. **Postpone Filling Vacancies or Fill Vacancies with Retirees, Part-Time Staff, or Volunteers**
Courts can delay filling vacancies as a temporary measure to reduce costs, although this creates case and document processing backlogs, increases burnout among existing staff whose workloads increase, and decreases efficiency. In 2011, 33 U.S. states delayed filling judicial vacancies.²⁶ At the same time, 37 states postponed filling judicial support position vacancies.²⁷

Encouraging early retirement of judges and judicial staff can permit the courts to hire them back as less expensive consultants. In place of new judges, New York courts have come to rely on Judicial Hearing Officers (JHOs), retired judges who relieve sitting judges of some duties and provide assistance where needed. There are approximately 300 retired judges working as JHOs in New York State.²⁷ California also permits retired judges to serve on cases and pays them the difference in their retirement benefit and the salary of sitting judges.²⁸ This can help reduce case backlog while also managing the demand for new judges whose salaries are more expensive. Another option is to hire part-time employees, who do not receive healthcare and other employment benefits.²⁹

In some jurisdictions or countries, courts can fill vacancies with volunteers, particularly from local law schools and legal aid organizations. This not only reduces payroll expenses, but also increases knowledge of courts and court functions among younger lawyers. Volunteers’ responsibilities should be limited to relatively simple matters, such as editing, fact-checking, and calendaring. In Macedonian courts, law student volunteers assist judges in editing draft decisions.

11. **Train Judges and Court Staff**
Training court staff can reduce transaction costs and increase efficiency in the court system. Judges, who direct the pace of proceedings and allocate resources, contribute to the efficiency of court systems as well. Lack of knowledge and experience on the part of judges and court staff can slow down court processes and subject courts to costs associated with mistakes having to be corrected. In South Africa, training for court staff includes practical business skills and leadership.³⁰ This sensitizes staff to the need for continuous quality improvement of the courts and turns them into champions of judicial system reform.

12. **Create Performance Standards**
Creating performance indicators and targets can make court staff more accountable for their actions. In the Itagui district of Colombia, a Judicial Support Office sets performance standards and goals for court personnel,³¹ and ensures performance indicators are met through periodic evaluations. The indicators include specified time limits for certain actions, such as document collection, document filing, and communication with court personnel.³² Evaluations help courts determine which administrative staff members are not performing their duties up to standards and the circumstances under which inefficiencies exist. Courts then use this information to achieve cost savings and improve productivity by making changes to administrative procedures and staffing.

This is a difficult area because efficiency indicators can readily compromise the quality of judicial decision making and independence. For this reason, developing a culture of internal judicial review and quality assurance is essential. A great deal of work has been done in this area by the National Center for State Courts in the U.S. and the International Consortium for Court Excellence at the international level. The former has developed CourTools³³ while the latter has established the *International Framework for Court Excellence* as a recognized standard for quality improvements in court systems.

²⁴ Id.
²⁵ Id.
²⁶ Id.
²⁷ Id.
³⁰ USAID, supra note 4, at 34.
³¹ UNODC, supra note 16, at 33-34.
³² Id.
³³ “CourTools: giving courts the tools to measure success”, a project of NCSC at http://www.courtools.org/
Improving efficiency at the cost of compromising the quality of justice can be worse than having inefficient court processes – as the fact of efficient court systems in totalitarian states amply demonstrates.

2.3 Court and Case Management Measures
Court and case management measures for judicial cost savings involve changes to when and how judges adjudicate cases.

13. Modify Court and Case Assignments
Court systems can change the assignment system so that courtrooms are shared among judges, which can increase efficiency. An arrangement where one particular courtroom is exclusively used by one judge means that at all times some courtrooms are not in use. Non-exclusive arrangements provide the flexibility to adjust courtroom assignments in the face of new judicial appointments and caseloads.  

Formula-based case assignment systems, which automatically allocate cases to judges according to a pre-established formula, can reduce court expenses because they require minimal supervision and maintenance from court staff. In the Philippines, for example, cases are assigned to judges by lottery in the trial courts.  

Under a continuous trial system, which has been adopted in the courts in Iowa, one judge conducts a trial from beginning to end instead of having preliminary hearings or motions heard by other judges. The arguments for assignment of one judge for the life of each case are that it improves case management, reduces discovery excesses, and speeds access to courts as judges decide cases more expeditiously. Cost savings result when issues can be decided early, shortening the duration of each case.  

14. Restructure Courts
Restructuring a court system can entail consolidating courts, reducing overlapping jurisdiction between courts, or creating specialized courts. Vermont has restructured the administrative division between state and counties and eliminated redundant jurisdictions. In 2011, New Hampshire consolidated its district, family, and probate court operations for an estimated $1.3 million in annual savings.  

Creating specialized units within courts to handle different types of cases can realize cost savings and efficiency gains because judges handle disputes in less time due to their subject matter expertise. Without specialized courts, lawyers must present detailed information to generalist judges, which can raise costs and lengthen trials, whereas judges for specialized courts do not generally require extensive briefing in their legal area of expertise. Examples of specialized courts include family, environmental, probate, tax, workers’ compensation, water, land, administrative, juvenile, drug, and business/commercial courts.  

In Singapore, court reforms during the 1990s intended to divert cases from the Supreme Court to lower courts led to the creation of specialized courts. In addition to cost savings, establishment of these courts triggered a review of judges’ skills that led to better training for lower-court judges.  

Specialized courts are not as common in developing countries, which most often only have courts related to administrative, constitutional, and general jurisdiction. Creating specialized courts may have high initial costs, but due to the factors just reviewed, cost savings may be achieved over time, in addition to improved efficiency and quality of justice.

15. Favor Oral Proceedings

35 Cf. Flango, supra note 5, at 99.  
36 USAID, supra note 4, at 21.  
38 USAID, supra note 4, at 23.  
40 Fahey, supra note 7.  
43 Id.
Many judicial systems are introducing or emphasizing oral proceedings, where arguments by litigants can be made, responded to, and decided upon more quickly and directly. Oral proceedings can be a useful way to cut down on time and costs. To effectively conduct oral proceedings, courts need adequate equipment, facilities, and administrative support to record what is said as well as manage evidentiary material. Between 1994 and 2008, 15 Latin American countries have attempted to introduce oral proceedings for criminal cases. Among these, Argentina, Bolivia, Costa Rica, El Salvador, and Guatemala have revised their criminal procedural codes to incorporate oral procedures, while Peru and Venezuela have instituted oral civil proceedings.

16. Reduce Corruption
Corruption creates inefficiencies in the justice system, requiring more court staff and more time to complete tasks. Some of the strategies used to reduce corruption include ethics training for judges and court staff, mentoring programs for judges and prosecutors, standardization and public disclosure of court fees and procedures, and open court proceedings. Courts in certain jurisdictions in the Democratic Republic of Congo have installed locked glass boxes outside the courthouse, to display court fees and reduce opportunities for rent seeking by corrupt judges and court staff. After Yemen was suspended from Millennium Challenge Corporation’s grant program in 2005 due to noncompliance on several performance indicators, the Yemeni Government initiated anticorruption reforms, including sanctioning or suspending more than 30 corrupt judges.

Regularly lost or misplaced court records may be indicative of corrupt practices by court staff who interfere with the case management process in response to bribes from litigating parties. The case filing process must be transparent, both in terms of where the filing takes place and what the documents contain. Courts can improve transparency by allowing public access to court records and keeping court records under continuous court control. To combat corruption in Ecuador, windows were placed in the case filing area to allow the public to see the work of court registrars and clerks.

17. Increase Use of Alternative Dispute Resolution
Alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration, reduce court caseloads and are generally less expensive than trials. There are various means to compel use of ADR, such as mandatory mediation or arbitration for certain civil cases. To reduce the number of pending civil cases, Italy requires mandatory mediation of certain matters, such as property rights, inheritance, medical liability, and damages caused by vehicles. The use of mediation in Italy is estimated to have decreased the average duration of legal proceedings from 547 to 202 days.

Since 2001, USAID-funded projects have established 16 ADR centers in Guatemala, making legal services available to over 100,000 persons. These ADR centers mediate cases involving criminal, civil, family, and labor issues. Participation is voluntary, and free legal services are provided to women, indigenous people, and the underprivileged. The ADR centers in Guatemala have proven to be sustainable, as most ADR centers have continued to operate after foreign funding ended.

Problems associated with ADR can include lack of impartiality, lack of clear procedural guidelines and standards of conduct for mediators, unpredictability of decisions, and difficulties with enforcement. Nonetheless, public confidence and respect have grown for ADR, especially in developing countries where ADR allows for greater access to justice by disadvantaged groups and can be less intimidating and costly to the public than formal courts.

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44 USAID, supra note 4, at 23.
47 Id.
50 USAID, supra note 4, at 18.
52 Id.
54 Id.
18. Increase Use of Small Claims Courts
Small claims courts resolve lawsuits below a certain monetary value, without the need for lawyers. Faster and with simpler procedures than other courts, small claims courts reduce costs for courts and litigating parties. Typical types of disputes include debt collection, landlord-tenant law, and consumer contracts. USAID-funded projects established 22 small claims courts in the Philippines, helping draft small claim court rules, training judges and court staff, and publicizing the small claims court services to the public. Belarus, Botswana, Brazil, Honduras, Mexico, Romania, South Africa, and Venezuela are among the developing countries with small claims courts that have recently increased maximum claim amounts.

19. Remove Certain Disputes from the Court Adjudicatory Process
Uncontested issues and issues that are not truly in dispute can be resolved administratively, rather than through the courts, to cut costs. Matters amenable to administrative resolution include cases that would otherwise have required courts to collect fines (such as parking tickets, traffic cases, and ordinance violations) as well as uncontested cases (such as uncontested probate, no-fault divorce, naturalization, name change, and juvenile truancy cases). Failure to reach a resolution in the initial administrative review need not mean immediate referral to a court. Many administrative issues can be resolved by appeals to a tribunal within the administrative agency. New York City created administrative tribunals to decide certain types of cases formerly processed within criminal courts, including parking violations, noise pollution complaints, sanitation, fire, building code, health, and mental health violations.

20. Manage Appeals
Courts can cut costs by curtailing excessive or frivolous appeals, although care must be taken to ensure that defendants and litigants are not denied due process. Establishment of clear and fair rules for the appeals process allows courts to avoid unwarranted appeals and the concomitant paperwork, while affording litigants their rights to appeal. Strategies include limiting the scope of appeals, establishing time limits for filing appeals, and offering fast-track mechanisms for the review and resolution of certain types of appeals.

21. Consider Legislative Changes
Some jurisdictions would benefit from examining the legislation governing the courts to identify areas for reform which could cut costs and increase efficiency. Fundamental are measures to ensure early access to legal advice so that the need to go to court is minimized. Some examples include limiting the right to appeal (e.g., in Afghanistan under current law either party as a matter of right may appeal any decision for any reason, both to the court of appeals and the Supreme Court), eliminating in absentia cases (which require extensive resources), instituting plea bargaining (under consideration in the Democratic Republic of Congo), standardizing the criteria for assignment of free legal aid to indigents, establishing a bail system, and reforming the system of pretrial detention (such as is taking place in Haiti).

Court systems can also increase revenue by amending legislation to expand the categories of infractions and petty misdemeanors that can be dealt with through administratively issued fines or by raising the applicable amounts. This has the added benefit of eliminating court appearances for those cases that would otherwise have to be heard, which reduces demands on court resources.

3. Generating Ideas for Further Cost-Saving Measures
Courts seeking ways to reduce costs can solicit or generate new ideas for judicial cost savings in a number of ways. Court employees who originate judicial cost-saving ideas can receive rewards for making suggestions that are successfully implemented. Incentives can range from recognition to sharing a portion of the savings. Court departments may also be incentivized through bonuses to reduce costs without adversely affecting the quality of services provided. Such an arrangement would have to be carefully managed to make sure that the system was not gamed by court administrators who might inflate their budgets one year to cut them the following year. Contractors who make capital improvements resulting in cost reductions or who reduce fees for contracts that they have been awarded could also earn incentives. The

56 Id.
58 Flango, supra note 5, at 13-14.
U.S. state of Oregon has implemented both a state employee suggestion program and a government waste reporting system.⁶⁰

Many countries have established judicial councils or commissions composed of judges, court administrators, and other justice sector representatives. Where judicial commissions have broad policy-making authority over court administration, these commissions can be authorized to develop solutions to address courts’ limited budgets. Tasks for judicial commissions can include reviewing legislation and policies that govern court operations and identifying which cost-saving measures would be legally permissible or easily amended. Without this type of state-sanctioned legal review and reform, some changes in court operations for cost savings may not be possible or may be difficult to achieve.

Conclusion

The choice of which cost-saving measures to implement in a particular country will depend on the local circumstances at play: politics, policies, budgets, donor priorities, and the governing legal framework. But whichever tools are devised or selected for implementation, these cost-saving measures should be properly tailored and appropriate to the local context and reality. Although cost cutting can be painful, some justice sector institutions in developing countries may find that implementation of judicial cost-saving measures generates continued support and additional funding from international development agencies eager to recognize and reward the efficiency gains or the cost-cutting outlook of these courts. The hope is always that funding cuts to the courts will be temporary, and that with time countries will increases budget support to establish or rebuild a court system which is well-funded, well-organized, efficient, and responsive, and offers access to justice especially to the weak.

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Systemic Or Incremental Path Of Reform? The Modernization Of The Judicial System In Italy
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Abstract:

The paper presents the first results of the monitoring of the national program “Diffusion of best practices within the Italian judicial offices”². The program represents the first large scale attempt at modernization of the judicial offices and focuses on the organization and quality of work processes, ICT use, and the relations with the users. The paper analyses the program design, which is based on a mix of top-down actions of the central state administrations and bottom-up interventions proposed by the local judicial offices.

The hypothesis at the basis of the paper supports the view that the design is justified as it enhances the experimentation capacities at local level and values the partnerships with local stakeholders. This aspect is also underlined by the specific literature (in particular by the literature on professional organizations).

In the Italian case, which is characterized by strong regional imbalances in terms of social and economic development, strong program coordination is needed. However, this is not guaranteed either by central administrations or by partnerships among local offices.

1. Introduction
The weak organizational performance of the Italian judicial system is well known. The inefficiency of civil justice is one of the main issues of the current political and institutional debate due to its links with the social and economic development policies and, therefore, with the current economic crisis situation.

The main indicators of this inefficiency are:
  a) slowness in the solution of disputes;
  b) increase in the backlog of work.

The vice-president of the CSM-Consiglio Superiore della Magistratura (Council for the Judiciary, the body responsible for ensuring the self-government and independence of the judiciary) has recently underlined this situation in a book which states: "...the Italian courts and law courts are confronted with more than 5.6 million pending civil lawsuits and almost 3.3 million pending criminal trials; a staggering trial length corresponds to these numbers: on average 845 days for first instance civil lawsuits and 1,509 days for the appeals and 7 years overall for both trials. As to the criminal trials, the average is 1,400 days for both first instance and appeal trials." (Vietti 2011: 52).

There is also another relevant aspect that has to be underlined: the great difference between the performance of the courts and law courts in the different parts of Italy. For instance, the length of civil lawsuits is higher in the Southern regions than in the Northern ones.

According to the Italian Institute of Statistics (ISTAT), the length of Italian first instance civil cases reached 904 days in 2007. This length includes performances that vary from the 423 days of the Law Court of Turin to the 2,352 days of the Law Court of Cosenza. The same differences as mentioned above are also to be found when looking at the cases that concern work, social insurance or social assistance (Carmignani e Giacomelli 2009).

The length of delays in civil justice cases exceeds the boundaries of justice sector and has become an issue of economic policy, as is the case of all public services. For instance, the ex-president of the Bank of Italy underlined in his 2011 Report on the Italian economy that the length of civil cases had brought about a loss of 1 point of the Italian GDP. Furthermore, currently, the length of civil justice cases is one of the main intervention priorities in the Italian Southern regions (Ministero per la coesione territoriale/Ministry for territorial cohesion 2012).

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² The term “judicial office” is used because not only courts but also public prosecutions offices are involved in the project. In Italy public prosecutors are equally independent as judges.
Moreover, numerous international studies underline that in Italy the length of civil justice is much higher than in other countries similar to Italy in terms of dimension (population and enterprises) and economic development. For instance, the 2012 ‘Doing Business Report’ shows that the length for the recovery of a credit due to a commercial dispute is 1,210 days in Italy, compared to an average of 518.03 days in the OECD countries with the highest income.

There are various reasons for this situation. In particular, despite a high productivity of the system in terms of outputs, magistrates underline the following weak points of the justice system:

- high level of conflicts and lack of filters when entering the justice system (especially in the civil justice case). The number of cases is much higher than in other countries similar to Italy and this causes a workload larger than the capacity of the judicial system to get through the backlog. This situation could be overcome through the introduction of alternative ways of solving the cases;
- the excess of trial guarantees (three levels of trials) and the high number of magistrates involved (especially in the criminal trial case); a simplification of the procedures in place currently and a change in the trial models are proposed in order to overcome this situation;
- weaknesses in terms of human resources:
  a) the need to increase the number of magistrates and of administrative functionaries;
  b) balanced distribution of staff between the various judicial offices;
- organizational weaknesses: the need to reform the distribution of judicial offices within the judicial district, closing the smallest ones.

Magistrates also emphasize that improvements in the justice system may also be derived from interventions regarding the organization of the judicial offices both within and among the different offices.

However, economists from the Bank of Italy and scholars of organizational disciplines have focused more on the organizational issue than the magistrates have, underlying the following issues:

- the relevance of introducing control and planning systems within the judicial offices, so as to base decisions on precise data;
- the possibility of using new organizational processes such as: repeated (serial) decisions when dealing with cases regarding the same issue (for instance cases regarding pensions); introduction of the “first-in – first out” rule of managing cases; management of one case at a time and not of more cases at the same time;
- the obvious need to diffuse the use of ICT within all judicial offices.³


The proposals for addressing the problems of the Italian justice are, therefore, divided into two types of action. On the one side those that regard changes in the legal norms, such as, for instance, the desire to limit the justice demand by introducing alternative ways of solving issues that before required the judge’s intervention; on the other, those that are in favor of the introduction of tools and processes of organizational modernization.

This paper deals with the second type of actions by presenting and analyzing a relevant national program for the modernization of the judicial offices, started in 2008 which continues at present. The national program is called: “Diffusion of best practices within the Italian judicial offices” and is financed with ESF resources.

The main research questions are:

- a) What are the characteristics of the program design and how are they justified? What are the links between the program and the international debate on the modernization of the public administration? Who are the actors that have sustained the program design?
- b) What are the main results obtained so far?
- c) What are the critical aspects that have emerged up until now?

The hypothesis proposed here refers to the fact that an incremental intervention design, based on pilot experiences of local offices is a justified reform model, in particular in the Italian case.

The first reason that should justify the adoption of such a model considers the peculiarity of the justice sector that is based on professional organizations. In the case of such organizations, it is preferable that the modernization proposals are tested in different types of organizations so as to identify the most relevant solutions to diffuse elsewhere, taking into account context differences (for instance the differences between small, medium and large judicial offices, etc.).
Furthermore, another reason that justifies the adoption of this model is the strong social and economic differences between Central – North (more affluent) and South Italy. This situation allows the local central and northern public administrations to have and utilize more local resources, and to receive more pressure and stimulus for improving their performances than the southern public administrations.

The paper is organized as follows:
- the next chapter presents the characteristics of the national program for the Diffusion of Best Practices in the Italian Judicial Offices.
- the chapter is preceded by an introduction to the literature on the modernization of public administrations;
- the third chapter presents a brief chronology of the program design and implementation; the monitoring data of the first two years of implementation of the program; and it presents in depth the case of the Law Court of Milan;
- the fourth chapter discusses the results obtained taking into account the hypothesis formulated at the beginning of the paper.

2. The Characteristics of the Italian National Program: “Diffusion of best practices within the Italian judicial offices”. An incremental model of administrative reform

2.1 Systemic or Incremental Model of Administrative Reform?
In the last 20 years, various sectors of the Italian public administrations modernization reforms have been adopted. These have been largely inspired by the international debates on the reform of the public sector (New Public Management, post-NPM reform-style, governance, etc.). Only recently, analogue reforms have been adopted in the Italian justice sector, often commenced at the level of the single local judicial office.

The national program “Diffusion of best practices within the Italian judicial offices” is the first large program that aims to reorganize the working processes in the judicial offices through the adoption of specific organizational tools and processes.

The program does not derive from a specific general normative intervention and does not include all the Italian judicial offices. The program is based mostly on local initiatives, as it can only count on limited national coordination, at least for the moment.

It is, therefore, a program based on the incremental logic and on a mix of top-down directions and implementations with bottom-up objectives.

Due to these characteristics, it is worth looking in depth at the literature on administrative reforms to see how arguments sustaining the systematic and (top-down) intervention designs or the incremental ones have developed.

Besides research on sectorial cases, there are only a few works within the policy analysis literature that discuss the design models of the administrative reforms. One can refer to the Brunsson and Olsen model (1993 cited by Peters 2008, and Brunsson 2009) that maintains that a reform has to be structured according to a top-down model in order to be successful. One can also refer to Peters' paper (1998), where he describes the program ‘Reinventing Government’ which was promoted by the ex-vice-president of the USA – Al Gore in 1993.

In this analysis, he underlines the characteristics of the program design based on bottom-up actions and on the role of “change agents” operating at decentralized levels.

Furthermore, one of the arguments sustaining the incremental and bottom-up designs consists of the fact that local institutions can act as policy and projects laboratories. They can experiment with alternatives to solve problems, sustaining the good practices, abandoning the failures, and adopting successful solutions found elsewhere (see Volden et al. 2008:319).

Bouckaert and Pollit (2011) also analyze the implementation of reforms based on the New Public Management principles. The purpose of the two authors is to compare reforms in the ‘core’ NPM countries with the ones in the so called ‘neo-Weberian’ countries (mainly European/continental), in order to see if differences between the two types of countries are reflected in the design of reforms and implementation processes.

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4 In this case, the role of the “center” has to be redesigned in order to act as a stimulus for innovation and diffusion of best practices and lesson-drawing.
The conclusion reached by the authors is that there is no correspondence between the types of reform coordination and their contents. Generally, they notice a prevalence of the top-down coordination (see Pollitt and Boukaert 2011:114). The literature on the reforms of the ‘professional’ public administrations offers some relevant information useful for analyzing the reform of the Italian justice sector, which is a public sector based on a professional organization.

Various studies on public organizations that employ professionals (health, higher education and scientific centers, justice and lawyers in general) have emphasized the central role of professional groups in the change process, due not only to their expertise, but also to the strong control exerted on the other functionaries and on the users.

In particular, the literature underlines the opposition of such groups to the introduction of managerial processes within the public administration. The introduction of managerial roles, or of internal controls and accountability rules, has been seen to be a measure to weaken the power of professional groups and their control over the organizations.

In synthesis, the literature does not offer unambiguous indications on the success of various strategies used by governments for implementing administrative reforms in public administrations, based on professional organizations.

Countries such as the UK and New Zealand have adopted a top-down model in line with the so-called hard NPM, based on the introduction of strong managerial roles within the PA and external regulation.

However, the literature underlines also the adverse effects and the ambiguous results of such a model. Continental European countries, with a Rechtstaat/Napoleonic tradition, and Northern European ones, have adopted models based on the introduction of indirect managerial processes within the public administration, based on professionals’ and managers’ involvement in processes of organizational learning, cultural change and continuous improvement in the quality of services offered. This also included processes of audit and external regulation.

They have also adopted models of bottom-up “self-reforms”, based on the development of professionals’ managerial competences and on the change in the role of some of them (those placed in the executive positions), avoiding to the need to employ (or to increase the power of) managers who do not belong to the professionals’ group.

In particular, it is underlined how “governments which adopt this [last] strategy may be motivated by three possible considerations: (i) they decide that modest rather than radical strategies of public service reform are more likely to produce a political payoff; (ii) they have respect for alternative and legitimate power centers such as the liberal professions; (iii) earlier strategies of hard or soft NPM reforming have been tried and have foundered on the rocks of professional resistance” (Ferlie and Geraghty 2005: 439).

Finally, one can refer to a recent Italian study, which has analyzed the Italian administrative reforms, and in particular the ones implemented within the central state administrations. The authors maintain that:

1. Italian public administrations have improved over the last 20 years;
2. This has been the result of initiatives, often isolated, implemented by “illuminated” public managers and local politicians;
3. Furthermore, these initiatives have been possible due to the ‘90s legislative reforms;
4. No policy sustaining a real change in the functioning of the Italian PA has been implemented;
5. There has been no supporting policy, mainly due to the fact that the paradigms characterizing the administrative reform policy community were often inadequate (Butera e Dente 2009:17-18).

In this work, Butera and Dente maintain that one of the causes of the unsatisfactory results resides in the fact that most of the interventions have been implemented in an horizontal way, which has referred to almost all Italian public administrations without adapting them to the different contexts of the Italian public administration.

Furthermore, Butera and Dente state that even though “… these interventions have been necessary for removing obstacles and providing directions on the reform processes, they have not been sufficient and most of all they have not dealt with an essential issue. Changes in the way public administrations work cannot occur by imposing them from a central level, but have to be internalized by each public institution” (Butera e Dente 2009:22).

The two authors propose to adopt a mix of top-down and bottom-up interventions: “the proposal we make consists in the adoption of a national program of promotion, animation, support and diffusion of exemplar projects regarding the

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5 See, also, Dent and Whitehead 2002; Kirkpatrick et al. 2007; Evetts 2010.
reorganization of single ‘parts’ of the central state administrations, namely the adoption of Change Plans, which could obtain quick and simultaneous non incremental improvements in terms of efficiency (reduction of costs and increased productivity), effectiveness (improvement of the service offered) and quality (users' satisfaction)” (Butera e Dente 2009:43).

To conclude, the few indications on the design of reform interventions provided by the literature suggest the adoption of a mix of top-down and bottom-up measures/ processes. This flexibility is underlined also by theoreticians of the governance approach (Sørensen 2012, Pierre 2012).

2.2 Administrative Reforms in Italy and the International Debate about NPM and Post-NPM Reforms

Until recently, the analyses of the Italian administrative reforms have mainly underlined the failure of national interventions.

These analyses have concluded that the main cause has to be looked for in the prevalence of a paradigm based on the administrative law and the related epistemic community.

This paradigm is characterized by:

- relevance of the central normative regulation as a way of administrative action; increased attention to the legislative drafting rather than to the implementation design;
- focus on the overall coherence of the system through generalized interventions regarding all the administrations of the respective field. Several times, analysts have used the term “reforms implemented through decrees” to underline that failure was unavoidable as the lack of an implementation design brought about only a formal fulfilment of the law provisions and an imitative isomorphism without triggering the necessary organizational or behavioural changes to support the implementation of reforms (see Dente 1989; Panozzo 2000; Capano 2006; Ongaro 2006). These considerations made Peters to develop the idea of continuity in the Napoleonic tradition (Peters 2008).

On the contrary, some recent comparative researches on Italian administrative reforms (Barzelay and Gallego 2010a and 2010b; Mele 2010; Ongaro 2008; Ongaro and Valotti 2008; Gualmini 2008) have shown a more complex reality, where the administrative law paradigm continues to be relevant but no more dominant.

Furthermore, local institutions are given a relevant role in the network of actors. For example, when comparing the administrative reforms in different countries, Pollitt and Boukaert include Italy in the neo-Weberian country group, together with Spain, France and Germany, a group that presents a specific trajectory of reforms (Pollitt and Boukaert 2011). And Gualmini underlines that “…In Italy a number of major innovations marked a break with the past… Italy also witnessed full-scale changes in inner managerial techniques during the 1990s” (Gualmini 2008: 81-84).

In our view, the case of the national program ‘Diffusion of best practices’ seems to sustain this second thesis.

2.3. The National Program Diffusion of Best Practices

The program “Interregional/transnational program for the diffusion of best practices within the Italian judicial offices” was approved in April 2008.

It is was created subsequent to the agreement between the European Commission (DG Employment, Social Affairs and Inclusion), the Ministry of Justice, the Ministry of Labor, the Ministry of Public Administration, 19 regions and 2 autonomous provinces.

The extended partnership is explained by the fact that the program is funded by the ESF (one of the structural funds of the EU regional policy). This also explains the presence of both DG Employment and the Italian Ministry of Labor, as well as...

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6 “… Innovation relies on the presence of autonomous spaces in which decentered entrepreneurs can develop and pursue innovative ideas. However, in order to be effective this bottom-up interaction is in need of skillful top-down meta-governance that frames the interaction in ways that motivate the involved actors to innovate … This firm meta-governance helps to activate the knowledge, ideas, commitment, and energies of street-level bureaucrats, users of public services, employees, and private stakeholders in formulating, implementing, and disseminating new, innovative, ideas.” Sørensen 2012.

7 In her analysis, covered the formulation phase of the policy cycle, Gualmini continued: “… In terms of the number of laws approved by the Italian Parliament, the modernization process can be said to have been extensive compared with the changes made during previous decades. Moreover, it covered all three dimensions in question [(1) central bureaucracies’ formal structure; (2) civil service organization and careers; (3) internal administrative procedures and processes].

8 The official name, using the UE terminology, is: “Interregional/Transnational Project for the diffusion of good practices within the Italian judicial offices. Reorganization of the working processes and optimization of the resources of the judicial offices”.

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the presence of the 19 regions and the 2 provinces. In Italy, in fact, the European funds are managed mostly by regional governments. The Ministry of Public Administration also takes part. Its involvement is explained by its experience in sustaining and managing innovation programs in the public sector.

The program is based on the specific experience developed autonomously by the Prosecutors’ Office of Bolzano between 2004 and 2007 and funded with ESF (the next chapter presents a brief reconstruction of this intervention).

The objectives and contents of the program are described in a document attached to the Agreement Protocol signed by the partners (see http://www.giustizia.it/giustizia/it/mg_2_9_4.wp).

The program anticipates the funding will be of approximately two years of technical assistance activities (and therefore of external consultants’ intervention) to be realized within a defined number of judicial offices (not in all judicial offices), mostly Prosecutors’ Offices, ordinary Law Courts and Courts of Appeal.

The main objectives of the program are:
- to increase the quality of civil and penal justice;
- to reduce the organizational costs;
- to improve the information and communication capacity of judicial offices;
- to improve the processes of external accountability with regards to the results of their actions and use of public resources.

These objectives have been articulated in six activity lines to be implemented in each of the selected judicial office:

1. the analysis of the key working processes and the introduction of a reorganization plan; the implementation of the project with the aim to:
   - improve the internal operational efficiency;
   - create a performance monitoring system;
   - improve the quality and the effectiveness of the services offered to users (professionals users such as lawyers and general users such as members of the public or court users), with solutions such as a one-stop-shop;

2. analysis of the ICT technologies used in judicial offices, aimed at optimization of use and the development of services managed and delivered electronically; (this action does not foresee the acquisition of hardware and software);

3. drafting of an annual Social Budget Report (Social responsibility report) of judicial offices involved in the program;

4. drafting of the Citizen’s Charter and of the Guide to the services offered by the judicial offices;

5. support for obtaining ISO 9001:2000 quality certification;

6. creation or improvement of the website of judicial offices involved, with the aim to support online communication and the exchange of documents.

(See http://www.giustizia.it/giustizia/it/mg_2_9_4.wp).

The procedure for identifying the offices to be included in the program is based on the following steps. Each of the participating regions and autonomous provinces defines the budget to be allocated to the programme based on the availability of ESF funds.

At the same time, the Ministry of Justice asks all the judicial offices to send their proposals that have to contain a draft of the project ideas proposed by the presidents of the judicial offices. Initially, the Ministry of Justice managed a selection based on the quality of the project proposals, on their coherence with the program and on the availability of resources decided by each region. The Ministry defined the funds to be allocated to the technical assistance activities based on the size of the judicial office (number of magistrates and number of staff) and of the population residing in the territory under the jurisdiction of the judicial office. Successively, the increase in the funds available for the program in some regions (such as Lombardia, Sicilia and Campania, etc.) brought about an increase in the number of judicial offices taking part to the program. At the end of 2012, there were 182 judicial offices taking part to the Program.

In this way, the program chooses to be rather flexible. The regions are responsible for organizing the tenders for the selection of consultants for the technical activities. The consultants are selected based on the quality of their proposals and the economic offer.

For the first time in the recent history of the Italian justice sector, a vast intervention program aimed specifically at the organizational development of judicial offices is developed. Furthermore, it is a program that does not derive from
normative regulation\textsuperscript{9}. In particular, the program is based on conceiving the judicial activity as a public service and emphasizes the role of the users, not only of professional groups (lawyers), but especially of citizens.

Many characteristics of the international debate on public administration reforms (New Public Management approach/Governance) can be found in the design of this program. Attention to the quality of the working processes (ISO quality certification), to the accountability of the offices (Social responsibility report), the commitment towards standard, quality and time frame of service delivery (Citizens’ Charter), the commitment towards e-government innovations and the attention to the efficient use of public resources.

In the next chapter, a brief reconstruction of the program design and the first implementation period is presented, in order to analyze the key actors and, in particular, the relations between the top-down and bottom-up orientations.

3. Brief Reconstruction of the First Two Implementation Years of the National Program “Diffusion of Best Practices in the Italian Judicial Offices

3.1. The Conception Phase

The national program, as mentioned, is based on the experience of the Prosecutor’s Office of Bolzano.

In 2004 the Prosecutor decided to implement some interventions of reorganization in his office. He followed some courses on organizational issues with the aim to introduce new tools and processes for improving the performance of the administrative office and its communication with court or office users. The Prosecutor managed to obtain ESF funds from the Province of Bolzano.\textsuperscript{10} On this basis, between 2004 and 2007, the following projects were implemented:

- elaboration of an annual Social Responsibility Report aimed at communicating the main results of the activities carried out by the Prosecutor’s Office to its external stakeholders;
- definition of a Citizens’ Charter aimed at providing guidance on the services offered by the Prosecutor’s Office and at indicating their minimum levels of quality;
- implementation of a customer satisfaction survey and complaints’ registration;
- obtainment of the ISO 9001:2000 quality certification;
- redefinition of a series of work processes;
- creation of a website;
- elaboration of a self-assessment based on the Common Assessment Framework-CAF, in order to identify critical areas of intervention through projects concerning the organizational improvement of the Prosecutor’s Office and of the services offered;
- participation in national initiatives regarding quality and continuous improvement within public administration.

The success of these local initiatives was appreciated by the Italian Council for the Judiciary (CSM) and covered by the media, also, in part, due to some results obtained in the fields of interest in the political debate in Italy (i.e. reduction in the costs of wire–tapping, maintaining, however, the same quality and efficiency level).

The Bolzano case revealed some aspects that were considered an opportunity for starting a national program for the modernization of judicial offices:
a) reforms of the justice system that have been traditionally carried out by the center (CSM and the Ministry of Justice), are now implemented at a local level;
b) initiatives aimed at reforming the justice system could be financed by the European Social Fund and be a part of the regional cohesion policies.\textsuperscript{11} The experience of the Prosecutor’s Office of Bolzano represents, therefore, the reference point for a national program of administrative modernization of the Italian justice system.\textsuperscript{12}

\textsuperscript{9} The proposals aimed at the organizational innovation were included in the various reform projects presented by the governments between 2000 and 2010. However, the debate focused on the relation between the state powers (see Paciotti 2006), while the organizational issues were secondary. In 2012, Monti government approved the reduction of the small judicial offices (62 offices) within the spending review policy. Since 2000, thanks to the action of some local judicial offices, an important project of innovation of the civil justice sector has been implemented: the OCT – Online civil trial. The OCT foresees the electronic communication between the various subjects involved (mainly magistrates and lawyers). The OCT project is mainly implemented in the law courts (at the end of 2012, there were around 67 law courts that had implemented the OCT) and the implementation level varies from one judicial office to another (see http://www.processotelematico.giustizia.it). Only in 2009, the Ministry of Justice funded its extension to all law courts.

\textsuperscript{10} In Italy the European Union Structural Funds are in great part managed by the regional governments. The Autonomous Province of Bolzano and the Autonomous Province of Trento have the same governmental functions as the regional governments.

\textsuperscript{11} The efficiency of civil and criminal justice is one of the objectives included in the 2007-2013 National Strategic Reference Framework approved by the European Commission (see pp. 117-118). It is the main document for the programming of structural funds in Italy.
Thus, the organizational reform of the justice system has become one of the objectives of the new 2007-2013 ESF program negotiated by the EU Commission and the Italian Government (represented by the Ministry of Economy and Finance).

In 2007, the Minister of Justice asked the chief of the Organization Department to confirm the possibility of using ESF resources for extending the Bolzano experience to other Italian judicial offices as well. The chief of the Organization Department was a magistrate from the Law Court of Milan and in that period had been already known for his activity in the field of administrative modernization. In fact, in that period he was involved in the implementation of the Online Civil Process, one of the main innovation interventions underway at that time.

The chief of the Organization Department promoted the constitution of a working group made up of representatives from the Ministry of Justice, the Ministry of Public Administration (Dipartimento della funzione pubblica), the Ministry of Labor, representatives of the Italian regions, the representative of the European Commission in charge of the European Social Fund, and the chief Prosecutor of Bolzano.

In April 2008, an agreement was signed between the above mentioned actors, with the contents described in the paragraph 2.3.

Afterwards, two bodies were created for directing the program: a) the Steering Committee, consisting of representatives of all the institutions involved; b) a Strategic Unit, consisting of the Ministry of Justice, the Department of Public Administration and a team of experts (Task team). This aimed at grouping the ideas and agreements developed during the previous year in a national program for the administrative reform of the Italian judicial offices.

As to the actors involved in the program, two other aspects have to be underlined.

Firstly, as there was no internal technical structure that could be involved in the project implementation within the Ministry of Justice, the chief of the Organization Department asked for the support of a consultant that had already been involved in the implementation of the Online Civil Trial. These consultants were well known experts in the ‘judicial world’ as they cooperated with the Ministry of justice, with judiciary offices and with the University of Bologna, which had carried out numerous studies and projects in the justice field. 13

Secondly, it is important to emphasize the involvement of the Ministry of Public Administration, who was invited to take part in this initiative due to its experience in promoting and sustaining innovations developed by the local Italian public administrations (municipalities, regions and provinces).

Between 2000 and 2006, the Ministry of Public Administration managed the “Cantieri” (‘Building sites’) program, a relevant project of modernization of the Italian public administration, and especially of local public institutions. The “Cantieri” program was drafted after the introduction of the central state reform based on a federal direction. Moreover, the “Cantieri” program was highly influenced by the international debate on public sector reforms (i.e. the researches of international organizations like OECD) as well as the Italian debate on the economic role of public services.

The main initiatives foreseen by the program were focused on innovations aimed at improving the institutional and administrative capacity of the public administrations involved; the introduction of strategic planning and management systems; evaluation of the outcomes and quality of policies and services implemented by public administrations, besides the evaluation of their inputs and outputs; development of pay-for-performance systems; use of ICT technology to improve communication with citizens (websites that could be used also for delivering services, web delivery, disintermediation through one-stop shops and one-stop windows, e-democracy activities, etc). As well, the “Cantieri” program was based on the valorization of local experiences, therefore, on a bottom-up model. At that time, many local Northern and Central Italian administrations had already implemented relevant interventions focused on organizational change (i.e. introduction of the general manager figure, of performance management systems and of management systems based on Total Quality Management principles) as well as on public services management (public-private partnerships, ICT based delivery,

12 The case of the Prosecutor’s Office of Bolzano is not the only case where innovations have been implemented firstly at local level. Media publicised different interventions among which the one (management of civil trials) implemented by the Turin Law Court and some interventions of the Milan Law Court (the so-called Online Civil Trial – PCT).

13 It has to be underlined that, in the last decades, the main groups of researchers in the field of organization of the Justice system worked within the Faculty of Political Sciences of the University of Bologna. In 1992 this group created the Institute for Research on Judicial systems – IRSIG/CNR, located also to Bologna. And within the same university operates the Centre for the organization, the management and the digitalization of the Judicial Offices (COMIUG), which publishes the review Quaderni di Giustizia e Organizzazione (Journal of Justice and Organization).
participation of citizens to towns urban planning and architectural projects, involvement of consumers in services design, etc. However, some public institutions in the Mezzogiorno area (Southern part of Italy) also implemented relevant initiatives in this field.\(^{14}\)

Through this program, the Ministry of Public Administration played the role of director on the one side by funding the creation of communities of practices and the diffusion of knowledge aimed at the transfer of tested innovations, and on the other by incentivizing the implementation of new organizational modernization projects.

The new program for the modernization of the justice system largely follows the “Cantieri” model, acknowledging, thus, the reputation acquired by that Ministry.

3.2. The Implementation Phase: The First Period (2008-2012)

The implementation phase of the program started in 2008 with training activities aimed at creating the cultural bases necessary for the program implementation.

Meetings with all the presidents of the judicial offices (courts of law and prosecutors’ offices) were organized at the CSM (Council for the Judiciary). The following issues were discussed during these meetings: performance management, inter-organizational processes; communication with the press and the general public.

Between 2008 and 2009, the Ministry of Justice organized a series of meetings with the presidents and administrative directors of the judicial offices involved in the program.

Between 2008 and 2009, the Ministry of Justice and the Ministry of Public Administration drafted a version of the Common Assessment Framework adapted or customized to the justice field.

Additionally, in 2008, the Strategic Unit defined the criteria for regions to follow for the drafting of tenders for the technical assistance activities.

In the last months of 2008, Lombardia region published the first tender; other 13 regions published the tenders in 2009. The other regions published the tenders between 2010 and 2011. It has to be underlined that during the years some of the regions increased the resources allocated to the program and other tenders were published in 2012, while more still have to be published in 2013. The length of the tender procedures brought about delays in the start of the activities to be implemented. The first interventions were implemented after the first half of 2009.

At the end of 2010, the Ministry of public administration began the Monitoring of the justice performance project (MPG – Monitoraggio performance giustizia), with the aim of supporting the offices involved by monitoring the progress of the national program and evaluating the first results. At the same time, the regions involved elaborated more formal reporting to check the financial issues related to the national program.

The reports provided the following data.

In mid-2012 there were 182 judicial offices involved in the program. 55 of the involved offices have already concluded the activities; 30 of them have still ongoing projects; 31 are only in the start-up phase, while another 66 offices have actuated the procedures for the funding of the interventions. Furthermore, Lombardia Region funded for another year the activities of 11 offices that completed the first two years of technical assistance.

If we consider 133 of the 182 offices involved, in January 2012, the funding provided for implementation of the program amounted to approximately 30 million euro (the amount is meant to increase during 2012).

The following table presents the number of the judicial offices involved in the program divided on the basis of type of office.

\(^{14}\) See Vecchi 2009; Mele 2010.
Table 1 – Number of judicial offices per type

<table>
<thead>
<tr>
<th>Type of Offices</th>
<th>Offices Part Of The Program (June 2012)</th>
<th>Total Judiciary Offices In Italy (June 2012)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutor Offices, 1st instance (Procura della Repubblica)</td>
<td>66</td>
<td>165</td>
</tr>
<tr>
<td>1st instance Law Courts (Tribunali ordinari)</td>
<td>54</td>
<td>385</td>
</tr>
<tr>
<td>General Prosecutor Offices (second instance) (Procure generali della Repubblica)</td>
<td>15</td>
<td>29</td>
</tr>
<tr>
<td>Courts of Appeal (Corti d’Appello)</td>
<td>21</td>
<td>29</td>
</tr>
<tr>
<td>Juvenile Prosecutor’s Offices (Procure della Repubblica per i minorenni)</td>
<td>6</td>
<td>29</td>
</tr>
<tr>
<td>Juvenile Courts (Tribunali per i minorenni)</td>
<td>7</td>
<td>29</td>
</tr>
<tr>
<td>Surveillance Courts (Tribunali di sorveglianza)</td>
<td>6</td>
<td>29</td>
</tr>
<tr>
<td><strong>Total 1</strong></td>
<td><strong>176</strong></td>
<td><strong>695</strong></td>
</tr>
<tr>
<td>Justice of the peace Offices - Non-professional judges for minor (of less relevance) cases (Uffici del giudice di pace)</td>
<td>7</td>
<td>844</td>
</tr>
<tr>
<td><strong>Total 2</strong></td>
<td><strong>182</strong></td>
<td><strong>1,539</strong></td>
</tr>
</tbody>
</table>


(*) Number of judicial offices before the September 2012 reform that eliminated a number of small offices: 31 Law Courts (First instance) and 31 Prosecutor Offices. Moreover, it eliminated more than 600 Giudici di pace (Justice of the peace offices).

Considering the most relevant offices, the program covers 25% of the overall offices, including all prosecutor’s offices and law courts of big cities. The following table shows the territorial distribution of the judicial offices involved and the resources allocated by the regions.

Some regions adopted an extensive policy consisting in the financing of most of the law courts and prosecutor’s offices as well as other judicial offices. This is the case of Lombardia, Campania, Sicilia and Puglia regions. The Southern Italy regional governments allocated significant resources to the program and the offices involved represent almost half of all the judicial offices involved in the program at a national level. Some of the regions facing economic problems allocates limited resources to the program and used the ESF funds for solving problems related to the labor market.

Table 2 – Number of Judicial Offices per Region and Related Budget

<table>
<thead>
<tr>
<th>Regions and Autonomous Provinces</th>
<th>N. Judiciary Offices Involved (June 2012)*</th>
<th>Budget (*** For tenders Until January 2012 (**)</th>
<th>N. Judiciary Offices Financed January 2012 (**)</th>
<th>Budget: Average per office</th>
<th>Inhabitants (2011)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>North</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Valle d’Aosta</td>
<td>3</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>128,230</td>
</tr>
<tr>
<td>Piemonte</td>
<td>5</td>
<td>959,167</td>
<td>5</td>
<td>191,833</td>
<td>4,457,335</td>
</tr>
<tr>
<td>Lombardia</td>
<td>31</td>
<td>6,177,400</td>
<td>31</td>
<td>199,271</td>
<td>9,917,714</td>
</tr>
<tr>
<td>Veneto</td>
<td>3</td>
<td>664,500</td>
<td>3</td>
<td>221,500</td>
<td>4,937,854</td>
</tr>
<tr>
<td>Friuli VG</td>
<td>3</td>
<td>575,000</td>
<td>3</td>
<td>191,667</td>
<td>1,235,808</td>
</tr>
<tr>
<td>Liguria</td>
<td>2</td>
<td>600,000</td>
<td>2</td>
<td>300,000</td>
<td>1,616,788</td>
</tr>
<tr>
<td>A.P. Bolzano</td>
<td>2</td>
<td>200,000</td>
<td>1</td>
<td>200,000</td>
<td>507,657</td>
</tr>
<tr>
<td>A.P. Trento</td>
<td>4</td>
<td>456,789</td>
<td>4</td>
<td>114,197</td>
<td>529,457</td>
</tr>
<tr>
<td>Emilia-Romagna</td>
<td>7</td>
<td>1,466,000</td>
<td>7</td>
<td>209,429</td>
<td>4,432,418</td>
</tr>
<tr>
<td>TOT NORTH</td>
<td>60</td>
<td>11,098,856</td>
<td>56</td>
<td>198,194</td>
<td></td>
</tr>
<tr>
<td><strong>Center</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tuscany</td>
<td>3</td>
<td>791,667</td>
<td>3</td>
<td>263,889</td>
<td>3,749,813</td>
</tr>
<tr>
<td>Marche</td>
<td>2</td>
<td>300,000</td>
<td>2</td>
<td>150,000</td>
<td>1,565,335</td>
</tr>
</tbody>
</table>
The monitoring reports drafted by the Ministry of Public Administration contain information on the projects realized within the program. The monitoring is based on an online questionnaire filled out by the chiefs of the judicial offices with the support of the technical assistance (from January 2013 on site visits are foreseen to check information provided).

The second report drafted in July 2012\textsuperscript{15} provides information on the activity of 65 judicial offices that answered the questionnaire. The report shows that the offices have implemented a large amount of projects. The number of the interventions monitored amounts to 706, as articulated in the following intervention lines:

**Table 3 – Areas of intervention and number of projects developed by 65 local offices monitored**

<table>
<thead>
<tr>
<th>Areas of Intervention</th>
<th>Number of Projects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Line 1 – Analysis and reorganization of the judicial offices in order to improve their operational efficiency and the effectiveness of the services offered to users</td>
<td>241</td>
</tr>
<tr>
<td>Line 2 – Analysis of the ICT technologies use and their use for the organizational improvement</td>
<td>173</td>
</tr>
<tr>
<td>Line 3 – Drafting and adoption of Citizen’s Charters</td>
<td>64</td>
</tr>
<tr>
<td>Line 4 – Support to the obtainment of the ISO 9001:2000 certification</td>
<td>53</td>
</tr>
<tr>
<td>Line 5 – Drafting and publication of the Social Budget Report</td>
<td>67</td>
</tr>
<tr>
<td>Line 6 – Communication with the citizens and institutional communication: creation of Websites, etc.</td>
<td>108</td>
</tr>
<tr>
<td>Total</td>
<td>706</td>
</tr>
</tbody>
</table>


\textsuperscript{15} See http://www.qualitapa.gov.it/iniziative-in-corso/miglioramento-giustizia
While one expects similar outputs in each of the offices implementing the activities foreseen by intervention lines 2, 3, 4, 5 and 6 (even though the outcomes may be different), it is worth taking a closer look to the interventions included in the first activity line.

As mentioned above, the first intervention line includes activities focusing on organizational analyses (generally mapping of working processes, self-assessments through the Common Assessment Framework model and the construction of performance assessment systems), at the basis of the re-engineering and re-organization activities to be implemented. Therefore, the first intervention line is a wide framework allowing for the design of different projects on the basis of the priorities and opportunities perceived in the various contexts.

The following table presents the main issues dealt with by the line 1 projects. Most of the projects regard the re-engineering of the work processes on the one hand between the administrative offices and on the other between the magistrates and the offices. This emphasizes the fact that in most judicial offices the chiefs’ attention focuses on improving the internal working processes. However, some projects also focus on procedure simplification so as to improve the service offered to the users (both citizens in general and professional users such as lawyers, consultants supporting the magistrates in the trials, etc.). A rather small number of projects refer to the implementation of performance monitoring systems (i.e. one of the main objectives of the program, that is in fact not taken very seriously by the implemented projects).

An important number of projects focus on the optimization of working processes between the offices (for instance between prosecutor offices and law courts of 1th instance; or between law courts and courts of appeal). It is obvious that there is an increasing attention to the overall cycle of the working processes. The implementation of some projects have the objective to create citizens’ offices, which should manage issues that are dealt with by different judicial offices within the same city.

Table 4a - Themes covered by the projects of Line 1 (65 judicial offices monitored) – Intra-organizational objectives

<table>
<thead>
<tr>
<th>Intra-Organizational Themes</th>
<th>Number of Projects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reengineering of the back office procedures</td>
<td>63</td>
</tr>
<tr>
<td>Reengineering of the workflow between magistrates and administrative staff</td>
<td>29</td>
</tr>
<tr>
<td>Reengineering of front-office services for non-professional users</td>
<td>20</td>
</tr>
<tr>
<td>Creation of information offices for non-professional users</td>
<td>20</td>
</tr>
<tr>
<td>Reengineering of services which involve specific categories of professional users</td>
<td>16</td>
</tr>
<tr>
<td>Reengineering of services for all types of users</td>
<td>14</td>
</tr>
<tr>
<td>Reengineering of staff services</td>
<td>14</td>
</tr>
<tr>
<td>Implementation of data banks and information systems</td>
<td>11</td>
</tr>
<tr>
<td>Analysis of magistrates’ and administrative staff’s workloads</td>
<td>11</td>
</tr>
<tr>
<td>Reengineering of front-office services for specific nonprofessional users</td>
<td>8</td>
</tr>
<tr>
<td>Design and implementation of performance measurement systems</td>
<td>3</td>
</tr>
</tbody>
</table>


Table 4b - Themes covered by the projects of Line 1 (65 judicial offices monitored) – Number of projects with inter-organizational objectives (*)

<table>
<thead>
<tr>
<th>Inter-Organizational Themes</th>
<th>Number of Projects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reengineering, optimization and simplification of procedural flows between offices</td>
<td>38</td>
</tr>
<tr>
<td>Reengineering and optimization of human resources services common to different judicial offices</td>
<td>13</td>
</tr>
<tr>
<td>Creation of inter-departmental information/orientation/and assistance offices for professional and nonprofessional users</td>
<td>12</td>
</tr>
<tr>
<td>Design and implementation of electronic procedure to exchange information with other local public administrations</td>
<td>3</td>
</tr>
</tbody>
</table>

Note: the same project can have intra- and inter-organizational objectives

3.3. An in-depth look at the implementation of the program concerning the Law Court of Milan

In order to better present the activities realized within the program “Diffusion of good practices within the Italian judicial offices” it is useful to describe the interventions implemented in a single judicial office.

The Law Court of Milan is one of the most active judicial offices in the implementation of modernization interventions. In addition, there are numerous information sources related to the interventions implemented within the Law Court of Milan which are available. Although this case is not representative of the average of Italian judicial offices (the Law Court of Milan is one of the biggest three Italian judicial offices, together with Rome and Naples), it is interesting for two reasons:

a) because it shows a relevant number of areas covered by the interventions; and

b) because the implementation process is characterized by strong relations with local actors (public institutions and economic subjects).

The Law Court of Milan could count on technical assistance activities of approximately 300,000 euro during the first two years of the program and 150,000 euro for the last year. The activities started at the beginning of 2010 and will end halfway through 2013.

<table>
<thead>
<tr>
<th>Line</th>
<th>Project</th>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Linea 1</td>
<td>Reorganization of the civil and penal records offices</td>
<td>Reorganization of the front-offices providing information to professional users</td>
</tr>
<tr>
<td>The Project “Customers’ office”</td>
<td>Reorganization of the front-offices providing information to professional users</td>
<td></td>
</tr>
<tr>
<td>Management of the file</td>
<td>A project for the electronic mark of the trial folders (by using the bar code technology). Drafting of the feasibility study.</td>
<td></td>
</tr>
<tr>
<td>Improvement of the management of the penal sector</td>
<td>A project for the reorganization of the procedures of the justice expenses and executions carried out within the penal sector</td>
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<tr>
<td>Witnesses’ project</td>
<td>Establishment of a welcoming orientation service for witnesses and simplification of procedures related to witnesses</td>
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<tr>
<td>Management of external consultants</td>
<td>Intervention aimed at increasing the transparency of the management of the Consultants’ record and of the assignments offered to external consultants</td>
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<tr>
<td>Accounting and staff management</td>
<td>Reengineering of the working processes and optimization of management software regarding: magistrates’ and administrative staff management; efficiency of the maintenance works of the Justice Palace</td>
<td></td>
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<tr>
<td>Common Assessment Framework</td>
<td>Carrying out of a self-evaluation assessment of the organization of the willful jurisdiction sector based on the CAF model.</td>
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<tr>
<td>Planning and control processes</td>
<td>Support for the elaboration of programming documents; support for the activation of performance measurement system within the civil sector, called “magistrates’ console” (financed with other funds); project for the constitution of an Evaluation Committee for the performance assessment of the Court</td>
<td></td>
</tr>
<tr>
<td>Reorganization of the Willful Jurisdiction Sector</td>
<td>The project developed together with the Court of</td>
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16 The Law Court of Milan together with those of Rome and Napoli is one of the three big Italian judicial offices. Milan territorial area has 2.6 million inhabitants, of which 300,000 foreigners. To the resident population, tourists and business tourists have to be added. In 2010, the number of tourists in the Milan area reached 5.7 million visitors of which 2.8 foreign tourists. As to the organizational structure of the Law Court of Milan, in June 2012, it included 259 ordinary magistrates (among which the President of the Law Court), 556 administrative functionaries and 71 titular (honorary) judges.
Law of Monza foresees: a) the creation of external information points in collaboration with the Municipalities and the Volunteering Associations; b) ICT connections with the lawyers, municipalities and rendering communications paperless; internal reorganization through the transferring of some activities to the Public Relations Office.

| Line 1 | Strengthening of the activities carried out by the Innovation Office | Agreement with the universities for students’ internships and training sessions for the better management of innovation projects |
| Line 2 | Census of the hardware and software equipment | Analysis and proposals for the optimization of systems and the definition of improvement priorities |
| Line 2 | Monitoring of information systems | Implementation of the monitoring system of information solutions (sw and hw) used within the Court of Law |
| Line 2 | Implementation of new software | Implementation of software for the digitalization of folders and assignment procedures of trials to magistrates |
| Line 2 | Intranet | Creation of an intranet project connecting the judicial offices located within the “Justice Palace” of Milan |
| Line 2 | Website of penal sentences | Development of a data bank of penal sentences |
| Line 3 | Drafting and publication of Services Chart for the Willful Jurisdiction Sector | a services chart was already drafted which all the modules for acceding to these services are attached. It was not possible to include quality standards within the Chart. The Court of Law drafted autonomously the Services Chart of the GIP/GUP offices. |
| Line 4 | Support to obtaining the quality certification | It was implemented only for the service concerning the Witnesses’ Management |
| Line 6 | Communication and development of the website | Organization of national seminars for presenting the programme results. Development of a website managed by the Court of Law within another project. |
| Line 6 | Interactive services provided through the website | Development of on-line certificates and assistance to acceding to the online services. |


This list of projects emphasizes at least four relevant directions:

- attention for the users and external stakeholders through interventions such as the Public Relations Office, the Social Budget Report, the Citizens’ Charter, the Witnesses’ project and the realization of online services. Therefore, one could say that a clear attention to judicial action as a ‘service’ and to the relevance of users’ opinions in the design and planning of activities emerge;¹⁷
- attention for the performance measurement systems, aimed at making magistrates and the administrative staff feel part of the organization “Law Court of Milan” and not only of the national judicial system (and at making them consider and “correct” their behavior based on the conclusions of the performance measurement). These aspects are dealt with within the projects, referred to the performance measurement systems in the civil sector (‘Magistrates’ console’), the constitution of an Evaluation Committee with the presence of external experts and stakeholders, with the aim of a periodic assessment of the Court and of the reliability of performance data; the use of the CAF model for self-evaluations;
- development of ICT based systems aimed at: reducing the justice time, at increasing the efficiency in the use of resources, reorganizing workflow, simplifying the access of professional users and general users to services and increasing the effectiveness of the magistrates’ work (see projects implemented within line 2 and 6);

¹⁷ See Pomodoro 2012.
development of inter-organizational projects with other judicial offices (the Prosecutor’s Office, the Court of Appeal, etc.) aimed at improving the efficiency and quality of services offered (i.e. Customers’ Office Project, Intranet of the Justice Palace of Milan) and at creating partnerships for a better quality of service offered by the Law Court (see the project for the reorganization of the Willful Jurisdiction Sector, etc).

The objective to create partnerships with various actors is, indeed, one of the peculiarities characterizing the project of the Law Court of Milan as well as other projects implemented in particular in Central and Northern Italy.

It is useful to analyze this aspect in order to have a complete description of this implementation framework.

Distinctly different from the Italian judicial tradition, the Law Court of Milan is testing a close interaction with local public administrations and other external stakeholders, among which the Lawyers’ Association is the most relevant. This collaboration has been formalized through the creation of the Milan Justice Table, where they take part both as financial partners and/or direct participants to the implementation of on-going projects. Since 2010, the Law Court of Milan has adopted a Strategic Plan and built up a specific Innovation Office led by a magistrate in order to better manage the projects developed together with other partners.18

The table below presents the main partners and the related projects.

<table>
<thead>
<tr>
<th>Partners</th>
<th>Projects</th>
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<tbody>
<tr>
<td>Ministry of justice</td>
<td>● Online Civil Trial (PCT)</td>
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<td></td>
<td>● Management Control</td>
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<td></td>
<td>● Special Plan of Digitalization</td>
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<tr>
<td>Ministry of public administration</td>
<td>● Special Plan of Digitalization</td>
</tr>
<tr>
<td>Ministry of economy and finance</td>
<td>● 2015 EXPO funds: 4 millions of euro, year 2010; and 4.4 millions euro year 2011; for the improvement of ICT software and hardware (on-line civil trial, performance monitoring system, etc.) and the implementation of the Customers’ Office</td>
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<tr>
<td>Regione Lombardia</td>
<td>● Project testing a system for vocal recognition during hearings;</td>
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<td></td>
<td>● Best Practices project (in coordination with: EU/DG Employment; Ministry of Justice; Ministry of Labor; Ministry of public administration)</td>
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<td></td>
<td>● Project: SemplificaMI (Simplify Milan), in partnership with Milan Municipality</td>
</tr>
<tr>
<td>The Province of Milan</td>
<td>● Agreement for the employment of people receiving redundancy funds (“cassa integrati”) within the Court of Law of Milan</td>
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<td></td>
<td>● Plan for the staff’s competences update and requalification</td>
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<td></td>
<td>● Realization of the Wi-Fi connection of the “Justice Palace”</td>
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<tr>
<td>The Chamber of Commerce of Milan</td>
<td>● Creation of the website of the Court of Law of Milan;</td>
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<tr>
<td></td>
<td>● Digitalization of the documents regarding the execution of one or more parties involved</td>
</tr>
<tr>
<td></td>
<td>● Online system for the booking of hearings regarding forcible evictions</td>
</tr>
<tr>
<td></td>
<td>● Project: SemplificaMI (Simplify Milan), in partnership with Milan Municipality</td>
</tr>
<tr>
<td>Milan Municipality</td>
<td>● Requalification of the physical spaces used for trials processed immediately (“direttissime”)</td>
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<tr>
<td></td>
<td>● New building office on Pace street</td>
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<tr>
<td></td>
<td>● Management of the Expo funds</td>
</tr>
<tr>
<td></td>
<td>● Project: SemplificaMI (Simplify Milan), in partnership with Milan Municipality</td>
</tr>
<tr>
<td>Lawyers’ Order</td>
<td>● Agreement for the reduction in the time period of trials</td>
</tr>
</tbody>
</table>

18 See: Castelli e Xilo 2010; Tribunale di Milano 2011.
This table describes how the Court of Law of Milan can count on financial and technical support from multiple subjects and not only on the one offered by the Ministry of Justice, in charge of the organizational needs of the judicial offices in Italy. As can be seen from the table, some of the partners are central state administrations (Ministry of economy and finance, Ministry of public administration, Ministry of justice), and many others are local partners: local government institutions (Regional, Provincial and Municipal governments, Chamber of commerce), the Milan Lawyers’ Association, etc.

Another relevant aspect regards the creation of an Innovation Office within the Court of Law of Milan, which is in charge of coordinating the internal staff’s activities (magistrates, administrative staff and also consultants) within the project implementation and guarantee’s the quality of the accountability processes (the Performance Plan, the performance evaluation, the social budget report, etc.). By implementing these activities, the Law Court of Milan can count on the support of some of the universities of Milan and consulting firms.

Coming back to the “Diffusion of Best Practices” program, it has to be emphasized that the case of the Law Court of Milan is not an isolated case, in terms of projects implemented and development of territorial partnerships. Due to the dimensions of this paper, I will recall only some of the projects presented during seminars/conferences such as the annual fair of the Italian public administration (called ForumPa - see http://www.giustizia.it/giustizia/it/mg_16_1.wp?contentId=NEW749714) or signaled by the Ministry of Public Administration in the program website (see http://www.qualitapa.gov.it/iniziative-in-corsomiglioramento-giustizia/risorse/materiali/).

An interesting case is one regarding the Law Court of Monza, which is a city near Milan. The Law Court of Monza developed an interesting project in the field of willful jurisdiction, a law field that deals with social issues strongly linked to the action of the welfare services, such as: minors’ protection, divorces, etc., together with different municipalities, lawyers’ and volunteering associations. Decentralized offices were created for reducing the queues at the offices of the Monza Court of Law, for diffusing documents and providing necessary information. As well, specific software was designed to allow users to trace the progress of their requests to the Court. (see Di Guardo e Verzelloni 2011). Other interesting experiences are: the Prosecutor’s Office of Monza; the Law Court of Brescia; the Prosecutor’s Office of Ravenna; the Law Court of Reggio Emilia; the Law Court of Modena; the Prosecutor’s Office and Law Court of Turin; the Minors’ Courts of Law of Salerno and Napoli; to name a few.

Even if they are limited to few cases, these examples show that the program has been considered an opportunity for developing ideas and projects from the bottom and for activating local resources for the justice systems: a mobilization not experienced in the past.

3.4. The Role of Central Administrations in the Implementation of the National Program

The objective of this paragraph is to analyze the role of central administration in the national program implementation, as the program design foresees a central coordination and the diffusion of good practices implemented within the overall program.

As mentioned earlier (3.1.) in the conception phase, the Ministry of justice and its Organization Department, supported by a task team of internal officials and external consultants had a strong management role.

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19 See http://www.cittadinanzattiva.it/ and Cittadinanza Attiva 2012.
20 See the experiences of partnership with local actors, too; in particular, through the construction of specific organizations in Modena and Turin: Modena Giustizia Foundation and Torino Giustizia Association. See www.innovazioneperareaita.it and http://www.comune.torino.it/giunta/enti/enti-citta/associazione-torino-giustizia.shtml.
After the end of the second Prodi government and the appointment of the new Prime Minister in May 2008, the chief of the Organization Department of the Ministry of Justice was replaced and returned to the Law Court of Milan where he started to direct the innovation projects of this office.

The new responsible person, however, had not had the same experience as the previous position holder and he lacked a reference network on modernization policies outside the judiciary system. This resulted in a weaker role of the Organization Department in a relevant phase of implementation process. In fact, in mid-2010 the taskforce team of the Ministry of justice changed and a new team was made up of magistrates and internal functionaries with little experience in sustaining innovation policies. Only at the end of 2012 did the Ministry of Justice decided to involve the responsible person from the Department of the information system, thus strengthening the coordination action, but only for the ICT projects.

In mid-2011, the Ministry of public administration started monitoring the program (one report was published in May 2012 and another one in July 2012) through the organization of a specific project (MPG – Monitoring of the Justice Performance) and the constitution of a working group made of external consultants (five at the beginning, now ten).

The aim was to produce information on the physical progress of the national program and a good practices’ analysis and diffusion, as well as the evaluation of the whole national program. In mid-2012, the Ministry of public administration organized, in cooperation with the Ministry of Justice, a meeting with all the judicial offices involved in the national program at the annual Public Administration Exhibition – called Forum PA 2012. Some of the local projects, considered as positive implementations, were presented at this exhibition.

Summing up, the Ministry of Public Administration is the only central administration that has currently invested financial resources and which created a technical structure for playing an indirect coordination function through the diffusion of information and knowledge acquired during the program.

At the same time, the Council for the Judiciary played a weak role. However, within the Council there is no technical structure that could have technical competences to follow the national program. The Council was constantly informed about the program evolution and supported it, in some way, but without specific commitment.

The Italian regions and the European Commission are other actors that played a role at the central level. The Italian regions, through their national coordination structure, ensured the accountability of the program by taking into consideration the respect of the European rules (through the monitoring of the interventions and the program advancement).

The European Commission, represented by DG Employment, participated in the Monitoring Committees and made various presentations of the program advancement reports, requesting detailed information and participation. It has to be underlined that the positive image of the program transmitted by the Italian regions and ministries convinced the European Commission to include the modernization of the Italian judicial system within the 2014-2020 structural funds programming strategy.21

The central state administrations did not play, until now, a strong top-down coordination role within the program implementation. This was due on the one hand to the weakness of the technical structure and the lack of experience in European programs (in particular of the Ministry of Justice) and on the other the ESF financing of the national program, which assigned a relevant role to the regions, which limited the information and knowledge diffusion activities. There is the risk that the characteristics and the effectiveness of the technical assistance financed by the national program be very different from one place to another. In particular, there is the risk that:

- The specificities of the local requests will reduce the achievement of the program objectives;
- In the judicial offices characterized by a less prepared leadership, the quality of the program could be limited and less innovative;

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21 See European Commission 2012. It is important to underline that the issue of administrative capacity and organizational modernization have been central in the development policies financed by structural funds due to the action of the Department for Development and Economic Cohesion (now a branch of the Minister of territorial cohesion). Tools such as monitoring, ex ante, intermediary and ex post evaluation, administrative and financial auditing, the use of the European legislation for contracting the production of goods and services to private companies have been diffused within the Italian public administration also due to the action of structural funds. In this context, the action of the Department and of the current minister Barca have contributed to putting the issue of the administrative modernization (central and local) as a key component of the cohesion policies on the political agenda (see Melloni e Pasqui 2009).
The learning and diffusion processes may be effective only in the more developed regions. Currently, there are no detailed evaluations of the program. However, during seminars and meetings some weaknesses were emphasized.

One of these regards the tenders published for selecting consultants. The selection of consultants and funds dedicated to consultancy activities are managed by the Regional offices through public tenders. The ESF regional offices have no experience in the justice field, and, in some cases the pressure exerted by the local context has led to variations against to the original guidelines. Furthermore, in some cases the regional coordination proved to be quite limited. While some Regions (Lombardia and Campania) created monitoring teams to verify the compliance of the outputs produced with the requests of the national program, others did not.

Another difficulty refers to the capacities of the consultancy itself. Until the program creation, there were few experts in the organization of judicial offices, but it requires an extensive use of technical assistance. In most of the cases the tenders are won by groupings made of national or multinational companies (Universities are involved in a few places).

The fact that some of the groupings selected have won more tenders in different regions fosters a replication of outputs. However, the serial replication of the same schemes in different places has on the one hand some positive aspects (such as the fact of dealing with similar problems in the same way, favoring dialogue between different realities) and on the other some negative results (such as not paying attention to the local context and its needs).

In fact, some unsatisfactory results are emerging. For instance, one of the tenders published by a region has been blocked due to the fact that the winning company has been shown to be unable to ensure the realization of the services requested. The relations between offices and consultancies were one of the arguments dealt with during recent conferences (in part because of the lack of magistrates’ experience in managing the relations with consultants). Furthermore, some of the public managers of judicial offices in Southern Italy underline the difficulty of realizing partnerships with local public and private institutions, in contexts characterized by criminal infiltrations.

There remain some doubts about the sustainability of the innovations in some of the judicial offices involved, as with the end of the program the consultants' services will cease as well.

Consequently, the risk is that the program does not change the fact that in Italy the diffusion of innovations within the public administration presents high levels of territorial differences. This situation is even more relevant in Southern Italy. An undesired and adverse result lies in the increasing gap between areas where internal organizational factors (leadership, staff's competences, etc.) and external factors (institutional thickness,\textsuperscript{22} social capital\textsuperscript{23} and social-economic wealth) can sustain the implementation of innovation processes and those where the resources are not sufficient (as Southern Italy, even though in Southern Italy structural funds financing development and cohesion policy are consistent).

Nevertheless, the implementation of policy learning practices has to be emphasized. Some of the offices are adopting projects already implemented elsewhere. This is the case of the Willful Jurisdiction project implemented first within the Monza project and currently in the Law Court of Milan, in collaboration with the Law Court of Monza; the case of the Public Relations Office implemented first at Genua and afterwards considered as the background for the construction of Public Relations Offices within other judicial offices; the Social Budget reports of the Law Court of Milan and Brescia. One interesting aspect is relevant in the fact that these experiences are usually the result of the collaboration between local judicial offices, belonging to different regions (for example, the cooperation between the Law Court of Milan and the Law Court of Catania).

4. Conclusions
This reconstruction of the national program design and implementation process emphasizes some positive aspects concerning the program design, as well as some weaknesses.

The interest and activism of judicial offices is underlined not only by the projects implemented, but also by the increase in the number of judicial offices involved in the program with respect to the initial number.

\textsuperscript{22} See Amin and Thrift 1995.
\textsuperscript{23} See Cartocci 2007.
The project’s design is significant both in terms of the projects designed and issues covered by these projects, which has brought about the implementation of some innovative solutions (even though the evaluation of their effectiveness is still rather limited).

Another positive factor is the implementation of learning practices developed at local level. In many regions the involvement of local stakeholders is rather important as: on the one side resources (funds, know-how, organizational ones) allocated to the projects increase; on the other many of the stakeholders involved (first of all lawyers, etc.) play an important role in the co-production of services, and therefore, in influencing the justice sector performance.

This result seems to justify the position sustained within the literature on professional organizations with regard to the relevance of both local actions for the testing and adaptation of more general solutions and the long implementation duration of such processes.

As to the critics of the 1993-2008 Italian reforms, and in particular to the design and organization of the reforms processes, sustained by Butera and Dente, the observations to be made are much more complex. Data on the evaluation of the program effectiveness are not yet available and, therefore, no conclusions can be presented. Butera and Dente sustain the need to adopt reforms characterized by a mixed strategy, top-down and bottom-up, but with a strong direction of central state administrations, a selection of the public organizations to be reformed, and a defined time period of the reforming interventions. This should allow the implementation of actions that are adapted to the specific contexts of the organizations to be reformed as well as profound innovation of the organizations involved.

When looking at the program features, it can be noticed that the implementation seems to be rather distant from these indications (as well as from those sustained by the post-NPM debate). The central state direction is weak and limited only to the monitoring aspect and the evaluation of the program conducted by an outsider, the Ministry of Public Administration. The selection criterion is limited as well, but the number of the judicial offices involved is high. The available data and the present implementation state show that the program choice of focusing on local initiatives is successful. However, the problem of geographical gaps continues to be relevant.

Finally, one of the conclusions consists in contesting the affirmation according to which the Italian administrative reforms fail due to the hegemony of a formalistic administrative culture, focused on the idea that reforms are to be implemented through laws.

In fact, the program is not the result of a legislative process, but of a junction between the innovation experiences developed by local judicial offices, the activism of some magistrates that have acted as policy entrepreneurs and the professional and epistemic communities that have already taken part in the design of administrative reforms and have been part of the international debate on administrative reforms.

The ‘Diffusion of best practice’ program presents some characteristics that are very close to the international debate on administrative reforms, both from a content and design point of view. The attention paid to performance monitoring, partnership development, quality of services, customer satisfaction and bottom-up initiatives are all issues specific to interventions associated with the New Public Management movement. Furthermore, the focus put on the development of ICT, outcomes, creation of a local leadership, which should be a warrantor of the performance and professional ethic of the programme towards local collectivities, are features more close to the post–NPM and good governance debates (see Lodge and Gill 2011; Christensen and Lægreid 2007; Christensen and Lægreid 2011 and 2012; Dunleavy et al. 2006; Osborne, ed., 2010; Klijn 2012; ).

In this sense, the analysis on the Italian public sector reforms (cfr. Pollitt and Boukaert 2011; see also Gualmini 2008) confirm the inclusion of Italy on the Neo-Weberian countries list, even though it belongs to the sub-group of “modernizers (managerial way)” countries. In fact, in some areas of the country there is a tendency towards the “modernizers (participatory way)” sub-group.

However, the difference between the levels of modernization of the various sectors of the public administration and the need to specify the advancement of reforms in the various territories justifies – at least in the Italian case- a theoretical research question. It is, in fact, a need that puts into discussion the choice of the “country” as a unit of analysis within comparative researches on the convergence/divergence in the introduction and implementation of administrative reform models, and in particular within those analyses that are based on the historic institutionalism approach.
This unit of analysis does not allow taking into consideration the relevant differences between the social and economic characteristics and institutional capacity within a country. Moreover, it also does not manage to provide an in-depth explanation of the different characteristics and directions of the modernization of different sectors of the public institutions in the respective country.\textsuperscript{24}

This is why the adoption of the Vincent Ostrom’s proposal (Ostrom and Ostrom 1991) of conceptualizing the different public services as different “industries” seems more convincing.\textsuperscript{25} Moreover, it seems useful to articulate the program interventions on a sub-national level (different geographical areas), when the different geographical areas of a country are characterized by strong social, economic, cultural and institutional differences.

5. Bibliography


\textsuperscript{24} See, for example, the papers of Kickert 2011, Sotiropoulos 2004a and 2004b about the modernization of public administrations in the Southern Europe states. The analysis developed in these papers risk to be weak – considering the Italian case – because they generalize situations that are specific of certain areas of the nation. For example, the failure of some administrative reforms is explained as caused by a low level of civic culture and the aversion to the state. Studies on social capital show, on the contrary, that many Italian regions presents high levels of civic culture, high level of public services’ quality (see, as an example, the paradigmatic case of the nursery schools in Emilia-Romagna region, that is considered in USA and Northern Europe as a case-study of excellence). See Cartocci 2007 and the classic Putnam 1993.

\textsuperscript{25} “We can then think of the public sector … which many units and agencies of government as being composed of many public service industries … The governmental component in some industries, such as the police industry, will be proportionately larger than others, such the health services or the transportation industry. But most public service industries will have important private components. Each industry, moreover, will be characterized by distinctive production technologies and types of service rendered. These facilitate coordination of operational arrangements within an industry and allow for substantial independence between industries”, Ostrom and Ostrom, 1991: 182.


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Documents Used For the Case Reconstruction


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**Book Review**

By Sandra Taal, PhD Candidate at the Law Department of Utrecht University

Reforming Justice: A Journey to Fairness in Asia
Livingston Armitage
Cambridge University Press, 2012

**Introduction**

Over the past few decades, a considerable amount of money has been spent on international development assistance. In this challenging field, judicial reform efforts have been carried out all over the world. Unfortunately, these efforts have generally led to disappointing performances and results. A valid question is: why? In the book *Reforming Justice: A Journey to Fairness in Asia* Dr. Livingston Armitage provides the reader with a refreshing vision on judicial reform. He convincingly argues that justice should be “repositioned more centrally in evolving notions of equitable development” (p. 1). In explaining why justice should reposition itself, Armitage takes a few steps back and frames his ideas around the concept of justice and the related purpose of judicial reform. In the second part of the book, Armitage links the purpose of judicial reform with the practical issue of evaluation. In the third part, three case studies from across Asia are presented to provide the reader with some illustrative ‘real world’ insights. In the introductory section of the book the author grasps the reader’s attention by presenting his theoretical and practical knowledge on judicial reform in a way that fits the topic of the book perfectly. He shows the reader that he is passionate about the topic and that he will use his theoretical knowledge and personal experiences to reflect on the current developments in the academic literature and in the practical field of development aid to offer a structural, in-depth analysis with some additional new insights.

**Justice and the Purpose of Judicial Reform**

According to Armitage, “the purpose of judicial reform should be realigned to promote justice, which has at its essence the promotion of fairness and equity” (p. 27). In the light of this statement, Armitage reflects on the idea that justice is a public good and fundamental to human well-being. From a judicial context, Armitage views the courts as the responsible agencies to protect and promote justice. However, ‘justice’ is not just essential to “the work of the courts” (p. 10), it is also “central to the quality of development” (p. 10).

“The imperative for justice – that is, centralizing the concept of fairness – is thematic to development at large. Reforming justice is as essential to development as it is to courts. As justice should be the focus of judicial reform, so equally this focus should not be confined to courts. Justice must apply across development, though this has been rarely asserted to date” (p. 11).

With these statements, Armitage makes the reader aware of the importance of justice in any given society. Automatically, this takes the reader to one of the main motivations of the author to write this book, namely, that efforts of judicial reform need to be focused on the promotion of fairness and equity. The economic rationale for judicial reform has dominated the field for many years. Armitage marks this institutionalist approach to development as being “under challenge for failing to sufficiently meet the needs of the poor” (p. 12).

“[T]he institutionalist theory of judicial reform which serves economic or political purposes is insufficient – even dysfunctional – because it has been unable to create equitable growth. To date, development ideology has privileged doctrines of growth-based economics which have given insufficient attention to distribution in poverty allocation. This ideology has been deficient because of the absence of any dimension of fairness and equity” (p. 12).

In a chronological overview of the history of judicial reform, Armitage shows that, recently, humanistic justifications for judicial reform have entered the discourse. Different from the economic or political justification, the humanistic justification “rests on the validation of promoting fairness and access to justice based on an emerging concept of poverty as deprivation of opportunity and of the human rights of the individual” (p. 48). Armitage points out that in order to build a compelling theory of justice reform that also incorporates the constitutive humanistic dimension, the prevailing institutionalist theory of judicial reform should be revised. The prevalent economic justification has just not provided clear empirical evidence for its success in alleviating poverty (p. 128). Judicial reform still lacks “a clear and compelling justification or theory” (p. 126).

“There is no available evidence that judicial reform has attained its stated goal of poverty alleviation and only patchy empirical evidence to validate the prevailing reform approach. Significantly, this lack of evidence of success is impelling the ongoing evolution of approach. It justifies the reframing of judicial reform from its mainly instrumental role in supporting economic growth to a more constitutive theory which centres on notions of justice as fairness and equity” (p. 28).
Armytage further argues that,

“[s]o long as alleviation of poverty remains the apex goal of development, justice must embrace the distributive dimension of poverty alleviation through the exercise of rights, and judicial reform should be realigned to support that” (p. 125).

In the first part of the book Armytage’s foremost concern appears to be to explain why judicial reform should promote justice. In my view, Armytage has succeeded in reaching his goal. He familiarizes the reader with the relevant theoretical concepts and their practical implications. By doing that, Armytage provides the reader with a background in the classical and modern concepts of liberal philosophy, and links the philosophical justification for judicial reform to the complex world of development performance. In a carefully written and readable way, the in-depth analysis highlights the most relevant features in unraveling the issue of the purpose of judicial reform.

The Evaluation of Performance and Three Asian Case Studies
The central question of the second part of the book is almost deceptively easy: “does judicial reform work” (p. 129). In order to know whether judicial reform works, its effectiveness should be evaluated. According to Armytage, evaluating judicial reform is an important method to judge the efficacy of judicial reform (p. 14). However, in order to be able to evaluate the effectiveness of judicial reform, we need to be clear on what to measure and how to do it (p. 283).

After a more general discussion on the lack of an “established orthodoxy on how to evaluate development effectiveness” (p. 133), Armytage refocuses again on the evaluative practice in judicial reform. In a critical analysis, he reflects on the lack of evaluations of judicial reform and also on evaluations that are undertaken, but that are poorly done (p. 181-185). In answering the question how judicial reform should then be evaluated, Armytage takes the reader back to the first part of the book where he explained that judicial reform should promote justice, in terms of fairness and equity. Armytage states that “an adequate evaluation of judicial reform endeavor can only be provided by reference to a previously agreed normative framework with which evaluative judgments of merit and worth can be made” (p. 186). The author then goes further by arguing that,

“[s]uch a framework exists in the principal treaties of international human rights law. The singularity of this framework is that it is extant and formally endorsed by the overwhelming majority of UN member states. These rights are normative, systematic, universal and actionable as standards of justice on which measures of fairness and equity can be firmly grounded” (p. 186).

In part three, Armytage shows the reader more specifically what is going on in the field of evaluative practices by presenting three case studies from across Asia. The first case study is about the Asian Development Bank and its judicial reform experience. The second case study presents the AusAID’s Law and Justice Sector Program in Papua New Guinea. And the third case study reflects on the diverse experiences of several reform practitioners from around the Asia Pacific region. Due to space limitations, a detailed description of the three case studies cannot be given. But, it can generally be stated that every case study gives an unique insight into the contemporary practice of judicial reform. In that sense, it contributes to the understanding of the various issues that have been raised in the first two parts of the book. Also, it confronts the reader with the current ‘real world’ challenges of judicial reform. And last, but not least, on the basis of some collective findings derived from the case study analysis, Armytage makes the hopeful statement that “it is possible to demonstrate success in judicial reform endeavors – although this has not yet occurred to date, is costly and requires ongoing endeavor” (p. 286). After the final chapter in the book that is titled “The way forward” (p. 279), the book ends with four annexes.

Final Remarks
The book Reforming Justice: A Journey to Fairness in Asia provides a coherent analysis of a complex topic that has not gone unchallenged. The author has used his acquired knowledge as a reform practitioner cleverly to connect theory with practice in a way that appeals to an academic public as well as to the development community. Armytage has created a good balance between his insider knowledge and a critical outlook on the reform practices. In a well-structured and comprehensive way, Armytage guides the reader through the past and current difficulties, and the ongoing challenges in the field of judicial reform. This book forms an important contribution to the debate on international assistance in the field of judicial reform by pinpointing the crucial issues that are necessary to discuss, in order to overcome the accumulated confusion in this interesting, but complex field.