Dublin Castle
Dublin, Ireland
Site of the 2008 IACA Conference
International Association For Court Administration

IJCA will be an electronic journal published on the IACA website (www.iaca.ws). As its name suggests, IJCA will focus on contemporary court administration and management. Its scope is international, and the Managing Editors welcome submissions from court officials, judges, and others whose professional work and interests lie in the practical aspects of the effective administration of justice.

The International Journal For Court Administration is an initiative of IACA's Executive Board and its diverse membership. They anticipate that the Journal will become an effective communications vehicle for the international exchange of experiences, ideas and information on court management, and thereby contribute to improving the administration of justice in all countries. Although IACA is a relatively young organization, the collective international experience of its Executive Board and Managing 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 of 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 should serve 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 Shariah-based legal systems throughout the world. Our initial plan is publish two issues per year.

The Managing Editors welcome submissions from court officials, judges, 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 chose IACA Journal.
Welcome to the inaugural issue of the International Journal on Court Administration (IJCA). Co-Managing Editors Philip Langbroek and Barry Mahoney join me in extending to all of IACA’s members and friends our hope that you will review and draw benefit from this first issue of the Journal. This inaugural issue reflects the effort, imagination, and commitment of IACA’s Officers to respond to the need of our growing community of court system and related professionals throughout the world. We created IJCA to address your interests, inform your professional curiosity, report relevant research, and offer advice on aspects of court system governance, reform, management, and administration. We hope this initial issue is responsive.

Our introductory issue offers an excursion that extends from judicial system restructuring efforts in Abu Dhabi to initiatives for reducing delays in case processing in India; from how to conduct a weighted caseload analysis to a report on the efforts of the Council of Europe’s Commission for the Efficiency of Justice to measure court quality; from a status report on the efforts of the Russian Judiciary to implement a system of professional court administrators and managers to an historical overview of how the administration of justice in Brazil’s court system has evolved and progressed. Other themes also are explored.

There are three ways in which we invite you to contribute to making this novice Journal a useful and productive instrument for our profession. First, if you have undertaken or are aware of an interesting new development or initiative in the areas of court system governance, reform, management, or administration, please consider writing a description of it for submission to the Managing Editors. Second, if you have suggestions on how the IJCA might be improved or its value enhanced, please write to or call us. Third, please share access to IJCA with your friends and colleagues, and urge them to join IACA. Information on how to join is detailed on our website www.iaca.ws.
From the Co-Managing Editors
By Philip M. Langbroek and Barry Mahoney

The Importance of Effective Court Administration

Well functioning court administration is a condition for legal certainty, the fair and effective resolution of legal disputes that reach the courts, and the functioning of a market economy. It contributes to the peaceful solution of conflicts, prevents us from taking justice in our own hands, and provides a foundation for protection of fundamental human and legal rights. A well functioning court thus contributes to the well-being and welfare of all and is an important element of good governance. That courts are instituted and paid for is a responsibility of the government. But the way courts function as organizations and in adjudication is mainly up to the court's leaders and managers (both judges who have leadership roles and non-judicial staff in executive positions) and to the judges.

Courts are often seen as constituting the Third Branch of Government. They play a prominent role in separation of powers theory, and the position of courts and judges is a favorite subject among constitutional lawyers. This is nice from an academic viewpoint, but in practice court managers have to deal with 'rules and games' to organize the courts' budgets as well as to handle a broad range of other administrative duties essential to the effective functioning of the courts. Courts are paid from taxpayers' money and they always need another branch of government to support them financially. The source of funding may be a minister of justice, a minister of finance or a democratically elected representative body. Courts have no possibility of raising taxes for their own budget, and to arrange for that would be contrary to basic requirements of impartiality and the right of access to justice. Being a part of the state organization, courts always have to deal with organizational dependencies and a set of typical risks. Risks are related to:

- the impartial position of judges and the court in relation to the parties;
- the independence of the judges from executive bodies and the autonomy of court organizations;
- the relation between judges and courts and the general public. The media often play an intermediary role in that relationship;
- the capacity of the court to adequately deal with the quantity of cases filed at the court;
- the juridical knowledge of judges and court staff.

In all kinds of conflicts, be they within criminal, ordinary or administrative jurisdictions, judges must take a decision, and this often involves a decision against at least one party, or it is perceived to be so. Family cases, even when not of a juridical complexity, may be difficult to resolve and may involve deep private emotions and drama. Judges and court clerks may in some instances risk the revenge of the losing party. Judicial decisions in cases against the government or an administrative body may affect the outcomes of public policies. Courts and judges therefore sometimes risk being publicly bashed by politicians who will thereafter be in a position to vote on the courts' budget.

Criminal cases, especially, tend to attract media attention. The court organization may risk loss of the trust of the general public in criminal cases—for example, when the public feels that sentences are not severe enough or when the court decides that a suspect should be released pending trial. Trade cases may involve the complexities of intellectual property and business organization. In such cases, there is sometimes a risk that judges and court clerks may be offered bribes. There is a different type of risk, too, in complex cases involving issues requiring specialized knowledge—will the judges and clerks be knowledgeable enough to deal with the complexities of the case?

In principle the societal demand for courts' services is endless. Court organizations risk not having enough capacity to deal with large numbers of cases filed at the court. The capacity issue seems to be a constant with courts throughout the world: resources are rarely sufficient to meet the demands for court services, with the result that backlogs and delays are a perennial challenge for court leaders and managers.

Courts, while serving society from a strictly neutral position, can only function well when they manage these risks well. That is not easy, as the societal and political forces pushing and pulling a court organization may be intense. Citizens, parties, child protection agencies, probation offices, businesses, lawyers, public prosecutors, the police and bailiffs all are in need of the services of the courts, take part in proceedings and engage in exchange of information with the courts and its clients. It takes great balancing skills to make a court and a court-organization (and certainly a nation wide judicial system) live up to political, public and clients' expectations of efficiency, fairness, transparency, societal responsiveness, timeliness of proceedings, accountability and, last but not least, legal obligations. Courts (even courts with few judges or only a single judge) are highly complex organizations, and the complexity is compounded for nation wide judicial systems. Keeping these organizations in shape needs the constant attention of judges, court administrators and clerks, and...
national court services. Outside scrutiny—very much including examination of court processes and practices by knowledgeable consultants and academic researchers—can also be very helpful in strengthening courts’ capacity for effective administration.

The International Journal of Court Administration seeks to contribute to the effective functioning of court administration everywhere. Problems and solutions of courts in one country may inspire analysis and solutions elsewhere. Outside of North America, court administration is rarely recognized as a special branch of public administration. We believe that court administration (and, more broadly judicial administration) deserve special attention from professionals in the courts and at the faculties of law and of public administration. It is a special discipline that involves rules of procedure, understanding of “legal cultures” and the realities of actual legal practice, management, law, and politics. To further this discipline for practitioners and academics, we offer a platform for exchange. Every experience is valuable.

We are most proud to present the first issue of this journal. We hope to develop it further in the time to come. For the journal to succeed we need and welcome descriptions of projects, experiences, and analyses from persons working on court- and judicial administration throughout the world, and we will appreciate comments and suggestions from the journal’s readers.
ABSTRACT
This paper addresses the struggle of the Italian justice system during the transition to implement the 1989 Code of Criminal Procedure. The Code was intended to solve some of the major problems of the Italian Courts, such as backlog and length of trials, by adopting special procedures and an adversarial model. Justice system officials assumed that the oral process would accelerate the pace of litigation and, thereby, increase the efficiency and the effectiveness of the administration of justice. In retrospect, the assumption was simply wrong. On the contrary, the Italian experience demonstrates how a significant reform in the criminal process and procedure involves not only amending the rules; in addition, it must consider the institutional and organizational contexts, the actors’ capacity to absorb change, and the risk that change may worsen the functioning of the criminal process. The paper also shows how the legal formalism that pervades the Italian justice system saddled the reform with rules that failed in practice to work.

INTRODUCTION
This paper focuses on select aspects of the Italian Code of Criminal Procedure in action following its implementation on 24 October 1989. I will use a judicial administration approach by reviewing the law in practice rather than the law in books, attending more to caseflow management and organizational issues than to legal aspects.

In particular, I focus on select issues linked with the initial impact of the criminal process reform: the changing role of judges, prosecutors, and defense attorneys; the difficulties entailed in learning how to present oral argument and the related record; and the effort to introduce so-called special proceedings. I end the paper with conclusions based on the facts described.

The data and the information presented in this paper reflect extensive field research initially completed by the Research Institute on Judicial Systems of the Italian National Research Council and the Research Center of Judicial Studies at the University of Bologna when the Code entered into effect and subsequently updated with the analysis of quantitative data and legislation.

As a prelude to analyzing the reforms of the Code of Criminal Procedure, I describe briefly the organization of the Italian judiciary to provide for the reader the correct institutional framework.

THE ITALIAN CRIMINAL JUDICIARY: A BRIEF OVERVIEW

COMPOSITION OF THE JUDICIAL POWER: A major feature of the Italian justice system is that public prosecutors are part of the Judicial rather than the Executive power. Both judges and prosecutors are part of magistratura; as members of the
same body, they are called magistrates (magistrati). Both have the status of public official and are considered part of the traditional state bureaucracy. During their careers, they can switch between prosecutorial and judicial positions as many as four times, subject to the consent of the Judicial Council. Judges and prosecutors begin their career in the judiciary when they are about twenty-seven years old. A law degree is required. They also have to be successful in a public competition which stresses their knowledge of formal and abstract law. Salaries increase and advancement up the "career ladder" are substantially based on seniority. Even though a recent law reform claims to have introduced effective change in the evaluation process and, therefore, in the career advancement, empirical research needs to be undertaken to evaluate the actual impact of this reform.

**The Ministry of Justice:** The other justice system organization that completes the institutional setting of the Italian judiciary is the Ministry of Justice; it is in charge of the organization and functioning of the judicial offices (procurement, technology, administrative personnel, budgeting etc.). It is a peculiarity of the Italian Ministry of Justice that almost all the executive positions are held by magistrates.

**Court and Prosecutorial System Structure:** The structure of the Italian judicial offices is organized as follows.

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4 Prior to World War II, prosecutors were hierarchically subordinate to the Minister of Justice. The Italian Constitution enacted after the Fascist regime placed the public prosecutors within the judiciary.

5 This limit was recently introduced by the controversial Law n. 111, enacted by the Parliament on July 31st, 2007 (in particular art. 2 point 4 changes art. 13 of the Legislative Decree n. 160, 5 April 2006 enacted by the previous Government). This law has reformed several aspects of the organization of the judiciary (i.e. magistrates’ selection, transfer, evaluation, promotions, disciplinary, training).

6 The Judicial Council is the institution in charge of recruitment, promotion, transfers from judicial positions and has a disciplinary system for judges and prosecutors (art.105 Italian Constitution). The Council is considered the self-government body of the Judiciary, including both judges and prosecutors. It is the key player in all the policies that deal with members of the Judiciary. In particular, the Council decides about their transfers, appoints the head of the offices, subject to the formal consent of the Ministry of Justice, approves the internal organizational schemas (tabelle) which are a quite detailed description of the organization of the office and of the criteria used to assign cases within the courts and, partially, also within the Prosecutor's Offices. Although the Council was mentioned in the 1948 Constitution, it was established only in 1959. It is composed of twenty-seven members: sixteen judges and prosecutors elected by their colleagues, eight law professors or lawyers with at least fifteen years of experience in the law profession elected by the Parliament, and three ex-officio members (ex officio members are: the President of the Republic, the President of the Supreme Court and the Chief of the Public Prosecutor’s Office attached to the Supreme Court). Every Council remains in office for four years, and members cannot be immediately re-appointed (art. 104 Italian Constitution). The composition and the electoral system of the Judicial Council were changed by statute no. 44 of 28 March 2002. Currently, the sixteen elected members of the judiciary must be as follows: 10 judges, 4 public prosecutors and 2 judges or public prosecutors working in the Supreme Court or in the Public Prosecutor’s Office attached to the Supreme Court. Members elected by the Parliament are elected at a joint session of the Parliament with a qualified majority of three fifths of all the members (about 950 people), or a majority of three fifths of the voters after the second ballot. The President of the Judicial Council is the President of the Republic, but for the day-to-day operations of the Council, the Constitution (art. 104) provides for the election of a vice-president from among the members elected by the Parliament. The Council has nine commissions which deal with the specific matters entrusted to the Council such as training, court organization, appointment of the head of the courts or Prosecutor’s Office etc., however, all the decisions must be taken by the plenary session of the Council. Such decisions can be appealed before the Administrative Court of Rome. The Judicial Council at the national level (Consiglio Superiore della Magistratura) must not be confused with the Local Judicial Boards (Consigli Giudiziari). In Italy, each judicial district has a Local Judicial Board, the members of which are three judges or prosecutors of the judicial district, elected by their peers every two years, as well as two members ex officio: the head of the Court of Appeal and the Chief Prosecutor attached to the Court of Appeal. Local Judicial Boards have a limited consultative function for the Judicial Council. They give opinions – almost always highly positive – for judges’ or prosecutors’ career advancements when they reach a certain seniority in the Judiciary. They also give opinions on the organization of the courts’ and prosecutors’ offices within the judicial district and on request, on the extra-judicial activities by the judges and prosecutors of the district as well as on the temporary allocation of a judge to a different office. They are also in charge of organizing the on-the-job training of the apprentice judges and prosecutors within the district.


8 After 28 years, every career judge or prosecutor reaches the highest salary level without any real evaluation. The automatism in the career ladder also implies that quite often judges or prosecutors do not change their position, even if they move up to the next rung in the career and salary ladder. In other words, they do the same job but with a higher status and salary. See G. Di Federico (2005).

9 Law n. 111, 31 July 2007, see footnote 5.

10 Cost. art. 110.

A. LIMITED JURISDICTION FIRST-INSTANCE COURTS: The first single-judge court of limited competence is held by the Justices of the Peace (Giudici di pace). There are 849 Justices of the Peace offices nationwide which have limited jurisdiction in civil and criminal matters. Justices of the Peace do not receive a monthly salary but are paid on the basis of their actual work (i.e. they receive a certain amount of money for each decision, written judgment and hearing).

B. GENERAL JURISDICTION FIRST-INSTANCE COURTS: The courts of first instance with general competence are called Tribunals (Tribunali). There are 165 of these all over the country, as well as 222 detached offices. These courts sit either as a single-judge or a three-judge panel depending on the type of case. Within these courts, there are specialized units such as the Judge for Preliminary Investigations (Giudice per le indagini preliminari) and the Judge for Preliminary Hearings (Giudice per l’udienza preliminare). The Judge for Preliminary Investigations checks the work of the public prosecutors in many ways. For example, the judge must authorize tapping a suspect’s telephone, pre-trial detention, and suspension of the investigation upon the prosecutor’s request. The Judge of the Preliminary Hearing is in charge of the formal indictment of the suspect as well as application of special proceedings introduced by the 1989 Code of Criminal Procedure. Of the 165 courts of first instance, there are 93 units called Assize Courts (Corte di Assise) which have criminal competence in serious crimes such as murder and kidnapping that can entail a sentence ranging from 24 years to life imprisonment. Their composition includes two career judges and six citizen jurors. Of the 165 first-level courts of general competence, 26 are units called Revision Units (Tribunale della libertà o del riesame) which are in charge of revising court orders dealing with personal restraints within a judicial district. In addition, a reform has established a new special unit in only 12 of 165 courts of first instance and in 12 Courts of Appeal to deal with patents and intellectual property litigation.

The current court structure came into effect in July 1999. Previously, there was another court of first instance: the Pretura, a single-judge court with limited jurisdiction in civil and criminal matters. In 1999 the Pretura were merged with the Tribunali (courts of first instance), creating just a single court of first instance of general competence.

C. GENERAL JURISDICTION FIRST-INSTANCE PROSECUTION OFFICES: Attached to each of the 165 courts of general competence are 165 Public Prosecutor Offices.

D. “SPECIAL JURISDICTION” PROSECUTION BUREAUS FOR ORGANIZED CRIME: In 26 of those Prosecutor Offices, there is a special antimafia team called the Antimafia District Bureau (Direzione distrettuale antimafia). Established in 1992, these bureaus oversee all mafia cases within a specific judicial district — the geographical area of each of the 26 Courts of Appeal. The work of these 26 special teams is coordinated by a central office in Rome called the Antimafia National Bureau (Direzione nazionale antimafia), formally attached to the General Prosecutor’s Office of the Supreme Court. This National Bureau is directed by an Antimafia National Prosecutor and, among other responsibilities, it promotes mafia investigations through intelligence work. To preserve the independence and autonomy of each Public Prosecutor, the Antimafia National Prosecutor has only a single deputy and exercises no hierarchical authority over the regional offices. For the same reasons, within each Public Prosecutor Office, the Chief Prosecutor has very limited, if any, hierarchical authority over the deputies.

F. “SPECIAL JURISDICTION” PRISONER SURVEILLANCE COURTS: A specialized competence over detainees and prisons has been granted to the so-called Surveillance Courts (Tribunale di Sorveglianza). They number 58 and are organizationally separate from the courts of first instance where judges (Magistrato di Sorveglianza) deal with all matters related to the treatment of detainees. The decisions of these courts are rendered by a single judge and may be appealed to a panel of four whose members include two career judges and two experts.

G. “SPECIAL JURISDICTION” JUVENILE COURTS: Civil and criminal cases with defendants between the ages of fourteen and eighteen years are handled by 29 Juvenile Courts (Tribunali dei minorenni), to which specialized Prosecutor Offices are

12 The Justices of the Peace were introduced in the Italian justice system by statute n. 374, 21 November 1991, which came into effect in May 1995. The Justices of the Peace are temporary judges. They have to be qualified for the Bar to be appointed.
13 The Legislative Decree n. 491 of 3 December 1999 established two new courts of first instance with general competence (Tivoli and Giugliano). They were created nearby the courts of Rome and Naples, in order to decrease the huge caseload of these two courts. To date one of the two, the Giugliano court close to Naples, has never been in operation since it was established by statute in 1999. Therefore, theoretically, the courts of first instance with general competence are 166, but de facto they are 165 plus a “shadow court”.
14 Only the hearings that require a single-judge court can be held in the detached offices of the “Tribunals”.
15 There is also some exclusive competence for certain crimes which entail a prison sentence of at least ten years.
16 The “Revision Units” are not really separate organizational units within the courts; they are specific panels of three judges which decide on court orders dealing with personal restraints within a judicial district.
17 Legislative Decree no. 168 of 26 June 2003.
attached. Decisions are issued by panels of four whose members include two career judges and two experts, one male and one female, with professional expertise in social assistance, psychology, and related disciplines. Appeals from these courts are heard by a special unit of the Courts of Appeal.

H. FIRST-INSTANCE COURTS WITH “SPECIAL” SECOND-INSTANCE JURISDICTION: The courts of first instance, sitting as a single-judge benches, also function as second-instance or appeal courts for the decisions made by the Justices of the Peace.

I. GENERAL JURISDICTION SECOND-INSTANCE OR INTERMEDIATE APPEALS COURTS: The 26 Courts of Appeal (Corte di appello) – and three detached divisions – function as appeal courts for decisions rendered by the courts of first instance (Tribunali). Within these Courts of Appeal, there are several specialized units, including the Appeal Courts of Assize (Corti di assise d’appello) which handle appeals from the Court of Assize of first instance, and the specialized juvenile units, which hear appeals from the Juvenile Courts. These various units of the Courts of Appeal sit in panels of three judges, with the exception of the Corte di assise d’appello which sit in panels of two career judges and six citizens who serve as jurors.

The appeal process considers both factual or evidentiary matters and legal issues. In effect, new evidence can be submitted during the appeals process, a practice that has the potential to significantly protract the length of the criminal process on the appellate level.

J. GENERAL JURISDICTION SECOND-INSTANCE OR APPEALS LEVEL PROSECUTION OFFICES: Attached to each Court of Appeal there is a Public Prosecutor Office which prosecutes cases on the appellate level.

K. GENERAL JURISDICTION SUPREME COURT OR COURT OF LAST INSTANCE: Italy’s highest court is the Supreme Court (Corte di cassazione), located in Rome. It deals with questions of law and conducts final appellate reviews of all provisional orders relating to personal restraints (art. 111 Cost.). The Supreme Court’s jurisdiction extends to ensuring the uniformity of how the law of the state is interpreted and applied. The Court is obligated to review all the pleadings that are appealed to it; it does not have a writ of certiorari discretion. This requirement generates a substantial caseload which, in turn, requires a disproportionately large court of final appeal. The Supreme Court currently has in excess of 300 judges, which is exceedingly high when compared with the terminal courts of appeals of other European judiciaries.

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FIGURE 1 – The Italian criminal judiciary (simplified overview)

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18 Notwithstanding Italy’s status as a country in the civil law tradition in which the stare decisis doctrine does not apply, precedents have always played a major role in passing judgments. In particular, the judgments by the Supreme Court have always affected the decision-making process of the trial courts.
CRIMINAL JUSTICE PROCEDURAL REFORM

A NEW CRIMINAL PROCEDURE CODE: In 1988, the Italian Parliament enacted a Code of Criminal Procedure with an effective date of October 24, 1989. This new Code superseded the 1930 Code that originally was drafted under the Fascist regime and amended several times after the Second World War to make it compatible with the post-war Constitution.

A. THE OLD CODE – LACK OF PROCEDURAL DUE PROCESS PROTECTIONS: The structure of the first Code (known as codice Rocco, from the Minister of Justice who played a major role in its preparation) was based on a non-adversarial or inquisitorial model and hierarchical officialdom. During a closed pretrial inquisitorial phase, evidence was gathered to determine whether a crime had been committed and, if so, by whom. Formally, a judge controlled the pretrial examination, performing the role of both judge and investigator. The defendant had no right to participate or even to be notified of the investigation. Without the presence of the defendant or defense counsel during the examination proceeding, interrogators could exert considerable pressure on witnesses who appeared before them. Following the examination phase, a trial proceeding was conducted for presentation of the evidence and structuring of a case on the basis of which the defendant could be convicted. The principles of orality and immediacy were abandoned; records and materials collected during the investigative phase became the basis for the verdict and sentence. The trial process merely confirmed what had taken place during the pretrial examination phase.

A series of Constitutional Court decisions issued between 1965 and 1972 increased the participation of the defense in the pretrial phase. "But while these decisions guaranteed greater protections for the defendant in the pretrial phase, they did nothing to temper the system’s exclusive focus on the pretrial phase."

B. ENACTING THE NEW CODE: Enacting the new 1989 Code was a complex and very lengthy process. Parliament began consideration of criminal procedure reforms in 1965, but did not formally authorize an effort to draft a new Code until 1974. The government completed a preliminary draft in 1978 that coincided with the beginning of a period of intense terrorist activity in Italy. After several delays, the final statutory deadline for completion and passage of the code expired. Nearly ten years later, in 1987, Parliament issued a new delegation of authority, and the following year, effective October 24, 1989, it approved the new Code of Criminal Procedure.

C. ANTICIPATED CONSEQUENCES OF IMPLEMENTING THE NEW CODE: The new Code reflected an effort to transition from an inquisitorial to an adversarial model of criminal procedure, one that has its distinctive origins in liberal ideology and is considered a more functional and transparent litigation model for liberal democratic states. The reform effort also was motivated by the enormous backlog of pending cases and the archaic and time-consuming procedural requirements of the old code. The enormous investment of time and effort required by various court procedural rules, and its harmful impact on due process rights and the ability of the court system to deliver timely justice – an impact for which Italy has been repeatedly condemned by the European Court of Human Rights – have contributed to multiple disastrous consequences which violate citizens’ legitimate expectations of their justice system.

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D. ASSUMPTIONS: The decision to move from the old inquisitorial model to an adversarial one was based on two major assumptions: First, that the adversarial procedure is more compatible with democrat government; and second, that there was a pressing need to restore effectiveness and efficiency to the administration of criminal justice.

E. PRIMARY OBJECTIVES: The two primary objectives of the reform were (i) to terminate eighty to eighty-five percent of new criminal cases prior to trial by employing primarily Italian plea-bargaining (applicazione della pena su richiesta della parti), and (ii) to accelerate the trial process through the use of other special procedures created by the new Code such as direct trial (giudizio diretissimo); abbreviated or summary trial (giudizio abbreviato); immediate trial (giudizio immediato); and penal decree (decreto penale).

F. ANALYSIS: It is not clear how these legal reforms by themselves can make the judicial system more efficient and effective. Procedural law is just one of several factors that must be coordinated to effect a substantial change in the quality of justice; it may not by the most important one.

Changing from an inquisitorial to an accusatorial system, and from a written to an oral process, is complicated and difficult. These two models are substantially different. Table 1 summarizes some of the differences.

<table>
<thead>
<tr>
<th>Inquisitorial</th>
<th>Accusatorial</th>
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<tbody>
<tr>
<td>Offense against the State</td>
<td>Offense against the individual</td>
</tr>
<tr>
<td>Truth emerges from a long, segmented trial process organized in different installments</td>
<td>Truth emerges from an adversary process consolidated into a single continuous trial</td>
</tr>
<tr>
<td>Parties are different, the investigating judge seeks the truth</td>
<td>Parties are equal under the law</td>
</tr>
<tr>
<td>Judges dominate the process</td>
<td>Judges manage the process</td>
</tr>
<tr>
<td>Evidence is collected and reviewed by the judge before the trial</td>
<td>Evidence for its case is collected by each side prior to and presented during the trial</td>
</tr>
<tr>
<td>Primarily a written process</td>
<td>Primarily an oral process</td>
</tr>
<tr>
<td>Secret dossier</td>
<td>Public trial</td>
</tr>
<tr>
<td>Jury trials are exceptional</td>
<td>Jury trials are more frequent</td>
</tr>
<tr>
<td>Written judgment and sentence</td>
<td>Oral verdict or written judgment and sentence</td>
</tr>
<tr>
<td>Appeal on facts and law; new evidence allowed</td>
<td>Appeal on law; new evidence not allowed</td>
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</tbody>
</table>

Perhaps the most important and difficult element in the reform process is the initial implementation which can result in its success or failure. At this important juncture, Italy faced some enormous problems that, in hindsight, could have been foreseen.

THE INITIAL IMPACT

A. THE DIFFICULT RELATIONSHIP BETWEEN PROSECUTORS’ OFFICES AND THE POLICE: One problem with the former Code was the discretion it allowed the police with regard to how much time they could take to file criminal complaints. It was considered a source of possible abuse and a violation of the constitutional provision of “mandatory penal action.” According to the Italian Constitution, the prosecutor must file a criminal complaint if there are reasons to suppose that a crime has been committed.

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27 Cost. art. 112.
This principle of mandatory penal action or compelling initiative of criminal proceeding by prosecutors was a reaction to the Fascist period, during which prosecutors were under the control of the executive power and many abuses occurred.28 This principle should have guaranteed the equal treatment of citizens.29 “In fact, however, penal actions in Italy are largely discretionary. The magistrates to whom this task is assigned institute proceedings not only on request from outside (reports and accusations from the police, private citizens or public authorities) but also on their own initiative. In other words, it is quite legitimate for them to carry out, with the greatest independence, investigations of any kind, of any citizen, using the various police forces to verify whether the offenses they (more or less justifiably) assume to exist have actually been committed.”30

To reinforce the monopoly over initiating criminal proceedings, the 1989 Code of Criminal Procedure mandates that a complaint (or notice) that a crime was committed must be filed in the prosecutor’s office by the police within forty-eight hours.31

The major objectives of this rule were: (i) to eliminate the discretion of police agencies which are arms of the executive power, in determining the pace of the investigations; and (ii) to involve the prosecutor in the investigations as soon as possible in order to improve the administration of justice by advancing the process.

In practice, however, the rule did not fulfill the expectations. In the first two days after the Code went into effect, police agencies, in their efforts to comply with the new forty-eight hour rule, overwhelmed the prosecutors’ offices – particularly those in the courts of limited jurisdiction which handle about 85% of the entire caseload – with crime reports that they had collected throughout the year. As a consequence, prosecutor offices were flooded with thousands of documents that, under the law, were supposed to be recorded “immediately”32 by hand in an archaic docket registry book.33 In effect, although crime reports were effectively filed in the prosecutors’ offices by the police within the required forty-eight hours, most languished without action for six months or longer while the prosecutors struggled to deal with the backlog.

Moreover, even if the prosecutor’s office could immediately record all the crime reports, it is hard to believe that they would be able to manage the huge caseload effectively. (In some cities, each prosecutor already has a caseload of more than 5,000 cases.)

This was not the only problem inadvertently created with implementation of this new rule. Because the prosecutor is legally in charge of managing the investigations, the police determined it was unnecessary to conduct any investigation or assemble evidence prior to receiving the prosecutor’s instructions. As a consequence, the police were losing or misplacing important pieces of information that should have been collected and secured immediately following the crime. In addition, conflicts between police officers and prosecutors had been increasing. Many police officers had little confidence in the ability and competence of prosecutors to lead criminal investigations, in part because the only training many of them received was on the job.

After three years of trouble, the government finally amended the forty-eight hour rule.34 Now the police must transmit a crime report to the prosecutor’s office “without any delay.” This amendment helped to adjust the flow of reports, but it failed to address the fundamental challenge of how to respond effectively to the mandatory criminal action requirement which compels courts and prosecutors’ offices to deal with an enormous paperwork burden to the detriment of the substantive investigation process.35 The best intentions of the Italian Parliament notwithstanding to promote the principle that all crimes have to be prosecuted in a timely manner, the Italian Judiciary has tightened itself in a vicious loop.

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31 See the Code of penal procedure (C.p.p.) art. 347.
32 See the Code of penal procedure (C.p.p.) art. 335.
35 Although reliable data are not available, it seems that about 95% of crime reports with unknown perpetrator submitted to the prosecutors’ offices are dismissed by the judge without any real investigation.
B. FORECASTING CASELOAD AND ANTICIPATING JUDICIAL NEEDS: Many prosecutors’ offices were unable to manage the unanticipated increase in filings because their offices were insufficiently organized, staffed, and equipped. No legislative impact studies had been undertaken to assess what resources would be required to process the additional caseload. The Ministry of Justice does not have a functional system to determine judicial needs and to forecast judicial caseloads. Organizationally, the Italian Judiciary suffers from an inadequate strategic planning function, resulting in the failure to adequately orchestrate resources to deal successfully with the practical requirements of implementing the new Code. Indeed, a major judicial administration concern is the lack of reliable data on extent to which implementation of the new criminal code has been successful and its overall impact on the performance of the judicial system. Installation of automated caseflow management systems in recent years has led to modest increases in the reliability and availability of data. The primary cause of the modest increases appears to be not so much the unavailability of technology to handle data, but the judges and court officials have not yet come to recognize how important the recording of accurate and complete case information data can be in helping to manage institutional operations and in anticipating future requirements. In short, in many courts, accurate data collection and preservation appear to be viewed as a waste of time rather than an investment.

Pursuant to the Constitution, the Ministry of Justice is responsible for the organization and the functioning of the judicial and prosecutorial system. However, the Ministry lacks a qualified technostructure that can be useful to analyze, design, plan, and implement progressive change in an organization. Almost all the executive positions in the Ministry of Justice (e.g. Director of the Prison Department, Director of Information Technology, Director of Statistics etc.) are held by magistrates who, with some exceptions, have neither sufficient training nor experience essential to their positions. Rather, they bring to them an archaic and formalistic approach which impedes their success and the adoption of flexible and progressive management principles and practices in the Ministry. This lack of organizational sensitivity and management competence give rise to problems in key areas of administration such as strategic planning, information technology, performance appraisal, finance and budget, and human resources management. The resulting dysfunctions, which undermine initiatives for dynamic reform, linked with the inadequate performance of the criminal justice system, were foreseeable had the legislators, legal scholars, and judicial officials who wrote the 1989 Code and who were in charge of the implementation process, adopted a more pragmatic, proactive, and goal-oriented approach.

Italian policy makers and criminal justice system executives continue to maintain that the function of criminal procedure rules is to yield a deductive and abstract intellectual effort rather than viewing them as a set of important organizational requirements. Pursuant to the Constitution, the Ministry of Justice is responsible for the organization and the functioning of the judicial and prosecutorial system. However, the Ministry lacks a qualified technostructure that can be useful to analyze, design, plan, and implement progressive change in an organization. Almost all the executive positions in the Ministry of Justice (e.g. Director of the Prison Department, Director of Information Technology, Director of Statistics etc.) are held by magistrates who, with some exceptions, have neither sufficient training nor experience essential to their positions. Rather, they bring to them an archaic and formalistic approach which impedes their success and the adoption of flexible and progressive management principles and practices in the Ministry. This lack of organizational sensitivity and management competence give rise to problems in key areas of administration such as strategic planning, information technology, performance appraisal, finance and budget, and human resources management. The resulting dysfunctions, which undermine initiatives for dynamic reform, linked with the inadequate performance of the criminal justice system, were foreseeable had the legislators, legal scholars, and judicial officials who wrote the 1989 Code and who were in charge of the implementation process, adopted a more pragmatic, proactive, and goal-oriented approach.

THE ROLE OF DEFENSE ATTORNEYS, PROSECUTORS AND JUDGES

A. DEFENSE ATTORNEYS

Another major problem that emerged with adoption of the new Code was the balance between the prosecutor and the defense attorneys, a problem that was exacerbated by the changing role of judges. In the adversarial model, criminal defense attorneys play a very active role. They conduct investigations to gather exculpatory evidence, and they must be prepared to mount a vigorous defense that includes examining their own and cross-examining prosecution witnesses. To collect exculpatory evidence, they have to acquire investigative skills and recruit professional private investigators to assist and support them in seeking evidence. In Italy, prior to adoption of the new criminal code there were few such professional investigators because the existing inquisitorial model did not need them. As a consequence, defense attorneys had difficulty finding qualified investigators. That shortage has largely been eliminated, but for a number of years following implementation of the code, there were inadequate investigative resources available for the defense. Italy does not have a public defender system. Where an indigent person is charged with serious criminal behavior, private-sector defense attorneys are appointed by the court from a list prepared by the local bar association.

B. PUBLIC PROSECUTORS

Public prosecutors in Italy enjoy a privileged status among their Western European colleagues. Their status as judges provides them with status and benefits that include career protections, professional independence, immunity from liability, etc. In addition, the Constitutional principle of mandatory penal action authorizes them to exercise broad discretion in setting priorities and committing criminal justice system resources (e.g. wiretapping, number of police officers to involve in an investigation etc.) to the process of conducting a criminal investigation. Implementation of the new Code enhanced and strengthened their roles. For example, a prosecutor’s decision to dismiss a case, to incarcerate a defendant for pretrial detention, or to authorize a wiretap on a telephone, must be reviewed by the preliminary investigation judge.


37 A new law was enacted by the Parliament (n. 397, 7 December 2000) to better regulate the investigations carried out by the defense lawyer.
The role of prosecutors has also been strengthened by what it has been called a *countereform*. This *countereform*, which reverted some of the oral innovations of the new Code back to written processes, was determined mainly by Constitutional Court decisions and by a government law in the aftermath of the assassination of the General Manager of Criminal Affairs of the Ministry of Justice, Giovanni Falcone, and his colleague, Paolo Borsellino, who for many years led the investigations into mafia crimes in Palermo.

It is impossible to analyze in this brief overview all of the details attending the significant changes that occurred as a consequence of this tragedy. One of the most important provides that in organized crime trials, certain categories of evidence collected for other trials or during the preliminary investigations can be introduced in written form, primarily for the protection of potentially targeted witnesses who otherwise would have to appear in court and offer oral testimony. This was a substantial retreat to certain provisions of the inquisitorial model, and it is perceived as weakening the role of defense attorneys and strengthening that of prosecutors. Here it is important to point out how the full accusatorial and inquisitorial models are two ideal opposites on a *continuum* within which every criminal judicial system eventually locates the position which best suits its criminal justice system.

It also bears brief mention that an amendment to the Constitution (n. 2, 23 November 1999) modified article 111 of the Constitution by introducing a provision for the *fair trial*, similar to article 6 of the European Convention of Human Rights, to balance the impact of the inquisitorial *countereform*.

**C. Judges**

In the inquisitorial model, the public hearing is much less important than in the adversarial model. In the former, the judge already knows and understands the case prior to the trial. Documents and transcriptions of depositions taken before the investigating judge are part of the file. The public hearing is the end of a long process that transpires in successive stages. Essentially, the trial in the inquisitorial procedure is something quite different from the public accusatorial model trial. "The file of a case [was] the nerve center of the whole process, integrating various levels of decision making […] The trial was not concentrated, but organized in installments. After a matter has been considered at one session, new points can emerge to be the subject of another session, and so on, until that issue seems thoroughly clear".

In the adversarial model the trial, rather than the case file, is the focal point of the litigation process. "Attorneys on both sides must have good oral skills. The drama of a case is concentrated on few hearings and "requires that decisions be based largely on fresh impressions, including surprise, shock, the spell of superficial rhetoric, and, perhaps, even theatrics".

In sum, the litigators’ performances have to be remarkable to allow the decision maker, the judge, to be informed of the details of the case through the parties’ process of evidentiary presentation and argument.

The difference between these two opposing models is substantial. To trained observers who watch videotaped trials and various interviews, trial attorney performance in general and public prosecutor performance in particular requires several years of professional trial experience to build up to a level that is acceptable and appropriately competitive. Making the transition from a file-based process to an oral-based one is time consuming and requires commitment and effort. In the United States, only a minority of practicing lawyers learn or are trained to function as active trial-level litigators. Trial-level prosecutors are provided fairly significant training in how to present the case to court, to examine their own witnesses, to cross-examine defense witnesses, and to address a jury.

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39 Law n. 356, 7 August 1992 that was inspired by the law decree n. 306, 8 June 1992.
43 For example, the training offered by The National College of District Attorneys at Houston, Texas.
The poor performance of Italian prosecutors in this transition to the adversarial model, linked with the civil law tradition where judges play a far more proactive role during the trial (they are responsible for developing the evidence, calling and questioning witnesses, etc.), generated another problem. Judges are supposed to remain neutral in an adversarial model, but in Italy, given the inertia of the old system, they frequently question witnesses directly, reverting back to the traditional inquisitorial model. Here again, the criminal law reform required adaptation to and acquisition of new skills and patterns of actions, which cannot not be learned and integrated overnight.

**THE CALENDAR AND THE TRIAL RECORD**

Making the transition to the oral process from the written process anticipates a much greater need for adequate preparation and extemporaneous performance skills. To adequately organize and prepare, it is very important to design and implement an effective calendaring system as well as a verbatim trial recording system that is reliable, accurate, and complete.

**A. CALENDAR MANAGEMENT**

In several Italian courts, managing the calendar in a manner consistent with the new oral process remains an elusive objective for prosecutors, judges, police officers, counsel, and even witnesses. Effectively scheduling events for the investigation, pretrial hearing, and trial calendars is critical to effective management of the pace of litigation. It permits the prosecutor who led the investigation to easily track the case all the way to court.

In Italy, the case is initiated by the prosecutor’s office. If not carefully managed, it may generate calendar definition problems. A review of the various stages of case processing clarifies what these problems are.

The prosecutor who has a major role in the investigation typically determines when to file the case in court. The case is randomly assigned to a preliminary hearing judge who determines whether to indict the defendant or dismiss the case. If the judge decides to indict the defendant, the case will be assigned to a trial division for public hearing. Because the preliminary investigating judge, the trial division, and the prosecutor do not share an integrated calendaring and scheduling system and because there is no specialization by criminal case type or jurisdiction, coordinate their respective activities and scheduled is a difficult and time-consuming proposition, thus delaying prompt case processing. For example, five different cases assigned to the same prosecutor could be assigned to five different preliminary hearing judges, as well as to five different trial divisions, and all of them have independent calendars. As a consequence, it is not unusual for the same prosecutor to have two or more scheduled hearings in different courts at the same time or at overlapping times. Because he or she cannot simultaneously be present at the same time in different courtrooms, there incidence of adjournments is very high; moreover, where a substitute prosecutor is designated who has insufficient time to become familiar with the particulars of the case, his or her performance frequently is inadequate.

**B. THE TRIAL RECORD**

Also very important for the trial process in an adversarial system is the manner in which the oral record is taken and preserved. In the courts of the United States on both the state and federal levels, a variety of recording systems are deployed, ranging from the traditional stenotyping to the most advanced CAT (Computer-Aided Transcription) and CIC (Computer-Integrated Courtroom) systems to digital audio and videotape court reporting. The oral trial needs a recording system that is reliable, complete, accurate, and easy to use, among other reasons for purposes of presenting a clear and complete record of the trial if the decision in the case is appealed.

Unlike the adversarial model, the inquisitorial procedure, which relies heavily on content of the file, can utilize short summaries of the oral discussion and witness testimony rendered in a hearing because most of the documentation is the dossier. In most court systems that continue to rely on the inquisitorial model, the presiding judge will dictate short summaries of the proceeding to a court clerk who records them either in handwriting, on a typewriter, or on a PC. The

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44 See C.p.p. art. 506.
46 For minor cases the public prosecutor can decide to overcome the filter of the preliminary hearing judge and ask for a trial date directly to the judge.
48 M. Damaska (1986), p. 33: “In the great majority of Continental countries […] The integrity of a powerful central authority was thought to require strict governance by rules […] As a bureaucratic maxim of the period asserted: What is not in the file does not exist.”
risk, of course, is that the judge’s summarized description may contain biases or comprise an incomplete record of key witness testimony. For that reason, some inquisitorial-based systems are adopting verbatim recording systems to ensure the accuracy of the record.

The new oral trial model has forced the Italian courts to address the recording problem. The legislators, in part due to lack of useful information about state-of-the-art recording technology, selected stenotype as the standard and, for particular events, audio or video recording with a summary account of the interrogations. The Ministry of Justice then recognized that there was an insufficient number of skilled stenotypists to staff the nation’s courtrooms. The Ministry then rushed to procure and test audio-recording systems for the courts and to train courtroom staff in their use. Some courts took the initiative to locate and enter into contracts with free-lance reporters. A few months later, the Ministry sponsored pilot testing of videotaping systems in six courts. Following relatively successful results of the pilot test at the end of calendar year 1992, the Ministry of Justice purchased eighty of these video systems to deploy in the trial courts.

Judicial assessments of these different systems are as varied among judges in Italy as they are among judges in the United States. Generally speaking, most Italian judges who understand the role and function of the adversarial model prefer the videotaped record. They find it helpful in complex cases and particularly useful in organized crime or mafia trials where visual communication is extremely important. However, it is necessary to revise the law to make the videotape record really useful both at the trial and at appeal levels. The primary problem is the transcript which is still considered necessary even where video or audio recording is made. Judges, prosecutors, and attorneys have relied on paper for so long that transferring to an electronic recording involves too much change too quickly. Over time, each court appears to have migrated to a hybrid that responds to the needs of its judges, leaving justice system officials with a heterogeneous mix of systems that is costly to operate, administer, and maintain.

THE ITALIAN SPECIAL PROCEEDINGS

A major purpose of the new Code was to create new proceedings that would serve to help reduce enormous pending criminal case backlogs and to accelerate processing of the caseflow. The Code introduced alternative proceedings to the trial referred to as “special proceedings.” Their goal is to reduce the number of criminal cases that go to trial by using a variety of abbreviated procedures designed to encourage agreement among the parties. Table 2 summarizes the different special proceedings available and their main features. This paper cannot describe or analyze all of them; it focuses on the Italian version of plea-bargaining.

PLEA BARGAINING: Italian plea-bargaining is very different from the version of plea-bargaining generally utilized in the United States. Although the goal is supposed to be the same – settling cases before trial – the rules that govern the two systems and their respective effects are quite different. Italian plea-bargaining allows the defendant to opt for, at the most, a one-third reduction in the sentence he otherwise would receive based on the charges in the indictment. The reduced punishment cannot exceed five years; otherwise, the plea-bargaining is not applicable. Unlike plea-bargaining in the United States, Italian prosecutors cannot bargain by reducing the number or kind of charges. In addition, the Italian model permits defendants to bargain pleas with the judge, even when the prosecutor does not consent.

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52 See C.p.p. art.444. This article of the 1989 Code has been amended with the Law n. 134, 12 June 2003. Up to 2003 the plea bargaining could apply to crimes that, after the one third reduction, entail a punishment up to two years imprisonment, the law n. 134 has enlarged the use of plea bargaining to crimes that entail punishments up to five years imprisonment.
A very important aspect of plea bargaining has not been adequately considered in Italy. To effectively utilize plea-bargaining to decrease the backlog of pending cases that are tried, it must be considered from the hurdles race perspective. In the United States, from initial filing of the charge through the preliminary hearing or indictment to the time of the trial, prosecutors may repeatedly approach the defendant with variations of a plea-bargain. Many prosecution offices as a matter of policy, make their best, most lenient offer early in this sequence. The longer the defendant waits, the greater the likelihood that the generosity of the original plea-bargain offered will be diminished. There is an inverse relationship between the amount of work the prosecutor invests in the case and how generous the offer is likely to be. There is little utility in bargaining when the trial is imminent—the prosecutor is prepared and all the paperwork has been completed and filed with the court.

In Italy, plea-bargaining is not conducted in the context of a hurdles race. Defendants can plea-bargain or consent to the other special proceedings without penalty as late as the day of trial before the judge and either with or without the prosecutor’s consent. To that extent, no incentives exist to motivate defendants to opt for alternatives to trial, especially if they are not being held in pretrial confinement. Defense attorneys, unless they are court-appointed counsel, have no incentive to settle cases because they can earn more if the case is brought to trial. The only strong incentive to plea bargain is triggered when a defendant is caught red-handed in committing a crime because a plea bargain will result in reducing the punishment by one-third where the likelihood of being convicted is very high.

Plea bargaining, as well as the other special proceedings, have only slightly diminished the number of cases that went to trial in the first years of the implementation of the Code. Things have changed during the years, particularly after the 2003 reform that enlarged the possibly to plea bargaining, with an average of about 35% of criminal cases brought before

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**TABLE 2 - Italian special proceedings: main features**

<table>
<thead>
<tr>
<th>Proceeding</th>
<th>Usage</th>
<th>Trial</th>
<th>Sentence</th>
<th>Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decreto Penale – Penal Decrete</td>
<td>Cases where a fine is due</td>
<td>No trial</td>
<td>Fine (50% reduction in what should be paid)</td>
<td>No appeal allowed</td>
</tr>
<tr>
<td>Applicazione della pena su richiesta delle parti – Plea Bargaining</td>
<td>Cases where the sentence, after 1/3 reduction, does not exceed five years in prison</td>
<td>No trial, but plea bargain is possible just before the opening statements</td>
<td>No sentence, but the judge can review the plea bargain</td>
<td>No appeal allowed under parties’ agreement</td>
</tr>
<tr>
<td>Giudizio Abbreviato – Abbreviated Trial</td>
<td>All cases except those punishable by a life sentence</td>
<td>No trial; the judge uses only the dossier</td>
<td>Verdict and written judgment, sentence reduced by 1/3</td>
<td>Appeal is allowed with some restrictions</td>
</tr>
<tr>
<td>Giudizio Direttissimo – Direct Trial</td>
<td>Defendants either are caught in act or confess</td>
<td>Adversary trial</td>
<td>Verdict and written judgment</td>
<td>Appeal is always allowed</td>
</tr>
<tr>
<td>Giudizio Imediato – Immediate Trial</td>
<td>Cases with overwhelming evidence</td>
<td>Adversary trial</td>
<td>Verdict and written judgment</td>
<td>Appeal is always allowed</td>
</tr>
</tbody>
</table>

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54 See C.p.p. art. 446.
55 Although reliable data on the use of plea bargaining in all types and phases of proceedings were, and still are, scarce, from October 1989 to December 1993, the average nationwide percentage of plea-bargainings, on the total of the prosecutors’ office filings to the courts of limited jurisdiction (preture) was less than 1.5% and less than 4% for the courts of general jurisdiction (tribunali). The other special proceedings also were not very successful. From October 1989 to December 1993, in the courts of limited jurisdiction there were 0.3% giudizi abbreviati, 1.9% direttissime, 25.1% decreti penali. In the courts of general jurisdiction, there were 1.5% giudizi abbreviati, 3% direttissime, 4.6% decreti penali, 2.6% giudizi immediati (Ministry of Justice, Monitoring Office, Criminal Division, 1994).
the judge that are disposed by special proceedings. However, this percentage is still too low to give some relief to the overwhelmed criminal caseload, which still suffer of an outstanding number of pending cases, an extremely slow length of the procedure and a consequent huge percentage of criminal case that end because they go over the statute of limitation. The integrity of the justice system is strongly diminished under these circumstances.

CONCLUSION

This paper has addressed important issues that have confronted and continue to confront Italian prosecutorial offices and courts since implementation of the 1989 Italian Code of Criminal Procedure. The Code was designed to address major problems with which the Italian Courts were wrestling, including enormous pending case backlogs and unnecessarily lengthy proceedings, by adopting special procedures and an adversarial model.

The Italian experience illustrates that assuming that the substitution of the oral for the paper process for purposes of accelerating the pace of litigation and improving the administration of justice was both wrong and naive. On the contrary, if criminal justice reform efforts are not adequately researched, planned, organized, and managed, the overall consequences can increase rather than diminish the difficulties with which the criminal justice system must deal. Substituting the oral process is just one of many important steps that may have to be taken to effect sustainable improvements in the administration of justice. A prime lesson learned in Italy is that it makes no sense to change the criminal procedures rules without simultaneously reforming the institutional roles of prosecutors, judges, and defense counsel.

The legal formalism that pervades the Italian justice system saddled the 1989 Code with rules changes that have been shown to not work in practice. The Constitutional principle of mandatory penal action requirement imposed on prosecutors generates enormous paperwork to the detriment of substantive action by law enforcement. Implementation of this Code provision has demonstrated that this ideal principle is impractical and does not work in practice. Conflicts between prosecutors and police agencies have been emerged as a result of the prosecutors’ expanded role in managing investigations. Italian plea-bargaining and other delay reduction measures under the rubric of "special proceedings" have not fulfilled their initial expectations of reducing the number of cases that proceed to trial. The Italian experience also has show that cultural traditions and practices are often difficult impediments for lawyers and magistrates to overcome when attempting to integrate into an old system fundamentally new practices and procedures that may be perceived as counter-intuitive and questionable. Judges have complained about prosecutors’ poor performances during the oral trial process. Their substandard performance detracts from the quality of the public hearing and may impact the judges’ ability to reach the correct decision. On the judges’ side, they also had several difficult transitions to make in adapting to their new adversarial role.

“By definition, a reform is intended to cause change, and, in contrast with normal behavior, change conveys elements of risk and uncertainty that, themselves, tend to inhibit action [...] one must plan a reform with specific attention to normal behavior within the system to which the reform is to be applied”. In the Italian case the negative impact of these drawbacks might have been minimized had more attention been focused in developing the Code, planning for its implementation, and preparing and training the key players.

56 It is a rough calculation based on the gross data supplied by the the Statistical Office of the Ministry of Justice at: www.giustizia.it/statistiche/statistiche_dog/2006/appenale/nazionalepen.xls

57 According to a forecast made by some chiefs of public prosecutors’ offices before the Judicial Council, in few years 75% of criminal cases will be dismissed because they exceed the statute of limitation.

Theme: Reform, Change Management

Judicial System Restructuring and Modernization in Abu Dhabi
By Lawrence Groo, Abu Dhabi Government Restructuring Committee, Program Management Office

Abstract
The purpose of this article is to provide a practical overview of the recently initiated modernization of Abu Dhabi’s judicial system. Beginning in 2007, Abu Dhabi’s Government launched a comprehensive effort to transform the Emirate’s judicial system. While the implementation of these reforms is ongoing, with the adoption of the law in May 2007 establishing the new judicial architecture the initial phase of the modernization program is already complete. The restructuring process encompasses court management and administration reform, a new judicial training regime, a redesigned organizational structure for the Emirate’s Judicial Department and courts, and the establishment of a system-wide strategic planning and budgeting process. Many of these initiatives are supported by applying advanced IT-based applications. Given the early achievements and ambitious broader aims of the restructuring process, Abu Dhabi’s example is relevant not only to the other Emirates within the Federal UAE system, but also within the context of the wider Middle East region.

I. Introduction
In 2007 the Government of Abu Dhabi launched a comprehensive restructuring and modernization program with the objective of transforming the Emirate’s judicial system. This program envisions the improvement of court operations and administration, judicial training, performance management and strategic planning, as well as overall judiciary organization and staffing. Advanced information technology applications were identified as integral tools to support improvements in all of these areas. Collectively, the program was designed to achieve a more effective judicial system and enhanced rule of law.

While the implementation of the associated reforms is ongoing, with the adoption of the law in May 2007 establishing the new judicial architecture the initial phase of the modernization program is already complete. 2 The purpose of this article is thus to (1) outline the aims of this restructuring and modernization effort (Section III); (2) to describe the achievements of the program to date (Section IV); and (3) to note reasons for the program’s initial success, ongoing challenges, and to place Abu Dhabi’s example within the wider context of the Middle East (Section V).

II. Overview of Abu Dhabi’s Judicial System
The Emirate of Abu Dhabi is the largest of the seven Emirates within the United Arab Emirates, and Abu Dhabi city is the capital of the UAE. Until the mid-20th century, the Emirate’s population was largely dependent on date farming, camel herding and fishing and pearl diving in the Arabian Sea. In this earlier era, laws were primarily tribal-based and enforced in tribal courts. The economic development of the Emirate shifted dramatically following the discovery of oil in 1958. Today the Emirate has nearly nine percent of total known global oil reserves, and features one of the highest per capita incomes in the world. Bolstered by strong oil prices and significant domestic investment in infrastructure, urban development and cultural and educational sectors, Abu Dhabi has one of the world’s fastest growing economies. As of late 2007 there is more than $200 billion in planned urban developments (accounting for close to 30% of development in the wider region), including a new cultural district in the city of Abu Dhabi that will feature the world’s largest Guggenheim museum, a branch of the Louvre museum, and several other world-class cultural destinations. The Emirate is also developing a number of strategic sectors, launching important initiatives with leading partners in the fields of alternative energy (Massachusetts Institute for Technology), medicine (Cleveland Clinic), education (Sorbonne University), and aerospace technology (Boeing). Notwithstanding this phenomenal growth and economic transformation, the local population maintains a strong connection with traditional local Arab culture and Islam. There are approximately 1.8 million inhabitants, a majority of which are expatriates; there are 400,000 citizens.

Within this remarkable economic and demographic context, Abu Dhabi’s modern legal and judicial framework is predicated on the UAE’s Federal Constitution, adopted in 1971. In common with other legal systems in the Middle East, the judiciary is largely based on the continental European civil law model. The system is divided between civil, criminal
and sharia jurisdiction, with the latter focused primarily on family, inheritance and personal status matters. As in other Federal states such as Canada and Malaysia, under the Constitution there are both Federal and local courts, although the former exist only in four of the seven Emirates. The Emirates of Dubai, Ras Al Khaima and, most recently, Abu Dhabi, have opted to maintain local court systems under the Federal Constitution, whereas the other four Emirates (Sharjah, Umm Al Qaiwain, Fujairah, and Ajman) feature Federal courts. The UAE’s Federal Supreme Court tries cases pertaining to Constitutional issues that arise in any of the Emirates.

Under Abu Dhabi’s recently enacted law on the judicial system, the Emirate maintains a three-tiered system of courts: First Instance Courts, Appeals Courts, and a Court of Cassation. Courts are located in eight different cities of the Emirate, with approximately 115 judges and over 500 support staff. As with other government departments in the UAE and the Gulf region, a majority of staff are expatriates, with less than 15% of judges maintaining UAE citizenship. Most expatriate judges and staff are from other regional countries, including Egypt, Sudan and Morocco.

While employing expatriate judges may strike some foreign observers as highly unusual, the shared legal heritage of regional Arab countries – procedural and substantive laws in most Arab countries were heavily influenced by Egyptian models, and in most systems sharia plays an important role – make this practice more understandable, if still exceptional. The workload of Abu Dhabi’s court system is increasing at approximately 2% annually, with 25,239 cases (whether criminal, civil or sharia) registered before the First Instance Courts in 2006. Of this total, over 60% of the cases were criminal in nature. The dynamic and record growth enjoyed by the Emirate over the last five years, averaging over 15% per annum, suggests that court dockets are likely to grow significantly in coming years, and is likely to include an increasingly higher percentage of complex commercial cases. With respect to dispute resolution, by law family related cases must first enter family advisory bodies before entering court, and all civil cases are required to first endeavor to solve any disputes via government sanctioned Settlement Committees.

Unlike the judicial models adopted in Dubai, Qatar and Bahrain, Abu Dhabi has not established independent judicial mechanisms affiliated with economic “free-zones” that are outside of the authority of the existing national judicial framework. Instead, Abu Dhabi has maintained legal unity within the Emirate, while adopting more streamlined and advanced commercial law procedures to bolster the confidence of international companies and foreign investors.

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3 The Courts are located in Abu Dhabi, Al Ain, Delma, Dhafran, Marfa, Rahba, Ruwais and Sila. Other courts are expected to be established as the Emirate continues to grow.
III. Modernization Program

In 2005 the Government of Abu Dhabi established the Abu Dhabi Government Restructuring Committee (ADGRC), whose purpose is to help the Emirate attain more effective and efficient government organization and services. The ADGRC operates under the aegis of HH Crown Prince General Sheik Mohamed Bin Zayed Al Nahyan. In coordination with the leadership of the Judicial Department, led by HH Chairman Sheik Mansour Bin Zayed Al Nahyan, the Emirate’s leadership committed to modernizing the judicial system. The primary impetus for doing so was to ensure higher standards of professionalism and service, and to improve legal certainty and law enforcement. An overhaul of the justice system was also cited as one of the critical elements in supporting the Emirate’s continued economic growth and integration into the global economy.

The first step in the justice restructuring program was the establishment of a Steering Committee in late 2006. Comprised of representatives from the Federal Ministry of Presidential Affairs, the Abu Dhabi Judicial Department, the Executive Council’s General Secretariat and the Executive Affairs Authority, the Steering Committee reports directly to the Chairman of the Judicial Department and is empowered to take action on any issues pertaining to the judicial system’s modernization and restructuring.

The Steering Committee in turn authorized the creation of an implementation team comprised of local and international experts to lead the modernization program, with a detailed program scope, timeline and budget. Working in close conjunction with representatives of the Judicial Department, the implementation team was initially tasked with working across four thematic areas: (1) strategic planning, budgeting and performance management; (2) court management and administration; (3) information technology; and (4) communications. Initial preparatory work in these four areas has led to a detailed implementation plan involving 10 separate workstreams.

Working under the supervision of the Steering Committee via regular meetings and briefings, the implementation team launched a multi-phased program intended to achieve a more effective, independent and cost-effective system of justice that incorporates practices and processes utilized by the most advanced judiciaries in the world.

IV. Progress and Expected Results

The most critical development to date in the modernization program was the adoption of the new law establishing Abu Dhabi’s judicial system in May 2007. There are four particularly important aspects of this law. First, the law establishes an independent Judicial Council, composed of a majority of judges, which is responsible for governing judicial affairs. Specifically, the Council oversees the appointment and promotion of judges, reviews the quality of judicial decision-making via the Judicial Inspection Division, and approves and oversees court procedures and policies. In establishing the Council, the Emirate has adopted a model of judicial governance that is one of the most independent and self-regulating in the wider Middle East region.

The second particularly noteworthy component of this law is the strengthening of court management and authority under Court Presidents. For example, the law establishes the position of Head Clerk within each court, centralizing court management under a senior court administrator who reports directly to the Court President. More generally, Court Presidents are now directly responsible for all staff within their courts.

The third key attribute of this new system is a consequence of the centralization of court staff under Court Presidents – that is, those staff within the judicial system that do not work directly within courts. Specifically, support staff will be organized across five main offices: IT, Public Affairs, Administration, Performance Management and Judicial Support Services. Increasingly, the important support functions and services undertaken by staff in these offices (supervised by the Undersecretary, or lead executive officer of the Department) will operate under transparent and clear performance guidelines, focusing on higher-level policy development and management practices rather than lower-level administrative tasks (which can be outsourced or left to court clerks, as appropriate).

The fourth significant area impacted by the new law is training. By establishing a local independent legal and judicial system, the new law paves the way for a new judicial training regimen which will be guided and administered by a soon to be established Judicial Academy. This Academy is expected, in time, to not only train future judges and senior court staff from Abu Dhabi, but to act as a resource and training facility for other Emirates (and in time, other countries).

Following the adoption of the new law, the implementation effort has to date achieved a number of important milestones. Within 90 days, a comprehensive analysis of the system’s operating and structural strengths and weaknesses was completed. This effort was immediately followed by the comprehensive detailed design of the judiciary’s entire organization, including courts and supporting entities. In addition, an implementation plan was prepared that provides a detailed sequencing of reform initiatives planned for the next six months and beyond.
An intensive three-month training program was also initiated to benefit assistant judges and newly appointed judges. A team of leading scholars and academics from across the region was gathered to prepare and deliver a course of instruction on civil, criminal, commercial and procedural laws. This course focused on both key principles of UAE law and higher court rulings and the comparative experience of Lebanon, Jordan, Egypt, Syria, Qatar and the UAE, and highlighted the notable legal unity across most Arab countries. As noted above, given that much of the UAE’s civil and criminal legislation derives from Egyptian laws and procedural codes that have also been adopted in various regional systems, understanding the comparative case-law of other countries is of particular relevance for Abu Dhabi’s judicial personnel.

During the initial six month implementation period a number of important IT-based initiatives were also initiated and completed, including (1) equipping all judges with lap-top computers and associated training; (2) installing local area networks in remote courts; (3) ensuring appropriate network security measures to protect sensitive data; (4) developing a digital catalog of all national laws and higher court cases; and (5) designing and developing a judiciary website. A comprehensive electronic archiving effort, recording some 500,000 cases, was also launched, and is expected to be completed within a five month period.

Less tangible, though of considerable importance, are three more general achievements. First, as a result of granting judges and associated staff a salary schedule that is independent from the national civil service system, the government has made a strong statement regarding the unique and valuable role of judges and personnel within Abu Dhabi’s society.

Secondly, not unlike other GCC countries, Abu Dhabi’s deficit of local judges has been targeted as a key area for improvement. The Judicial Council, for example, is comprised of 50% nationals, considerably higher than the ranks of the bench as a whole, and is expected to be almost entirely nationalized within five years. Similarly, the bench of the first instance courts, which constitutes approximately 75% of judges within the Emirate, is expected to be 75% local by 2012, up from less than 15% today. This goal will be achieved through the means of an intensified training regime for local assistant judges, in addition to the considerably higher judicial salaries and associated benefits.

Finally, it remains to note that the recent law enables women to assume the bench for the first time. Currently there are three female assistant judges and two prosecutors within the judiciary’s ranks. This development substantially widens the potential pool of judicial applicants; the more so since a large percentage of local law graduates are women.

The next implementation phase, expected to be completed over the coming 12-18 months, includes the following:

- Realignment of the judiciary’s staff to comply with the new detailed design of the judiciary;
- Establishment of a new system for training, selecting and promoting judges and developing judicial specializations;
- Design and adoption of new financial management and human resources management processes and procedures;
- Development and adoption of a comprehensive strategic and operational plan to guide the judiciary’s continued development over the 2008-2010 period;
- Design and implementation of a modern public complaint monitoring system;
- Design and development of a comprehensive IT-based case management system;
- Design and development of a system-wide IT-based performance management system;
- Design and development of an internal portal resource for all staff as well as court users;
- Renovation and refurbishment of court facilities to improve access and level of service;
- Amendment of procedural laws enabling more streamlined and transparent trials; and
- Establishment of a Judicial Training Academy, with a state-of-the-art curriculum for new judge and select court staff.

Other initiatives and performance-based improvements are also planned. The primary results of these efforts are expected to be improved quality of judicial decision-making, reduced trial times, improved level of service for court users
and the public at large, more transparent laws and court decisions, clarified career and training opportunities for court staff, and, overall, higher levels of public confidence in the courts and a greater degree of professionalism and capability by judges and court staff.

V. Conclusion

Having described the framework, achievements and continuing efforts to modernize Abu Dhabi’s judicial system, three additional issues are worthy of mention: (1) notable aspects of the restructuring process that have contributed to the program’s success to date; (2) future challenges and complexities that the modernization effort is likely to face; and (3) the implications of Abu Dhabi’s experience for the wider region.

There are at least four primary factors that have ensured the program’s success to date:

*Unequivocal political support*: From the beginning of the modernization program, the senior political leadership of the Emirate, across the Judicial Department, the ADGRC, and the Ministry of Presidential Affairs, has shown unwavering and strong support for the reform effort. This has enabled a full mobilization of internal resources (including the adoption of a special budget supporting the modernization effort), and removing various internal bureaucratic hurdles that would accrue from less senior and undivided political support (for example, ensuring the Judicial Department was not bound by the traditional civil service requirements in recruiting and hiring new staff).

*Effective program oversight*: Whether on the part of the Steering Committee or the ADGRC, the primary government officials entrusted with oversight authority for the implementation have been closely involved at every stage of the modernization effort to date. For example, Steering Committee members receive weekly (and in some cases daily) updates on implementation issues, identifying any issues that need higher-level political support. This close involvement and supervision has also ensured a high degree of cohesion between the approach being implemented and the unique political, social and cultural aspects intrinsic to Abu Dhabi’s government and society. The individuals involved were handpicked by the Emirate’s senior political leadership, and are among the most able and impressive individuals within the Emirate’s government (or, in my experience, any government).

*Dedicated and experienced implementation team*: The assembled implementation team was fully dedicated to the restructuring effort (whether internal or external team members), and has regularly worked six day weeks throughout the initial implementation phase. The overall implementation effort includes staff from the ADGRC PMO and a variety of external consultants – particularly key roles have been assumed by the management consultancy Booz Allen Hamilton, as well as the Amman-based Centre for Arbitration and Law (in addition to other consultants and organizations). The combined team includes a number of experts with previous experience with the Emirate’s judicial system (at both the Federal and local levels), as well as with other advanced and developing judicial systems. This not only eliminated the usual “acclimatization” period for key staff, it also enabled the team to more effectively gauge priority implementation issues and establish closer connections with counterparts across the government.

*Clear timeline and program scope*: The modernization program has also benefited from the setting, and adhering to of a detailed time and project scope approved for six-month intervals. The timeline and scope are defined with a high degree of detail (specifying what the result will be of each initiative and who is in charge of ensuring successful implementation, etc). This timeline and scope are distributed to all relevant parties across the Judicial Department and related government entities.

None of these factors are revelatory given experience with government reform programs elsewhere in the Middle East, Europe, Asia and Latin America. However, the combination of these factors, together with the fact that the reform program has been entirely started, managed and supported by the local government, has led to an especially focused restructuring program that has, in the words of an expert from the United States Federal Judicial Center, led to completing “at least two year’s worth of work in only a few months.”

On the other hand, there are a number of challenges facing the implementation program. In my opinion the primary challenges are fourfold:

*Scale*: Government modernization programs typically focus on one or two discrete aspects of an institution (customer service, performance management, etc.). In traditional court reform programs, for example, the focus is often only one tier or section of the wider system. In contrast Abu Dhabi’s leadership has committed to restructuring and modernizing the entire judicial system, at one time. While it is true that the Emirate’s judicial system is of a comparatively small scale (total workload at the First instance level is equivalent to the workload of one large urban
court in a country like Egypt), the significance of this ambitious scale is a particular challenge given the need to ensure the successful integration and sequencing of reforms in different parts of the judicial system. For example, that various IT-based applications such as the case management system, performance management system and electronic archiving, should be compatible, even though their development complexity, timeline for deployment and end-users are distinct.

Meeting expectations: The political leadership of the Emirate has repeatedly indicated the importance of completing the necessary reforms as quickly and comprehensively as possible. This is especially true in the justice sector – at the Federal level, for example, the UAE's Prime Minister recently issued a rare public rebuke of a government organization, expressing his “utmost dissatisfaction” at the level of service of the Ministry of Justice and in the courts, and pledged that “[w]e will not allow this to continue”.4 This commitment to judicial reform, mirrored at the Emirate level in Abu Dhabi, has been backed by allocating significant internal resources for the restructuring program. However one may push reforms from on high, engendering fundamental behavioral and organizational change requires years of steadfast work and a host of related reforms sequenced over a period of months and years. The complexity of a judicial system, whether measured as a function of associated human interactions or procedural components, is exceptional. Moreover, since – like most governments in the Gulf – there is comparatively limited institutional familiarity with internal reform programs residing within Abu Dhabi’s courts, key officials have difficulty accepting that attaining a fundamentally enhanced level of organizational performance is rarely, if ever, managed in less than a matter of several years.

Creating a stronger judicial culture: While “culture” is a much abused catch-all for the lack of organizational and behavioral capabilities, what is nevertheless undeniable is that in a country as new as the UAE (founded in 1971), the judicial profession can benefit by further developing a supporting culture of professionalism and respect common in states with older judicial institutions. While in Western Europe and North America the vocation of a judge is esteemed and respected across society, in Abu Dhabi – as elsewhere in the Middle East – the judicial profession has not been as well recognized or professionalized; a circumstance which requires significant investment in training, recruiting, and broader public education throughout society.

Pairing reforms with actual organizational capabilities: One of the most common mistakes of government reform programs is importing a group of external experts to design new systems, performance standards and internal processes without ensuring sufficient internal capability to actually achieve sustainable performance improvements across the wider organization. This risk exists in Abu Dhabi as well; while a number of additional and better qualified staff are being hired to help lead the new judicial system, and counterparts from the Judicial Department have been committed to working alongside the implementation team, the successful integration of the myriad procedural, staffing and technology-based reforms within the judiciary remains a delicate work in progress.

None of these challenges are unique given experience in other countries, as well as existing literature and research on organizational change and institutional development.5 Nor is this article the venue for describing in detail the unique responses necessary to overcome each of these challenges. The central point is that given the existing positive factors above, achieving continued implementation success is likely, though not assured.

While this article does not address wider concepts of state and administrative development, Abu Dhabi’s example suggests a broader observation about the evolution of government in the wider Middle East. Whether one studies the achievements to date or the government’s ultimate stated goals, it is likely that within several years Abu Dhabi will have a judicial branch of government that is, in certain respects, as capable and technologically sophisticated as some of the most advanced and developed states in the world. Given that Abu Dhabi’s local and Federal government is only 35 years old, and that the older generation of UAE citizens today was raised in starkly under-developed surroundings amidst Arabia’s dauntingly arid geography, this achievement is highly significant.

Moreover, it is notable that Abu Dhabi’s leadership has initiated these far-reaching reforms highlighted not as a response to external pressure or donor demands, but rather to achieve ambitious internal public service reform goals. In contrast, many of the extant government modernization programs (and judicial reform programs in particular) in the Middle East and elsewhere are taking place as a result of external incentives or supra-national regulatory compliance issues. To the extent that a significant percentage of these externally-induced reform programs prove incapable of fundamental

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5 For a general survey of judicial reform experience see, for example, Juan Carlos Botero et al, “Judicial Reform,” 18 World Bank Research Observer 1 (2003).
organizational and service improvements, the Emirate’s experience of launching an entirely homegrown self-financed and internally managed judicial modernization program of ambitious scope represents an instructive and hopeful model for implementing lasting government reform in other countries.

Bearing these points closely in mind, it is fair to draw a final and important conclusion about the nature of government and judicial reform in the Middle East. Specifically, Abu Dhabi’s example not only demonstrates the commitment of the Emirate’s political leadership to attaining a high standard of public service -- it also suggests that the commonly held notion in certain quarters that the cultures and political systems in the Middle East are somehow inherently unsuited to, or incapable of attaining, internationally recognized standards of the rule of law and effective government should be fundamentally reconsidered.

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6 See, for example, U.S. Rule of Law Assistance has had Limited Impact, U.S. Government Accounting Office (GAO-01-740T), Statement of Jesse T. Stone, Director of International Affairs and Trade before the House Committee on Government Reform, Subcommittee on National Security, Veterans Affairs, and International Relations (May 17, 2001).
Theme: Reform, Change Management

Judicial Productivity in India
By Barry Walsh

Unlike some British imperial legacies, such as English literature and the sport of cricket, judicial and court administration in India bears important dissimilarities to its British progenitor. These differences are substantial. Some of them are subtle and seem to gain scant recognition, even to many who practice as judges, advocates or commentators within the Indian court system. The direction for improving the Indian court system is to be found by recognizing those differences and the lessons they may offer.

The essential thesis of this paper is that the practices and associated expectations of participants in the Indian court system are significantly different from most other countries that have inherited their legal systems from the British. An examination of those differences can help to identify strategies that may be pursued in overcoming a significant case backlog and delay problem in Indian courts. International comparisons with courts in other jurisdictions are not only useful and appropriate, but offer new opportunities for reforming the Indian court system that may hitherto have been overlooked. If the reader agrees with the author’s arguments and conclusions, then this paper offers a novel range of areas in which reforms may be advanced. If, on the other hand, the effect of this paper is to provoke a contradictory response from Indian commentators by reference to practices in other countries, then it will have achieved its purpose in seeking to gain recognition of the value of international comparisons as a means of identifying court system reform strategies in India and, hopefully, elsewhere.

Differences in practices and expectations

The constitutional and legislative features of the Indian court system suggest that it is very much modeled on the English adversarial common law system. With notable qualifications, such as the abolition of the jury system in 1956, Indian trial and appellate courts follow the English model. The application of that system in India, however, has resulted in practices which are significantly divergent from those of England and other English speaking former British dominions that adopted English law; such as the USA, Canada, Australia and New Zealand. Unlike India, these other court systems have been generally successful over the last 20 years or so, in overcoming endemically large backlogs and delays in case disposals. Through trial and error, and bitter experience in some cases, those other systems have identified the causes of backlog and delay and successfully applied usually similar methods to overcome them.

Judicial Productivity

A view widely shared among judges and commentators on the Indian judicial system is that there are not enough judges for the workload they have to bear. Three arguments are commonly offered in support of this. The first is that high rates of case pendencies across India show that there are not enough judges to dispose of the cases before them. A second argument is that there is a logical and proper numerical relationship between a society’s population and the number of judges needed to service that population – and that the proportion of judges relative to population in India is very low by World standards. A third argument, related to the second, is that in those societies which are particularly litigious, possibly India, the proportion of judges relative to population should be even higher, compared with less litigious systems. The evidence that might support each of these arguments is readily at hand. Pendency figures and population statistics are quite accessible. However, one necessary assumption which seems to be implicit in each argument is that Indian judges are efficient in disposing of their caseloads. If, for example, there were good reasons why Indian judges can be expected to be less productive than judges in other countries, then presumably there would be an argument for having more of them, relative to population. Similarly, if for no good reasons, Indian judges are less productive than other systems, then there might be an argument for not increasing their numbers until their productivity is improved by other means. But evidence about the productivity of Indian judges, as distinct from their workloads, is seldom, if ever, raised as a factor in support of the case for increasing judicial numbers. More commonly, it seems to be assumed that judges are sufficiently productive, perhaps as productive as they will ever be.

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2 Pendencies mean the number of pending cases. The terms “pending caseload” and “backlog” are also used to describe such cases.
It is difficult to rationally evaluate judicial productivity without identifying an objective benchmark to indicate just how productive a judge could be. If judges across India share common managerial problems, such as low numbers and poor resources, as many believe to be the case, then it is unlikely that an objective benchmark of judicial productivity can be found within India. International comparisons are more likely to be illuminating. The problem in looking to other systems, however, is in finding a system that is sufficiently similar so as to permit reasonable comparison. This is difficult. Civil law systems, for example, are especially unlikely to offer useful comparisons because a large proportion of civil law trial court benches often comprise at least three judges, whereas most trial court benches in common law systems, such as India, are of judges sitting alone. Common law systems, on the other hand, can also offer unhelpful dissimilarities by reason of geographic spread, size of populations and economic and cultural differences. These differences can be compensated for, when data relevant to productivity is available. Often systems which might bear comparison with Indian experience do not necessarily offer accessible data that would permit useful comparison. Data that has been readily accessible to the author by reason of personal experience, however, has been data about court practices in Australia and in the courts of Delhi, in India.3 As it turns out, comparing the court system of the National Capital Territory of Delhi with all of the courts of Australia can offer some useful insights into the question of judicial productivity in India. Delhi, for instance, has 13.8 million people, whereas Australia’s population is not much greater at 20 million. Both are common law systems that rank their courts into generally three levels. Both operate under codified constitutional federal systems and each have jurisdictional ranges that are generally comparable for criminal, civil and appellate jurisdictions. Here are some figures about each system that can be related to judicial productivity.

**Judge to population ratios.** Allowing for High Court judges in Delhi (the superior court of the national capital region), but excluding Supreme Court judges (the national superior court), there are 30.8 judges in Delhi per million of population4. The comparable Australian figure is 44 judges per million of population5. This indicates that Australia has half as many judges again than Delhi when compared proportionately to population. This comparison strongly supports the argument for increasing judge numbers in Delhi to match the ratios achieved in Australia – assuming, of course, that the ratios in Australia represent an appropriate benchmark for India6.

**Disposals per judge.** A useful indicator of judicial productivity is the ratio of judges to disposals per year. It is better to consider disposals, rather than pendencies, because disposals represent actual productivity, whereas pendencies represent productivity that is yet to happen. Looking at disposals is useful because it gives an insight into judicial productivity in terms of what they do, rather than in terms of the population they serve. It also offers an indicator that can be related individually to each judge. In Delhi courts this ratio was 701 disposals per judge per year.7 The comparable figure for Australian courts was 1,511 disposals per judge or around double the level of Delhi disposals.8 This suggests that Delhi judges might have to work twice as hard to dispose of as many cases as Australian judges.

**Judges per lakh9 of disposals.** Another indicator of judicial productivity is to measure the number of judges needed to dispose of 100,000 cases in a year. This is useful for the purpose of justifying additional judge appointments in tandem with, or as a consequence of, increases in caseloads. In Delhi district courts 153 judges are needed to dispose of 100,000 cases in a year. This is useful for the purpose of justifying additional judge appointments in tandem with, or as a consequence of, increases in caseloads. In Delhi district courts 153 judges are needed to dispose of 100,000 cases in a year. This is useful for the purpose of justifying additional judge appointments in tandem with, or as a consequence of, increases in caseloads.

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3 Very little statistical information about Indian courts is published. Most of the data used in this article was derived directly from the courts themselves from their routine internal reports, few of which are published in their entirety. Some authoritative data on Delhi courts is available via the websites of the Delhi High Court ([http://www.delhighcourt.nic.in/](http://www.delhighcourt.nic.in/)) and the Delhi District Courts ([http://www.delhidistrictcourts.nic.in/](http://www.delhidistrictcourts.nic.in/)). Statistics on courts in other countries referred to in this article are derived from published reports, as cited.

4 Sanctioned rather than working numbers of judges are used to ensure comparability with Australia. The working number of judges in Delhi is closer to 21.5 judges per million of population. The sanctioned numbers used are 33 High Court and 392 district courts judges in Delhi as against a population of 13,782,976 as determined in the 2001 census.


6 For example, Australia’s judges are distributed over a landmass 2.5 times the size of India, whereas Delhi is effectively a city state, a factor which implies that Australia might need more judges than Delhi to cover a more widely dispersed population.

7 Based on disposals of 79,297 civil & 95,698 criminal in district courts and 32,346 disposals in the High Court in 2004. Judges to disposal ratios are based on working, rather than sanctioned numbers of judges which is taken to be 296 in Delhi in early 2005.


9 In India a lakh means 100,000 and is more commonly used as a numerical measure than thousands or millions.
Disposals per lakh of population. A further variation is to look at the number of case disposals per year per lakh of population. In Delhi the number of cases disposed per 100,000 of population is 1,506. The comparable Australian figure, however, is 6,651 or almost four and a half times greater. This suggests that the population of Delhi is, at most, one quarter as litigious as the Australian population. It would seem that the level of litigation is not necessarily a factor affecting the ability of Delhi judges to dispose of cases.

These different ways of examining judicial productivity in India reveal an extraordinary but logical conclusion: If litigation rates in Delhi rose to levels equivalent to Australia, then the average productive capacity of the Delhi courts would need to increase at least eight fold to cater for the additional work. If the working number of judges in Delhi were to be doubled, so as to match the ratio of judges to population in Australia, it would only account for around half of the required increase in productive capacity. Thus it could be said that no practical increase in judicial numbers would overcome the reality that Delhi judges are only half as productive as Australian judges in terms of case disposal capacity. One might question the precision of these figures, being based on the latest available yearly figures, rather than figures compiled over time. However, the degree of difference between judicial productivity of Delhi and Australia is so great that numerical errors are unlikely to affect the basic conclusions.

Why are judges in Delhi, and presumably across India, so much less productive than Australian judges? The answer is that, despite the similarities of each system, Indian courts administer cases in ways that are significantly different from the ways of Australian courts. It is unlikely that Australian judges work harder than Indian judges; nor are they necessarily more learned or experienced. What is different is that they generally use case management and court management methods and practices which Indian courts generally do not use, or are less effective in using. These methods and practices are referred to in this paper as “best practice”. Many courts in England, USA, Canada, Australia and New Zealand use best practice methods; but not all of them. And those that do use best practice methods are not without their problems from time to time. But the judicial leadership of each would vouch for the fact that when those practices are consistently used, they work. So how is it that Indian practices differ from best practice?

Low civil settlement rates
A key reason why Australian judges dispose of more cases per judge than Indian judges is because they conduct fewer trials. Overwhelmingly, the dominant means by which cases are disposed of in Australia is by voluntary settlement by the parties, rather than by a judge-adjudicated verdict. In best practice systems, 70% or more of civil disposals can be expected to settle before a trial begins\(^{10}\). In Indian trial courts, the settlement of a case by voluntary agreement between the parties is a rarity. In civil matters the typical proportion of cases that settle is around 5% and most of those settlements reportedly occur after a trial begins\(^{11}\). The causes of these low rates in India are not well researched. The main cause may be that the incentives for parties to settle disputes in best practice jurisdictions are either absent in India or are rendered less compelling by other factors.

In systems that apply best practice, and probably in all common law systems, there are two types of cases which are prone to settle. The first kind, which we may call early settlement cases, are either cases where all parties are in an ongoing relationship of some kind and want to resolve their dispute quickly; or cases where the cost of settling for both parties is not high and where settlement would allow them to pursue other, more worthy things. In early settlement cases there is a prospect that the parties will settle early in litigation, often without the direct involvement of a judge, by using methods like private arbitration, mediation, court-supervised settlement conferences or old fashioned advocate-to-advocate bargaining.

The second kind of case that is prone to settle, which we can call late settlement cases, are cases in which the parties are in sharp dispute but who reach a point in time where one of them starts to believe three things, i.e. that (i) unless they settle, they will lose the case at significant cost to themselves; (ii) the time of loss is imminent or is not far off; and (iii) when they lose, they will quickly be forced to pay a higher price than if they decided to settle. In Australia a high proportion of settlements are both early settlement and late settlement cases. In well managed courts that encourage case settlement, early settlement cases are filtered out of court lists relatively early, sometimes even before the case is listed before a judge. But late settlement cases usually remain in court lists until case preparation is completed and a date for

\(^{10}\) The proportion of instituted cases that went to trial in the trial courts in the Canadian province of Ontario was consistently below 10% in the period 1978 to 2000. This, of course, is a practical settlement rate of 90%. Source: Ontario Courts Annual Report 2002-2003.

\(^{11}\) This figure is based on the results of a listing survey conducted in early 2005 which, among other things, measured the means by which cases were disposed in 21 trial courts over a three week period — of all the disposals recorded in that period only 5% were by way of settlement - Source: Listing Survey Report, May 2004, ADB /GOI India Administration of Justice Technical Assistance Project TA4437-IND
trial is set. When a trial date is set in most Australian courts, the psychological pressures on parties to consider compromise begin to coalesce, with the common result that settlements occur, as is often said, “at the door of the court - meaning that a high proportion of cases settle on the morning of the first day of a trial. The psychology of late settlement cases is so reliably predictable that many civil courts in Australia, and in other systems, confidently schedule more trials than there are available judges, in the expectation that a proportion of them will settle before their trial begins.

Undoubtedly there are early settlement and late settlement cases in Indian trial courts. But few of them appear to settle. Why would this be so? In answer, two reasons can be offered. One reason is that voluntary settlement is not the custom in India, the English adversarial system being well ingrained since the British era. It might also be said that concern about corruption in the legal profession and the judiciary make Indian litigants wary of settlement processes. But in answer to this argument, it may be said that customary inhibitions, even concerns about transparency of settlement processes, can be overcome by managerial initiatives in courts, such as the development of formalized court annexed mediation schemes or similar ADR initiatives that assure transparency of settlement negotiations under judicial supervision.

The second reason for low settlement rates, which is considerably more compelling, is that Indian courts do not offer the essential preconditions of late settlement as suggested above, - i.e. they ordinarily do not offer a party in a case the opportunity to reach a point of realization that they will lose the case; that they will lose soon; and that they will soon have to pay for it. Why would those preconditions be absent from Indian courts when they are evidently present in Australian courts and in other systems? The answer to this question is much simpler. It is because most Indian trial courts cannot offer litigants what may be called outcome date certainty – i.e. they cannot indicate or direct with reasonable certainty when a particular trial will be completed and when a readily enforceable and final verdict will given in favor of one party. The absence of outcome date certainty in Indian courts is the quintessential difference between most Indian courts and most courts in Australia and other systems which apply best practice methods. Before elaborating on the reasons for the absence of outcome date certainty, however, it is useful to point out an important difference that affects settlement in criminal cases in India.

Low criminal plea rates
Plea rates are the proportion of criminal cases in which the accused person pleads guilty and thereby avoids a trial. Sentencing a person who pleads guilty requires fewer resources for a court and the prosecution; and avoids the uncertainty of putting the accused to trial. It also enables the decision on sentencing to take into account factors that may mitigate a sentence, such as contrition of the accused. Accused persons are motivated to plead guilty when they believe that a finding of guilt by trial is likely; and when they believe they will get a lighter sentence by pleading guilty. Best practice criminal justice systems endeavor to give accused persons ample incentive and opportunity to plead guilty. They do this by usually offering efficient prosecutions that have a high probability of a finding of guilt, they provide outcome date certainty and they assure consistency in sentencing. In Australian magistrates courts, over three quarters of criminal cases are disposed by plea or by comparable processes that do not involve a defended hearing. In contrast, rates of guilty pleas are not measured or reported by Delhi sessions courts or magistrates courts. Presumably the same applies to most other Indian criminal courts. However, anecdotal feedback from Indian judges and advocates suggest that pleas are uncommon, if not rare, except possibly in non-custodial matters. The sad reason for this is likely to be that there is no incentive to plead guilty when there is a high probability in Indian criminal courts that the accused will be acquitted, either at trial or on appeal. Conviction rates indeed appear to be low. The 2004 annual report of the Delhi district courts, for example, reported that only 35% of criminal sessions cases and 49% of magistrates cases resulted in a conviction. To date, little information is available on plea rates, let alone research on the causes. What is clear is that in most Australian and other criminal court systems that apply best practice methods, the rates of guilty pleas account for sizable proportions of criminal lists, allowing judges of criminal courts much higher disposal rates than are achieved in Indian criminal courts.

A predominance of contested hearings
Rates of civil case settlement and criminal pleas in any court system are influenced purely by subjective assessments of self interest. If a defendant sees advantage in settling a civil case, rather than wait for a judge to enter a verdict, the defendant will settle. Similarly, if an accused person believes that he or she will be convicted and may suffer a worse

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12 Few Indian courts offer court annexed mediation. In most Indian trial courts, however, there is a court annexed alternative dispute resolution process known as a lok adalot. Lok adalots are tribunals, normally presided over by a judge, to which, usually, small civil claims are referred for conciliation and negotiated settlement. The features of lok adalots which distinguish them from court annexed mediation, is that they are held in open court and usually in large volumes on a single day.


14 District Court of Delhi website at http://delhidistrictcourts.nic.in/Annual%20Reports.htm
penalty on a plea of not guilty, then the accused will consider a plea of guilty. These are truisms of human behaviour that apply irrespective of culture or jurisprudential traditions. Settlement and plea rates in India are usually low because there is uncertainty about the likely outcome; about when that outcome will occur; and because defendants thereby perceive advantage in delay or indecision. To reverse this trend, it is necessary to offer more certainty of outcome and to deny advantage to litigants who procrastinate. For courts this means being able to ensure that trials are finished within a certain period that is known to the parties and that the prosecution in a criminal case is well prepared to secure a conviction. Furthermore, civil defendants who go to trial without settling and who then lose, should expect to pay more than they would have been required to pay, had they settled. Similarly, accused persons who plead not guilty and are then found guilty, should expect that their penalty will be worse. Courts have little direct control over the quality of the prosecution. However, they can have control over the timing of a criminal trial, as they do in civil cases. This concept is described as trial date certainty in Australia and other systems that endeavor to apply best practice. In India, however, the idea that trials can be given near certain completion dates is peculiar and quite rare.

A propensity to adjourn

Outcome or trial date certainty is difficult to achieve in India courts because most cases are adjourned multiple times and in unpredictable ways, even after a trial begins. In Australian courts the reduction of the average number of case adjournments has been a major managerial priority in backlog and delay reduction for at least the last 20 years. Criminal case attendance rates for most courts in Australian states range from 0.3 to 6.3 adjournments per disposed case. Civil case adjournment rates are in the range of 1 to 5. In India attendance rates appear not to be counted by any court. Estimates offered by individual Indian judges and advocates, however, put the rate of adjournments in Indian trial courts as typically between 20 and 40 times over the life of a case. Some cases are adjourned many more times. An ADB study revealed that on a single randomly selected day in March 2004 the High Court of Delhi had listed before it an average of 100 cases per judge, of which 80% were adjourned to another day. Another ADB study conducted in Delhi district courts over a three week period in early 2005 showed that 80% of a much larger sampling of listed cases were adjourned. These figures suggest that while Australian courts devote a lot of effort to minimize case adjournments, Delhi courts depend upon high rates of adjournment to get through their daily cause lists. With almost no exceptions, every Delhi judge’s cause list contains at least a dozen cases daily (often several dozen). And each case will typically be called and given some attention, if only for a few minutes, before being adjourned again. It appears that the trends in Delhi are reasonably typical of most Indian courts.

Absence of continuous trials

The propensity of Indian courts to adjourn cases compared to Australian courts can be explained by a fundamental difference of view about how cases should be managed by courts. Australian courts share with many of the intuitive courts in England, the USA, Canada and New Zealand, a convention that a trial should, as far as possible, be conducted continuously. A continuous trial means that ordinarily a judge should conduct a trial in a particular case, and normally no other, from start to closing submissions with minimal interruptions. This convention probably stems from the jury system which demands that evidence be presented to jurors as quickly as possible so that they can deliberate on their verdict and then be discharged. Even in those jurisdictions in which juries are no longer used, the commitment to pursuing continuous trials still remains because of the recognized efficiencies they provide. For reasons unclear, however, continuous trials in India have become largely extinct. While Indian jurists and advocates would agree that continuous trials are desirable, it almost never happens.

The tendency of cases to be adjourned in India appear to have two distinct causes. The first is what appears to be a well established practice that there be a separate scheduled hearing for each of the main stages of a prosecution or a civil action. It is an undisputed practice, for example, that once the plaintiff’s evidence in a civil case has been given and cross examination is complete, then the case should normally be adjourned to another day for the purpose of hearing the defendant’s evidence. Australia does not have this convention – there is normally an expectation that evidence for all

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15 While the expression “trial date certainty” applies in Australia and elsewhere, this paper uses the term “outcome date certainty” in recognition of the fact that setting a date for the commencement of a trial in India does not really indicate when that trial is likely to finish.

16 The term “attendance” is used in Australia in lieu of “adjournment” when counting the total number of courtroom events - thereby ensuring the first court event is counted. The American term “appearance” has not been adopted in this paper as it can mean something else in other jurisdictions. For example, in Australia and India “appearance” can refer to whether or not a particular party or legal representative actually attended a scheduled hearing.

17 Average attendance rates can be less than 1 because many cases are disposed before being listed before a judge.


19 The practice exists under legislative authority that a higher court in India can exceptionally direct a lower court to try a particular case “from day to day”. But even in these circumstances such a direction is taken to mean no more than a requirement to hear one case at least for part of the day, each consecutive day, while other cases are also heard.
sides and submissions will occur within a continuous, mostly unbroken, trial. Indian courts, on the other hand, work on the assumption that a trial ought to occur in no less than five stages, each separated by an adjournment, i.e.

- Issues and charges
- Plaintiff’s or petitioner’s evidence
- Defendant’s or respondent’s evidence
- Final argument
- Order and judgment.

A second evident cause of high rates of case adjournments in India is the effect of rising backlogs and case delays. Given that courts already routinely fragment trials into separate formal stages, the response to rising caseloads has been to subdivide them even further. Generally, as cause lists have grown, individual cases have been scheduled for hearing no less frequently; but less time is available for them at each hearing by reason of there being more cases in each cause list. There is a commonly held view among judges and advocates alike, for example, that it is better to take the evidence of one available witness and then adjourn, rather than risk that witness not being available on the next occasion. Australian courts, however, would resist this practice. Instead, Australian courts would seek to deal with rising caseloads by maintaining a commitment to continuous trials and by applying other measures to deal with rising caseloads.20

So why is it better to preserve continuous trials rather than to fragment trials into shorter but regular hearings? The answer is that continuous trials offer outcome date certainty while fragmented trials do not. Once a trial starts under a continuous trial system, the date of the outcome becomes readily predictable and permits the parties to consider settling their case. But when trials are fragmented into multiple adjournments, there is no predictability about the time of a final outcome, thereby reinforcing the reluctance of parties to settle. So it would seem that if Indian courts aimed at more continuous trials, then they could induce more case settlements with consequential reduction in their trial volumes and pendencies.

**Fragmented hearings**

The advantages of continuous hearings are not limited to encouraging more case settlements. They also reduce the duration of trials overall. Not all Australian court trials are continuous. Many non-jury trials are adjourned “part heard” for various practical reasons. Part heard adjournments, however, are resisted by Australian judges because they are inconvenient and costly. The need to adjourn a trial before evidence is closed usually represents an unscheduled disturbance in a system that assumes all essential evidence will be available at the scheduled time. Thus if an adjournment is sought, then an Australian court will usually consider penalizing the party who seeks it, if that is a practical option. And the prospect of a penalty being imposed is usually an effective deterrent against such things as failing to prepare for a hearing. Regrettably there appears to be little research available on the efficiency of trials in India. So it is not possible to offer certain conclusions about it. However, one might confidently infer that a system which usually fragments the taking of evidence into numerous installments will be less efficient and more time consuming than a system which seeks to assure an unbroken presentation of evidence and submissions by contesting parties.

**Deterring misbehaviour**

There is a widespread view among Indian judges and advocates that the Indian justice system offers ample opportunity for a litigant to evade court decisions, or to intimidate opposing parties by appealing or by lodging an interlocutory application. A high proportion of pendencies comprise such applications, with the result that delays in disposing of them afford ready opportunities for litigants to evade court decisions. Similarly, it is said that there is a remarkable degree of court tolerance of incompetence in the legal profession and of litigants in general. The ADB survey of court adjournments conducted in early 2005, for example, indicated that 43% of cases listed were adjourned due to the fact that either a litigant or legal representative failed to attend or was not sufficiently prepared for the hearing. High levels of case adjournments also offer opportunities to evade court decisions, often for many years, and also defeat the incentive of either party to settle. While Australian courts also need to deal with unmeritorious appeals, incompetent advocates and ruthless litigants, they are generally effective in discouraging them. The primary way they achieve this is by ensuring that adjournments are minimized and by offering early decisions on interlocutory applications and appeals. But what underlies the success of these methods is the presence of an effective means of punishing those who misuse court processes. Courts achieve this by enforcing cost penalties against misbehaving litigants and by using an effective disciplinary system against misbehaving advocates. India has both a system of party/party cost sanctions and a system for disciplining

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20 In an environment of large trial backlogs, Australian courts will ordinarily list a case for trial whenever there was available time for a continuous trial – effectively resulting in longer waiting lists for a trial date.
misbehaving advocates. However, it seems to be common knowledge that neither system is consistently effective in offering a deterrent to misbehavior. The reasons for this and the likely remedies are necessarily speculative, as little formal research into these problems appears to have been done. Whatever the reasons, it may be said that it is recognized in Australia that effectively deterring behavior which defies or seeks to evade judicial policy and court orders, is a key to assuring judicial productivity. Arguably this connection is yet to be recognized in India.

**Slow evidence**

Oral evidence in most Indian courts is generally typed in real time by the presiding judge’s stenographer using a word processor. In some cases manual typewriters are also used and sometimes the judges themselves record evidence by hand. In most cases the words typed by a stenographer are dictated by the judge after the judge hears the questions asked by advocates and the answers given by witnesses. Much court time is often spent supervising the typing of testimony in this way, including dealing with arguments from advocates about the accuracy of the words dictated. Oral evidence in Indian courts consequently tends to be taken slowly and incompletely. This is often made more onerous if the language of the witness is not English, in which case the judge must also act as interpreter when dictating in English. No court in Australia uses this method. Instead they use shorthand writers, stenotype machine operators or electronic sound recording with associated verbatim transcript production. Human shorthand or stenotype writers are used sparingly in Australia because of the high cost and the difficulty in finding skilled writers. Voice recognition technology is still unreliable in a court environment. Consequently, the preferred technology in most courts that apply best practices is sound recording of court proceedings and full or partial text transcription from the recordings by typists (transcribers) working outside the courtroom. The introduction of sound recording to Indian courts, however, would not be a simple matter of installing new courtroom hardware. It would presage enormous change in the dynamics of courtroom usage. It would require, for example, that courtrooms become relatively noiseless; something that most Indian judges and advocates are not used to and would probably have trouble adapting to. It is unlikely that any studies have examined the efficiency of present Indian methods of court recording. However, one can speculate fairly confidently that unlike current Indian methods, which necessarily impede the pace at which oral evidence can be taken, sound recorded courts would enable evidence to be taken much faster, possibly at twice the speed. Until that happens, of course, Indian courts will remain less efficient at taking evidence than courts which successfully use sound recording, such as in Australia.

**Conclusions**

Some key points of comparison explained above are now summarized.

**Judicial productivity.** If the Australian court system is used as a hypothetical benchmark, (i) there are almost half as many more judges in Australia as a proportion of population than there are in Delhi; (ii) the average case disposal capacity of a Delhi judge is only half that of an Australian judge; and (iii) per lakh of population, the number of cases disposed by Australian judges is eight times greater than Delhi judges.

**Settlement rates.** Delhi judges, and probably most Indian judges, appear to be less productive because they administer more trials as a proportion of overall disposals than Australian judges. Over 70% of Australian disposals are settled voluntarily without a court verdict, whereas the comparable rate in India is probably around 5%. Around three quarters of Australian criminal cases in magistrates courts are disposed without a defended hearing, usually involving a plea of guilty; whereas most Indian criminal cases are defended. Only around half of criminal cases in India result in a conviction, whereas much higher rates of conviction are typically achieved in Australian courts.

**Adjournment rates.** Typically a case in an Australian court will be adjourned up to half a dozen times. In India cases are typically adjourned 20 to 40 times before being disposed. The fragmentation of the taking of evidence by frequent adjournments results in reduced efficiency in trial management. This inefficiency is compounded by the method of court recording by dictation, which probably doubles the time taken to record oral evidence, compared with sound recording methods used in Australian courts.

**Continuous trials.** Most trials in Australia are run continuously, i.e. a judge conducts the trial in one case, and normally no other case, from start to closing submissions, with minimal interruptions. Continuous trials almost never happen in Indian courts, with most trials being adjourned at the conclusions of each of up to five stages of trial. Adherence to continuous trials and minimization of adjournments are key reasons why Australian courts have high settlement rates for civil matters and high rates of undefended hearings in criminal cases with consequent benefits for judicial productivity. Continuous trials and low adjournments are achieved by having effective means of deterring misbehavior by litigants or advocates.

Courts that apply best practices tend to be preoccupied with increasing judicial productivity, minimizing adjournments and increasing certainty of trial scheduling and verdicts. The intended by-product of each of these strategies is to increase overall case settlements rates and to increase the proportion of case settlements that occur early. Discussions about case delay and backlog problems in India, however, seldom invoke these kinds of issues. Not only is the Indian court system...
different from other common law systems, but arguably contemporary public debate about the problems that beset Indian courts has not yet recognized those differences. Indian courts need to acknowledge those differences and to act upon them. If this were to happen then the following major changes in judicial policy might be contemplated:

- Shifting the debate about judicial numbers to a debate about judicial productivity.
- Adopting case settlement, rather than case adjudication, as their primary strategic goal of Indian courts.
- Substantially reducing case adjournment rates in India to levels achieved in other systems.
- Implementing continuous trials as the preferred trial method for cases that do not settle.

Each of these options, if applied with any vigor, would be regarded as radical in India. All of them, however, have already been successfully applied in other systems. The challenge for those that influence the policies and practices of Indian courts is to accept that the key to successfully reforming the Indian court system is to apply methods used in other systems that have been shown to be effective. Indian practice should emulate best court management practice and improve upon it; just as Indians have done so well with English literature and the sport of cricket.
By the turn of the millennium most courts in Canada had court administrators managing their operations and their staff. As a rule, the court administrators worked in a partnership with the chairmen of their courts, who typically delegated some of their official responsibilities. But the mere presence of court administrators, not to speak of their broad range of functions, was still relatively new. Only in the 1970s did most courts acquire administrators, and it took at least another decade before they were fully accepted by judges and entered into a position of equality with some, if not many, chairs of courts.

The emergence of the court administrator in Canada was tied to the movement to unify and streamline provincial courts that began in the late 1960s and reflected a realization that courts had fallen behind the rest of government in the process of administrative modernization. For example, at one time doctors administered hospitals, but as medically trained specialists many did not have the administrative skills needed to run a large and complex organization. Only in the 1960s was the job of running hospital transferred to hospital administrators, and then only because of agreement that persons trained in administration would run hospitals better than doctors, who should concentrate on treating the sick. In Canada for a long time judges were the ‘administrators’ of the courts. They received files, scheduled cases, heard cases, received fines and remitted them to the executive branch of government. In many respects judges were subservient to the executive, a situation that changed as courts followed the way of other public institutions.

Canadian reformers were able to draw on the experience of a number of states in the post World War II USA that had already developed unified court systems and undertaken administrative reforms. While as of 2000 the American court reform movement that produced trial court administrators had not experienced the success that it had in Canada, the United States (or at least particular states) deserves credit as the birthplace of the modern court.

Here we will examine the emergence of the trial court administrator in the USA; the adoption of this role and of modern court administration in Canada; and finally, some major themes in the modernization of the management of courts in Canada.

Before World War II in the USA most criminal and civil cases involved the laws of the states (and not the federal government) and were heard in courts that were the creatures and servants of municipal and county governments, rather than of states. The mix varied from one state to another, but was on the whole unnecessarily complex. Moreover, the administrative operations of many courts were in the hands of elected clerks, that is officials of local government, and the composition and size of staff varied widely, with no one keeping track on a state wide basis. Of course, many of the judges were also subject to periodic elections. Often the local bar, consisting of the lawyers in the community, exercised inappropriate influence in the courts, for example over the distribution of cases among judges and the scheduling of cases. At the same time, the tradition in multi-judge courts was for each judge to run his/her own courtroom as a separate administrative entity in isolation from other judges on the same court.

Already in 1906 the noted jurist and future law professor Roscoe Pound called for the unification of courts in the states and the development of court administration controlled by judges rather than local political elites, but by 1940 he could write only of individual experiments in this direction. To be sure, the small but influential system of federal courts had in 1939 under Chief Justice Hughes created its own administrative service (separate from the Department of Justice). But the unification of courts and depolitization of court administration in the states remained only a goal of reformers, among them the vocal lawyer from New Jersey Arthur Vanderbilt, who became President of the American Bar Association in 1938. Vanderbilt created a new ABA section on judicial administration and gave the section’s head, Judge John Parker, the mandate to develop standards on court administration. The work of Parker and Vanderbilt became the starting point for postwar improvements in court administration, as they laid out the administrative roles of judges, and called for the

1 This section on court administration in the US draws on Robert Tobin, Creating the Judicial Branch: the Unfinished Reform (Williamsburg: National Center for State Courts, 1980).

creation of offices of court administration. In 1974 the American Bar Association issued an updated version of the ABA Standards of Judicial Administration, and to this day the Bar Association has facilitated high standards for court administration.

It was clear to Vanderbilt and other reformers that administrative reform of the courts was possible only with their unification at the state level and their detachment from local financing and control. In the decades following World War II these goals were gradually accomplished, especially in urbanized states, with the state of New Jersey as a pioneer. Arthur Vanderbilt fought to get New Jersey voters to adopt a constitutional amendment to reorganize that state’s and create a unified court administration under the Supreme Court, whose chief judge he became in 1949. Accordingly, he established the position of state court administrator in 1950 to manage all the state’s courts through the new court administration. One judge on every three or four courts was designated “administrative judge” and put in charge of the court operations for the group of courts.

The Vanderbilt model was possible only where states unified courts at the state level, and this happened only gradually. The increasing costs of maintaining courts in cities, where caseload pressure was growing, led many municipal governments to agree to unification, although often they tried to preserve a place for elected clerks. To the extent possible state authorities replaced elected clerks with civil service positions, but in some states the position of clerk lasted and would limit the authority of trial court administrators when that position was established. In short, between 1950 and 1975 most states established state court administrations headed by administrators with varying degrees of authority, and in 1971 this group created its own organization. The Conference of State Court Administrators, is comprised of the state court administrator or its equivalent for each of the 50 states, Washington D.C., and the territories of the U.S. This association continues to be active today and meets annually with the Conference of Chief Justices (the highest judicial officers of states and territories).

The first trial court administrator was appointed in the Superior Court of the City of Los Angeles in 1957, and in the next decade enough administrators had appeared at the trial court level to allow the creation of a National Association of Trial Court Administrators. The elected clerks responded by creating their own organization, the National Association of Court Administration. In 1985 both organizations merged and became the National Association for Court Management, with more than 900 administrators of courts growing by 1997 to more than 2,300. The movement to establish trial court administrators, to give them distinctive professional status, and to expand their role in courts was given an important boost with the creation in 1970 of a national training centre—the Institute for Court Management—joining programs in court administration at three universities. Finally, in 1971 the National Center for States Courts was founded as a research and consulting arm of the state courts, and supported by state governments. The National Center would play a major role in the spread and sharing of expertise among members of the emerging “profession” of court administrators. In addition, the National Center for State Courts became an information service for inquiries on court matters and a central repository of court literature, as well as supporting research on various court-related issues.

The administration of courts also became the subject of journals such as Justice System Journal and The Court Manager.

The new trial court administrators came from a variety of backgrounds. Initially some were lawyers themselves, and that made them compatible with the judges. But increasingly in the 1970s and 1980s the administrators of courts had training in management or administration, general or specifically judicial, and over time judges came to recognize the special contribution that professional managers made to the courts.

The actual functions performed by court administrators varied widely from state to state and in practice with the particular judges and administrators as well. At the most basic level administrators served as “administrative assistants” to the chief judges, with routine responsibilities relating to purchasing, space, accounting, and usually supervising the staff of courts (sometimes sharing this duty with the clerks). On the other end of the spectrum were court administrators who operated as “strong managers” of courts. While deriving a good part of their authority from the chief judge, these court administrators executed court policy on most administrative matters, handled relations with the rest of government and the public, and most importantly played a major role in caseflow management and the improvement of courts.

Over time the emphasis in judicial administration in the USA shifted from improving the organization and structure of courts to enhancing their accountability, performance, efficiency, and effectiveness. This shift came from the realization that improvements in structure alone would not achieve the goal of efficient and effective courts. Of primary concern was addressing the problems of case backlog and delay, including the potential of caseflow management and mediation.

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3 To learn more about the National Center for State Courts and its many useful publications, visit its website: www.ncsonline.org
Judges also came to recognize that administrative efficiency of courts required professional managers and staff capable of working with judges in formulating and executing policies at the court.

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

Ultimate responsibility for caseflow management rested officially with judges. Judges had the authority to seek assistance from the court administrators and get these administrators actively involved in the pursuit of caseflow management innovations. Such innovations included new systems of allocating cases among judges (not by specialization but by the complexity of cases and the time needed for resolution); and new ways of tracking and managing cases from initiation to disposition. Thus, caseflow management came increasingly to imply the use of early screening and disposition, and various forms of alternative dispute resolution. In some courts new posts like “case manager” or “trial coordinator” were established, in addition to or as substitutes for “court administrators”.

Arguably, it was the new body of knowledge about caseflow management that gave court administrators a distinct professional identity. Court administrators fully versed in the latest techniques of caseflow management, including the use of computers, offered something to the operation of courts that persons with legal training did not. Overall, a significant role in caseflow management often characterized the stronger court administrators, although in some courts the demands of personnel management and budgetary matters took precedence.

The assumption of a major managerial role by trial court administrators did not come easily. In many places the court administrators had to “fight their way into the system over the objections of judges”, not to speak of the clerks. Moreover, many of the important functions of the administrators had to be performed “in the name of the chief judge”. This applied to the assigning and scheduling of cases among judges, their vacation schedules, and the sensitive matter of assigning reserved parking spaces at the court.

In some states trial court administrators were subordinate to the state court administrator, who might be involved in their selection and supervision. Moreover, to the extent that functions like personnel management, budgeting, and caseflow management, were performed by the state-wide Court Administrative Office, the discretion of administrators at the local courts might be limited. While formally court administrators might be subordinate to the court administration office under the state supreme court as well as to their chief judges, it was the relationship with the latter that determined what court administrators did.

The actual relationship between the chief judge and the court administrator in state courts at the end of the millennium varied greatly depending upon their personal chemistry. Increasingly, chief judges were prepared to delegate many of their responsibilities to the court administrator, but, according to Tobin’s study, real executive partnerships between the chief judge and court administrator were not yet the rule. As we shall see, this ideal was more fully realized in courts in Canada.

Modern court administration in Canada began in the 1970s, when the American court reform movement was already in full swing, but its principles were adopted more quickly and fully by Canadian provinces than many American states. Of course, Canada is much smaller in population (less than one ninth the size) than the USA; and as of 2004 only three of its cities had more than a million people. Apart from the highest courts in the nation’s capital Ottawa (Supreme Court, Federal Court), Canada has two types of courts—the higher trial and appellate courts with federally-appointed judges, and the courts of the provinces with provincially-appointed judges. Both types of courts are administered and funded by the provinces. The courts of the provinces—typically now called provincial courts—are the most numerous and have the largest case loads. They are analogous to raionnye sudy in the Russian Federation before the revival of the mirovye sudy, and we will focus for the most part on their administration.

Unlike the United States where the funding and administration of almost all state courts used to be a local responsibility, the provincial courts (or magistrates’ courts as they used to be called) were sometimes funded by the provincial governments (in part out of fees and fines collected). But in other provinces unification of lower courts at the provincial level was, as in the USA, a prerequisite for administrative modernization. For example, the province of Ontario assumed responsibility from cities and counties for funding its magistrates’ courts only in 1968. Whatever the funding scheme, until the decade of the 1970s the provincial governments paid little attention to how these courts were run. Provincial
“inspectors of legal offices” would do periodic audits on fine collection and spending, but they gave little, if any, advice on the management of the courts. As a result, there was considerable variation in court administration, in the words of one observer “a fractured mosaic of individual fiefdoms”. The emerging gap between the often archaic methods of administering courts and the caseload pressure led to serious reviews of the situation by reform bodies, for example, the Justice Development Commission of British Columbia. The result was the establishment in almost every province between 1970 and 1977 of province-wide offices of court administration (at least for the provincial courts) with their own Directors. About half of these directors had legal education; the rest were non-lawyer civil servants with administrative experience.

Following Canadian constitutional tradition these offices and directors were and remain part of the executive branch of government. They are, as a rule, located within provincial attorney-general departments or ministries, bodies that combine prosecution, court administration, and other legal functions. In formal terms at least, all staff of Canadian provincial courts are subordinate to these departments, that is to the executive branch, a fact that made the empowerment of trial court administrators more controversial than might otherwise have been the case.

The establishment of the post of court administrator at the courts themselves (and sometimes for regions within provinces) also began during the 1970s and by the end of the 1980s the majority of courts in Canada had a court administrator, usually (but not always or right away) with responsibility for supervising the rest of the court staff (registry officers, court reporters, etc.) This was easier to accomplish than in the United States, since Canada had no tradition of elected clerks with interests to defend. In 1975 the Association of Canadian Court Administrators was founded, and it began to hold regular meetings and distribute a newsletter. Diploma programs in justice system administration were established, starting with Brock University in 1980; other post-secondary educational institutions followed suit.

The spread of knowledge in Canada about modern court administration and its underlying philosophy got a boost with the publication in 1981 of a book Judicial Administration in Canada, co-authored by the British Columbia head of court services, Judge Perry Millar, and the soon to be founder of the first university training program in court administration, Professor Carl Baar.4 The book promoted a broad conception of the functions of the trial court administrator, which was reflected in the topics it presented as central to the “technology of judicial administration”. These were: “personnel systems and functions in courts” (how to manage the court staff); “budgeting and planning” (not just accounting but setting out the needs of courts and lobbying for them); “caseflow management” (as in the USA the core and unique specialty); “records and space management” (including how to run an archive); “information systems and computer technology” (already crucial to courts in Canada in 1980); and “systems implementation” (taking the broader perspective). For all of these topics Millar and Baar explored what the court administrator could and should do rather than the changing realities on the ground.

The modernization of court administration in Canadian courts and the growing importance of court administrators made some judges nervous that functions that mattered to the administration of justice were being performed by staff that were subordinate to the executive branch. This was true legally, although in practice the chief judges of courts usually directed their administration. Some judges came to believe that the independence of courts as institutions required that all court administration fall under the sway of the judicial branch.

This issue received serious consideration in a 224-page report sponsored by the Canadian Judges Conference and the Canadian Institute for the Administration of Justice. Masters in their Own House: A Study on the Independent Judicial Administration of the Courts appeared in 1981 and was written by the Chief Justice of the Superior Court of the province of Quebec, Jules Deschenes, and the already mentioned Professor Carl Baar. The authors concluded that it was inappropriate to have the same agency handling public prosecution and the provision of court services, and called for the establishment of court services departments accountable to provincial judicial councils.5

In 1985 the Supreme Court of Canada ruled in its Valente decision that independent adjudication by judges did not require that court administration be under the judiciary, only certain functions directly related to adjudication such as assignment of judges, scheduling of trials, and allocation of courtrooms.6 In his 1987 Report of the Ontario Courts Inquiry, Justice Thomas Zuber of the Ontario Court of Appeals agreed with the Supreme Court that judicial independence requires only that judges have the power to determine standards for matters bearing on their casework, including “the assignment of the totality of a judge’s workload…” But Justice Zuber was sensitive to the apprehensions of judges, and insisted that the

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administration of courts should be based upon “shared responsibility” and “a close working relationship and mutual consultation” between judges and court staff; division of labour, yes, but not isolation.\footnote{Ontario Ministry of the Attorney General, \textit{Report of the Ontario Courts Inquiry}, by T.G. Zuber (Toronto: Queen’s Printer, 1987), esp.145-159.}

Time has proven Justice Zuber correct. As of 2004 there was still support among Canadian judges for detaching the administration of courts from the executive branch. In practice, though, the development in many, if not most, courts of effective partnerships among chief judges and court administrators made this issue more symbolic than practical, although it still rouses emotions.

The Association of Canadian Court Administrators (ACCA) has become increasingly proactive in developing standards and competencies for court administrators. While the organization initially started as a meeting of the ‘administrative heads of courts’ from all Canadian jurisdictions, by the early 1990’s it had developed into a membership-based organization and one that promotes excellence in court administration through professional and educational initiatives. Most recently, ACCA has copied its American sister organization, National Association of Court Management, in defining and promoting a definition of “core competencies” for court administrators. Training seminars have been mounted to help court administrators develop or improve their skills in these areas. They have included such subjects as the purposes and responsibilities of courts; leadership; caseflow management; information technology management; court and community communications; human resource management; resources, budget and finance; education, training and development; and strategic planning.\footnote{The website of the Association of Canadian Court Administrators is: www.acca-aaic.ca}

Court administration in Canada, and the work of the trial court administrator in particular, is characterized by three features that deserve comment—the concept of executive partnership; the primacy of a public service ethos; and systems of case management aimed at efficient and fair disposition of cases.

The predominant approach to managing courts in Canada in the new millennium emphasizes cooperation and teamwork, especially among the chairman of the court and the trial court administrator. While officially court administrators may only assist the chief judge in performing his administrative responsibilities, in fact the two figures often form an executive partnership. Of course, the personal chemistry among the two figures matters, and may influence what the partnership means in practice. But it is normal, not exceptional, for the court administrator to take charge of some of the functions that are deemed to be essential to adjudication, such as allocation and scheduling of cases, albeit under the supervision of the chief judge. In such matters as managing of court staff and the preparation and implementation of court budgets, the court administrators are likely to be the dominant actors. In many of their activities they need to coordinate with provincial (and sometimes regional) court administrators, but their main relationship is to the chiefs of their own courts. Whereas consultations with colleagues beyond the court may happen a few times a month (and mostly by telephone), interaction with the chief judges of their courts takes place a few times each day. In short, court administrators typically have a good deal of discretion. They are able to make many decisions on their own or in consultation with their chief judges; only occasionally must they consult their superiors above the court. While court administrators are technically in a position of dual subordination, they have one real master, and with that master they often achieve a position of functional equality.

In the province of Newfoundland and Labrador the Director of Court Services functions as the administrative head of the Provincial Court system. While on paper the Director reports to the Deputy Minister of the Department of Justice, in practice the Director interacts with the Deputy Minister rarely, perhaps three-four times a years. On the other hand, the Director of Court Services works on a daily basis with the Chief Judge of the Provincial Court system. Together they plan, direct, supervise and control the work of the court. On the occasion when there are interactions between the Director and the Deputy, it usually, if not always, has to do with budgetary issues. It is through the executive of the Department of Justice that the Court applies for and requests changes in its funding allocation.

The court administrators of the individual courts report to the Director of Court Services and through that reporting relationship to the Department of Justice. The Provincial Court Act identifies the employees of the court as both “employees of the Department of Justice and Officers of the Court”. The court administrators of the individual courts work with the senior judge (in multi-judge courts) or the sole judge (in single judge courts) to plan and coordinate the functional operations of their court.
As the managers of diverse staff, court administrators in Canada must work in a cooperative way with the court staff, judiciary, lawyers, and the public. Court administrators often represent the views of the administration of the court on multi-disciplinary committees.

Since the mid 1990s one of the central goals of modern court administration, in the US and Canada alike, has been the creation of a user friendly, service-oriented court. The reputation of courts and the morale of judges and staff alike, improve when the court’s main constituency—the public—feels well served by it. Public attitudes toward courts depend in part upon their efficiency; reducing backlogs and delays is since qua non. Beyond this, the experience of members of the public at the courts matters. Locating facilities in accessible places; keeping them open during hours when people can use them; making information of all kinds easily available to the public (at the court and on the internet); and developing among court staff the habits of courtesy, politeness, and a genuine desire to help persons who come to them, both in their dealings with the court and their interactions with other related agencies (social service, legal etc.)—all such steps help produce a service-oriented court.

The responsibility for ensuring that courts are user friendly and constantly improving their services to the public rests in Canada with all persons who take part in administering the courts, starting from the very top. Thus, the Court Services Division of the Province of Ontario’s Ministry of the Attorney General built these concerns into its Five Year Plan 2002-2007. The mission of the division is defined as maintaining a “modern and professional court service that supports accessible, fair, timely and effective justice services.” The business goals to fulfill this mission include: “timely and efficient case processing; accessible services; consistent high quality services; accountable and effective decision-making; and efficient resource management.” These goals in turn are translated into a whole battery of “service standards”, against which the work of the court is to be evaluated constantly. The detailed plan schedules dozens of initiatives aimed at achieving, directly or indirectly, courts that serve the public.

The ethos of service has become a guiding principle in the management and assessment of Canadian courts, and a central concern for trial court administrators. It is their responsibility to discover new ways to ensure contact with the court is a pleasant and rewarding experience for members of the public, in whatever capacity they come to the court.

For example, children who are victims of crimes and who come to court to testify are provided with a child-friendly waiting area, which is private and keeps them away from the accused and his/her supporters. This area generally contains toys, books and games to try and keep these children occupied as they wait. Additionally, many courts have closed circuit television, which enables the child to testify from a remote room in the courthouse, linked to the courtroom. This witness can be seen by all parties in the courtroom through closed circuit TV. However, the child is protected from seeing the accused. Still other courts have made one or two of their courtrooms into a special child size courtroom—using smaller furniture and taking the judge’s bench off the dias.

Some courts have embraced technology and have made all or at least some of their courtrooms technology friendly. This enables the lawyers to bring computers and electronic equipment to the courtroom and 'hook in' to the cyber world. This makes legal research and case law precedents accessible in real time.

In the Ottawa courthouse a self-service Family Law Centre has been created. Self-represented litigants, who are going through family disruptions, can use this facility to prepare various court applications under the Family Law Act and speak to a legally-trained counselor to get advice on how best to proceed with their matter before a judge. It is a free service to the public. With respect to family matters many courts have implemented mandatory mediation, which is a service provided by the court or is court referred and provided by the community. The purpose is to minimize the adversarial nature of family matters and to keep the best interests of the child(ren) at the center. Education is used to inform the parents of the long-term impact on children involved in such family proceedings. Mediation is used to lessen the adversarial nature of such proceedings.

Another distinctive feature of court administration in Canada is the development of comprehensive case management systems that emphasize not only the scheduling of cases for trial but also pretrial management of cases brought to the courts with the aim of reaching settlements without trials. In Canada (and other common law countries) most criminal cases end in guilty pleas and as a result never have a full trial. Pretrial resolution of conflicts in civil cases is commonplace worldwide, and one of the strengths of Canadian case management systems is that they encourage rapid disposition even of cases that may not go to trial. Of course, avoiding trials (and the unnecessary use of expensive court time) remains a goal of case management.

Consider, for example, the case management system used in the Superior Court of Justice, Toronto Region. (This is the second level in the hierarchy of courts). Since July 2001, with a few exceptions, all civil disputes must enter the system
and be placed under the control of a “case management master” (sometimes a case management judge). This full-time judicial official convenes a case conference with the two sides (sometimes by telephone) to discuss the issues, and schedule a series of events. These events include within three months of the filing of the statement of respondent compulsory mediation, at which a neutral mediator (from outside the court) attempts to resolve the dispute. Should this fail, the process of discovery begins, with each side getting to interview each other’s witnesses, culminating in a settlement conference (within six to nine months of the start of the process), where the responsible master or judge explores the strengths and weaknesses of each party’s case. The parties are asked to generate options and the settlement conference judge (or master) offers a solution. Only if this is refused, are the preparations for trial undertaken (before another judge, not the one who handled the settlement conference), and even on the day of the trial the parties may settle on their own. Note that this case management system is based on the premise that cases are the responsibility of the court and not of individual judges. If a case reaches trial, it is heard by a judge who has had no involvement with the pretrial settlement process. The introduction of such a system of case management in countries like Germany or Russia would require separating the management of cases from the individual judge.

The Toronto case management system, and others of its ilk, encourage early settlements and avoid unnecessary use of trials, which are costly to the state as well as the litigants. Every stage of the system (presented here only in broad strokes) has its own deadlines and the materials of the case (whether electronic or paper in form) must be carefully managed. Court administrators at courts that use such a case management system must be well versed in a variety of administrative and technological disciplines, and able to keep the lawyers playing by these complex rules of the game in a courteous and informative way.

In 1995 the Canadian Bar Association (CBA) formed the “Task Force on the Systems of Civil Justice” (grazhdanskaya, not tsivilnaya) to inquire into the state of the civil justice system on a national basis and to develop strategies and mechanisms to facilitate modernization of the justice system. The Task Force concluded that the central issues affecting access to civil justice are delay, costs associated with going to court and a lack of public understanding of the civil justice system. The Canadian Forum on Civil Justice was established to meet these challenges. It is a national organization and its objectives are to seek ways to improve the civil justice system by: collecting information on the practice of civil justice; carrying out research on matters affecting its operations; promoting the sharing of information about best practices; functioning as a clearinghouse and library of information for the public; developing liaison with similar organizations in other countries to foster exchanges of information; and disseminating knowledge about experiments and initiatives in civil justice.

The phrase ‘civil justice system’ evokes in most people the image of an imposing courthouse, an austere courtroom, an adversarial trial procedure, and a trial judge as the final arbiter of rights in dispute. The Canadian Bar Association’s vision for the civil justice system in the twenty-first century is of a system that:

- is responsive to the needs of users and encourages and values public involvement;
- provides many options to litigants for dispute resolution;
- rests within a framework managed by the courts; and
- provides an incentive structure that rewards early settlement and results in trials being a mechanism of valued but last resort for determining disputes.

The modernization and professionalization of the management of courts in Canada and the USA have produced a new set of expectations among the public and court regulars alike. Not only must courts operate fairly and efficiently, but they must also be accessible and user friendly. It is no longer sufficient to continue operating courts in a satisfactory way, but it is necessary to constantly assess the quality of operation in relationship to its goals and to plan ways of improving the work of the courts. It is expected that court administrators and chief judges will work together in an executive partnership to make all of these things happen.

Court administration also contributes to judicial independence to the degree that it helps foster the reality and thus the image of a public service agency that works well, that does its jobs, and that meets the purposes that citizens expect of it. The better the courts administer themselves, the stronger their arguments in favor of institutional independence, for example the potential separation of court administration from ministries of the attorney general. Moreover, the chief judge and court administrator can help the organization respond to outside interference, adapt to new demands, and find directions for the future.

Naturally, both the court systems of provinces or states and particular courts vary in the degree that they achieve these lofty goals. But most courts in Canada are improving well and are more efficient and pleasant places than they were years ago.
**Theme: The Function of the Court Administrator**

**The Court Administrator In Russia: Problems Of Creation And Development**

By Irina Mikheeva, Professor of Law, Nizhniy Novgorod, Russia

**Court Administration and Court Administrators in the Russian Federation**

Russia currently is involved in an extensive judicial reform movement that is designed to create an effective and functioning court system based on accepted notions of best practices. A necessary aspect of the reform movement is a reassessment of principles of court management and the role of court administrators in the judicial system. This article examines Russia’s reform movement in detail and considers the role of the court administrators in that movement.

**History of Judicial Reform in the Russian Federation**

The Russian Constitution allocates political power between the legislative, executive and judicial branches, and it vests the judiciary with the authority to administer justice under the Constitution and laws of the country. Modernization of the Russian judiciary commenced in 1991 when the Supreme Soviet of the Russian Soviet Federative Socialist Republic approved President Boris Yeltsin’s Concept of Judicial Reform (hereafter “Concept”). Russia’s issuance of the Concept came at a crucial point in the nation’s transition from the Soviet period to a modern democratic state, and it was designed to strengthen and enhance the nation’s adherence to the rule of law.

The Concept was designed to achieve a number of objectives. One objective was to alter the relationship between the state and the individual by providing all citizens with access to the justice system. A second objective was to establish and ensure judicial independence. As the Chair of the Russian Federation’s Supreme Court, V. Lebedev, stated, the primary objective of judicial reform was “the establishment of the judicial power within the state mechanism as a separate influential power, independent in its activity from the legislative and executive branches”. A final objective was to provide an organizational basis for the judicial system, extending to such administrative issues as the judiciary’s personnel and financial structure. The most important is to amend or replace existing legislation in order to conform it with the norms of international law and international standards in the field of human rights.

**II. Structure of the Russian Federation’s Judiciary**

A. The Judicial Structure: The Russian Federation shall have federal courts, constitutional (charter) courts, and justices of the peace of the constituent members/entities of the Russian Federation. These elements shall comprise the court system of the Russian Federation (hereinafter (“RF”).

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It must be noted that Russia (as the federative state) consists of the constituent parts/members/entities of the whole federative state, so-called «Subjects of the Russian Federation» (as the USA consists of the states as the constituent parts/members/entities of the whole American federative state). These «Subjects» in Russia are represented by the republics (e.g. Tatarstan, Bashkortostan etc.), kray (regions), oblast (provinces), cities of the federal subordination - Moscow and St.-Petersburg, autonomous provinces and autonomous regions. So the USA consists of the States, and the RF consists of the «Subjects» - constituent members/entities of the RF, which are called differently – republics, kray (region), oblast (province), city of the federal subordination – Moscow and St.-Petersburg, autonomous provinces and autonomous regions. The names of these constituent members/entities of the RF are fixed by the Russian Constitution (Russian Const., Art. 65.). Besides there are administrative-territorial subdivisions in the frames of every constituent member/entity of the RF and in the frames of every city (or town) – so-called «rayon» (districts). In every constituent member/entity of the RF, in every district there are the corresponding courts.
The Constitutional Court. The Constitutional Court of the RF and the constitutional (charter) courts of Russia’s constituent members/entities are charged with hearing cases that raise constitutional issues relating to federal laws or other related acts such as normative acts of the President of the RF, the Council of the RF, the State Duma, or the State Government. They also are tasked with determining whether (i) those laws and acts, and (2) the constitutions/ charters and other normative acts of the constituent members/entities of the RF, comply with the Constitution (Article 125).

The Supreme Court of the RF and the constituent courts of Russia’s constituent members/entities, as well as military and specialized courts, all fall within the category of courts of general jurisdiction.

The Supreme Court of the Russian Federation (hereinafter SCRF) The SCRF is the supreme judicial body for civil, criminal, administrative, and other cases under the jurisdiction of courts of general jurisdiction. It also is charged with supervising the activities of the lower courts. In addition, the SCRF can function as a court of first instance in cases that have special importance or a special relationship to the public interest. Finally, the SCRF is charged with reviewing decisions of the lower federal courts of general jurisdiction.

Middle Tier Courts of general jurisdiction. The middle tier courts (the Courts of the Russian Federation constituent members/entities) are authorized to examine cases as courts of first- and second-instance, in the order of supervision and for newly discovered circumstances. In the second instance, they are authorized to act as higher-instance courts at the cassation instance for the rayon or districts courts. They are organized as a presidium of the court, a judicial panel for civil cases, and a judicial panel for criminal cases. There are 88 middle-tier general jurisdiction courts with a total of 4,317 judges and 8,554 support staff.

First-Tier Courts. The first-tier courts include all general jurisdiction rayon or district, city, inter-municipal, and other geographic courts of similar jurisdiction. They comprise the base of the general jurisdiction courts framework and exercise jurisdiction over all civil cases, most criminal cases, and administrative offense cases. Rayon or district courts function as the appeals instance for the Justices of the Peace which operate within their geographical jurisdiction or districts. This first-tier system comprises 2,478 rayon courts populated by 18,000 judges and 50,931 court-support personnel.

Justices of the Peace. Justices of the Peace have no federal status and function as general jurisdiction judges of the constituent members/entities of the RF. Justice of the Peace courts were introduced in 2000 in provide broader judicial system access to the citizenry. Although 7,333 Justice of the Peace positions are authorized, currently only 6,280 are filled.

Military Courts. Military courts exist and function in the branches of the Armed Forces, military districts, and districts of antiaircraft defense, navy, and separate armies.

Arbitration or Commercial Courts. The system of Arbitration or Commercial Courts comprises the Supreme Arbitration (Commercial) Court of the RF, the arbitration cassation courts, the appellate arbitration courts; the arbitration courts of the constituent members/entities. The system is organizationally divided into four levels.

The first level includes eighty-two federal arbitration courts. They comprise the arbitration courts of the various constituent members/entities of the RF and hear cases as courts of first instance.

The second level comprises twenty appellate courts that were established in 2004 under the Federal constitutional law. These courts hear and decide appeals from decisions of the first-instance courts, which have not yet come into legal force.

The third level comprises ten courts of arbitration districts, each of which functions as a court of cassation over a geographically designated circuit in which the arbitration courts are organized. These courts review the legality of decisions rendered by first-instance courts, focusing on whether the lower court correctly applied substantive norms and procedural requirements.

7 The middle tier courts of general jurisdiction includes the supreme courts of the constituent members of the RF, i.e. of republics, kray (regional), oblast (provincial) courts, city courts of Moscow and St.-Petersburg, courts of autonomous provinces and autonomous regions.
8 All statistics is actual for the moment of writing this article.
The fourth level comprises the Supreme Arbitration Court of the Russian Federation, the court of final appellate review in commercial disputes. It reviews decisions rendered by lower-level arbitration courts, supervises the activities of lower courts, and issues explanations on matters of judicial practice in commercial jurisdiction.

The internal procedure of the arbitration courts and interrelations between them are regulated by the Arbitration Courts Rules of Procedure adopted by the Supreme Arbitration Court. The administrative and institutional structure of the arbitration courts at each level is determined by their functions and case-flow.

The current annual caseload of the arbitration courts exceeds one million cases. This diverse caseload includes a broad variety of disputes, including sales contracts, property, taxes and acts of taxation agencies, insolvency (bankruptcy), loan contracts, insurance, legal acts of state authorities and other bodies.11

Arbitration courts exist to resolve disputes alleging violations of the rights business interests, and other commercial matters of enterprises, offices, organizations and private citizens in entrepreneurial and other categories of economic activity.

B. Guarantees against Bias: The RF judicial system’s functions encompass the responsibility to ensure fairness. Court proceedings must be public. Judges may close hearings only in limited situations, such as protecting personal privacy in civil proceedings relating to paternity and criminal proceedings relating to rape. Judges also are prohibited from rendering default judgments in criminal cases; criminal convictions must be based upon adversarial advocacy of the relevant issues under the supervision of a neutral judicial officer constrained by procedural safeguards.

The RF Constitution contains provisions to ensure judicial independence from legislative and executive interference. Judges are not removable by elected officials. They report only to higher court judges and other members of the judicial community. Judicial independence is strengthened by financing the judicial system entirely from the federal budget. 12

III. The Judicial Reform and Creation of the Court Administrator Position

In August of 2006, the Russian Federation adopted a new program designed to improve the administration of justice and to help ensure the rights and interests of citizens and organizations.13 This program attempts to promote openness and transparency, increase public trust, improve the quality and the enforceability of judicial decisions, ensure judicial independence, and create the conditions necessary to establish and maintain a fair and just judicial system. One important element of the reform movement has been instituting a role for professional court administrators.

A. The Role of Court Administrators: An essential element of the reform movement involves the creation of effective court administration structures, including the reliance on professional court administrators. The expectation is that administrators will relieve judges of the responsibility for managing courts and administrative functions not directly related to hearing and deciding cases.

With some exceptions, court administrators are now used throughout the RF. The position was first introduced into the courts of general jurisdiction and has been institutionalized in those courts. The commercial courts also have administrators whose duties are well-defined and include the responsibility for managing support staff.14 In the courts of general jurisdiction, the administrator’s duties are less well-defined, but efforts are underway to detail and standardize their tasks and competences. To that extent, this article focuses on the court administrator position in the courts of general jurisdiction.15

B. The Role of the Judicial Department: A major component of the reform process calls for establishing a Judicial Department at the Supreme Court of the RF. Following its implementation, the Judicial Department began to institute centralized initiatives to improve how the courts are administered and financed. The Department has a wide range of responsibilities for providing material and technical assistance, automating case management, organizing court activities,
training court personnel, and managing external relations. The next step is the creation of a judicial system Information Center.

The Judicial Department and its subdivisions are tasked with strengthening the independence of courts and judges but may not interfere in the process of rendering justice.\(^{16}\)

The Federal Law “On the Judicial Department at the Supreme Court of the RF” also provides for the position of the “court administrator”\(^ {17}\).

**IV. Problems in Implementation of and Development of the Court Administrator Position**

Although Russia’s court administrator initiative has been a positive development, it has not come without difficulties. There are uncertainties relating to the status of court administrators, how they are appointed, lines of authority, chain of command, qualifications standards, and continuing education requirements. Each of these is discussed below.

**A. Laws Governing Court Administrator Functions:** In courts of general jurisdiction, court administrators are employees of the Judicial Department, and are charged with facilitating court activities. Articles 17-19 of the Law on the Judicial Department (hereinafter “JD”) regulate the foundation of Appointment and Removal, and the Powers of a Court Administrator. The Law provides as follows: “work of the courts … is supported by the administrator of the correspondent court”. However, the court administrator’s position is governed by a number of other statutes and local regulations of the JD. The most detailed document regulating the position is the Typical Service Regulations for Court Administrator.\(^ {18}\) The Regulations define the position of court administrator as having a “directors’ (managers) position in the federal state civil service.”\(^ {19}\) The Regulations also define the qualifications requirements, appointment procedures, job functions, rights and responsibilities of court administrators, and their subordination to the Judicial Department.

**B. Appointment and Subordination of Court Administrators:** Courts administrators for the courts of the constituent members/entities of the RF are appointed (and, if necessary, removed) by the Head of the Board for Legal and Organizational Support of Courts.\(^ {20}\) The appointment is based on the recommendation of the chairperson of the court for which the appointment is being made. The administrators for the rayon or district courts are appointed by the Head of the JD subdivision at the level of the constituent member/entity of the RF upon recommendation of the chairman of the rayon or district court for which the appointment is being made.\(^ {21}\) Once appointed, court administrators function under the Control of the JD or its subdivisions attached to the different constituent members/entities of the RF (which have the authority to dismiss them), but they report to and take direction from the chairperson of the court for which they work.\(^ {22}\)

That court administrators function under both the JD and the chairpersons of their courts raises difficult questions. There is, for example, uncertainty regarding which authority is responsible for determining an administrator’s salary, leave, bonuses, penalties and, ultimately dismissal, etc.\(^ {23}\) The court administrator works in the court, reports to the chairperson of the respective court and fulfills his instructions, but also is an employee of the JD. The court personnel managed by the administrator are appointed by the chairperson of the court, raising additional potential conflict. Although court support

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\(^{18}\) «Typical Service Regulations for Court Administrator» approved by the Order N80 of the General Director of the Judicial Department at the Supreme Court of the RF (August 22, 2006).

Here it is necessary to note that the term “Regulations” is defined as rules regulating the order and the time for organizing events, actions, and activities, and restricting them by clear limits; i.e. rules, regulating the order of any activity. The Law “On the State Civil Service in the FR” (p.47) envisages the structure and the content of the job/service regulations for a public servant. In accordance with these Regulations for a public servant the Judicial Department developed the Typical Service Regulations for the Court Administrator.

\(^{19}\) In accordance with the Federal Law N58-FZ “On the system of the State Service in the RF” (May 27, 2003) the RF has the State Civil Service, the State Military Service and the Law-enforcement Service. The court administrator is referred to the State Civil Service of the RF/ This type of the state service is regulated by the special Federal Law N79-FZ “On the State Civil Service in the RF” (July 27, 2004) with amendments as of February 2, 2006, March 2, April 12, 2007.

\(^{20}\) It is a subdivision in the Judicial Department.

\(^{21}\) Article 18 of the Federal Law N7-FZ “On the Judicial Department at the Supreme Court of the RF” (January 8, 1998).

\(^{22}\) Article 18 of the Federal Law N7-FZ FZ “On the Judicial Department at the Supreme Court of the RF” (January 8, 1998), also: item 1.1 and 1.4 of the Typical Service Regulations for the Court Administrator approved by the Order of the General Director of the Judicial Department at the Supreme Court of the RF N80 (August 22, 2006).

staff and the court administrator are employees of the same court organization. But at the same time appointment and subordination involve different structures and have different orders/procedures.

C. Additional Status Issues: Russian court administrators also face uncertainty regarding whether they should function as “managers” of their courts, or simply as “assistants” to their chairpersons.

There are several approaches to defining court administration. Some authors argue that the position should include the processing and archiving of cases. Other argue that court administrators should manage “all court activities except administration of justice, including mediation in the pretrial settlement of the dispute.” In any case, administration as a process/action provides for a wide range of managerial activities. At the very least, court administrators must be involved in the overall management of their courts. Indeed, when Russia created the court administrator position, one of the central objectives was to free judges and chairpersons from general administrative tasks so that they could focus on deciding cases and administering justice.

In general, the normative documents provide that court administrators should be responsible for organizing their courts’ activities. As a result, court administrators should engage in internal court administration (e.g., management of court employees: organization and maintenance of judicial statistics and case management, maintenance of court archives, etc.), external organization of court activities (e.g., interaction with the Bar, law-enforcement and other state bodies) and should be charged with providing material and technical support for their courts. Indeed, court administration should involve the administrator in so-called “control and coordination” functions. These activities involve a variety of functions, including coordinating case management functions (e.g., statistical recording and the preparation of statistical reports), supervising court employees responsible for preparing judicial statistics, exercising control over the preparation of timely reports regarding the functioning of courts, coordinating court activities relating to serving visitors, organizing and preparing courts rooms, overseeing the log books or registers that record information (e.g., receipt and status), exercising control over the court’s archives.

In the Russian system, few court administrators exercise such broad responsibilities. Neither formally nor nominally do court personnel report to the court administrator. In addition, it is not clear that all or even most administrators exercise managerial functions.

In theory, at least, the chairperson of the court issues instructions clarifying the administrator’s status. But, in some cases, court administrators are not managers but perform technical and logistic tasks, such as the supply and maintenance of office equipment. Indeed, in some courts, the position of court administrator is combined with and functionally equivalent to the position of supply or facilities manager. In most courts, administrators do not have the formal competence to manage court personnel and to organize case management. Court personnel report to the chairperson, the head of the clerks’ office or the personnel department. This creates the unusual circumstance that the court administrator may be supervised by the head of the clerks’ office or the personnel department even though administrative theory suggests that both of these individuals should be regarded as subordinate to the court administrator.

The court administrator should function as the head of court personnel, but in many courts administrators perform essentially technical functions. They handle building maintenance issues, arrange transport, sign way-bills, ensure lines of communication, deliver statistical reports, and so on. Only in some courts do court administrators assume responsibility for supervising and overseeing more important issues (e.g., the transfer of cases from courtroom secretaries to the clerks office, following up on pending cases, developing norms for the handling of suspended cases, developing time frames and procedures for enforcement of judicial decisions, and preparing analytical reports for the chairperson). However, in most

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25 Reshetnikova I. Presentation at the first international conference on court administration in Ljubljana, September 26-28, 2004 (Though the Chairman of the Supreme Arbitration (Commercial) court Ivanov, without belittling the significance of the pretrial methods dispute resolution, put under doubt the correctness of using the term “court administration” regarding these methods as they provide for subsidiary or indirect participation of the courts).
26 Typical Service Regulations for Court Administrator approved by the Order of the General Director of the Judicial Department at the Supreme Court of the RF N80 (August 22, 2006).
27 From this point it is interesting to look at the creation of the normative and legal regulation of the court administrator’s activities. In Section II item 2.1 – 2.3 Temporary instructions on organization of the work of the court administrator, which was in force before adoption of the above mentioned statute documents, clearly state that “The court administrator is in charge of the court personnel. Heads of the subdivisions of the court personnel subordinate directly to the court administrator and report to him. The status of the court administrator is established by the order of the chairperson of the respective court”. These provisions fully correspond to the role of the court administrator as the head of the court personnel as it was positioned within the framework of the judicial reform. Unfortunately, out of all these norms only one is still valid today – “The job instruction of the court administrator is developed and adopted by the chairperson of the respective court” (it regulates interaction of the court administrator and the court personnel).
courts, the court administrator does assume responsibility for overseeing court personnel involved in supply acquisition and in technical issues. In most Russian courts, court administrators do not manage services of the court, but only facilitate their non-stop operation. Currently, it is accurate to refer to court administrators as deputy chairpersons for administrative and maintenance issues. If we desire to have real court administrators, consistent with the broad responsibilities originally envisioned for this position, the status of court administrators needs to be enhanced. This step necessitates a revision of the Regulations governing court administration to make clear that court administrators, not chairpersons, are responsible for all administrative and operational functions. As part of this effort, the responsibilities of court administrators should be clearly defined to include such matters as personnel management. Other steps might also be possible, but this would be a good first step.

V. Training and Qualifying Court Administrators

No less interesting or important are issues relating to the training and qualification of court administrators.

A. Current Qualifications: At present, in courts of general jurisdiction, a candidate for court administrator must hold a college degree and must have relevant work experience in the area of specialization. The law does not define the concept of “area of specialization.” As a result, most court administrators are former military officers or individuals with technical and economic as opposed to legal backgrounds. Since most court administrators are male, without legal backgrounds, it is perhaps natural that court administrators have become involved in facilities maintenance issues. However, for the overall development of the justice system, it is important that court administrators assume a broader array of functions (e.g., maintaining judicial statistics, providing judges and court employees with normative legal acts, legal literature, guidelines and reference materials, organizing case management and archival systems, facilitating supplies and technical systems). Indeed, it would be helpful if court administrators had a stronger background in the law. If the court administrator’s tasks include administrative and facility maintenance activities (e.g., building repair, and so on) court administrators also will need training and/or experience in technical sciences and economics or finance.

The current definition of court administrator tasks and competencies must be amended to provide for greater detail in both the experience and training areas of qualification. Where the Regulations require only a ‘higher education’ diploma without specifying the subject area, issues relating to the job qualifications of court administrators will fall to the determination of the chairpersons of the individual courts. They will decide whether the court administrator should function as a manager with a legal background, as a manager-economist, or in some other role.

B. Continuing Education for Court Administrators: If court administrators are to be expected to perform a variety of more important functions, they must be appropriately trained. Indeed, the laws and executive acts of the Russian Federation provide that all civil servants have the right to training and continuing education. Professional development is specifically provided for in the Typical Service Regulations of the Court Administrator where they mention the right to “improvement of the professional level.” The normative acts governing issues concerning education after graduation from university discuss skills and knowledge improvement such as short-term training on relevant topics, seminars, long-term courses of 70 to 100 hours, self education, training on individual plan; professional retraining including long-term training of more than 100 hours, and individual internships. In addition, a resolution of the Presidium of the Council of Judges of the RF approved Recommendations regarding improving the skills and knowledge of judges and court personnel.

Court administrator training and education is provided by many different sources. In accordance with Decree of the President of the RF entitled “On the Russian Academy of Justice,” the Academy of Justice is charged with improving the

28 Typical Service Regulations for Court Administrator approved by the Order of the General Director of the Judicial Department at the Supreme Court of the RF N80 as August 22, 2006
30 The other acting documents include: Resolution of the Government of the RF N109 “On approval of the provision regarding the state request/order for professional retraining and qualification improvement of state employees of federal bodies of the executive power” (February 14, 2001); Decree of the President of the RF N983 “On additional measures regarding preparation of the state servants” (September 3, 1997). The Decree of the President provides for the annual approval of the training plan for federal state service including: (1) compulsory professional retraining for the persons newly appointed to the state posts of the federal state service no lower than the deputy head of the department (hereinafter – managerial positions) during the first year of service; 2) compulsory skills and knowledge improvement (at least once in three years) for the persons holding managerial positions; 3) internship abroad for persons younger than 40 years old (for military officers transferred to the reserve due to the reform of the Armed Forces of the RF younger than 45 years old)
31 See: «Requirements to additional professional training programs» approved by the Order of the Ministry of Education of Russia N1221 (June 18, 1997).
32 Methodical Recommendations regarding improvement of qualification of judges and court personnel approved by the Resolution of the Presidium of the Council of Judges of the RF (October 6, 1999).
function of skills and knowledge of judges and court employees. In addition, the Council of Judges of the RF offers professional training for judges, court personnel, and administrators working in federal courts of general jurisdiction.

The Russian Academy of Justice and its branches have departments charged with improving the skills and knowledge of state employees of the Judicial Department at the Supreme Court of the RF, including court administrators. The training curricula must be approved by the Heads of the subdivisions of the Judicial Department at the Supreme Court of the RF in the constituent members/entities within the RF, and the content for court administrators is broad enough to encompass the breadth of their duties. The curriculum includes sections that focus on the judicial system, organization of administrator work, oral communications, and the psychology of business communication. These courses are offered periodically by qualified instructors. Of course, it is difficult to formulate a uniform course curriculum for court administrators because their job duties are not clearly defined and the training and experience they have varies widely from one to another.

Special efforts to develop curricula for court personnel and court administrators are being made by the Russian-American Judicial Partnership with the participation of the Canadian-Russian Judicial Partnership. They work together with the representatives of the Judicial Department at the Supreme Court of the RF and professors of the Russian Academy of Justice. This activity has focused on personnel management, case management, automation of legal information, court security, and access to justice. If the new curricula are approved by the rector of the Russian Academy of Justice and the General Director of the Judicial Department at the Supreme Court of the RF, it will be used to improve the skills and knowledge of court administrators and court personnel in all 10 branches of the Russian Academy of Justice.

VI. Conclusion

In Russia, although court administrators are in wide use, problems persist. In many courts of general jurisdiction, although administrators are theoretically positioned as the personnel managers, they often function as assistants to the chairpersons of their courts, and do not have authority over personnel issues. Many court administrators do little more than maintain and repair court facilities. In addition, qualification requirements for the court administrator position are not clear, due, in part, to uncertainties relating to the court administrator’s duties. These uncertainties have made it difficult to develop an appropriate curriculum for training and qualify court administrators.

In order to improve the court administrators’ functioning, it is important to make clear that courts administrators are the “managers” of their courts, and that the following recommendations be implemented:

1. Organizational duties within existing courts should be transferred from the chairperson of the court to the court administrator (as was originally intended when the court administrator position was created), and the administrator’s responsibility for management of court personnel should be clearly defined. These objectives can be accomplished in stages. Initially, courts could transfer duties related to facility maintenance and external organizational (to the extent not already transferred). Court administrators could then be asked to assume responsibility for personnel management. To accomplish this objective, it would be logical to transfer both the court administrator and court personnel to the jurisdiction of the Judicial Department at the Supreme Court of the RF.

2. The job specifications for court administrators should clearly define the level of education and specialization required for the position. Court administrators must be given authority for the tasks that they currently perform, but they also should be charged with responsibility for and granted the authority to exercise personnel management. This redefinition will empower court administrators to obtain the training and development required by their more broadly defined professional duties.

32 Decree of the President of the RF N528 “On the Russian Academy of Justice” (May 11, 1998).
Theme: Evaluation Of Courts And Judicial Systems

Improvements of Judicial Systems: European Experiences
By Pim Albers, Council of Europe, Directorate Human Rights and Legal Affairs

IMPROVEMENTS OF JUDICIAL SYSTEMS: EUROPEAN EXPERIENCES

1 Introduction

A proper function of courts is to positively influence the economic development of societies. Companies or enterprises are best served when courts function in a fast, fair and affordable manner. However, courts exist not only for the sake of companies, but to bring justice to citizens in accordance with the rule of law. I will focus little attention on the difficulties associated with defining the concept of rule of law. However, it is important to emphasize that developed societies must respect the rule of law. They do so by ensuring an independent judiciary, an impartial court system, a degree of separation of powers between the executive, legislative and the judicial powers of government, and the right to a fair trial. In the greater European community, these essential conditions are set forth in article 6 of the European Convention on Human Rights which states that: “(…) everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law (…)”.3

Before I discuss the Council of Europe’s efforts to promote ‘efficiency of justice’ and improvement of quality in member countries, it is necessary to analyze the Framework for Court Excellence4 a global initiative to stimulate judicial improvement and modernization. As part of this Framework, a Consortium for Court Excellence was created in 2007 at the initiative of the Subordinate Courts of Singapore. Partners in this Consortium include the National Center for State Courts and the Federal Judicial Center – both based in the US; the Singapore Subordinate Courts; and the Inter-Australasian Institute of Justice. The Consortium is assisted by the special advisor of the CEPEJ (the European Commission for the Efficiency of Justice)5 and experts from the legal vice presidency of the World Bank.

The function of the Consortium for Court Excellence is to improve the quality of courts based on ‘standard’ quality models established by the Malcolm Baldridge Quality Award, the European Foundation on Quality Management, the Singapore Quality Awards, and other quality systems such as the RechtspraQ system in the Netherlands and the Rovaniemi courts in Finland. In 2008, work on the Framework for Court Excellence will include a ‘self assessment tool’ for the courts. Both the Framework and the tool can be used to identify areas for needed improvements.6

2 The European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe

The Council of Europe, founded in 1949, is one of the oldest intergovernmental organizations in the world. Its main aim is to protect and to promote human rights, the rule of law, and pluralist democracy in the 47 European Member States.7 For promoting the rule of law the Council uses two mechanisms: (1) intergovernmental activities and (2) legal co-operation. The intergovernmental activities are primary based on the drafting of conventions (binding agreements between the Council of Europe and the ratifying member states) and recommendations (non-binding legal instruments for example on the independence of judges and prosecutors, the enforcement of legal decision and the use of mediation). Legal co-operation programs are developed to help beneficiary countries with institutional, legislative and administrative reforms. Mostly experts of the Council of Europe and staff members work together with governmental authorities to prepare and to introduce new or modify current legislation as well as to create an operational framework which can be used to implement legislative or organizational reforms. Examples of co-operation activities are: the training of members of schools for magistrates and the organization of workshops and seminars on specific topics (e.g., councils for the judiciary, judicial ethics, and court statistics), etc.

5 The author of this article is one of the leading experts and advisors in drafting the framework for Court Excellence.
6 Information regarding the Framework of court excellence, a users guide and a court self-assessment tool will be in the near future available on a special website of the organization.
7 Building Europe together on the Rule of Law (Council of Europe, Strasbourg, 2006).
The European Commission for the Efficiency of Justice (CEPEJ) is one of the intergovernmental activities of the Council of Europe. The creation of the Commission was the outcome of the 23rd Ministerial Conference of Justice Ministers in London in 2000. Main topics of this conference were the problems in the length of (civil) court proceedings in Europe and improvements that could be made in the organization of the functioning of the judiciary. The central aim and tasks of the CEPEJ are described in Resolution 2002(12). The CEPEJ is established to improve the efficiency and functioning of the justice systems of member states `with a view to ensure that everyone within their jurisdiction can enforce their legal rights effectively.'

It examines the results achieved by the different judicial systems in the light of the principles (access to justice, efficient court proceedings, status and role of legal professionals, administration of justice and management of courts, the use of information and communication technology) laid down in the Statute of the CEPEJ by using common statistical criteria and means of evaluation. Other tasks of the CEPEJ are to identify concrete ways to improve the measuring and functioning of judicial systems, assistance to member states, and, at the request of relevant steering committees of the Council of Europe, drafting recommendations for new -- or modifying existing -- legal instruments.

This article examines the CEPEJ’s approach, through the work of experts in the field, for evaluating and improving the measurement and functioning of those systems. The latter task is illustrated by CEPEJ reports on the reduction of delays in court proceedings. The article concludes by describing CEPEJ’s working group on quality.

3 Evaluation of judicial systems: past and present

When the CEPEJ was created in January, 2002, one of its first tasks was to develop a methodology for comparatively evaluating the composition and functioning of European judicial systems. The CEPEJ accomplished this task through a small expert group composed of six experts from CEPEJ representative countries and a scientific expert. Based on a discussion and an expert paper on the experiences and lessons to be learned from international studies evaluating judicial systems, the group developed a pilot questionnaire on judicial systems.

One of the group’s first problems was how to overcome differences in legal terminology. In different countries, basic concepts like ‘courts’, ‘lawyers’, ‘judges’ and ‘cases’ can have different meanings, and the development of uniform definitions is an essential component of an effective judicial improvement scheme. A second problem was a lack of data. At a European level, there is a critical need for quantitative data on court performance (especially on the length of proceedings), and many member countries currently are unable to provide the required data. The final problem involved the requirement under European law the questionnaire be drafted in the two official languages of the Council of Europe (English and French). Experts in the governmental ministries in some countries are not conversant in either language. They were compelled to first translate the questionnaire to their own national language, then to translate the completed questionnaire into English or French for submission to the Secretariat of the CEPEJ. Such successive conversions can lead to interpretation problems.

Notwithstanding the difficulties, the experts were able to draft a pilot questionnaire in six months. The questionnaire was composed of 123 questions designed to provide an overview of the judicial structure and operation in the individual countries. The questionnaire sought both general information and specific details regarding the country’s court system:

- Access to justice and to courts
- The functioning of the nation’s court system and its relative efficiency
- Use of information technology in the court system
- Whether the judicial system provides litigants with a fair trial
- Information regarding judges, public prosecutors, and lawyers
- Information regarding the system’s enforcement agents and the execution of court decisions

To facilitate the process of data collection, the experts decided that each country should nominate a ‘national correspondent’. This official – usually a representative of a ministry of justice – should be responsible for co-ordinating the data-collection process in his or her own country. He or she is also the main contact person for the experts of the evaluation working group. The experts assessed the questionnaire to determine which questions should be modified and which questions should be removed. After the test round and the nomination of ‘national correspondents, the questionnaire was disseminated at the end of February 2004.

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8 Resolution 2002(12) Establishing the European Commission for the Efficiency of Justice (CEPEJ), Strasbourg.
The initial report on European judicial systems was finalized and adopted by the CEPEJ at a plenary meeting in late 2004. The report was then adopted by the Committee of Ministers in early 2005. Finally, the report was presented at an international conference on judicial systems in The Hague in May 2005, where it was received by government officials, scientists, politicians and the media. Most commentators expressed the opinion that the CEPEJ had produced a unique document that provided the first broad overview of the composition and functioning of European judicial systems based on empirical data collected by the member states.

Governmental officials, the media and the judiciary were especially interested in the report because it addressed issues relating to the financing of courts, the salaries of judges and prosecutors, and the number of courts. As a rule, these issues are hotly debated in annual policy debates leading up to preparation of the annual budget for courts.

As a part of the evaluation exercise, comparative data was collected on national court budgets, on the number of courts of general jurisdiction, and the (gross annual) salaries paid to judges and prosecutors at the various tenure levels. In certain countries the report led to ‘heated’ debates between the minister of justice and the union of judges regarding the need to increase court budgets and the salaries of judges. The report also led to discussions regarding the need to reduce the number of court locations.

Details of the report are set forth below. Figure 1 presents expenditures on courts and legal aid as a percentage of the national budget. This figure clearly shows the disparities between nations regarding the allocation of financial resources for courts. As the reader might expect, especially for countries with the lowest expenditures, this information can be used in negotiations between the judiciary and the authority responsible for the financing of courts as a basis for seeking budgetary increases. The data on salaries and court locations can be used similarly. The figure allows comparisons that reveal whether a country has judges or prosecutors that earn a relatively low salary compared to their ‘neighbours’ or has too many small-sized courts.

Figure 1  Public expenditure on courts and legal aid as a percentage of the national budget (Source CEPEJ report 2005: 22)

The United Kingdom, Ireland and Iceland pay their judges best whereas poorer countries such as Moldova, Romania, Bulgaria and Georgia pay their judges a relatively low salary. Of course, to make a proper comparison between the countries, other factors need to be taken into account. For example, in the United Kingdom, there are a very small number of professional judges, and judges are typically recruited from a pool of experienced lawyers and solicitors. This is not the case for most of the other countries, where judges are recruited directly after finishing law school. In addition, there are differing standards of living between the various countries that necessitate differences in salary levels. For this reason,
comparative data need to be scrutinized cautiously. Nevertheless, for countries that have similar with same standards of living, the salary data can be used by judges to seek salary increases appropriate to their responsibilities and professional status.

Figure 2  Gross annual salaries of judges (CEPEJ data 2004 used)\(^{10}\)

Content and limitations of the first evaluation report

In addition to the topics mentioned, the report ‘European judicial systems: facts and figures 2002\(^{11}\) contained a qualitative and quantitative description of the state of affairs on legal aid, the number of judges and court staff, the court performance of the courts in Europe, the functioning of public prosecution agencies and (private) legal professionals (lawyers, enforcement agents and mediators).

The comprehensiveness of the first report on judicial systems was limited because a majority of the countries did not in 2002 provide information on the average length of court proceedings -- the number of days required to move a case from filing to final judicial decision. Only a few countries could provide data regarding the number of days required for four standard-categories of cases: divorce; employment dismissal; intentional homicide; and robbery. Figure 3 presents information regarding the average length of court proceedings in-divorce cases.

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\(^{10}\) Similar information is presented in the first evaluation report on judicial systems with the 2002 data used.

\(^{11}\) CEPEJ (2005), European Judicial systems: facts and figures, Strasbourg.
Preparation of the second evaluation round

Immediately after the publication of the pilot report, the experts of the evaluation working group began preparing for the next round of evaluations. The first task was to revise the questionnaire based on lessons learned from the first evaluation round. Many questions were revised, some were removed, and new questions were introduced. For example, the experts tried to insert clearer definitions of the word “cases,” to improve the design of questions relating to court performance, and to reduce interpretation problems by providing more complete explanations or by adding detailed descriptions of common legal terminology. Most new questions were based on topics suggested by the Committee of Ministers or the member states, for example, questions dealing with enforcement of judicial decisions, the arrangement and procedures for the protection of vulnerable persons, lawyers, and the notary.

The national correspondents were invited to begin the second round of data collection in September 2005, and the process was expected to last approximately one year. In October 2006, a new report was published that included data for the year 2004.12 Compared with the first report, the second one contained more detailed and richer information relating to the financing of courts, public prosecution agencies and legal aid, as well as regarding the variety of judicial and extra-

12 CEPEJ studies No. 1, European judicial systems (edition 2006: data 2004), Strasbourg. The full report can be downloaded from the website of the CEPEJ: www.coe.int/cepej.
judicial tasks performed by courts. In certain European countries, courts are expected to perform tasks related to business registers, land registers and insolvency registers. Courts that perform these additional tasks may have significantly higher workloads. The second report also provided more detailed information regarding geographical access to justice because it differentiated between courts of first instance based on geographical court locations. This focus on geographical location allowed the report to eliminate confusion relating to the definition of the term “courts.” For example, in some countries, a court might be defined as an administrative entity or jurisdiction. In other countries, a court might be broadly defined to include a few judges or a panel of judges. By introducing the concept of geographical court locations, the report presented a more precise picture of geographical access to justice by reference to the number of court buildings. Figure 4 is a geographical map that shows the number of court locations per 100,000 inhabitants in Europe. The darker the colour grey, the more court locations can be found in the given countries.

When you take a close look at the map, you can see that a relatively high number of court locations can be found in certain countries. This is especially true in a certain number of Balkan countries, as well as in Portugal, Belgium, Greece, Ireland and Finland. The high numbers in such countries may be attributable to courts that perform extra-judicial tasks in the field of land and business registers.

Impact of the report
As has been said before, the report was launched at a press conference in Strasbourg in October 2006. Many articles were presented in newspapers describing the main important headlines of the report. Especially in France, much attention was given to the work of the CEPEJ. Most of the media reviewed the report positively. This was also the case with respect to the majority of policy makers and legal professionals. However, some politicians, i.e. ministers of justice, were ‘sceptical’ about the outcome of the report, indicated that the results described were ‘outdated’, and concluded that the comparison was based on ‘things’ that are not comparable at all.

Figure 4 The Number of geographic court locations per 100,000 inhabitants (Source: CEPEJ report 2006: 63)
4 Limitations of the CEPEJ methodology and suggestions for improvement

Although the CEPEJ report provides an overview of the current state of judicial systems in Europe, the report suffers from certain deficiencies. First, the report does not provide real ‘evaluation’ of the functioning and composition of judicial systems in the Member States of the Council of Europe, but rather only a ‘photographic’ snapshot. In the future, it will be necessary to conduct more detailed and evaluative studies. Second, the report focused on the ‘supply’ side of judicial systems (i.e., the courts, judges, prosecutors and private legal professionals), and includes factual data (i.e., data regarding the number of courts, professional judges, the budget of courts and prosecution agencies, the court performance), but omits information related to the efficiency of justice – information regarding the perceived level of satisfaction with respect to the services delivered by the courts, legal professionals, and other legal institutions. The report focuses only on how judicial institutions are organized and functioning. This in contrast with, for example, the ‘Governance Matters’ reports of the World Bank where information on the perceived rule of law is presented, based on perception surveys of the users of the system.\textsuperscript{13} Third, the report suffers from concerns regarding the quality of data. The experts obtained quantitative and qualitative information from only one source per country – the national correspondent responsible for data collection in his or her country. Because the national correspondents provided differing levels of detail regarding court statistics and justice indicators, and because they exercised varying levels of quality control regarding the data used, the quality of the data from the different countries may vary. Some countries exercised a high level of quality control; others did not. Finally, the report suffered from the use of paper-based questionnaires. The first two questionnaires were simple – not professionally designed - Microsoft® Word documents. From the viewpoint of readability, major improvements could have been made in terms of the layout of the questionnaire. Because the questionnaires were drafted as Microsoft® Word documents, all data had to be manually registered in databases. Compared with an electronic questionnaire, the process was time-consuming and prone to registration errors.

To address the limitations described, several improvements are currently being implemented. First, in the beginning of 2007, the experts issued a call for research projects designed as launched to examine the CEPEJ data further and to identify possibilities for evaluation. As a result, several universities and research institutes in Europe developed study projects relating to access to justice, the enforcement of judicial decisions, delays and length of proceedings, monitoring and evaluation of courts, the use of information and communication technology, training and education of judges and prosecutors, justice and cultural diversity in Europe, and administration and management of courts. By the end of 2007, a number of reports with additional information on European judicial systems will be available.

A second suggestion for improving the quality of data is to ask the member states to review and evaluate the quality of the CEPEJ data. One specific member state has proposed that, on a voluntary basis, during the next evaluation round, a small group of countries be evaluated by a team of experts from other countries. The aim of the evaluation is to review the quality of the justice statistics at a national level which could lead to the improvement of the consistency and quality of the data. At the moment, this proposal is being discussed between representatives of the CEPEJ.

Another suggestion relates to the ‘paper-based’ questionnaire. During the third evaluation round, scheduled for the fall of 2007 and the winter 2008, a web-based internet questionnaire will be used. As a result, national correspondents will be able to fill in the required data using web-based tools. Parts of the questionnaire can be forwarded electronically to different justice institutions as well. Even for the federal countries, the data collection workload will be reduced by electronically transmitting the questionnaire to regions and aggregating the data at the national level once they are received from the individual regions.\textsuperscript{14} In addition to these improvements, further modifications have been made in the questionnaire and the explanatory note in an effort to reduce interpretation problems and to increase the uniformity of the data received.

5 Reducing delays and the management of judicial time

Another important task of the CEPEJ lies in the area of reducing court delays and managing judicial time. In 2003, a working group on ‘delays’ invited experts to draft a report on criteria that can be used to determine ‘reasonable’ length of proceedings and on factors which may influence the length positively or negatively. The researchers Langbroek and Fabri

\textsuperscript{13} On the other side, the World Bank study is limited to the demand side of the Rule of Law. No factual data is used on the ‘supply’ side. See for example: D. Kaufman, A. Kraay, M. Mastruzzi (2007) WPS4280 study, Governance Matters VI: aggregate and individual governance indicators 1996 – 2006, Washington.

\textsuperscript{14} Switzerland and Germany have developed a ‘modified’ version of the electronic questionnaire in cooperation with the IT-department of the Council of Europe. With this version (in the German language) it will be possible to collect information at the level of the individual ‘Länder’ or ‘Cantons’.
(2003), relying on research by Mahoney (1988) and Steelman (2000), identified the following factors which have a positive effect on the length of court proceedings:

- Judicial commitment, leadership and accountability mechanisms (e.g., a court president who promotes activities designed to reduce the length of proceedings);
- Involvement of court staff and lawyers efforts to reduce the length of proceedings;
- Systematic supervision of case progress by court personnel;
- Court efforts to define goals and standards that demonstrate best practices, and that allow for performance comparisons between courts;
- Monitoring of cases by an information system (this should include the progress of cases, the inactivity of cases, the workload of the courts, etc);
- A case management approach which permits active management by the court of a case as it progresses from filing to disposition;
- A policy that prohibits unjustifiable continuances, encourages firm trial dates, and utilizes a backup judge’ system for trials;
- An individual judge assignment system;
- Judicial and staff education and training. 15

In 2004, this list of factors, combined with the researchers’ recommendations to stimulate future research on the features of court proceedings, the management of courts and the governance setting of courts, was used by the CEPEJ to create in 2004 a Framework program on ‘the optimum and foreseeable timeframes’. 16 The Framework document starts with the idea that court cases should ‘be processed in optimum and foreseeable timeframes,’ and that it is the responsibility of national jurisdictions to take adequate measures to reduce the length of proceedings. The Framework suggests that excessively long proceedings may lead to corruption in the judiciary. For example, parties have paid money to judges or court clerks to speed up proceedings (i.e. to give this case a higher priority) or even to slow down a court proceeding.

A lack of financial resources is not always a sufficient justification for court delays. Sometimes, changes in the internal working processes of courts can significantly reduce the length of court proceedings even without an investment of additional financial resources.

The Framework program is designed to guide in drafting measures for reducing court delays. However, when it comes to these measures three points should be taken into account:

1. Each Member State must find a balance between the resources which can be allocated to justice, the good management of these resources, and the objectives set for justice.
2. There should be efficient measuring and analysis tools for measuring timeframes available, and these tools should be defined by the stakeholders through consensus.
3. A careful balance should be struck between procedural safeguards, which necessarily entail the existence of lengths that cannot be reduced, and a concern for prompt justice17.

Bearing in mind these three principles, 18 lines of action were formulated, which may be helpful for countries in the fight against delays. Certain actions require more financial resources and an improvement of the quality of legislation, while others aim at improvements of legal proceedings and the introduction of specific measures to change the internal organization of courts. The 18 principles listed in the Framework program include:

1. Obtaining sufficient resources;
2. Improving the quality of legislation;
3. Improving timeframes;
4. Defining and monitoring optimum timeframe standards for each type of case;
5. Improving statistical tools and developing information and communication strategies;
6. Identifying pilot courts to test new approaches for the reduction of length of proceedings;

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16 A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe, CEPEJ, 19 Rev 2, (Strasbourg 2004).
7. Allowing adjustment of timeframes;
8. Acting on the number of cases dealt with by the court by ensuring an appropriate use of appeals and other applications;
9. Improving the quality of proceedings;
10. Defining priorities in case management;
11. Better organizing trials to reduce waiting time, while paying special attention to victims and witnesses;
12. Establishing a procedure for re-activating pending cases;
13. Creating more flexible rules governing the territorial jurisdiction of first instance courts;
14. Involving the relevant authorities in the administration of the courts;
15. Developing programs for the training of judges and prosecutors and the professions generally;
16. Organizing the relationships between the courts and lawyers;
17. Improving the monitoring of, and compliance with, time-limits established by judicial experts; and,
18. Defining the modalities for having bailiffs, clerks/Rechtspfleger, notaries and all other professions involved in justice administration.

6 The network of pilot courts

One of the first outcomes of the Framework program was the introduction of a network of pilot courts in April 2006, the first meeting of which was held in Bucharest. The network was based on the assumption that each country would nominate one of its own courts as an example of a court where best practices are used to reduce the length of court proceedings. Representatives of this network, mostly judges or court staff, exchange information during annual meetings. They also discuss other issues through an electronic discussion board maintained on the CEPEJ’s website. Network members can post their questions on this electronic board and receive comments or reactions from other members.

The network is not only the central forum for exchanging best practices; it also is a ‘sounding board’ for draft proposals created by the CEPEJ’s working groups. For example the members of the network have given their opinions on studies on ADR and documents concerning the ‘quality’ of courts and judges. The last two issues are reviewed at the end of the article.

7 The taskforce on Delays (TF-DEL)

Between 2005 – 2006, a Special Taskforce on Delays composed of six expert members of the CEPEJ was asked to examine the causes for delay and to suggest solutions for reducing the length of court proceedings. Pursuant to its mandate, the Task Force produced a ‘Time Management checklist’ in 2005 that provided a practical guide for courts to analyze whether improvements could be made in the timeliness of proceedings of their proceedings. The check list encouraged courts to consider the following five indicators:

1. An assessment of the overall length of proceedings. The Task Force recognized that proper time management should focus not just on the duration of the individual stages of a proceeding, but also on the total duration of a proceeding from start to finish, including enforcement if applicable;
2. For the purpose of assessment, as well as for planning and transparency, standards and targets for the optimum duration of proceedings should be determined and made available to the users of the system.
3. In order to articulate standard for the realistic and appropriate planning of standards, a court must cluster case categories with respect to complexity and average length.
4. The most important and typical stages of judicial proceedings should be recorded, monitored and analyzed.
5. The courts or the judicial system as a whole should establish a mechanism for the prompt identification of cases with an excessive duration, and establish a system to remedy the situation and to prevent further dysfunctions.

The Compendium of best practices provides an overview of solutions that countries and courts can use to reduce delays and shorten judicial proceedings. Some of the suggested best practices involve the setting of realistic and measurable timeframes. For example, the Finish court in the city of Rovaniemi has agreed that all cases should be resolved within one year. The Compendium also recommends the creation of small claims, fast track and multi-track procedures in the courts, and suggests that an additional recommendation that can be found in the compendium is that time frames be established and enforced. For example, in some courts, the chief judge or a court of appeal is expected to intervene when timeframes regarding the duration of court proceedings are not met. The Compendium also includes examples of

18 CEPEJ (2005), Time management checklist, Strasbourg.
procedural case management policies, including case processing rules, limitations of the number of hearings, a policy for reducing adjournments, the use of standard templates for 'bulk cases', and video and audio conferencing techniques. The last issue discussed in the compendium concerns caseload and workload policies which may include monitoring of court workloads, the stimulation of ADR (outside the courts), the limitation of extra-judicial activities of the judge, and the increased use of a single judge in court sessions instead of a panels of judges.

The second TF-DEL report, written by French Judge Calvez is more analytical. It analyzes the main causes for delays in proceedings of the European Court of Human Rights in terms of 'reasonable time' frames for various alleged violations of article 6 of the European Convention on Human Rights, and suggests general norms and standards for the duration of judicial proceedings in the European Court on Human Rights.²⁰

The report suggests that the main causes for delays involve the following factors: the territorial distribution of court jurisdiction, transfers of judges, insufficient numbers of judges, the systematic use of multi-member tribunals (benches), backlogs of cases, complete inactivity by judicial authorities, systematic shortcomings in procedural rules, failure to summon parties or witnesses, unlawful summons, late entry into force of legislation, disputes about the jurisdiction between administrative and judicial authorities, late transmission of the case file to the appeal court, delays imputable to barristers, solicitors, local and other authorities, judicial inertia in conduct of cases, involvement of expert witnesses, frequent adjournment of hearings, excessive intervals between hearings, and excessive delays before the hearing.

More specific for civil proceedings, the Report suggests that delays are related to a failure to use the courts’ discretionary power and the absence or inadequacy of rules of civil procedure.

The Report suggests that criminal court cases may be delayed due to: structural problems in the organization of prosecution service, decisions to join or not join criminal cases, a failure of witnesses to attend hearings, and the dependence of civil proceedings on the outcome of criminal proceedings.

On the basis of her analysis of decisions of the European Court, and taking into account of the main causes for delays, Judge Calvez drafted the following criteria for assessing the ‘reasonableness’ of the duration of court proceedings in Europe:

- § A total duration of no more than two years for normal (non-complex) cases was defined as reasonable. If proceedings last more than two years, the Court should examine the case closely to determine whether the national authorities have shown due diligence in the process;
- § In priority cases, the court may depart from the general approach, and find violation even if the case lasts for fewer than two years;
- § In complex cases, the Court may allow longer time, but should pay special attention to periods of inactivity that are clearly excessive. Even if a longer duration is justified, it will rarely be the case that more than five years are justifiable, and will almost never that eight years of total duration is considered reasonable;
- § The Court did not find that proceedings were of excessive duration, despite manifestly excessive duration, only when the applicant’s behavior contributed to the delay.

The third report of TF-DEL was a research report conducted by Smolej and Johnsen on projects implemented in Denmark, Sweden, Norway and Finland in the area of reducing the length of proceedings.²¹ The report contained two parts. The first part involved a review of proposals and policies for reducing the length of proceedings in Northern European courts. It describes the use and determination of timeframes, with special attention to the creation of specific procedures for priority cases. The report also contains a typology of deadlines as well as time management strategies’ (e.g., court leadership, promotion of mediation, the need for a preparatory meeting and the setting of a date and time for the main hearing at an early stage, etc.).

The second part of the report contained a description of a Norwegian project designed to produce swifter criminal justice. The study distinguished between action time and standstill time. Action time is the time spent working on a case. Standstill time is the time when nothing happens. The researcher Johnsen reported that the average action time, beginning with the report of the crime and continuing through the prosecutorial decision, varied between two and five days between police

²⁰ CEPEJ studies No. 3 (2006) F. Calvez, Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, Strasbourg.
²¹ CEPEJ studies No. 2 M. Smolej and J.T. Johnsen (2006), Time management of justice systems: a Northern Europe study, Strasbourg. In this report various definitions on the length of proceedings are applied (mostly it is meant as the time in days spend from deposit of a case until the final judicial decision). Sometimes the authors are also using the terminology of timeframes and processing time without clear definitions.
districts and crime areas. By contrast, the standstill time varied between 43 and 309 days. In other words, Johnson that action time only constituted a minor part of the total processing time, and that standstill time counted for more than 90 percent of the total processing time! The report suggested measures for reducing case processing time, especially by focusing on measures for reducing standstill time.

8 SATURN (Centre for judicial time management)

In the beginning of 2007, the SATURN Center (Study and Analysis of judicial Time Use Research Network) was 'launched'. This center will work on the following issues:

a. Analysis of existing timeframes in the member States (timeframes per types of cases, waiting times in the proceedings, etc.);
b. Providing member States with knowledge and analytical tools of judicial timeframes for proceedings;

At the first meeting of the working group of SATURN, the general working principles were chosen. One of the first activities that will be carried out by SATURN is drafting a questionnaire on common case categories, the availability of information on length of proceedings and timeframes, and definitions that are used in the various courts to measure length of proceedings. Currently, the draft-questionnaire is being tested among a small group of pilot courts. During 2007 and after the second meeting of SATURN, the final version of the questionnaire will be sent to all the members of the network of the pilot courts. The outcome of this exercise will contribute to a better understanding of the categorization of cases that are used in the various courts in Europe, the problems, solutions and definitions applied to measure the length of court proceedings. A second outcome of the evaluation carried out by SATURN is connected with the evaluation scheme on judicial systems. In particular, the part on court performance might be improved in such a manner that, in the long run, comparable information will be available at a European level on the court performance (including key indicators on the length of proceedings).

9 Quality and Mediation

The CEPEJ’s latest activities are focused on the topics of quality and mediation. For example, the CEPEJ has suggested that European countries use alternative dispute resolution and mediation to reduce the workload of the courts and offer parties alternatives to litigation. Due to the importance of these suggestions, CEPEJ appointed a special working group to study these issues.

In 2007, the working group submitted a report on the impact of three Recommendations of the Council of Europe regarding mediation in the member states. With respect to Quality, the working group (GT-QUAL) considered a draft list of items that must be taken into account by nations seeking to improve the quality of their courts at its February 2007 meeting. The draft list included proposals relating to the efficiency of court hearings, enforcement of decisions, quality of services, and case management. In addition to this document, I drafted a discussion paper on court quality which offers an analytical model to measure the quality of the judiciary from three perspectives: the national perspective, the perspective of the individual courts, and the perspective of the judges.

10 Assistance Projects

As noted in the introduction to this article, the CEPEJ did not limit itself to the tasks of information collection and exchange between countries regarding the composition and functioning of judicial systems. During the last five years, the CEPEJ also assisted many countries in improving their judicial systems. For example, a seminar on mediation was held in Malta, and three experts were asked to draft a report on their mediation experiences by Switzerland. The Netherlands organized a special event in the year 2000 that resulted in a report on the territorial competence of courts. Likewise, the

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Russian federation studied issues relating to the non-execution of judicial decisions against the state. 27  Not only did the specialized working groups and SATURN focus on court delays and the duration of judicial proceedings, but these subjects were also addressed at two meetings that held in Croatia and Slovenia. 28

11 Conclusion

Five years after the CEPEJ was created, much has been accomplished at the European level. The CEPEJ has produced considerable comparative information on the composition and functioning of judicial systems at a national level as well as at the level of individual courts. In addition, the CEPEJ stimulated debate between courts regarding quality of justice issues, and also resulted in the creation of a network of pilot courts designed to test out ideas for improving the efficiency and quality of justice.

The success of the CEPEJ would not have been possible absent the active participation and co-operation of the member states of the Council of Europe and the involvement of many observers at (plenary) meetings of the CEPEJ. These observers include the International Union of Judicial Officers, European associations of judges and court clerks, the American Bar Association as well as other international organizations such as the European Commission and the World Bank.

Thus far, the CEPEJ has accomplished nearly five years of successful work. Hopefully, this success will continue into the future. The CEPEJ provides a vehicle for disseminating knowledge on the subject of administration justice for the 800 million inhabitants of Europe, and has helped achieve the goal of delivering justice within a reasonable period of time by an independent tribunal.

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28 As an expert I have drafted together with other experts a paper on court delays and the experiences of the Netherlands in reducing the length of proceedings. See: CEPEJ (2005)7, Practical ways of combating delays in the justice system, excessive workloads of judges and case backlogs, Strasbourg.
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Biography

Mr. Albers is a special advisor to the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe (secondment). He is responsible for evaluating judicial systems, and assisting countries to reduce court delays. As a former expert, chair of the evaluation working group, and member of the Bureau of the CEPEJ, he helped develop the methodology for evaluating judicial systems in Europe based on empirical data. His work resulted in two reports on judicial systems (2005 and 2006). Also, outside Europe, he has participated in comparative judicial assistance projects. For example, in 2006, he participated in a project of the American Bar Association (CEELI) and the Arab Council of Judicial and Legal Studies (ACJLS) designed to create justice sector benchmarks for the Middle East and North African countries. At the moment, he is serving as an expert/advisor to a project working to develop a global ‘framework for Court Excellence’ (a model to assess the quality of courts). This framework is supported by a ‘Consortium for Court Excellence’ (composed of representatives of: the Singapore Subordinate Courts, the National Center for State Courts, the Federal Judicial Center, and the Australasian Institute of Judicial Administration).

As a part of his function as special advisor, he represents the CEPEJ in many forums and conferences. In addition, he gives lectures at training courses for judges, court staff and representatives of ministries of justice working in Eastern European and MEDA (Middle East and Northern Africa region) countries. In addition to these tasks he is responsible for the subject of ‘e-justice’ in the CEPEJ and co-operation activities with the European Union in this field.
Monitoring and Evaluation of Courts Activities and Performance

By Gar Yein Ng, Marco Velicogna and Cristina Dallara

1. INTRODUCTION

This article is based on a report of a research study conducted by the three authors for the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe (CoE). The study focused on court monitoring and evaluation systems in six different countries, all of which are members of the Council of Europe, with particular emphasis on case management monitoring and evaluation.

Even though this phenomenon is attracting growing attention both from policy makers and judicial administrations, limited information on the subject is available concerning empirical experiences within the judicial systems. The limited available data concerning the functioning of judicial systems, however, shows a fragmented implementation of monitoring and evaluation policies. As the CEPEJ report states, monitoring and evaluation systems should help improve the efficiency of justice, the quality and standard of the service delivered by the courts, and should also contribute to a more consistent implementation of judicial policies.

Approaches to monitoring and evaluation “range from traditional statistical surveys of workload, largely lacking in any consequences, to performance based remuneration systems that define the salary of individual judges based on the number of cases they decide”.

The purpose of this article is to discuss an empirically derived model that describes the evolution of the courts’ evaluation and monitoring systems.

2. CONCEPTUAL FRAMEWORK

Conceptions regarding how courts should in western democracies, and theories regarding court organization and procedures, have evolved slowly in a relatively stable environment. Today, as changes are taking place more and more rapidly, especially in regard to such issues as legislation, business characteristics, etc., courts are being forced to continuously adapt and re-design their systems, procedures and practices. Old methods and ways of doing things are not capable of responding to the growing requests coming from the civil society and the growing quantity and complexity of the tasks that courts are required to perform. For these reasons we have chosen to focus our research on court monitoring and evaluation systems.

Several factors have contributed to the growing importance of judicial monitoring and evaluation in western European, including the growing attention to judicial activities and administration and the diffusion of new public management.

1 Gar Yein Ng (Maastricht University, NL), holds a PhD in Law from the University of Utrecht, with a thesis on “Quality of Judicial Organization and Checks and Balances”, a comparative thesis between the Netherlands and France. This thesis was written under the supervision of Dr. Philip Langbroek and Prof. Ten Berge at the University of Utrecht, Faculty of law. She is lecturer at Maastricht University. Marco Velicogna (IRSIG-CNR, IT; Utrecht University, NL) is a researcher at the Research Institute on Judicial Systems of the Italian National Research Council. He is also a PhD candidate at the University of Utrecht, Faculty of Law. He has also served as consultant for the Italian Ministry of Justice. Cristina Dallara (Bologna University, IT) is a researcher at the Department of Organization and Political System (DOSP), University of Bologna, working on “The role of European Union in strengthening the rule of law and promoting judicial system reforms in candidate and potential candidate countries”. She holds a PhD in Political Science from the University of Florence with a thesis on “European Union Rule of Law promotion in Romania, Serbia and Ukraine” under the supervision of Prof. Leonardo Morlino and Prof. Carlo Guarnieri.

The Introduction and Conceptual Framework have been written by Gar Yein Ng and Marco Velicogna. Methodology has been written by Marco Velicogna, The Model and Conclusions have been written together by Gar Yein Ng, Marco Velicogna and Cristina Dallara.


values. The importance of monitoring and evaluation is also due to the fact that, “the administration of justice looks very much like an ordinary public service organization”,\(^7\) has generated an awareness that the actors operating in the justice systems should earn their legitimacy not only by participating in the production of “sound juridical judgments but also by providing adequate services”.\(^8\)

Western constitutional theory demands that the judiciary operate within the rule of law, independently from other state powers, with a view to protecting the human rights of the citizens. It is expected that within this framework judges act in an impartial and independent way. When one thinks of the judiciary in a democratic country, instantly the constitutional principle that will spring to lawyers’ and legal academic minds will be judicial independence. Judicial independence is the central theme in constitutional law, in international treaties relating to human rights and a fair trial, and is promoted by international organizations in their efforts to develop judiciaries in member countries. In addition, the concept of independence is a key concern for all parties and lawyers coming before the bench to argue their case: will this judge decide my case without bias? In constitutional courses at university relating to the separation of powers, judicial independence is also a central issue.

A second, increasingly relevant issue concerns accountability. Traditional forms of accountability are primarily designed to protect the human right of fair trial (found also in article 6 of the European Convention on Human Rights). Until recently, these forms of accountability were thought to be sufficient to guarantee fair dispute resolution within the rule of law, be it in civil, criminal or public area.\(^9\)

Parliaments, Governments and Ministries of justice all around Europe have been confronted with mounting requests for better judicial services, a more efficient organization of services, better accountability and “modernization” of the justice machine. Furthermore, since the break down of authoritarian regimes in Eastern Europe, the development of justice systems has been increasingly regarded as a key aspect of the transition process. In these contexts, courts became crucial actors as they contribute to the development of new legislations, the adaptation of old rules to new contexts and to systems has been increasingly regarded as a key aspect of the transition process. In these contexts, courts became crucial actors as they contribute to the development of new legislations, the adaptation of old rules to new contexts and to the prevention of the arbitrary use of power.\(^10\) Furthermore, judicial institutions created in non-democratic contexts need to be reformed in order to make them adequate for new democratic contexts and tasks.\(^11\)

In order for judicial organizations to innovate, it is of paramount importance that they be able to monitor and evaluate their own activities and results. Monitoring and evaluation can support courts in performing their public services, adapting to the needs of the customer/client/citizen. The general idea behind this is that quality in services and products of the court innovation lead by monitoring and evaluation will lead to satisfaction of the clients/customers/citizens.\(^12\) It has been suggested that such satisfaction could in turn lead to public trust\(^13\) and governmental legitimacy.\(^14\)

Another important element is the growing attention towards accountability. Mechanisms of accountability are pivotal to a good working democracy because they help ensure that no one body, be it a state institution, a private organization or person, has the power to dictate the lives of the communities they serve except based on the rule of law.\(^15\) Furthermore, as already mentioned, they provide a powerful tool to induce a traditionally insulated organization like the judiciary to be more sensitive to its customer needs. There are two ways to hold an organization to account for its actions.\(^16\) One is where the citizens are passive, whereby the organization must take steps to ensure the transparency of decision-making and service provision. The other approach requires action by citizens in their capacity as clients of public services, where

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\(^7\) M. Fabri and P. M. Langbroek (eds), *The challenge of change for judicial systems, developing a public administration perspective*, IOS Press OHMSHA, Amsterdam, Washington 2000, p.8

\(^8\) Ibid.(eds), pp.8-9


\(^13\) G. Bouckaert and S. van de Walle, *Government and trust in government*, at EGPA Conference Finland 2001

\(^14\) Ibid.


they have the right to demand answers for actions taken and to demand the stopping or redesign of such actions.\footnote{For more on the concept of participation see: P. Selznick, \textit{The moral commonwealth: Social theory and the promise of community}, University of California Press, Berkeley, California 1992 p.314-318} In both cases, data concerning the activities of the public organization is required to be collected and made available.

As a consequence, nowadays, the traditional Western constitutional framework is expanding to include the requirements of organizational quality and efficiency imposed on justice in Europe by article 6 European Convention on Human Rights. Indeed, various countries have adopted legislation designed to improve the efficiency of justice. Monitoring and evaluation processes are assuming increasing prominence as tools that help measure outputs, assess policy implementation outcomes and allocate increasingly shrinking resources.

At this point, it is important to highlight the fact that monitoring and evaluation tools are also applied outside the context of judicial is not limited case management. Indeed, such tools are important to consider in determining equality, fairness, and integrity, customer relations (access to justice, public trust and confidence), quality of the work done by staff other than judges, personnel management and development, independence and accountability.

\section*{3. Methodology}

We have used CEPEJ data on evaluation and monitoring as a basis for structuring our research framework and analysis. This data has been integrated with qualitative and quantitative information already collected in various research projects, reports and studies conducted by members of the research group and by their research networks in recent years. We also supplemented the data with semi-structured questionnaires and interviews were conducted with CEPEJ contacts.

In order to create a more robust study, and to identify common and divergent patterns, we selected a multiple case study approach. The case study design is \textit{"the logic that links the data to be collected (and the conclusions to be drawn) to the initial questions of a study"}.\footnote{R. K. Yin, \textit{Case Study Research: Design and Methods}, Sage Publishing, Beverly Hills, CA 2003 p.27} Adopting a mainly qualitative approach, the study focused on six countries: France, Italy, The Netherlands, Croatia, Serbia and Slovenia. The depth, openness, and detail of qualitative inquiry, based on a limited number of cases, was deemed to be more appropriate for increasing the understanding of a complex but still uncharted phenomena such as the monitoring and evaluation of judicial offices. In fact, the preliminary analysis of the data provided by CEPEJ, even though quite useful as a way of orienting the research, revealed serious limitations as to the possibility of better grasping the specific characteristics and dynamics of the different monitoring and evaluation initiatives. The fact that we used a small number of cases, although reducing the chance to create the type of generalized finding that could be generated under a quantitative approach, helped produce a wealth of detailed information that a more quantitative approach could not provide.\footnote{M. Q. Patton, \textit{Qualitative Evaluation & Research Methods}, Sage Publishing, Newbury Park, CA 1990 p.13}

Starting from the public data provided by CEPEJ, a research project was sketched and case studies were identified. The criteria behind the case selection was based on two factors. The first one is that, between the members of the research team, all the countries’ judiciaries have been studied in depth. The second is that this selection allowed us to confront evaluation and monitoring in two diverse groups of judiciaries: three judiciaries of well established democracies and three judiciaries of recently developed democracies. An important point that needs to be stressed is that this grouping allowed us to account for different historical, institutional and legal experiences. These differences are not and should not be seen as a source of division but as an opportunity for mutual learning. This wealth of experiences make Europe an extraordinary laboratory of innovation and change.

We based our definition of monitoring and evaluation on the definition provided by CEPEJ. Regarding monitoring, we refer to procedures and practices aimed at assessing the day-to-day activity of the courts and judicial productivity. Regarding evaluation, we refer to procedures and practices directed at assessing the performance of court systems with prospective concerns, using indicators and targets.

Due to the fact that our field of research was an area where relatively little field research has been conducted (at the time this research was conducted), the choice was oriented to the selection of an exploratory research methodology with semi-structured interviews. Furthermore, in the Netherlands and France, the study greatly benefited from data collected by Gar Yein Ng in her PhD research—from 2002 to 2007. Concerning the Italian portion of the study, much of the data and information were drawn from research and studies conducted by the research Institute on judicial Systems on the subject of quality and evaluation of justice in the period from 2000 to 2007. The studies of Croatia, Serbia and Slovenia were supported by on-site visits conducted by one of the authors in each country from October 2006 to April 2007. For these three case studies, written electronic questionnaires were also submitted to CEPEJ contacts. This semi-structured questionnaire was specifically built from the CEPEJ report questions (and national answers) concerning monitoring and evaluation. Our questions were aimed at missing, unclear or interesting data that required further elaboration. Written replies from Croatia and Slovenia were analyzed and followed by a second round of questions. For the Serbian case study, a reply to the questionnaire was not provided in time. To overcome this fact, additional documentary evidence was collected. For this purpose, local expert support was used to search and analyze national documentation and to translate relevant references.

A pattern-matching technique was used to compare different national experiences. This offered the opportunity to highlight trends and possibly causal relations between national context characteristics. Such a comparison included the different balance between constitutional values and division of powers, legal frameworks, judicial organization, local organization, norms, procedures and practices, technological artifact features, adoption process and results. The model presented in this article is the result of such analysis.

4. The Model

Based on our research, we were able to discern different stages of development in the creation of court management monitoring and evaluation systems. Given the impetus toward democratization and NPM, we noticed a common trend towards the development of such systems. Such attempts have been met by difficulties, especially in the empirical implementation and in the capability of the systems to produce the expected results. This can be partially explained by some common factors that affect the measurement of all court activities of all countries such as setting standards for backlogs, reasonable delays and productivity. On the other hand, the different historical development and institutional settings of each country contributes to these difficulties. These differences have been kept in mind when developing our insights.

We have identified different stages of development for the operation of monitoring and evaluation systems based on the data from the case studies: bureaucratic data collection, normative framework, institution building, evaluation and monitoring, and accountability and action. We will proceed now to discuss each stage in turn.

Bureaucratic data collection takes place outside of monitoring and evaluation purposes. Examples for courts include the registration of cases in paper and electronic registers, and data collected in case tracking systems. These basic forms of data collection are ingrained in traditional court procedures and regulations. Courts in all the six countries collect such data in order to guarantee the respect of due process especially as regard the following of procedures, case handling and scheduling. Such data can be adapted for internal monitoring and evaluation purposes at court level. We concluded this because such data is usually collected according to standards and procedures individual to the court or according to data entry methodologies which are also individual to the court as is the case with Croatia, France, Italy and the Netherlands. Measures have been taken in all countries to standardize this data and adapt it for national monitoring and evaluation, however, as the data showed, such efforts have required normative and institutional developments.

Due to the complex relationship between judicial independence and accountability, a normative framework had to be developed in order to operate monitoring and evaluation systems within the principles of constitutional law. However, in none of the countries considered, did we find any explicit constitutional basis for monitoring and evaluating court systems. This is because constitutional law mainly focuses on individual accountability and the independence of judges rather than...
on the accountability of the court as a whole. This element could also be conceived of as part of ordinary political accountability.24

As stated earlier, the movement towards democratization and NPM have been the main impetus for normative changes. Most of these changes have occurred at the legislative level; for example, Slovenia, Croatia and Serbia have enacted legislation regarding democratization of the judiciary under the EU accession rules.25 Whereas France, Italy and the Netherlands drew impetus from the infusion of NPM values in reshaping the expectations of accountability from their populations and the need to increase efficiency and cut costs. Legislation from France and Italy provide clear examples of influences from NPM; e.g. in France, the new financial law requires all public services, including the courts, to account for their spending with objective criteria. In Italy, the legislation on administrative proceedings and on the reform of the Civil Service provided general frameworks within which also the courts had to operate. The Netherlands took a mixed approach and developed a normative framework which on the one hand democratized the judicial system at the same time as implementing NPM within the courts.

Institution building has characterized the first stage of implementation of the normative framework. From the data collected this has varied widely, from the adaptation of already existing offices, to the creation of new units or even institutions such as the Council for the Judiciary in the Netherlands. In some cases, such as Croatia and Slovenia, institution building didn’t really take place. However, in these two countries there is a complex relationship between different actors involved in court management at different levels which is institutionalized by the law. Nevertheless, in Slovenia, all of the institutions responsible for the efficiency of justice26 share the opinion that monitoring and evaluation of the courts’ performance is the main path to change and innovation. In particular, in the last two years, the Supreme Court has made consistent efforts to introduce monitoring and evaluation in courts practice. In Italy there has been a transfer of competences from the National Institute of Statistics to a Statistics Directorate General within the Ministry of Justice and a special unit within the Ministry of Justice for the evaluations of costs, performances and management. In France, two approaches have been taken. On the one hand a special court service was set up to assist in court management and on the other hand judges work as policy makers in the Ministry of Justice.

Only having established a normative framework and institutional setting can one start looking at operating an effective evaluation and monitoring system. In order to be effective, the system must operate transparently and with trustworthy standards. These standards involve various factors: trust in the monitoring and evaluating institutions, perception of usefulness of the exercise, methodology for data collection.

The trust in monitoring and evaluating institutions involves two potentially inconsistent issues. On the one hand, the independence and impartiality of the institution involved. For example, politically appointed members are more likely to be viewed with suspicion and prejudice. If court presidents are appointed by the government, in countries where political influence over the judiciary is still frequent, there could be a large trust gap. On the other hand, in the Netherlands, given the increased autonomy of judges in monitoring and evaluating their judicial system, there is more confidence in the monitoring and evaluation exercise.

As far as the perception of usefulness of the monitoring and evaluation process is concerned, this also varies. In Italy, personnel involved in the data collection exercise have low opinions regarding the usefulness of data collection, and these opinions influence their attitude towards the exercise. In addition, the political goals of standardizing practices or improving efficiency have been met with a mixture of skepticism and hostility. Finally, on the issue of methodology for data collection, the characteristics of specific organization (e.g., size of the court, case typology, number of cases, court procedures) make it difficult to create reliable indicators and standards by which to monitor and evaluate court activities in a generic way. Moreover, the use of data collected with tools designed for bureaucratic data collection can sometimes lead to a false picture of court activity. Furthermore, the politicization of data collection can sometimes lead to the manipulation of methodology and data collected thereby rendering it useless. However the manipulation of statistics is an age old tradition: there are lies, damned lies and there are statistics!

These concerns require that data be read with a pinch of salt. It is also possible that the mechanisms are built into the system in the attempt to ensure more objective, accurate and reliable results. They are trying to create such mechanisms in the Netherlands, Italy, France and Croatia through ICT, as well as through the constant development of criteria for indicators and standards.

The final stage for creating an effective monitoring and evaluation system is in the mechanisms for actions and accountability based on the use of the data collected. This research has shown three main uses of the data. On the one hand, some countries collect data but do nothing with it, as was the case in Croatia for a long time. On the other hand, countries like France, the Netherlands and Italy use monitoring and evaluation data to differing degrees to hold courts to

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26 The Supreme Court of the Republic of Slovenia, Judicial Council and The Ministry of Justice.
account for spending or to allocate resources as well as to make the organization more transparent. Finally, countries like Slovenia use it to mark progress in the judicial organization and to adapt policies accordingly. In particular, a project called Lukenda27 has been started in 2006 with the goal of reducing the courts’ backlogs and increasing efficiency. One of the expected results of the Lukenda project is the adaptation of policies according to the collected data of the courts. Furthermore, the project is trying to develop and introduce (in cooperation with some Dutch experts) a unit-based workload measurement system for the Slovenian courts.

Problems may arise at this stage as to the trustworthiness of the institution using the data, as it may not be the same as the one collecting the data. This may be a problem because of coordination between these institutions and also because of judicial independence issues. It is not the scope of this paper to demarcate the boundaries of judicial independence but, as discussed above, many actors have argued judicial independence to block organizational development.

5. CONCLUSION

Based on these five stages, we can observe a scale by which to assess the development of the countries’ monitoring and evaluation systems. However, in the use of this scale, and indeed during our conceiving of it, we urge caution. This scale is not to be used in a comparative way and if it is used at all, the historical background of the countries must be borne in mind. We observed during our research that the further down the scale the country tries to go, the harder it is to observe results from the monitoring and evaluation system development attempts. For example, bureaucratic data collection is already institutionalized and is usually the foundation of further attempts to adopt monitoring and evaluation systems. All of the countries in our study were in the process of developing norms or having developed norms were in the process of refining them. Definition of norms for creating monitoring and evaluation of court systems is somewhat tricky because of the autonomous nature of the professionals and the institutions being monitored and evaluated. Institution building, like building Rome, is a process that will take more than one day. It is not simply a matter of setting up units and tasking them with the job of monitoring and evaluating courts. It is a matter of training personnel, having a strong normative basis, and building trust within the balance of powers. This is especially sensitive for countries democratizing their public institutions, especially individuals who are being observed by international organizations.

Of course, monitoring and evaluation is not simply an exercise in data collection, but also depends on the type and quality of data collected and the use that is made of this data. This is a very sensitive and problematic issue in all of the countries that have been studied. It is at this point that it becomes harder to observe meaningful results from the adoption processes. We noticed that CEPEJ data had a similar experience. The data that we obtained from CEPEJ and CEPEJ contacts indicate that an adoption process has taken place at normative and institutional stage. There is some indication as to what is formally monitored and evaluated, but not necessarily what is done in practice, how the data is collected and what use is made of it.

Something that should be considered when conducting such research is the apparent lack of mechanisms to assess monitoring and evaluation systems and their development and successes in most countries. The Dutch example provides an exception to this experience in that they are constantly assessing the monitoring and evaluation systems internally at

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27 For further details see http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/zakonodaja/The_Lukanda_Project-v_ANGLESCINI.pdf
the courts and externally at the Council for the Judiciary. The experience in the Netherlands shows that such an assessment is part of an overall incremental process that is needed to develop effective systems. Especially toward the latter stages, standard institution building and normative frameworks are insufficient. Realistic programs of execution should be in place as well as accountability for those programs. This includes taking into account local characteristics, tuning the system to the specific needs and balance issues that characterizes each country.

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Websites
Theme: Judicial Systems, Courts, and ICT

Will E-Justice still be Justice? Principles of a fair electronic trial
By Ronald van den Hoogen

1. Introduction

In the years to come, our Judiciary will change drastically as a result of the possibilities of information technology. Current legal procedure, which is still dominated by paper documents, human activities and written communication, will become increasingly digitized or supported by technical applications. As a result, the administration of justice will become faster, more efficient and more effective. As electronic litigation or E-Justice becomes a reality, there will be many changes. Citizens, companies, lawyers and other legal professionals involved in the judicial process will be able to bring their cases to the court via an Internet portal. Video conferencing, which is already available, will increasingly make it possible to hear witnesses, suspects and legal experts without having to bring them to the courtroom. Courts rulings will be signed, sent and published through the use of electronic signatures, XML and web services. These changes in judicial practice are beginning to occur, not only in the Netherlands, but in the whole of Europe.

Every member state of the European Union is working, to a greater or lesser extent, to digitize their courts systems. These efforts are supported by the European Ministers of Justice. At the informal meeting of the Justice and Home Affairs (JHA) Council in June 2007, a decision was made to promote E-Justice, which it defined as the practice of using information technology to improve international legal data communication. The goal is to make it easier to lodge applications and submit documents relevant to a case in another European country.

The introduction of E-Justice will have a huge impact on the European Judiciary. This article examines a number of legal issues related to the E-Justice movement. First, it discusses how the digitization effort will affect the quality of justice in the European Union. Second, it analyzes how the process of digitization will influence and affect the rights of participants in the judicial process. Finally, the article examines how Europe will formulate 'principles of a fair electronic trial' that will serve as the basis for discussing the advantages and disadvantages of IT to the judicial process. The ultimate question is whether E-Justice will still be Justice.

2. A Fair trial

To be able to assess the impact of digitization on the judicial process and the quality of justice, we must first define the concept of "quality of Justice." While the concept of Quality of Justice can be defined in many different ways, we define the concept by reference to the European Convention on Human Rights (ECHR). That document provides clear quality guidelines and requirements for the Judiciary, and includes a number of different elements.

One element of quality of justice is defined in Article 6 of the ECHR which prescribes that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. In addition, the jurisprudence of the European Court for Human Rights has decreed that the right to access to justice is a fundamental element of the right to a fair trial.

A second element of quality is provided by the principles of access to justice. This principle, which means justice should be accessible and affordable for everyone, is subject to restriction. Courts and states may impose limitations, provided that the limitations do not affect the nature of the access and that they serve a legitimate purpose, and provided that a proper balance is maintained between the legitimate purpose and the restrictions imposed.

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1 Dr. R.H. van den Hoogen is working for the ministry of Justice in the Netherlands. He is a Member of the E-Justice Working Group of the Council of the European Union. The ministry of Justice has no responsibility for this article.
2 http://en.wikipedia.org/wiki/Web_service
6 ECHR, 21 February 1975, case 4451/70, Series A, 18 (Golder/ United Kingdom)
7 ECHR, 28 May 1985, zaak 8225/78, Series A, 93 (Ashingdane/ United Kingdom).
A third element of quality is the right to a public hearing which means that the public has a right to visit and observe courts and hearings. Of course, this right extends to the parties to the proceedings themselves.\(^8\) It also means that court verdicts, as a rule, must be delivered in open court. However, some hearings can be held behind closed doors for reasons of public health, public order or national security, or to protect the interest of minors or the privacy of litigants. The right to a public hearing generally includes the right to a publicly pronounced judgment. However, the European Court for Human Rights has decided that it may be sufficient to render the judgment in a courtroom that is accessible to the public\(^9\) or to send it to the parties directly.\(^10\)

A fourth element of quality is a right to the independent and impartial administration of justice. Independence and impartiality, at a minimum, means that the judge may not be influenced in taking his decision. In addition, it requires consideration the procedures for appointing judges, their term of office, any outside pressure and the impression that is created concerning their independence.\(^11\)

The right to have justice administered within a reasonable period of time means that the legal proceedings should not take too long. In assessing reasonableness, the duration of proceedings preceding the legal action must be taken into account.\(^12\) The European Court of Human Rights imposes on the member states the obligation to set up their legal systems in such a way that courts can handle their cases expeditiously. The Court has developed four criteria for assessing reasonableness: (a) the complexity of the case, (b) the conduct of the parties involved, (c) the interest of the parties involved and (d) the administrative and judicial activity.\(^13\) The complexity of a case may delay the handling of the case, whereas a special interest of one of the parties may require faster handling.\(^14\)

The right to a fair trial has three characteristics: the right to defence, the right to equal arms and the right to a sound reasoning. The right to defence means that the parties to the proceedings must be able to defend themselves against or to respond to an accusation or allegation of the other party. It also includes the right to sufficient time and facilities to prepare a case. Some other elements of the right to defence are described in article 6, paragraph 3: The right to summon witnesses for the prosecution and the defence and experts\(^15\), the right to question witnesses and experts and the right to defend oneself and to be present at the hearing.\(^16\) The right to equal arms implies that both parties must have the same means at their disposal to defend their interests.\(^17\) The right to a sound reasoning involves the requirement that the judgement includes the reasons for the decision.

These rights and the way in which they should be interpreted, will be influenced by developments in information technology, and will need to be the subject of further studies in the years to come. A preliminary analysis is given below. That includes an initial formulation of the principles underlying digital administration of justice and proper electronic administration of justice.

3. Accessible Electronic Administration of Justice

The administration of electronic justice must be accessible. This means, among other things, that it must be easy for litigants to take matters to court. The use of Information and Communication Technology (ICT) creates the potential for reducing legal costs by enabling clients to better access legal information, and do more of their own legal work, thereby reducing the cost of engaging lawyers. Publishing legal information on the Internet can improve public knowledge of the court system, thus making courts more accessible. I will not describe these aspects of access to justice, but will instead focus on other matters more closely related to the quality of the administration of Justice.\(^18\)

Judicial electronic data interchange is closely related to quality. Under the current system, documents must first be filed at the court registry or brought before the court by mail, so that the parties must be well aware of the procedure to be followed. Electronic access may simplify this process by allowing cases to be brought before the court via an Internet portal, for example by using standard forms or by logging in on a shielded website of the judiciary, after which documents

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\(^8\) ECHR, 8 December 1983, zaak 7984/77, Series A, 71 (Pretto e.a./ Italy).

\(^9\) ECHR, 8 December 1983, zaak 7984/77, Series A, 71 (Pretto e.a./ Italy).

\(^10\) ECHR, 8 December 1983, zaak 8273/78, Series A, 71 (Axen/ Germany).

\(^11\) ECHR 28 June, 1984, case 7819/77, 7878/77, Series A, 80 (Campbell & Meldrum/ the Netherlands).

\(^12\) ECHR, 9 December, 1994, case 19005/91, 19006/91, Series A, 304 (Schouten & Meldrum/ Netherland).

\(^13\) ECHR, 28 June 1978, Series A, 27 (König/ Germany).

\(^14\) ECHR, 8 December 1983, case 7984/77, Series A, 71 (Pretto e.a./ Italy).

\(^15\) ECHR, 28 August 1991, case 11170/84, Series A, 211 (Brandstetter/ Austria).

\(^16\) ECHR, 12 February 1985, case 9024/80, Series A, 89 (Colozza/ Italy).

\(^17\) ECHR, 10 February, 1983, case 7299/75, 7496/76, Series A, 59 (Albert & Le Compte/ Belgium).

\(^18\) For a discussion on Access to Justice Technology Principles, see: http://atjweb.org.
may be uploaded. With a limited number of mouse clicks, a lawyer or a litigant may institute an action and send all relevant documents to the court. Thus, access to the courts is greatly improved as courts are open 24 hours a day, 7 days a week. Documents can be submitted free of charge from any location.

The advent of electronic filing processes raises a host of issues. In particular, do litigants have the right to file documents electronically? If so, must litigants institute proceedings electronically, or may they still file paper documents? Of course, a requirement of e-filing can create access problems because not all people are computer literate. In addition, if a court is capable of receiving electronic documents, how does it convey this information to the public? And, for electronic filers, must they provide a street address or will an e-mail or website address suffice?

The Wet elektronisch bestuurlijk verkeer (Administrative Law Electronic Data Traffic Act (ALEDT)) has effect since 1 July 2004. This Act provides rules for electronic data traffic with administrative bodies. A legislative proposal is now being prepared in the Netherlands to apply this Act to electronic data traffic with administrative law courts. Both the ALEDT and new Act are based on the assumption that electronic data traffic will take place on a voluntary basis. In other words, electronic data traffic can only take place if both the court and the litigants are willing and able to communicate electronically. Because of the principle of equality of resources, citizens retain the right to submit documents non-electronically in hard copy form. They will not be forced to work digitally.

But what about professional litigants, such as lawyers, bailiffs and other government bodies like the Public Prosecutions Department or administrative bodies? Can they be expected, or required, to deliver their documents electronically now or in a few years time? Can professional participants in the judicial process - including judges - be obliged to work digitally? In several judgments the Supreme Court of the Netherlands has held that the government, or at least the Public Prosecutions Department, may have an obligation to work digitally. In 1995, the Court held that a suspect cannot be summoned to court ‘without providing notice to a permanent or temporary address’, provided that the street address is known or can reasonably be known to the Public Prosecutions Department. In determining if the address is known or can be known, the Supreme Court has taken into consideration the fact that the Public Prosecutions Department has a data system which contains the names and addresses of all persons detained in penal institutions. With this system, it is easy for the Department to find out if a suspect is being detained, and if so, in which institution. The Public Prosecutions Department failed to check the data base do this in the two cases mentioned and the Supreme Court attached legal consequences to that the failure; invalidation of the summons. There are good reasons why this should not only be an obligation of the Public Prosecutor’s office, but also a general obligation of other government bodies such as the Judiciary.

There is a trend in the Netherlands to require professionals to work digitally. In the Netherlands, entrepreneurs are already required to file their tax returns electronically. Recent legislative proposals seek to force certain categories of litigants to submit applications and notices, as well as to file and send papers and documents electronically. It will not be long before this obligation is extended to the legal profession. Our legal system will inevitably develop towards a more professional use of ICT.

**Principle 1. Equal access: For non-professional parties to proceedings, the non-electronic way must be maintained. Professionals should be obliged to work digitally.**

If the court is digitally accessible, should it remain digitally accessible? This seems to be a logical step resulting from the general notion that the government must be a confidence inspiring and reliable partner to litigants. This requirement has been included in the previously mentioned Administrative Law Electronic Data Traffic Act and the legislative proposal Office of Local Counsel (Abolition) Act.

Under the Act, the Judiciary may not unilaterally terminate an information relation, including information on the Judiciary’s website. That website – rechtspraak.nl – is becoming an increasingly important source of information for lawyers and other professionals. Therefore, it is of paramount importance that attention be given to the quality of the systems used to
store and retrieve this information. Inadequate website information will eventually lead the European Court to conclude that the judicial system is insufficiently accessible. The requirement that ‘information relationships’ entered into by members of the judiciary must be maintained can be regarded as a principle of sound electronic administration of justice.

Principle 2. Continuity: Information relationships entered into by members of the judiciary must be maintained, unless it was made clear beforehand that the relationship will be of a temporary or experimental nature.

If information is published on a website, or if courts are digitally accessible, this does not always improve accessibility. Problems of accessibility can remain for certain categories of litigants who are not computer literate and therefore need paper. A website may also reduce accessibility if the disclosure of information is unclear. There is an information paradox whereby more data does not necessarily provide more information.

In an effort to address these problems, the Ministry of the Interior and Kingdom Relations, recently published so-called web guidelines governing the accessibility of government websites. These guidelines prescribe that government websites must be permanently accessible. In addition, the Guidelines require that websites be “sustainable” in the sense that their content must be based as much as possible on – possibly open – standards for their structure, meaning, representation, storage and access. The applications and systems used must be in line with generally accepted applications. The Guidelines also require “accessibility” relating to the traceability, availability and currency of data and the user-friendliness of applications. The web guidelines indicate that the traceability of information is also important as a principle of sound electronic administration of justice.

Principle 3. Quality of information: electronic information to facilitate the access to the court must be accessible, traceable, clear and up-to-date. Generally accepted technology must be used as much as possible.

The electronic administration of justice must be confidence inspiring in order for the public to assume that accessibility is guaranteed. If digital documents are not completely received, or if there is a risk that outsiders are able to read or change the information, the public will not use the system, accessibility will decrease. The obvious solution for the Judiciary is to link its requirements to the requirements for electronic data exchange between administrative bodies as set in the Administrative Law Electronic Data Traffic Act. That Act emphasizes reliability and confidentiality as well as authenticity (the idea that the data must actually originate from the sender) and integrity – (the data must be complete and not changed by unauthorized persons). The information should also be inaccessible to unauthorized parties. The act prescribes that electronic data traffic must comply with the same requirements as conventional data traffic. Often there are no good reasons for placing demands on electronic data traffic that are out of all proportion to the demands put on conventional traffic. The criteria for securing networks and data sometimes form a barrier to the progress of electronic data traffic, whereas many messages are still sent by mail virtually unhampered by any safety regulations.

Principle 4. Reliability: electronic data traffic must be reliable and confidential. In determining the level of reliability the standards for conventional traffic must serve as a guideline.

4. Public electronic administration of justice

Proper administration of justice is visible administration of justice. The use of ICT can improve the implementation of the right to public access. Court sessions can be followed by ‘webcams’ and broadcast via the Internet, thereby allowing the general public to follow court sessions. From a practical point of view, it will not be possible to equip all courtrooms with webcams. In the case of court cases that draw a lot of public attention, broadcasting the court session via the Internet provides a much better way of implementing the right to public administration of justice. It is true that courtrooms are presently accessible to the general public, but in the Netherlands journalists are usually not allowed to record sessions.

26 H. Franken, Maat en regel (Measure and Measurement) (inaugural lecture Rotterdam), Arnhem: Gouda Quint 1975.
and judges can prohibit journalists from doing their jobs.\textsuperscript{29} The basis for this judicial authority is a matter of some debate. While the law itself simply provides for open court sessions, judges have sometimes limited reporters based on their authority to maintain ‘order in court’.\textsuperscript{30} It was feared that large cameras and strong lights might disturb the judicial process. However, today, journalists can make quality recordings using small, mobile cameras. In other words, judges can no longer rely on the need to maintain “court order” as a justification for cameras in the courtroom. However, judges might rely on another justification, the need to protect privacy, especially in criminal cases. Pursuant to article 6 ECHR, the right to public access to trials must be reconciled with the privacy interests of litigants. Technically it is easy to protect the privacy of suspects and broadcast the session at the same time, for example by incorporating a slight delay and ‘erasing’ personal data digitally. The Yugoslavia Tribunal has been working in this way for years.\textsuperscript{31} Nevertheless, it is safe to assume that the right to public access will eventually be interpreted to require that court sessions actually be public and visible to everyone.

**Principle 5. Freedom of the Press:** journalists must be free to do their job in court, if the privacy of litigants is sufficiently protected. They should also be permitted to use ICT.

The use of ICT may obstruct implementation of the right to public access. The use of digital files or video conferencing might make it more difficult for the public to be present in the courtroom, and actually observe, court proceedings. If judges and lawyers conduct proceedings through computer screens, or through cameras invisible to the public, the principle of public access is not served. But the reverse could also be argued. If the contents of a file are projected on a large screen, or if films can be shown during the court session, court sessions are more accessible and understandable than presently is the case. In that case the right to public access may be served even better. The right to an understandable court session, through the use of also if ICT, may come to be regarded as a right in the public administration of justice.

An important aspect of the right to fair administration of justice is the right to attend one’s own trial. In the Netherlands, courts have held that this requirement is met if video conferencing is used. Video conferencing does not deny suspects access to the judge because suspects and their counsel can exercise all the rights available to them in court and can actively take part in the hearing. Therefore, videoconferencing satisfies the requirement of principle 6 that parties to the proceedings must be able to follow the hearing.

**Principle 6. Public accessibility:** Even if court sessions are partly held digitally, the press, the public at large and the litigants must be able to follow the proceedings closely.

Public access to the administration of justice also requires that court decisions will be pronounced publicly. Although publishing court decisions on the Internet is the best way of informing the public, court decisions are presently only published online in the Netherlands to a limited extent. The Judiciary’s websites publishes only interesting decisions online, and these decisions are selected based on selection criteria created by the Council for the Judiciary. These selection criteria leave room for different interpretation by courts on what must be considered to be interesting for the public. Van Oprijen demonstrated that there are considerable differences between the decisions that courts publish on the Internet portal Rechtspraak.nl.\textsuperscript{32} One could argue that publishing judgments on the Internet is required by the public nature of judicial decisions, and is the modern way of implementing the right of public access to judgments. Practical implementation of the right to access suggests that it may not be desirable to publish large quantities of identical court decisions in standard cases. In addition, in order to protect the privacy of litigants, it will be necessary in some cases to remove certain personal data. This removal could make it more difficult to search for, and locate, and judgments. Nevertheless, in my view the principle that all court decisions must be published online remains a principle of sound electronic administration of justice.

**Principle 7. Online publishing.** All court decisions must be published on the Internet.

5. Independent and impartial electronic administration of justice

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\textsuperscript{29} This is outlined in a so-called press guideline formulated by the judiciary itself. See http://www.rechtspraak.nl/Actualiteiten/Informatie+voor+de+pers/Persrichtlijn.htm


\textsuperscript{31} http://www.un.org/icty/

The administration of justice must be independent and impartial. As a result, the judge should be able to form his opinion independently and should not let himself be influenced unlawfully. The appearance of partiality must also be prevented. Judges are assisted in achieving these tasks by numerous digital information sources. ‘Porta Iuris’ is a judicial information management system that allows judges to consult several judicial databases, as well as the sentencing system ‘Databank Consistente Straftoemeting’ (CST; Database Consistent Determination of Punishment). CST is a system that compares the sentencing in cases relating to similar offences. It may be used by judges as an advisory system when making a judgement. The database includes judgments since 1999 that imposed non-suspended prison sentences of four years or more. CST is the result of experiments and research into computer-aided sentencing at the end of the nineties. Despite these possibilities, the extent to which judges are actually influenced in their judgments is limited. There is no obligation to use any ICT application whatsoever.

The literature suggests that these uses of ICT applications can actually influence judges and judicial decisions. Information systems – like CST - contain numerous standards, interpretations and assumptions, and there is a risk that judges will base their decisions on the assumptions. Of course, it is permissible for judges to rely on systems like CST provided that judges are free to deviate from the system and to provide their own interpretations of facts and rules. At the same time, it is important that the data bases on which judges rely be made public via the Internet. The public has the right to access and analyze the facts and rules on which a judge bases his decision.

**Principle 8. Transparency: Decision programs used by the judge to support his decision must be actively made public by publishing them on the Internet.**

The question whether computers should be allowed to administer justice, has been a frequent topic of discussion. Or, to put it differently: should it be possible to render a judgment without the participation of a judge? Although the notion of computer-rendered decisions is both inconceivable and undesirable to many, the question remains whether principles can be formulated that guarantee the sound administration of justice in this context.

Before answering this question, it should be noted that the notion of computerized judgments is not as futurist as it may seem. In many simple cases, decisions are taken within the present judicature without a judge actually passing judgment. Many decisions are taken by support staff and are only marginally considered by the judge (if at all) who simply provides a signature. Sometimes, support staff uses stamps to affix the judge’s signature. From a practical point of view, computerized administration of justice is only a small step away. Nevertheless, further study will be needed to determine which cases might be handled in a fully computerized manner. Nevertheless, from a judicial point of view, there are no fundamental obstacles to computer-rendered justice.

**Principle 9. Computerized administration of justice: in simple cases there is no fundamental objection to computerized administration of justice.**

6. Electronic administration of justice within a reasonable period of time

Proper administration of justice includes the notion of “effective” administration of justice. Litigants are entitled to an expeditious proceeding, considering the time elapsed in previous proceedings, and ICT can help expedite the resolution of judicial proceedings. If cases can be brought before the court electronically, and documents can be sent and processed digitally, the process of justice will be expedited. Although it is difficult and time consuming to search large files at present, digital files could be consulted with one mouse click, and could be consulted by several people at the same time. As a result, judicial use of ICT permit courts to resolve cases more quickly than is presently possible with paper files. It may take some time, but in a number of years the right to administration of justice within a reasonable period of time will be
based on the periods of time that can be realized by making optimum use of the possibilities offered by ICT. If a court does not wish to use the possibilities of ICT, this could be a reason to assume that the reasonable period of time is violated, if it is plausible that the judgment would have been pronounced sooner if ICT had been used.

**Principle 10. Expeditious handling: cases must be tried expeditiously, taking the possibilities offered by ICT into account.**

The reasonableness of time periods is judged on the basis of the duration of the entire proceedings, including preliminary proceedings. The use of ICT can expedite proceedings substantially by sending documents to the court digitally and by processing them directly into court systems. Of course, the ICT system will require that courts make arrangements with legal partners of the judiciary like lawyers and bailiffs as to how documents are submitted digitally. This could be referred to as chain-computerisation and impact our notions regarding the right to the administration of justice within a reasonable period of time, and will discourage judges from taking postal delivery times into account in determining reasonableness. In due course the judge and his legal partners, especially those in the public sector, will be obliged to communicate and exchange information electronically, and the use of ICT will come to be regarded as a general principle of proper electronic administration of justice. In some five years’ time, citizens involved in legal proceedings will be able to rely on its presence.

**Principle 11. Chain-computerisation: where possible, the information exchange between the judiciary and other legal organizations must take place electronically.**

7. The right to fair electronic treatment

Litigants have the right to fair treatment meaning that both have the right to equal opportunities to defend their interests and to clarify their legal positions. They must also be able to comment on documents in their file, to call witnesses and experts, to react to the opposing party’s arguments, and the time and the facilities to prepare their case and to attend court sessions. Fair treatment also includes the right to sound reasoning. The right to fair treatment especially manifests itself during the trial when it becomes clear whether the parties are treated equally. Fair treatment and equality must also be reflected in the judgment and the grounds stated in support of the judgment. The arguments of both parties must be carefully weighed in the court’s decision and its grounds.

Courts must prevent one party from gaining an advantage over another through the use of ICT, especially when one of the parties is less capable of defending his interests using ICT applications. This subject was discussed in connection with the use of the CST database mentioned above. The system was made available only to the Public Prosecutions Department for some time, and was not generally accessible by the legal profession. Therefore, it was decided in 2005 to give the legal profession access to the database as well. A. Wallace even posed the question whether the right to a fair treatment might even require a judge to limit the use of ICT by one of the parties: “At the end of the day, there may be situations where the court will have to limit the use of technology, in order to ensure that its use does not give one party an advantage over the other.”

The judicial obligation, however, extends beyond the principle of fair treatment. The judge cannot be expected to foster perfect equality between the parties. If one of the parties is not capable of working with ICT applications, the judge or the other party cannot be blamed for this lack of capacity. Situations can arise, however, when the judge or the judiciary has a responsibility to act. If, for example, the Public Prosecutor is given the opportunity to hear witnesses abroad by means of video conferencing, and is capable of managing such a hearing properly, the judge should enable the suspect to participate in the video conferencing process. In some cases, the court may be required to offer the parties support in operating videoconferencing equipment or in establishing videoconferencing setting up the connections.

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44 At the same time it could be argued that certain ICT applications for consulting Internet pages or using e-mail have become so customary nowadays that support offered by the judiciary would be a little far-fetched.
**Principle 12. Equality:** both parties to the proceedings must have equal access to and equal opportunities to use ICT applications.

An opinion often expressed in the literature is that the use of ICT may enable the judge to improve his reasoning for a decision.\(^{45}\) This is based on the assumption that the judge would in fact do this. The relevant question is, however, if the judge should improve his reasoning for the decision. This would be in line with the principle formulated above that professionals may be obliged to work digitally. A judge using a decision supporting system is usually able to specify precisely on which rules he or she has based his or her decision. The next question is: how far should the obligation to provide reasons stretch? Do judges have to consider the hundreds of judgments they may find in a database such as CST? Such questions should be the subject of further investigations.

**Principle 13. Right to attend:** if the use of ICT can improve the justification of decisions, decisions must be better justified.

### 8. Conclusion

Digitization has changed, and will continue to change, the judicial system and judicial processes. It is of paramount importance that courts and commentators begin to understand the possible consequences of electronic processes on judicial quality and the administration of justice. In the present article, thirteen principles of proper electronic administration of justice have been formulated that can be seen as a framework for the electronic administration of justice. If we want to ensure that the electronic administration of justice remains fair, courts and court administrators must adhere to -recognize and adhere to the following thirteen principles and requirements: continuity, equal access, traceability, reliability, freedom of the press, public accessibility, online publication, transparency, computerized administration of justice, expeditious handling, chain management, equality and the right to attend.

Adhere to these principles will have consequences for the judge, who will be required to take them into account in actual court cases, as well as for the parties to proceedings whose rights and obligations may be affected by the possibilities of ICT. Judges will be expected to understand and anticipate these ‘new’ rights, and improve their use technical facilities in preparing and handling cases. In the not-too-distant future, judges will be required to have the capacity to work digitally, and the possibilities of ICT will place higher demands on the administration of justice which will be forced to become better, faster, more careful and safer than is presently the case. These changes and possibilities will affect judges and the quality of judgments and proceedings they can offer.

In the past one sometimes wondered if computers would ever administer justice, but in some years’ time the question will be justified if the judges themselves are still capable of administering justice. I predict that the answer will be: yes, but not without the computer.

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8. Conclusion

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