The Four Courts
Dublin, Ireland
Site of the 2008 IACA Conference Reception
International Journal 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.

Markus Zimmer  
Executive Editor

Philip Langbroek  
Co-Managing Editor

Barry Mahoney  
Co-Managing Editor

Editorial Board IACA Journal

Jeffrey A. Apperson, U.S. District Court, Western District of Kentucky, USA
Marc Dubuisson, International Criminal Court, The Hague, The Netherlands
Luis M. Palma, General Coordinator, National Commission of Judicial Management (Supreme Court of Justice, Argentina)
Marco Fabri, National Research Council, Research Institute on Judicial Systems, Bologna, Italy
Vladimir Freitas, Tribunal Federal de A4a Regiao, Brazil
Medhat Ramadan, Law Faculty, University of Cairo, Egypt
Marcus Reinkensmeyer, Court Administrator, Maricopa County Superior Court in Phoenix, Arizona, USA
Johannes Riedel, president Cologne higher regional court, Germany
Anne Wallace, University of Canberra, Australia
Beth Wiggins, Federal Judicial Center, USA
Fan Mingzhi, Shandong District Court, China
Pim Albers, CEPEJ of the Council of Europe, Strasbourg
Andrew Phelan, Chief Executive & Principal Registrar, High Court of Australia
James E. (Jim) McMillan, Director - Court Technology Laboratory, National Center for State Courts, USA

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.
Greetings from Abu Dhabi to all IACA members and readers of the *International Journal for Court Administration*. This second issue of the Journal reflects a diverse collection of articles relating to various aspects of court management and administration. Readers may be interested in the account by former U.S. District Court Clerk Luther Thomas of his participation with judges and prosecutors in an effort to assess the status of the Iraqi justice system shortly after the invasion. Another article by our good friend and colleague, P.J. Fitzpatrick, the current CEO of the Courts Service of Ireland, explores efforts to restructure the organizational structure and operational framework of the Irish courts. We are grateful to these authors and all others who contributed to this issue. We also are grateful to our Managing Editor, Philip Langbroek, for his tireless efforts to produce this second issue while juggling other responsibilities at the Law Faculty of the University of Utrecht and elsewhere.

Judges, court managers, and court staff in many countries continue to struggle to improve the capacity of their courts to effectively administer justice. In some, the challenges are enormous. I recently returned to Rwanda, a small developing country nestled deeply in the heart of East Africa, to participate in a conference assessing judicial reform progress. There, 60-70% of Rwandans survive at an economic level defined as absolute poverty. The revenues of the Government of Rwanda in 2007 for a population of more than ten million were approximately US$ 700 million. Committed judges, prosecutors, and court managers live on extremely modest salaries and operate their courts with minimal resources. Other travels this year have taken me to Subordinate and Supreme Courts of Singapore where highly automated and well-managed courts serve as a model for other East Asian countries, and to London’s Commercial Court whose reputation in the international business and financial communities is unparalleled.

Political, resource, and other challenges confront court systems even in the most advanced countries. We salute the efforts of our colleagues the world over – from Rwanda to Singapore, from Abu Dhabi to London -- for their committed and ongoing efforts to improve the quality and the effectiveness of how justice is administered while wrestling with such challenges. And we encourage all of you to share with us your articles, comments, and suggestions for this fledgling Journal.
From the Co-Managing Editors
By Philip M. Langbroek and Barry Mahoney

From this issue to the next: Globalization and Court Administration

At the IACA’s Third International Conference in Dublin this past April, participants heard numerous presentations on various aspects of innovative court and case management, technology, caseload analysis, and delay reduction. They also heard from colleagues seeking to establish and maintain effective court systems in countries that either have been or currently are dealing with severe civil turmoil and war. It was an inspiring occasion, and the articles in this new issue reflect the spirit of that conference.

This issue includes articles on justice and court administration under development in Iraq and Russia; New Public Management in Court Administration; and whether there is a role for an ombudsman for court administration. It includes discussions on modern court administration in Ireland and management control in the Federal Supreme Court of Switzerland. The issue includes an article about the use of dialogues as quality management tool in the Swedish courts.

This issue also includes a new feature: Books. From time to time, relevant books are published on court or judicial administration, and the Journal will include selective reviews of them for its readers. Readers who wish to review new books should contact the Managing Editor to discuss preparing a review for the Journal. Submissions should not exceed 3000 words.

Globalization affects the role and function of justice systems as the role of states in economic matters diminishes. This, in turn, has the potential to affect civil jurisprudence on the local and regional levels. International trends provoke the development of international conventions, treaties, and agreements that may trump jurisdictional and other issues in individual states. Human rights concerns in states that pay insufficient attention to violations, in turn, have spawned the creation of international criminal courts that struggle for political recognition of their jurisdiction and prosecutorial authority in a complex global arena. There are significant differences in perspectives concerning international criminal tribunals, and differences in culture, criminal jurisprudence, social and economic hierarchies, and other factors render difficult the effort to establish fully subscribed international agreement on criminal jurisprudence and what constitutes human rights violations.

Globalization spawns more practical functions for court administration such as

- correctly translating into local languages agreements and conventions with international scope and application;
- training judges who are predisposed to local and regional cultural, religious, and legal norms to be sensitive to, aware of, and align their work to the broader international community; and
- providing effective and precision translation services to increasingly diverse and non-local litigants.

These functions and others are critical for achieving the overall objective of fair, effective and expeditious administration of justice—an increasingly complex proposition for court system managers and administrators. And, of course, borrowing organizational designs from elsewhere and implementing them at home (or bringing them abroad) may be a risky business. Judicial councils, for example, may differ vastly in constitutional position, membership, and competencies. Their main purposes and functions may also differ vastly: from guardians of judicial independence to nationwide administrative agencies for the courts. Establishment of such a council may gravely affect the position of judges and the organization of local courts, and it certainly changes the interplay between and among judges, court management, and the ministry of justice or similar body.

Efforts by administrators to integrate international best practices into established legal systems with values and traditions that are inconsistent with those practices can easily lead to tension and political conflict. One of the key challenges for court administration is to develop ways to identify the potential points of tension and develop ways to mitigate the potential conflicts. A primary goal of court administration is to strengthen the capacity of courts—as the primary mechanism for peaceful resolution of disputes—to perform their functions effectively, building on established practices while also drawing upon what is known and being learned about effective practices of court administration.

The next issue will explore some of these issues, and readers are encouraged to submit their ideas for articles that address them and innovative ways of dealing with them.

Philip M. Langbroek
Barry Mahoney
Balancing Territoriality and Functionality; Specialization as a Tool for Reforming Jurisdiction in the Netherlands, France and Germany

By Elaine Mak, Lecturer – Erasmus University Rotterdam, School of Law*

1. Introduction

The question of jurisdiction is at the heart of recent discussions regarding the modernization of European judicial organizations.¹ In some cases, special courts have been created for dealing with specific categories of cases, or particular categories of cases have been concentrated within a single court for the entire legal system. In some instances, reforms focus on reducing the number of courts or on creating a limited number of courts of general competence.

These ways of solving jurisdictional problems involve a departure from the classic organizational standard which was based on territoriality. In former times, the territoriality standard focused first and foremost on the geographical location of the court.² The standard of territoriality further encompassed issues of timeliness, hearing and understanding, comprehensibility, accessibility and visibility of the judiciary towards society.³ The recent reforms, however, shift the focus to an organizational standard that is based on functionality. In order to make the judicial organization compatible with requirements of expertise, the allocation of jurisdiction based on subject matter is held to the light. More and more often, specialization is the tool that is used to ensure that judges have the knowledge and skills required to do their job in a timely and correct manner.⁴

It is against this background that the question arises how far functionality should be pushed in the modernization process. An analysis of recent developments in the Netherlands, France and Germany sheds light on this question. In fact, even though these legal systems share a background in the liberal democratic legal tradition⁵, they have chosen different ways for dealing with questions regarding judicial specialization. The French judicial system is composed of courts holding competence to hear both civil law cases and criminal law cases (the ‘ordre judiciaire’). Administrative law cases are judged by the courts of the ‘ordre administratif’, with the Council of State at the top of the hierarchy.⁶ The Dutch judicial system is based on the French judicial system. However, from the 1980s onwards, important reforms have taken place. The administrative courts were merged with the district courts of general jurisdiction⁷, and now only a single ‘judicial organization’ exists, which deals with decision-making in civil law cases, criminal law cases and administrative law cases. Also, the number of municipal courts was reduced and – at a later stage – these courts were merged with the district courts.⁸ Jurisdiction for judging specific categories of administrative law cases and appeal cases in this field still lies with a number of special courts, which do not form part of the judicial organization.⁹ In Germany, finally, the federal system allows each region (Land) to draw its own judicial map. Therefore, reforms may be carried out in different ways and at different speeds. However, the German judicial organization originates in a tradition of specialization: it is composed of

* This article is based on the author’s doctoral thesis (Rotterdam 2008), ‘De rechtspraak in balans. Een onderzoek naar de rol van klassiek-rechtsstatelijke beginselen en ‘new public management’-beginselen in het kader van de rechterlijke organisatie in Nederland, Frankrijk en Duitsland’ (Wolf Legal Publishers), see in particular Chapter 6. This thesis was written under the supervision of Prof. Dr. Marc Loth (Erasmus University Rotterdam), in an informal cooperation with Prof. Dr. Dr. Otto Pfersmann (Université de Paris I Panthéon-Sorbonne).

¹ P. Albers et al, ‘De territoriale verdeling van rechtsmacht in Nederland’, (2004) 1 Trema 16; J.W.M. Tromp et al (eds), Concentratie en specialisatie van rechtspraak: noodzaak of overbodig? (Kluwer, 2006). The term ‘judicial organisation’ is used in this paper in different meanings: 1) the organising of judges and courts; 2) the way in which judges and courts are organised; 3) a group of persons, i.e. judges, with a certain goal or function, i.e. dispute settlement.

² Albers et al, op cit n 1, p. 16.
⁷ cp Article 43 of the Judiciary Organisation Act (Wet op de rechterlijke organisatie).
⁹ A comprehensive overview regarding the judiciary system in the Netherlands is available at <http://www.rechtspraak.nl/information+in+english>. 
five different branches or Gerichtsbarkeiten, which deal respectively with civil law cases and criminal cases, administrative law cases, labor law cases, social security cases, and financial law cases\textsuperscript{10}, and which reside under different ministries.

A comparison of the three legal systems enables us to shed more light on the question of specialization. In France, important reforms have been implemented to improve the judicial organization\textsuperscript{11} and the judicial map\textsuperscript{12} in particular with regard to specialization. Recent discussions in the Netherlands and in Germany focus on similar issues.\textsuperscript{13}

In this article, we examine the tradeoffs and balances obtained between territoriality and functionality in the Netherlands, France and Germany. Second, by focusing on the interaction between the relevant principles regarding judicial organization, a framework and possible scenarios for answering the balancing question will be developed. Third, the lines of the analysis will be drawn together in some concluding remarks.

2. Specializing Judiciaries: Framing the Balancing Question
The analysis will start by identifying the characteristics of specialization, and then will analyze and scrutinize the dilemmas associated with specialization.

A The characteristics of specialization
After investigating the concept of ‘specialization’, we will turn our attention to its role in the Dutch, French and German judicial systems.

1) The concept of ‘specialization’
With regard to the judicial organization in the Netherlands, the concept of ‘specialization’ has been analyzed by Hol and Loth. They define ‘specialization’ as:

‘(…) a multiform principle and a dynamic practice of professional functioning which are based on a claim regarding a certain command of knowledge and skills, mastered and exercised on a relatively high level, which claim is relative compared to the command of knowledge in the surroundings and which implies a certain organization of work on the basis of a division of labor.’\textsuperscript{14}

Hol and Loth identify three aspects of ‘specialization’ as applied to the judiciary. The aspect of knowledge, first, regards the judiciary’s claim with regard to the object and level of learning and experience available to judge cases. Secondly, the aspect of surroundings highlights the relativity of specialization in the judiciary as regards the level of specialization of one court in comparison with other courts, of courts and judges vis-à-vis other legal professionals, and of specific fields of judicial decision-making vis-à-vis each other. Finally, from an organizational standpoint, ‘specialization’ is a principle for the division of labor. It translates into a distinction of ‘specialisms’ (functions) and ‘specialists’ (persons).\textsuperscript{15}

On the basis of this definition, several forms of specialization can be distinguished.

2) Forms of specialization: concentration, allocation and cooperation
An analysis of the legal systems of the Netherlands, France and Germany shows that a variety of different devices have been used to realize specialization of judicial decision-making, including:

i) concentration of cases, i.e. the mechanism through which one or more courts in specific territories on the basis of legal provisions or through agreements between courts are allocated exclusive competence to deal with certain categories of cases\textsuperscript{16};

ii) allocation of specialized judges to different courts in the state’s territory;

iii) cooperation between courts, e.g. by the transfer of groups of pending cases from one court to another.

These instruments have taken particular relevance in the Dutch legal system. Examples concern the concentrated treatment of cases in the area of business law by the Companies and Business Court\textsuperscript{17}; the use of ‘traveling judges’ for


\textsuperscript{11} Cointat, op cit n 3.


\textsuperscript{13} See infra.


\textsuperscript{15} Hol and Loth, op cit n 14, pp. 490 and 493.

\textsuperscript{16} R.C. Hartendorp, Notitie rechterlijke concentratie (Raad voor de rechtspraak, 2003).
the adjudication of certain types of cases;\(^{18}\) and the joint settlement of fraud cases coming from several districts by the Noordelijke Fraudekamer.\(^{19}\)

In France, an example of specialization through concentration is formed by the exclusive jurisdiction of the tribunal de grande instance in Paris with regard to the handling of terrorism cases.\(^{20}\) Also, France has had much discussion regarding modernization of the existing system of territorial jurisdiction.\(^{21}\) In June 2007, the Minister of Justice, Rachida Dati, installed the Comité consultatif de la carte judiciaire.\(^{22}\) As a guiding principle for the reform of the territorial jurisdiction in France, she mentioned the adaptation to the evolution of the law, among other things by using specialization as a means to deal with the growing complexity of the law.\(^{23}\)

The German judicial organization shows a high level of specialization with regard to subject matter jurisdiction. Within each of the judiciary’s branches, territorial jurisdiction is the starting-point. However, within the boundaries set by the federal Constitution,\(^{24}\) many German courts show an increasing tendency to distribute cases according to the subject matter rather than on the basis of territoriality.\(^{25}\) Furthermore, on the federal level, specialization is visible in the creation of the Bundespatentgericht, which has exclusive competence for the judgment of intellectual property cases.\(^{26}\)

The three legal systems confront us with partly overlapping but also relatively diverse solutions regarding the distribution of judicial competences. Several dilemmas of specialization thus surface.

**B The dilemmas of specialization**

The preceding investigation forms the prelude to an inventory of the reasons for specializing judiciaries. Through a further analysis of this normative framework, insight will be gained into the underlying dilemmas provoked by the tendency towards specialization.

1) Reasons for specializing judiciaries: territoriality versus functionality

The main impetus for specialization is the belief that the concentrated treatment of similar cases will enhance the quality and timeliness of judgments. Expert judges can be appointed to deal with specific categories of (complex) cases, and these judges enhance the level of their expertise by dealing with a constant stream of similar cases.\(^{27}\) Specialization thus is put forward, among other ‘quality enhancing measures’, as a solution for improving the timeliness of judicial decision-making, and the level of expertise required for the adjudication of complex cases.

The benefits of specialization are evident in the recent French reforms. Minister Dati argued, among other things, that the courts need to have a ‘sufficient [level of] activity’ in order to function well. Specialization is carried through in order to guarantee the proper treatment of complex cases and the unity of the law.\(^{28}\) Also, the number of judges per capita and the implantation of courts are adapted in order to remedy the present inequality regarding the accessibility of justice for the citizens.\(^{29}\)

---

\(^{17}\) Regarding the functioning of this court, see M.J. Kroeze, ‘The Companies and Business Court as a specialized court’, (2007) 3 Ondernemingsrecht 86.

\(^{18}\) P.J.N. Schlössels, ‘Concentratie van bestuursrechtspraak. Iets over bundeling van specialistische kennis, territoriale spreiding van rechtspraak en reizende rechters’, in: Tromp et al, op cit n 1, p. 75.

\(^{19}\) Hol and Loth, op cit n 14, p. 497.

\(^{20}\) Article L706-17 of the Code de procédure pénale.


\(^{22}\) The progress of this reform can be followed at http://www.carte-judiciaire.justice.gouv.fr.

\(^{23}\) See http://www.carte-judiciaire.justice.gouv.fr/index.php?rubrique=10353&ssrubrique=10543&article=13392, where three other guiding principles are given regarding related issues.

\(^{24}\) Articles 92 ff of the Grundgesetz.


\(^{26}\) Article 96 Grundgesetz and Article 65 par. 1 Patentgesetz.

\(^{27}\) Hartendorp, op cit n 16, p. 8.

\(^{28}\) Dati, op cit n 12. See also Cointat, op cit n 3, p. 209.

\(^{29}\) Dati, op cit n 12.
On the other hand, some reforms in the three countries have been away from specialization. In France, categories of special courts still exist for example for the judgment of labor law cases (the conseils des prud'hommes) and commercial law cases (the tribunaux de commerce). During the early stages of the reforms of the Dutch judicial system, however, specialization was hampered by the merger of administrative law courts and municipal courts into the district courts. In recent discussions in Germany, it was argued that the smaller branches of the judiciary, i.e. the Gerichtsbarkeiten for labor law cases and for social security cases, should be merged into the bigger branches of the ordentliche Gerichtsbarkeit (civil and criminal law cases) and the Verwaltungsgerichtsbarkeit (administrative law cases).

The main concern when specializing judiciaries, or when reducing the level of specialization, thus seems to be the optimal scale of judicial decision-making. Solutions tend to focus on the 'functional' distribution of jurisdiction, while the aspect of territorial jurisdiction is of less concern. On a more fundamental level, this means a re-arrangement of the balance between two types of principles.

2) A framework for interaction: two types of principles

The developments in the Netherlands, France and Germany reveal a shift in the paradigm for discussion. In other words, the reform movements reflect a change in the coherent set of norms, principles, values, convictions and legal practices which is at the basis of discussions concerning the judicial organization.

Traditionally, discussions regarding judicial organization in western liberal democracies were linked to the framework given by the 'rule of law' as understood in the classic sense. This paradigm suggests that the basis of a legal and legitimate government must include certain fundamental elements: legality of government, separation of powers, protection of rights and freedoms, and a guarantee of judicial review. With regard to the judiciary, the basic elements require judicial independence and impartiality. The distribution of judicial competences has historically been based on the standard of territoriality, which ensures equal access to justice for all. However, this classic paradigm does not suffice to meet the needs of present-day society.

A new way of looking at questions of judicial organization has emerged, which combines the classic 'rule of law' principles with a new set of 'management' principles. The elements of this new set of principles are found in 'new public management' theories, which present a conceptual framework for describing the quality standards involved in the management of public institutions. From the 1990s onwards, these theories have been applied in policymaking and in academic discussions regarding judiciaries. The 'new' principles featured in these theories include standards of transparency, effectiveness and efficiency. Transparency implies openness, communication and accountability: it should be clear when a case can be brought to trial and which judge has jurisdiction to decide it. Effectiveness relates to the question of whether certain measures or constructions enable the realization of a specific goal, e.g. are the court's procedures adequate to enable it to resolve the particular type of conflict? Efficiency, finally, pertains to the appropriateness of specific measures or constructions for the realization of the intended goal: in other words, does the organizational structure of the judiciary allow for a focus on the main task of settling disputes and can this task be completed within a reasonable time?

The current paradigm for discussion incorporates both the classic 'rule of law' principles and 'new public management' principles in the legal framework which underlies the judicial organization. The new management principles have to be weighed against the classic principles when considering solutions for the judicial organization. In some cases, the two types of principles complete and reinforce each other. In other cases, however, they enter into conflict. Increasing the level of specialization in the judiciary might in fact have negative consequences for the protection of the classic values of judicial independence and impartiality. Newly created possibilities to ensure a flexible distribution of cases and judges give rise to the question to which extent should be held on to the classic value of 'territoriality' when it comes to the adaptation of the distribution of jurisdiction to present-day conditions.

31 cp supra.
33 As regards terminology, ‘principles’ here refer to values which give a fundamental basis to society; cf R. Dworkin, Taking Rights Seriously, Duckworth, 1977, p. 22.
35 cf Koopmans, op cit n 5, p. 7.
37 See in more detail Mak, op cit n *, particularly Chapter 1.
A complex balancing question in this way is brought to light. By comparing the Dutch, French and German experiences regarding specialization, an overview can be given of elements to be taken into account when answering this question.

3. Territoriality and Functionality: Striking a Balance
One of the difficulties is how to enhance specialization in the judiciary while at the same time respecting the principles of judicial independence and impartiality. In other words: how is it possible to strike an appropriate balance between territoriality and functionality? In this section, we discuss the benefits and risks of specialization in light of the new paradigm for discussion in the Netherlands, France and Germany. This will set the stage for the sketching of a number of scenarios for further discussion.

A Benefits and risks of specialization
Specialization engenders important benefits for creating an optimally accessible judiciary and an optimally efficient distribution of jurisdiction within a legal system. At the same time, possible risks jeopardize the guarantee of judicial independence and impartiality.

1) Benefits: complementing and reinforcing principles
In the Netherlands, France and Germany, the organization standards of territoriality and functionality are combined in solutions for the distribution of jurisdiction. In a general sense, the mixture of solutions thus expresses the complementing and reinforcing effect of classic ‘rule of law’ principles and ‘new public management’ principles.

A complementing effect of principles is easily stated. The principle of access to justice requires timely decision-making in a geographically nearby court. From the point of view of transparency, effectiveness and efficiency, the level of expertise has been added to the framework for reflection. In the three legal systems under scrutiny, the balancing of territoriality and functionality depends on two factors:

i) the nature of cases: territorial jurisdiction is indicated for decision-making in relatively simple cases, functional jurisdiction allows for specialization and thus better serves decision-making in complex cases;

ii) the occurrence of cases: often occurring types of cases can be dealt with most efficiently through territorial jurisdiction, while cases regarding infrequently occurring legal questions are most optimally dealt with through functional jurisdiction;

When combining these factors, the following forms and levels of territorial distribution and functional specialization of courts emerge:

i) simple and often occurring cases, e.g. general contract disputes and simple criminal cases, are dealt with by general and territorially distributed courts (the courts of first instance);

ii) complex and often occurring cases, e.g. labour law cases and commercial law cases, are dealt with by ‘justices of the peace’ (the Dutch municipal court sections of the district courts), or other specialized but territorially distributed courts (conseils des prud'hommes, Arbeitsgerichte);

iii) simple and sporadically occurring cases, e.g. ‘mass collective actions’ and big criminal law cases (‘megazaken’), are dealt with by a specific court with general jurisdiction;

iv) complex and sporadically occurring cases, e.g. business law cases and intellectual property law cases, are dealt with by a small number of specialized courts (the Companies and Business Court).

A reinforcing effect of these principles is present in measures regarding the promotion of uniform application of the law and regarding the solution of conflicts of competence. These issues concern complications engendered by the choice for specialization. To remedy diverging lines of case law between courts with overlapping functional competences, measures have been implemented which help to promote harmonization. To optimize the assignment of cases to the court best equipped to deal with them, a mechanism for solving conflicts of competences must be invented (e.g. the Tribunal des conflits in the French legal system). In this way, the classic values of the unity of the law, equality before the law and legal security remain in focus. At the same time, specialization can be used to optimize the transparency, effectiveness and efficiency of the judicial organization. As is shown by the Dutch, French and German examples, the choice for a specific solution is highly dependent on the existing institutional arrangements of the judiciary and on the legal culture in which discussion is taking place.\(^{38}\)

Regarding the classic principles of judicial independence and impartiality, the interaction with the new management principles is of a more conflicting nature.

\(^{38}\) cp Mak, op cit n *, in particular Chapter 3.
Concerning the concentration of cases, loss of the appearance of partiality becomes more real in the case of small decisions of special courts. Jurisdiction to a limited number of courts, the possibilities of ‘dialogue’ between courts are restricted and thus the development of the law is slowed down. Furthermore, insufficient means may exist to counterbalance controversial decisions of special courts.

Concerning the concentration of cases, loss of the appearance of partiality becomes more real in the case of small settings for specialized litigation. In the Netherlands, this concern materialized in the Clickfonds cases, which had to do with a fraud affair regarding the stock exchange. The creation of a special criminal chamber with competence to deal with all cases concerned in this affair was perceived as a threat to (the appearance of) judicial impartiality and led to several requests of recusation.

Special courts

The creation of a large number of special courts may cause problems in relation to the ability of courts to guarantee the unity of the law and regarding the development of the law. First, general courts find it more difficult to develop case law concerning specific questions of law which are shifted to the jurisdiction of the special courts. Second, by narrowing jurisdiction to a limited number of courts, the possibilities of ‘dialogue’ between courts are restricted and thus the development of the law is slowed down. Furthermore, insufficient means may exist to counterbalance controversial decisions of special courts.

With regard to the assignment of judges to courts, the shift to a functional approach requires special judicial training with the aim of creating ‘specialists’ judges. Arguably, in this way the judiciary is better able to interact with specialists in its ‘surroundings’ (e.g. the Public Prosecutor’s Service or the bar). However, with the increased use of specialist language, the comprehensibility of judicial decisions might suffer. Also, in a small setting of specialized actors, the risk of conflicts of interest and judicial partiality increases. Specialization can be realized by appointing lay judges in specific types of cases. In the Netherlands, for example, lay judges take part in judicial decision-making in the tenancy tribunals (pachtkamers) and in military cases. In France, the composition of the labor law courts (conseils de prud’hommes) and the commercial law courts (tribunaux de commerce) follows the same standard. However, to the extent that the lay judges do not enjoy the same institutional guarantees as professional judges, a risk exists that they may not have the independence and impartiality of ordinary judges. Last but not least, specialization of judges raises a conflict with regard to the guarantee of the classic standard of ‘immovability’ of judges. In order to ensure that judges will not be subjected to external pressure in their decision-making – in the form of the threat of transfer to a different post – the standard of immovability forbids the changing of a judge’s place of work without the judge’s consent. Recent Dutch reforms

Specialized allocation of cases and judges to courts

A new ‘functional’ distribution of jurisdiction might be realized by reforming the allocation of cases and judges to courts. In the Netherlands, the law was changed in order to enable the transfer of part of the case-load from one court to another court within the legal system. Such transfers benefit the judiciary’s effectiveness and efficiency by helping to ensure the timeliness and quality of judicial decisions. However, the focus on ‘new public management’ principles has repercussions regarding the geographical proximity of justice: times of travel to the courts may increase. More problematically, the transfer of cases between courts implicates a departure from the principle of judgment by the ‘lawful judge’, which requires that the law states the general rules of jurisdiction. Still a fundamental constitutional value in the German and in the French legal systems, the guarantee of this principle is no longer a top priority in all legal systems, as is shown by the reform of the Dutch judiciary.

With regard to the assignment of judges to courts, the shift to a functional approach requires special judicial training with the aim of creating ‘specialists’ judges. Arguably, in this way the judiciary is better able to interact with specialists in its ‘surroundings’ (e.g. the Public Prosecutor’s Service or the bar). However, with the increased use of specialist language, the comprehensibility of judicial decisions might suffer. Also, in a small setting of specialized actors, the risk of conflicts of interest and judicial partiality increases. Specialization can be realized by appointing lay judges in specific types of cases. In the Netherlands, for example, lay judges take part in judicial decision-making in the tenancy tribunals (pachtkamers) and in military cases. In France, the composition of the labor law courts (conseils de prud’hommes) and the commercial law courts (tribunaux de commerce) follows the same standard. However, to the extent that the lay judges do not enjoy the same institutional guarantees as professional judges, a risk exists that they may not have the independence and impartiality of ordinary judges. Last but not least, specialization of judges raises a conflict with regard to the guarantee of the classic standard of ‘immovability’ of judges. In order to ensure that judges will not be subjected to external pressure in their decision-making – in the form of the threat of transfer to a different post – the standard of immovability forbids the changing of a judge’s place of work without the judge’s consent. Recent Dutch reforms

---

39 cp CEELI, op cit n 4.
42 This possibility has been created in the Decree on better use of session capacity (Besluit nevenvestigings- en nevenzittingsplaatsen), (2001) Staatsblad 616.
43 Article 101 par. 1 of the Grundgesetz.
46 cp supra, this paragraph.
regarding the possibility of stationing specific judges in another court than their original place of work\textsuperscript{48}, implies a partial sacrifice of this standard.

The main benefits and risks of specialization have now been mapped. On this basis, let us consider the scenarios for further discussion.

**B Scenarios for further discussion**

Several ways for continuing the modernization processes in the Netherlands, France and Germany are now conceivable. The options fluctuate between three possible scenarios:

1) Pushing the limits: 100% transparency, efficacy and efficiency

A further optimization of the distribution of jurisdiction can be realized by relating specialized knowledge in the judiciary to specialized knowledge in the judiciary’s ‘surroundings’, including the Public Prosecutor’s Service and the bar. The creation of specialized courts at the locations where the Public Prosecutor’s Service has established ‘functional’ units\textsuperscript{49} does not have immediate consequences for the guarantee of judicial independence and impartiality. Nonetheless, these measures would be highly beneficial to the effectiveness and efficiency of the judiciary’s functioning.

In order to enhance the guarantee of judicial expertise, a solution can be found in the geographical division of the preparation and the hearing of cases. The preparation and decision-making of specific cases might be assigned to a single court, and thus enable the growth of judicial expertise. At the same time, the geographical proximity of the court to the citizens is preserved by allowing the hearing of cases at different locations.\textsuperscript{50} Attention should be paid, however, to the requirement of the ‘lawful judge’ as formulated in the classic ‘rule of law’ paradigm. From a ‘new public management’ perspective, moreover, internal incoherencies might surface, as the transparency of the distribution of competences is hampered by the geographical separation of the court’s location and the locations assigned for the hearing of cases.

Taking specialization further would certainly entail benefits for the transparency, effectiveness and efficiency of the judicial organization. However, this improvement comes at a price. Indeed, the quality of judicial decision-making might decline if the ‘deep’ knowledge of specialized judges comes to replace more often the ‘broad’ knowledge of generalist judges.\textsuperscript{51} Also, the physical accessibility of the courts and the development of the law through judicial decision-making might suffer in this scenario.\textsuperscript{52}

2) A return to the basics: re-invigorating the separation of powers, judicial independence and impartiality

The second way of dealing with the problems posed by specialization consists in a denunciation of recent and current reforms.\textsuperscript{53}

A scenario which takes these warnings seriously will emphasize constitutional requirements, like the legislator’s exclusive competence regarding the creation of courts.\textsuperscript{54} Guarantees to prevent the risks related to concentration of cases can be found in the limited mandate of judges, in the requirement of collegial judgment, and in the possibility of bringing an appeal against judicial decisions of special courts. Also, concentration of several special competences in one court can prevent this court from developing a practice which is too one-sided. Furthermore, in order to preserve classic ‘rule of law’ principles a limit has to be set to the possibilities of forum-shopping and judge-shopping.\textsuperscript{55}

However, if is held on too much to the classic principles for judicial organization, too little importance remains for the reality of the ongoing modernization processes which are supported by the society. Choosing this scenario therefore entails a risk as regards the guarantee of the judiciary’s legitimacy in the present-day context, \textit{i.e.} the total of factors

\textsuperscript{48} Articles 40 par. 2 and 58 par. 2 of the Judiciary Organisation Act.

\textsuperscript{49} This reform was proposed in the Netherlands by the former Attorney General Dato Steenhuis, in an interview published in \textit{NRC Handelsblad}, 27 May 2006, p. 33.


\textsuperscript{52} Buruma, \textit{op cit} n 40, p. 16.


\textsuperscript{54} Articles 116 par. 1 of the Dutch Constitution, 34 par. 3 of the French \textit{Constitution} and 92, 95 and 96 of the German \textit{Grundgesetz}.

justifying public trust in the courts.\textsuperscript{56} This brings us to a last possible scenario for the development of the judicial organization.

3) Taking a different perspective: rethinking the legitimacy of the judicial organization

A final way of moving forward in the modernization discussions consists of looking critically at the paradigm for discussion. The current debate requires a choice between optimizing the implementation of 'new public management' principles or the re-invigoration of classic 'rule of law' principles. As this article has shown, differential benefits and risks are involved in the choice of either of these approaches. Underlying this discussion are specific assumptions regarding the judiciary's legitimacy.

In fact, in order to retain (or regain) the public trust in the courts, the functional, institutional and argumentative dimensions of legitimacy need to be ensured.\textsuperscript{57} This comes down to a re-investigation of the courts' role; their organisational structure and the quality of judicial decisions needed to live up to the standards imposed by the present-day society. Different ways then open up for continuing the modernization discussions. Views to be taken into account are those expressed by the different interested actors in the legal system. From an external perspective, the interests of actors in the society are represented in the relation between the judiciary and its neighboring domains.\textsuperscript{58} From an internal perspective, the relations between actors within the judicial organization itself are at stake.\textsuperscript{59}

In a scenario which puts legitimacy first, the differential interests of citizens, judges, and political powers form the basis on which new judicial solutions can be constructed. The discussion then gains both in breadth (maximum participation of different actors) and depth (maximum display of different views). Thus, a third way is available in the search for an optimal distribution of jurisdiction.

4. Conclusion

The reform of jurisdiction on the basis of ‘specialization’ has laid bare a complex balancing question. Choosing for a functional approach means letting go (partly) of the classic organization standard of territoriality. For the discussions in the Netherlands, France and Germany, further studies will have to consider the underlying conflict between classic ‘rule of law’ principles and ‘new public management’ principles. In this light, several scenarios for the discussion present themselves. It seems especially worthwhile to further investigate the guarantee of the judiciary’s legitimacy under the effects of specialization.

\textsuperscript{56} cp Loth, \textit{op cit} n 45.

\textsuperscript{57} Loth, \textit{op cit} n 45, pp. 15-16.

\textsuperscript{58} M.A. Loth and E. Mak, ‘The Judicial Domain in View; figures, trends and perspectives’, 2007 Utrecht Law Review 75, p. 82.

\textsuperscript{59} Loth and Mak, \textit{op cit} n 58, p. 82.
**Internal and External Dialogue: A Method for Quality Court Management**

By Marie B. Hagsgård

**Introduction**

The aim of quality court work is to maintain or improve public trust in the court as a vital part of a democratic society. Public confidence in the judicial system is affected by a number of factors, including speedy and judicially correct decisions which are generally understandable and a good treatment of parties and witnesses before and during court proceedings. In order to uphold and enhance public trust, courts need to work systematically to improve the quality of court functioning.

But questions remain regarding how to institute quality court management, and how to achieve positive results. Although court managers in Sweden have shown an interest in starting systematic quality work, they have found it difficult to find a method for such work and systematically achieving results. Some of the difficulties managing quality work in courts have to do with the fact that courts are highly professional organizations with independent judges fulfilling the main tasks of the court. Judges are reluctant to believe that court managers are more knowledgeable regarding how to produce high quality court work. Moreover, managers (who are usually judges themselves) are often unwilling to tell their colleagues what to do to improve court functioning. In addition both managers of courts and judges are often skeptical regarding the ability of consultants to give advice on how to improve court functioning.

One way to overcome those difficulties is through internal and external dialogue designed to improve the functioning of a court. This method has been used in the Court of Appeal of Western Sweden since 2003, and is now used (to a larger or smaller extent) in six other Swedish courts, Court of Appeal of Skåne and Blekinge, Administrative Court of Appeal of Stockholm, District Court of Hässleholm, District Court of Borås, District Court of Vänersborg and District Court of Göteborg.

By involving all judges and other court staff in an internal dialogue with the court manager about how to improve court functioning, and then applying a number of the suggested measures, several court improvements have been achieved. When the dialogue has been widened further to include external interested parties such as prosecutors, defense counsel and the users of the court (e.g., the parties and witnesses) further changes have been suggested and more improvements made.

The method can be described in short as follows:

First an internal dialogue, including all judges and other staff, is initiated to take advantage of the experience and professional knowledge the staff concerning the functioning of the court. The aim of the dialogue is for the staff to give their view of what changes are the most urgent to make and what measures to take to improve the functioning of the court. The suggestions from the staff are followed by a clear decision from the court manager with reasons for his/her decision. The measures are enforced and later evaluated in a broad dialogue with the staff were they give their opinion of the result of the implemented measures and suggestions for adjustments.

Secondly the dialogue is widened to get an external view of the functioning of the court. Within the external dialogue lawyers and prosecutors and users of the court give their suggestions for improvements in the functioning of the court. The external suggestions are discussed internally by all staff who on the basis of external views, suggest further measures to the manager in order to improve the court functioning. The court manager makes a decision and communicates externally the measures taken as a result of the external dialogue. When the measures are evaluated prosecutors, lawyers and users are invited again to give their view of the result of implemented measures and to give suggestions for further improvements.

---

1. **Organizational developer and associate judge of Appeal at the Court of Appeal of Western Sweden**
2. All court managers in Sweden decided in 2004 at their annual meeting that there was a need to start systematic quality work in all courts of Sweden. A quality group, with judges and other staff, was given the task to suggest methods and a strategy for quality management in courts. In 2005 the quality group gave their recommendations in the handbook “To work with quality in courts” 19 pages (Att arbeta med Kvalitet i Domstolsväsendet), only available in Swedish. Court managers have since then chosen different ways of working with quality in their own courts.
In the following section, the different steps of the method will be explained by giving examples of how it has been implemented mainly in the Court of Appeal of Western Sweden, but also to a large or lesser extent in other courts. The reason for focusing on the Court of Appeal of Western Sweden is that the method described here has been used there since 2003, while it has been used for a shorter period in the other courts (beginning in the period from 2006-2007). At the end of sections a comment is made on the method.

**Start With Internal Dialogue**

*Dialogue Involving All Judges and Other Staff*

At the Court of Appeal of Western Sweden, the quality work started in 2003 with an internal dialogue within the court about the functioning of the court. The Court of Appeal of Western Sweden has 110 employees (36 judges) and was, at the time, organized into five departments with one of those departments allocated to administrative support. Each year the court passes sentences in approximately 4000 cases (criminal cases, civil cases and other). Almost all criminal cases are decided after court hearings.

The internal dialogue began with interviews of 65 (a little more than half) of the employees. The president (the manager of the court) requested the interviews in an effort to improve the court by involving all staff (judges and administrative personnel), taking advantage of the experience of the staff in finding the court’s strengths and weaknesses, and regarding how to improve it.

The interviews focused on a range of issues that could affect court functioning such as the efficiency of existing routines and practices, opinions regarding court leadership, the extent of cooperation within the different departments (and between them), and introduction and education of junior judges and other staff.

The interviews where conducted by one of the junior judges (myself) who had been briefly trained in the technique of interviewing. Each interview took about an hour and a half. The result of the interviews was positive, and resulted in a wide range of proposals for goals for improvement as well as ideas for practical measures for how to reach those goals.

The internal dialogue was extended when the results of the interviews were presented to the president and the staff. The result, including an assessment of the weaknesses of the court and the proposals for improvements, were then discussed by all judges and other staff in groups of 5-8 people and then in groups of 20-25 people (one for each department). The aim of these discussions was to produce recommendations for the president regarding areas of emphasis, and measures to reach goals set up in these areas, that could improve the functioning of the court. The discussions were led by the interviewer who was able to weave in information from the interviews into the discussions.
The staff made a number of recommendations regarding how to improve the quality of the court’s work such as measures to achieve better cooperation within and between the different departments of the courts, better routines for handling cases efficiently, further education for employees in certain subjects related to the work of the court etc. The interest shown in the group discussions was larger than expected.

Comment on the Method
The internal dialogue can either start with individual staff interviews or with group discussions involving all staff. If the dialogue focuses on individual staff interviews, it is important to interview at least half the staff to obtain significant staff involvement in the improvement process. It is important to announce the result of the interviews to all staff and then involve those who have not been interviewed in the following discussions about how to improve the court’s functioning.

Interviews with the judges and other employees at the Court of Appeal of Western Sweden revealed that they were very much aware of the importance of the role of the court in society, were proud to be participants in the process, and thus were willing to contribute to improvement of the practical work and functioning of the court. One judge stated it thus during the interview; “It is very important that we discuss quality; for example the way we write our sentences. It is important to write in a clear and simple way so that the public as far as possible can follow our reasoning. It is important to have the effect of our sentences in mind. We have a lot of power. We change people’s lives”.

By asking the professional judges how to improve the court’s functioning, the process invested them in the process. The judges seemed to feel that their professional know-how was being acknowledged, and that they were being trusted with the responsibility of advising management regarding how to improve the functioning of the court. Comments such as “I have worked here for 20 years and nobody has ever asked me what I think needs to be done to improve the functioning of the court” were common.

Another conclusion that derived impression from the interviews involved the need to interview staff individually and anonymously. Otherwise, it was not possible to obtain their honest opinions regarding the strengths and weaknesses of the court’s functioning. The need for individuality and anonymity has proved true for all courts which have used the method of individual interviews. As neither judges nor other staff are used to stating their views regarding the present state of the court’s functioning, or their ideas regarding how to improve it, it was necessary to allow judges and staff to give their opinions in private to the interviewer without fear of being criticized by colleagues or managers for these views. In the initial interviews, even those conducted individually and anonymously, some interviewees of the interviewed persons were hesitant to state their opinions. Nevertheless, not a single interviewee failed to share some ideas regarding of problems that needed to be addressed and possible solutions for improving the court’s functioning.

Experiences from other courts have shown the same thing. Involving all staff in an internal dialogue regarding what hinders the court to function well and in giving suggestions for how to solve the problems deeply engages judges as well as other staff.

By interviewing the staff individually, judges as well as other employees, begin to take an interest in working systematically with the quality work of the court. At the same time, the court manager obtains a true picture from the staff of what really hinders the court to function well and a range of good suggestions for what areas to begin to work with, and how to do it, in order to improve the court’s functioning.

Two courts have skipped the interviews process and began with group discussions. Although elimination of the interviews speeds up the initial procedure, experience shows that the interview process helps the staff gain a deeper commitment to the reform process. By interviewing the staff individually before group process begins, the later discussions produce better results and more suggestions for improvements than if people are put in group discussions straight away.

The deepest commitment to change seems to have occurred in the District Court of Vänersborg which took the internal dialogue one step further. In that court, staff interviews were conducted by five staff members; two judges, one trainee and two members of the administrative staff. The five staff members were initially interviewed by a consultant before they interviewed other court staff (six people each).

The five interviewers became deeply committed to change by first reflecting on the need for changes during their own interviews and then listening to the views of their colleagues. The focus on change was strengthened when the five interviewers agreed among themselves on how to prioritize the need for improvement in specific areas based on what they learned from the interviews. This prioritization was then presented to the court manager. Later when a plan for change was decided by the manager—largely in accordance with the recommendations given to him by the interviewers - the interviewers were committed to implementing changes in the daily work of the court.
Choose and Apply Measures

The internal dialogue process usually results in a large number of proposed measures, sometimes in a wide range of different areas. The deeper the dialogue, the larger is the amount of measures proposed.

When the end product of the internal dialogue is presented to the court manager, he or she must choose and prioritize among the various areas identified and decide which measures to implement. There are different ways to address this problem. The Court of Appeal of Western Sweden the president decided to implement as many of the proposed measures as possible in order to encourage further staff suggestions for court improvement. The measures were listed in the court’s action plan to be implemented during the next year, 2004. The plan was placed on the courts intranet and implemented measures were marked off the list. At the same time as the action plan was implemented, the president decided that the measures should be evaluated at the end of the year.

The process in the Court of Appeal of Western Sweden resulted in a number of changes. For example, the preparation of cases was delegated to court secretaries. The secretaries received special education and training in the work of preparation of cases, routines for handling these tasks were set up and a judge responsible for answering questions from secretaries was appointed in each department. Another example of change involved regular weekly staff meetings within each department to discuss problems encountered in the work during the prior week and develop plans for the work of the coming week. Other examples of change involved introductory sessions for new judges at the court, systematic feed-back from older judges to judges in training, and written examples of sentences in criminal cases for new judges to examine.

Comment on the Method

As mentioned above, both court managers and judges can be skeptical to the court manager making decisions about the functioning of the court on his or her own. In addition both court managers and judges are often skeptical regarding the advice of consultants on issues related to improving court functioning. By starting change with an internal dialogue involving all judges and other staff, these obstacles to change are avoided. The proposals put before the manager come from their colleges and other members of the staff and are built on their professional know-how. This makes it much easier for the court manager to make a decision on what measures to implement and apply.

But how do you as a court manager choose between the various suggestions for changed developed during the internal dialogue? One way of facilitating the decision is to ask the staff, judges and others, to suggest how to prioritize the suggestions for change, and help decide where to start. The court manager can also seek advice from the individuals who conducted the staff interviews. The interviewer has usually formed an opinion of what the staff thinks is the most important areas or measures. If the manager would choose to follow the recommendations of the staff the interest the staff has in these areas will help improving the work of the court. Should the manager choose not to follow the advice of the staff it is very important to state the reasons for choosing another way in order for the staff to be sure that their opinion has been heard before the decision was made.

Experience from several courts where the method has been used shows that it is important for the court manager to take decisions regarding the staffs suggested improvements as soon as possible and to communicate these decisions in a clear way. If decisions take time or are unclear the staff will be less willing to contribute with their suggestions when asked the next time.

Measure Results

It is of crucial importance for the court manager to do follow up regarding agreed-upon implementation measures and to measure the results of the implementation. It is equally important to show the results of measures taken to all staff so that they retain in engaging in an internal dialogue on improvement.

It can be difficult though to measure whether changes actually improve the quality of courts. One way of measuring results is through a self assessment that involves judges and other staff in a dialogue; did these measures lead to better court functioning, and achieve their desired results? By involving all staff in a dialogue about the results, the court manager can take advantage of the staff’s professional experience with the measures implemented.

After the first year’s quality measures were implemented at the Court of Appeal of Western Sweden, all judges and other staff took part in an evaluation of the measures at the end of 2004. The discussion led to proposals for further quality improvements/measures to be implemented the following year. The evaluation was carried out in small groups of 5-8 employees who gave their view of the results of the actions taken.
The evaluation suggested that the process worked most effectively when staff met on a weekly basis at the department level to discuss the work of the department. As judges and other staff met and learned more about each others work, they came up with new ideas regarding how to conduct the work more efficiently. An additional advantage was that employees got to know each other better. By delegating certain routine tasks to secretaries, the court was able to save judges an hour to an hour-and-a-half of time per week, and most secretaries appreciated to be able to do these tasks on their own without having to consult judges. The attempt to have older judges provide systematic feedback to younger judges was not regarded as successful. Older judges found it difficult to give specific and constructive feedback.

Two other measures of quality improvements were used at the Court of Appeal of Western Sweden. Swedish courts measure turn around times for cases as well as job satisfaction rates for court staff. In spite of the time invested in interviews and group discussions, the Court of Appeal of Western Sweden actually decided more cases during the first year of quality work than during the year before. In spite of a small increase in incoming cases, the Court of Appeal reduced its case balance by 100 cases from 2003 to 2004. An even clearer improvement in the functioning of the Court of Appeal of Western Sweden was seen in the job satisfaction rates of judges and other staff. After the first year of internal dialogue the staff’s sense that it could influence the work of the court, was twice as high as before the dialogue started. This is an important indicator of job satisfaction, but it also shows to what extent the court takes the experiences and ideas of judges and other staff into account when deciding on improvements in the functioning of the court.

When the internal dialogue has started within the court, it is time to extend the dialogue to interested parties. One may ask why not begin with the external dialogue, in order to hear the opinion of the “customer,” rather than with the internal dialogue. The experience at the Court of Appeal (and later at other courts) is that it is important to start with an internal dialogue in order to give professionals (judges and other staff) time to reflect on the quality of the work of the court and time to think about possible improvements before listening to the view of others. If they have had a chance to reflect on different possible changes, professionals are more open to external ideas when they come.

Several courts in Sweden have begun the process with external dialogue with lawyers and prosecutors regarding court functioning. After the external dialogue, many courts seem to have encountered difficulties in deciding what quality measures to implement and in convincing the judges of the necessity of taking those measures. On the other hand, when the process begins with an internal dialogue that broadly includes all judges and staff, court staff are more likely to be interested and engaged in the external dialogue and in implementing measures suggested by the interested parties.

In the Court of Appeal of Western Sweden, the external dialogue began following a year of internal dialogue. Indeed, the external dialogue was prompted by staff who suggested the president to extend the dialogue to prosecutors and lawyers. The internal dialogue had created an interest among judges and other staff in hearing the views of external interested parties of the court.

Thus prosecutors, defense lawyers and lawyers of civil law were invited to a dialogue between the staff and themselves about the functioning of the Court of Appeal. Open ended questions were asked such as what is working well in the criminal and civil processes at the Court of Appeal and what needs improvement. Five staff representatives listened to the external views and suggestions.

**Discuss Internally, Choose and Apply Measures**

After the meeting, all judges and other staff of the court were informed of the result of the external dialogue. Working groups of judges and other staff were formed to discuss the views of lawyers and prosecutors with the aim of proposing measures to improve the functioning of the court in the areas pointed out by the interested parties.

At a meeting of court staff, the working groups presented their proposals. The president then gave the staff an opportunity to give their view of what areas and measures they thought the most urgent.

After the meeting, the president made initial decisions regarding areas to improve and measures to be taken and implemented to improve the quality of the court’s work. Again decisions were made in large accordance with the recommendations of the staff. Lawyers and prosecutors were informed of the President’s decision and the proposals for change were presented on the court’s website.

One suggestion focused on ways for the court to improve its handling of civil cases. Lawyers expressed the opinion that civil litigation took too long and that the processes for handling these cases could be improved. The lawyers also gave practical suggestions for how to achieve that objective. A group of judges from all five departments of the court discussed the lawyers’ suggestions and agreed on routines and practices that could be used to speed up the handling of civil cases. These routines were proposed to the president who decided that they should be implemented in all five departments of
the court. Other examples of measures taken to improve court quality was to provide better switchboard service and better information and treatment of people called to court (especially people afraid of serving as witnesses).

**Measure Results**

At the end of the second year, prosecutors and lawyers were invited to provide feedback on whether the functioning of the court had improved by the measures implemented that year. Representatives of judges and other court staff were present also at this meeting.

The feedback from prosecutors and lawyers was very positive. They could see improvements in court functioning and suggested that the dialogue between them and the court was very valuable and might improve court functioning, and help the court better serve the interest of the parties and the public. At the meeting, prosecutors and lawyers also came up with suggestions for further improvements.

The feedback from prosecutors and lawyers was forwarded to all staff and to the president. On the basis of this feedback and the discussion that followed, as well as a self assessment (see 1.3 above), further improvements were made in the handling of civil and criminal cases.

**External Dialogue with Users of the Court**

For the court to function well and to maintain the confidence of the public, it is important for the court to obtain not only lawyers’ but also non-professional users view of the court system.

In the Court of Appeal of Western Sweden it is mainly the administrative staff of the court who dialogue with parties and witnesses through phones or court visits. The administrative staff encouraged a dialogue with them on the theory that how parties and witnesses are treated by judges and other staff, and whether they think that they are given a fair trial or not, are important. The administrative staff also encouraged inquiries regarding whether the public believed that they had received enough information before coming to court proceedings.

After a discussion at which all administrative staff and judges were invited to give their opinions, the president decided that defendants, plaintiffs and witnesses in criminal cases should be interviewed regarding their perceptions of the treatment and service given to them by the court before and during the trial. This information was obtained through interviews rather than questionnaires because experience had shown that the response rate for questionnaires was very low (especially for defendants).

To a great extent, those involved in courtroom proceedings agreed to be interviewed before sentence was passed. The interviews were held by two court employees (one administrative staff member and one judge), which gave the court direct insight into the perceptions of defendants, plaintiffs and witnesses. This would not have been possible if an external interviewer had been chosen to do the interviews. The direct insights were presented to all staff by and very useful and important in helping the court improve its functioning. When interviews are held with the help of employees of the court it is important to take into account that some people will have a tendency to give more positive answers “to make a good impression”. The experience at the court of appeal was in spite of this that a lot of critical points were made during the interviews that later helped in the work of improving how people are treated and informed in the courtroom and before court proceedings.

During a period of two weeks, 67 people were interviewed. The method used was qualitative (as opposed to quantitative). The aim was thus to get as many views as possible from users regarding the service and treatment they received at court. The interviews revealed that witnesses and plaintiffs at large needed more information about the court hearing in order to effectively prepare. By contrast, defendants were very aware of and sensitive to their interactions with the judge during the court hearing.

The results of the interviews were reported back to the judges and other court staff. The staff was then invited to take part in working groups to discuss and give suggestions for improvements based on the information received.

**Discuss, Choose and Apply Measures**

The suggestions from the working groups served as the basis for the President’s decision to adopt measures designed to improve the court’s ability to provide information in a timely manner, and to a better treatment of witnesses and plaintiffs (who had expressed fear about coming to court proceedings). Measures were also taken to make judges aware of the importance of providing sufficient information to the parties during court proceedings.
Examples of measures which have been implemented to provide users better information include:

- The production of a paper to be sent to court participants along with the call to come to trial. The paper included answers to frequently asked questions. For example, the paper answers questions about how to get to the Court of Appeal (a map shows the location of the court and directions on how to get there), explanations of why an individual might be required to come to court, and a direct telephone number for witnesses to call if they are afraid to testify and want special care or protection by court staff.

- The production of an information leaflet designed to explain to participants what happens during both civil and criminal court proceedings. These leaflets were distributed to lawyers and prosecutors to be distributed to defendants, plaintiffs and witnesses before trial, and were also handed out in the waiting room of the court.

- Photographs outside court rooms showing the interior of the court room so that parties and witnesses could orient themselves and understand where they and others are going to sit during the trial.

- Signs in front of judges, laymen and secretaries of the court in the courtroom, indicating the identity of court personnel.

- The distribution of better information, more quickly, to people waiting outside of courtrooms regarding delays in court proceedings.

- To improve the treatment of parties and witnesses, discussions were held among judges on how to treat people during court proceedings.

- Other employees discussed how to treat and give service to individuals arriving at court or calling before court proceedings.

**Measure Results**

The results of the implemented measures will be checked by a new round of interviews with plaintiffs, defendants and witnesses at the end of 2008. However, already the feedback from prosecutors and defense lawyers on the implemented measures has been very positive.

**Comment on the Method of External Dialogue**

The method chosen for assessing the views of interested parties resembles the method used to assess staff. Rather than sending questioners to prosecutors, lawyers, and users, court staff engaged in dialogue with interested parties.

The advantages of this method were many. First the staff of the court was able to obtain the views of lawyers, prosecutors and users face-to-face which helped them obtain deeper and longer lasting impressions than could have been obtained simply by reading. Second further questions could be asked by the staff if they felt that they needed more information on certain issues. Last the interested parties could see that the court staff was interested in their views because court staff took time to listen to them in interviews.

Following the example of the Court of Appeal, but taking it one step further, interviews were held at the district court of Gothenburg by two judges and two members of the administrative staff during three weeks in 2007. Four staff members interviewed 190 users of the court about their views regarding how they were treated before and during court proceedings. A report was written detailing the results of the interviews. An even more important result of the interviews was that the court staff gained the benefit of listening to court users face to face. The staff came with many ideas regarding how to better treat court users in the future.

**Why Internal And External Dialogue Should Be Used As A Method For Quality Management In Courts**

*Why should the method of internal and external dialogue be chosen rather than some other method for improving quality?*  According to our experience, internal and external dialogue was a critical factor in improving the functioning of courts. The reason is mainly that judges as well as court managers see themselves primarily as independent professionals. In order to make quality management in courts successful, so that it leads to improvements in the functioning of the court, the process must take advantage of the professional experiences of judges and their interest in delivering the highest quality possible in their work. If the goal is to achieve a better functioning of a court, it is therefore crucial to involve all judges in a...
dialogue about the quality and the functioning of the court. It is also important that judges reach an agreement to develop and improve the practices and routines of the court. If the process involves not only judges, but also other court staff and interested parties in a dialogue regarding needed improvements, and methods for bringing about those improvements, the process can then take advantage of the experience of all parties in deciding what to do and how to do it. This leads to even bigger improvements.

The method of internal and external dialogue may seem time consuming. Involving judges and other staff, not only in defining the problems and in suggesting solutions, but also in giving advice to the court manager regarding measures that could be taken to improve the functioning of the court, takes time. Do we really have that time?

The answer to that is yes. By taking that time, the court gathers and takes advantage of the professional knowledge of judges and other staff before deciding on the areas and measures a court needs to improve its functioning. At the same time, judges and other staff, by being involved in improving the quality of the court’s work from the very beginning, become engaged in the process and become eager to follow up and measure the result of the efforts. Thus the time spent by court officials in internal and external dialogue regarding how to improve court functioning, is regarded as well spent once the court sees the results of the implementation effort.

The result of the improvement efforts at the Court of Appeal of Western Sweden shows that internal and external dialogue is a good method for improving court functioning. Since the process began in the civil area, the time required to handle and pass has been reduced. The Court of Appeal has now taken the lead among the six courts of appeals in Sweden when it comes to short turnaround time for civil cases (sentences are passed within 7 months in 75 % of the civil cases). In addition, the court has seen an improvement in job satisfaction during the years following the improvements of 2004. The high measure of job satisfaction has continued in subsequent years.

The quality improvement process of the Court of Appeal of Western Sweden has been reviewed by two students at the University of Gothenburg. During the spring of 2007 they wrote a paper for their master’s degree on systematic quality work of the Court of Appeal of Western Sweden. They concluded that, although the staff of the Court of Appeal of Western Sweden had always been aware of the importance of improving the quality of the court’s work, the court’s functioning had improved in several aspects. One of these aspects was that the concept of quality among the staff of the court (both judges and other staff) had been broadened to embrace new areas of quality such as information and good treatment of court users.

Nine members of the staff were interviewed about the accomplishments of the reform process. One of the interviewed staff responded “The view of prosecutors and lawyers on how judges treat people in court was never to listen before. The work environment in the Court of Appeal has changed. We talk to each other in a totally different way and show each other more respect. But the big thing is how we who work in the court see our place in society. That people who come here should not be looked down upon but are entitled to a good and respectful treatment, no matter who you are”.

Further the evaluation showed that the work of improving the court’s functioning was seen by the staff as a mutual responsibility for all members of the staff. Court users were seen by the staff as one of the targets of the court’s quality improvements. According to the paper, many concrete measures were taken to improve the functioning of the court such as clearer signs showing users where to go, better waiting room facilities, and providing better information to users about court proceedings.

The feedback from interested parties on the results of the systematic quality work of the Court of Appeal of Western Sweden has continued to be very positive. Lawyers and prosecutors have been asked on a yearly basis to give their views regarding the reform process at the Court of Appeal. Organizations for victims of crime and probation authorities have also been invited to give feedback on the improvements. All interested parties have stressed the importance of dialogue and of seeing that their suggestions regarding how to improve the handling civil cases and the information and treatment of defendants and victims of crime, have been implemented in the Court of Appeal. Lawyers of civil law have been very positive about the new way the Court of Appeal handle civil cases.

Last but not least, an indicator of the success of the method of internal and external dialogue is that four district courts and two courts of appeal have started quality improvements based on similar methods involving all judges and other court staff as well as interested parties outside the court in a dialogue of how to improve the courts’ functioning.

The other six courts which have used internal and external dialogue methods to improve the functioning of their courts have not applied the method as long as the Court of Appeal of Western Sweden. In spite of the shorter period, they have seen considerable positive results. In a year’s time, the turn around times for cases has decreased considerably at the
same time that the number of cases waiting to be decided has sunk, by approximately 230 cases in the district court of Vänersborg and by 200 cases in the district court of Borås. All courts report better satisfaction by their staffs as a result of being consulted on how to improve the functioning of the courts. Those courts who have implemented suggested measures from judges and staff also report a much bigger flow of ideas for improvements from the staff as well as improved job satisfaction “we used to feel that we couldn’t influence anything, but now that we have seen that we can do so, we seem to have a never ending flow of ideas of how to improve things” is one of many positive comments.

Finland, Denmark and the Netherlands also have good experiences with dialogue between judges and interested parties as a method of improving the functioning of the courts.

In Finland, in the Rovaniemi Court of Appeal Jurisdiction, all judges in the district courts and the Court of Appeal meet every year to discuss and decide themes for improving the quality of the courts for the following year. After deciding on the themes, the judges then form working groups with, lawyers and prosecutors and sometimes police to work out a proposal for better routines and practices. The proposals are discussed by all judges at the end of the year and then implemented as recommendations for all judges to follow. The work of the Rovaniemi Court of Appeal Jurisdiction won the Chrystal Scales of Justice Award of the European Union in 2005.

In Denmark, judges in the Copenhagen area have agreed to work together to improve written sentences as well as the treatment of court users during proceedings. Judges read each others’ sentences and watched each others’ treatment of the parties and witnesses during court proceedings. They then entered into a dialogue with each other on how to improve their work.

In the Netherlands, systematic efforts to improve the quality work is presently managed in all courts of the country. That work was initiated by a several years long period of internal dialogue among judges which results in an agreement on 13 areas where improvements were needed in order to achieve a better functioning of the courts. Within these 13 areas, projects were started, where judges took part in suggesting measures to improve the functioning of the Dutch courts.

Outside the courts, the method of broad dialogue within an organization between staff and management, with an eye towards improving the quality of the work of the organization has also been proved successful. Professors Flemming Norrgren¹ at the University of Chalmers in Sweden and Professor Michael Beer² of the Harvard School of Economics have shown involving staff in a broad dialogue of what needs to be improved – a bottom-up approach - leads to greater improvements in the functioning of an organization than a traditional top-down approach.

Establishing Justice In Iraq: A Journey Into The Cradle Of Civilization

By Luther D. “Dan” Thomas

Introduction

In the spring of 2003, a multi-national coalition led by the United States invaded Iraq, beginning a conflict that has lasted for over five years. The principal asserted reasons for the invasion were to disarm Iraq of alleged weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free Iraqis from Saddam’s dictatorial reign. A major component of the coalition’s multi-faceted offensive was to restore some semblance of order after removing Hussein from power. To this end, officials at the State Department and Department of Defense recommended that a team of experienced American judicial professionals conduct an assessment of Iraq’s judicial infrastructure once hostilities ceased. As the final major military skirmishes came to an end, the Department of Justice selected a team of thirteen American judges, prosecutors, public defenders and a court administrator to travel to Iraq to make an initial assessment of the Iraqi judicial system over the next two months.  

The team arrived in Baghdad in mid-April after taking the same route that coalition forces took just weeks earlier: a trans-Atlantic flight to Kuwait followed by a 450-mile trek through the Iraqi desert. This article describes the work of the assessment team during May and June 2003, as initial steps were taken to bring a meaningful Rule of Law to Iraq.

Immediately before the assessment team’s arrival, the military’s civil affairs units and judge advocate general officers first on the scene undertook to determine the precise state of the Iraqi legal system and to restart and reform the system. However, these efforts were plagued with many problems that made communication impossible between these units and officials of the central coalition authorities in Baghdad.

Chief among these problems was that a developing insurgency continued to extend the chaotic situation despite the end of major combat in Baghdad. The military conquest of Iraq by the coalition and the ouster of Hussein’s regime created a dangerous vacuum in law enforcement authority. Hussein’s prewar release of thousands of violent and unstable criminals from Iraqi jails and prisons, followed by the coalition’s dismantling of the Iraqi military and security apparatus, complicated efforts to restore law and order. American tanks and armored personnel carriers were forced to patrol Baghdad’s streets. Rooftop snipers maintained a ubiquitous presence. Gunfire routinely crackled throughout the night. Carjacking, kidnapping, rape, and robbery became commonplace in Iraq’s large cities.

The chaos was not limited to Iraq’s streets. When the assessment team arrived, nearly all of the Iraqi government, including the courts, was not functioning. The top American official advising the Iraqi Ministry of Justice estimated that at best 5 to 10% of the courts were operating in any fashion at all. The courthouses and other buildings connected with the system of justice had been looted and plundered down to the fixtures and the wiring. Court officials had fled their posts and remained at home, fearing retaliation from an angry population or criminal gangs. The situation was beyond desperate.

The Iraqi Legal System

Iraq’s legal system dates back at least to 1700 B.C. and the days of King Hammurabi. The King who was known best for his Hammurabi’s Code, and legal concepts such as protection for the lower classes, the state’s authority to enforce the law, and the declaration that the punishment should fit the crime (an eye for an eye, tooth for a tooth).

The subsequent legal foundation of Iraq was built upon the civil law system as originally practiced in France and modified by a variety of sources including the Egyptian legal system. During the period of the British mandate in Iraq, changes were made to the substantive law, but the procedural legislation remained rooted on civil law. The British created an independent judiciary in Iraq during the Mandate period (1920-32) by establishing a semi self-governing Iraqi parliament and judiciary. Iraq’s Constitution of 1925 and subsequent constitutions, even including the Constitution of 1970, which

---

1 Thomas was the sole court administrator on the team journeying into the Cradle of Civilization. He retired in 2006 from the federal court system. His career included service as an elected state circuit court in Kentucky as well as serving as clerk or acting clerk of federal courts in Kentucky, Florida and Georgia.


3 "The Rule of Law in Iraq: A Major Step Forward—an Interview With Honorable Donald F. Campbell, former senior advisor to the Coalition Provisional Authority’s Ministry of Justice." The Metropolitan Corporate Counsel.
was adopted after the Ba’ath Party came to power, provided for separation of the branches of government, and a judiciary governed by its own Council of Judges.

Even after gaining independence from the British, Iraq retained its civil law system. The 1970 Constitution also continued the tradition that members of the judiciary should not belong to any political party.

Hussein and the Ba’ath Party’s leadership gradually undermined all of this. By 1979, the “no political party” rule had been removed, and the entire judiciary was placed under the Minister of Justice, a Saddam ally. The minister took over the council of judges and systematically reduced the authority of the courts. Assessment team members observed first-hand the effect of the judiciary’s minimization as they visited courthouses throughout Iraq.

**The Court of Cassation**

At the time of the assessment team’s visit, the Court of Cassation, the highest judicial body in the country, exercised judicial supervision over all other courts. The Court of Cassation consisted of a president, five vice presidents and at least thirty judges. In the summer of 2003, only twenty-one judges remained because Hussein had previously dismissed nine judges for refusing to impose the death penalty in a particular case.

The court sat in plenary session to consider matters referred to it. Sessions were held only when it was necessary to depart from previous precedent, consider a dispute over conflicting judgments it had previously espoused, or consider cases in which the death sentence has been passed down by a criminal court. When the court found a decision to be contrary to law, it could set aside the decision. In criminal cases, it could set aside a conviction, ratify a judgment, and reduce the sentence. Notably, there was no provision for increasing the sentence. Where an increase in sentence was necessary, the case was referred back to the originating court.

**The Courts of Appeal**

In 2003, the twelve regional Iraqi Courts of Appeal were located in Baghdad, Basrah, Mosul, Hillah, Kirkuk, Irbil, Najaf, and Nasiriyah. Each court of appeal serves a geographically-based appellate jurisdiction consisting of one or more governates or provinces. The courts of appeal hear appeals from all courts, with the exception of the Religious Court, and its decisions are subject to appeal to the Court of Cassation. Three-judge panels preside over each session of court. In turn, each three-judge panel is loosely supervised by a a president of each court of appeal.

**The Court of First Instance**

A court of first instance is located in each main town or city of a province. The court consists of a single judge and hears civil or commercial cases falling within its jurisdiction. Judgments from these courts are subject to appeal to the Court of Appeal.

**The Criminal Court**

The criminal court in each jurisdiction hears felony cases. A felony, according to the Iraqi Penal Code in 2003, is an offense punishable by death, life imprisonment or incarceration for a term between five and twenty years. The criminal court forms part of the governate’s Court of Appeal and effectively re-constitutes itself with the appropriate number and level of judges when sitting in its appellate capacity.

**Other Specialized Courts**

In addition to these regular courts, there were a number of specialized courts that heard particular types of cases. First, each governate had a labor tribunal to resolve disputes arising out of the labor act and the workers’ pension and social security act. Appeal from this tribunal lied with the Court of Cassation. Second, juvenile courts existed within each governate for offenders who were between the ages of seven and eighteen at the time of the commission of the offense. Third, personal status courts were also located within each governate. A single judge, typically a Muslim, presided over these courts that dealt with all matters affecting the personal status of an individual, such as marriage.

**Administrative Tribunals**

In 1977, administrative tribunals were established to adjudicate proceedings brought by ministries or state institutions against each other. These tribunals were independent from the Court of Cassation. Private parties were entitled to be joined as interested parties. There was also a general disciplinary council that heard cases concerning civil servants. Servicemen could not be tried for crimes in the civilian courts, and could only be tried in the military court system operating under the Ministry of Defense. Separate law enforcement courts had been established by the Ba’ath Party to deal with cases involving members of the security services and police.
Revolutionary Courts
Following the Ba’ath Party’s takeover of the government in 1968, revolutionary courts were created to hear matters relating to the security of the state and official corruption. They were omnipotent within the country and were totally independent of the regular judicial system. Staffed by Ba’ath party members without legal training, their decisions were final and without appeal. The coalition abolished this court during the summer of 2003.

Inquisitorial System and Investigating Judges
Unlike the American legal system’s adoption of the adversarial model, most legal systems based on civil law apply the inquisitorial system. In Iraq, investigations were set in motion by the submission of either a verbal or written complaint to an investigating judge, judicial investigator, police officer, or public prosecutor. Civil and criminal liability arising out of alleged criminal conduct run contemporaneous. Similar to America, civil liability may still lie even if criminal proceedings are abandoned.

In 1979, the Department of Public Prosecutions was created. The public prosecutors and their deputies were distributed throughout Iraq to establish a prosecutorial presence in each criminal court and in the Court of Cassation. Iraq’s legal system provided for a mandatory prosecutorial policy; thus the ability to dismiss a case due to insufficient evidence or public interest considerations vested solely in the investigating judge. The role of the public prosecutor is very much an advisory or observational role, and their focus is mainly providing opinions to the investigating judge on guilt or innocence. Most observers noted that the role of these prosecutors had become somewhat minimized in the process.

Hussein’s Judiciary: A Legacy of Favortism, Manipulation, and Corruption
Saddam’s Ba’ath Party manipulated the legal system to serve its own ends. Beginning in the early 1980s, all persons attending the Judicial Institute in Baghdad, Iraq’s principal educational, arm were required to join the Ba’ath Party. Many aspiring professionals in Iraqi society who were interested in advancing in positions in the government joined the party simply as a means of improving their chances to get ahead. This facilitated the regime’s control over the entire system, spawning a host of judges that were young and inexperienced, but politically loyal. While a majority of the judiciary was corrupted by the system of the Ba’ath Party and its endemic bribery, some judges resisted Ba’ath Party control. These principled jurists became political prisoners and were summarily imprisoned by Saddam’s regime.

Strong public sentiment against high-ranking members of the former regime and suspicions about the loyalties of such individuals provided the context for several orders issued by the Coalition in mid-May of 2003. Under the Geneva Convention, the Coalition was authorized to remedy the Ba’ath party’s monopoly over the judicial system by removing public officials from their posts in conformity with its obligation to maintain the orderly governance of the territory and to ensure its own security. Current judges and prosecutors who were former high-ranking Ba’ath Party members were removed from their posts pursuant to investigations into their party status or corruption. The first “de-Baathify” order issued by the Coalition officially barred Ba’ath Party officials within the top four (of ten) membership ranks of the party from holding government positions. The order also barred top-level ministry officials then holding lower-level membership ranks in the Ba’ath Party from future government service. Nearly five years after the issuance of the “de-Baathify” order, many question its wisdom as well as the Coalition’s decision to disband the Iraqi Army.

The Iraqi judicial system was also marginalized by several actions during Saddam’s rule. The regime created a variety of special security courts to hear cases involving state security. These were courts in name only and were nothing more than tools of Saddam’s dictatorship. The regime also encouraged the use of tribal courts in order to garner support for the regime from tribal leaders. Although tribal courts existed prior to Saddam’s rise to power, Hussein greatly increased their influence and power for his own political ends by diverting cases from the judicial system to the tribal courts.

Aside from the Ba’athists’ manipulation of the judiciary, an even greater issue of concern was the culture of corruption permeating the judicial system. Some interviewees stated that they either had no knowledge of corruption or had simply heard it was happening in some other town or with a profession other than their own; these accounts are simply not credible. Corruption existed for the simple reason that most working within the Iraqi legal system made a dismal amount of money. On one hand, defense attorneys appointed by the court in a felony case made the equivalent of $2 to $3 for the entire case. On the very bottom of the system, court employees and police officers were only making the equivalent of a few

---

4 Michael M. Farhang “Reconstructing Justice”, Los Angeles Lawyer, July/August 2004, p.45. Farhang, a federal prosecutor was on the team journeying into the Cradle of Civilization.

5 Frank J. McGovern “Rebuilding a Shattered System—American Lawyers are Helping Restore and Reshape the Legal Structure of Iraq”, Pennsylvania Lawyer, p.34.
dollars per month. There was little job satisfaction on the part of the lower level employees. On the other hand, judges tended to make a livable wage, largely due to what one judge said was simply a time-honored tradition: accepting “gifts.” For instance, some members of the judiciary were given land and government-provided automobiles. It was not at all surprising that those in the remaining sections of the justice system found it necessary to engage in illegal conduct. In the end, the public had little confidence in them and the court system in general.

It should be noted that similar patterns of corruption based on low pay for civil servants and others, and governments turning a blind eye to supplemental payments is a widespread problem throughout the world. For a time, there were issues in the American federal judiciary when clerks of court looked for their livelihood from the fees their offices generated as opposed to receiving salaries. Corruption in Iraq was no different than throughout the rest of the world.

Saddam’s totalitarian regime also left a festering legacy of property disputes that posed a significant threat to the overall stability in Iraq. In both the north and the south, the regime forced landowners from their land and redistributed the land to other parties. In the north, an area with significant Kurdish population, land was taken from Kurds and given to persons of Arab ancestry. In the south, an area with a majority Shiite population, the Ba’ath Party forced Shiites from their land and gave the land to Ba’ath Party loyalists. Arabs in the north and Ba’athists in the south then sold the property to subsequent purchasers who may not have been aware of the original removal of the property owners. Thus, there were conflicting claims to significant portions of the property with multiple claimants, all having apparently good title. These property disputes were major flashpoints that threatened the overall stability of the country.

**The Iraqi Bar**

In 2003, there were approximately 25,000 lawyers in Iraq, 15,000 of which belonged to the Iraqi Bar Association (“IBA”). The IBA’s headquarters building was located in the affluent Mansur District in Baghdad. Mansur was the site of significant looting due to its identification with Hussein loyalists. The IBA headquarters building itself was in reasonably good condition because of its members who stayed to protect it during the chaotic period just before and after the collapse of Saddam’s regime. These lawyers, armed principally with handguns, kept an around-the-clock protective vigil for several days.

A few days after arriving, members of the American assessment team attended a meeting at the IBA headquarters between officials of the American-led coalition and about 1,000 IBA members. Notwithstanding their cultural differences and the daunting presence of heavily-armed American soldiers throughout the meeting hall, assessment team members were warmly received by many of the lawyers. At this meeting, the head of the IBA was removed due to his affiliation with Saddam’s Ba’ath Party. Dissenting attorneys angrily protested the removal. This escalation prompted the assessment team and their protective escorts to hastily exit to the protection of their armored vehicles.

Following an election for interim IBA leadership, assessment team members worked daily with the newly-elected leaders and respected senior members of the country’s bar to familiarize themselves with the Iraqi legal system so that they could make meaningful recommendations to bring order to this chaotic state of affairs.

**Emergency Human Rights Recommendations**

The assessment team was mindful that Iraq’s legal system had its roots in one of the world’s oldest civilizations. After all, this was the very place where Hammurabi drafted his famous code giving citizens public rules of conduct for the first time. However, the assessment team immediately recognized the necessity of fundamental changes in order to bring Iraq’s legal system in accord with basic human rights and international law. The assessment team immediately changed their objective from making a comprehensive assessment of the legal system to assisting with these basic changes.

The criminal practice code in effect at the time sanctioned torture and permitted coerced confessions that were supported by other evidence. As a result, confessions obtained through torture were routinely admitted in court. Another fundamental deficiency was that the criminal code then in effect did not clearly provide for the right of an accused person to remain silent.

About the same time that the assessment team arrived in Baghdad, the Coalition Provisional Authority headed by former Ambassador L. Paul Bremer, replaced the Office for Reconstruction and Humanitarian Assistance as the interim operating government in Iraq. The judicial assessment team made the following emergency recommendations to Ambassador Bremer: (1) that he immediately take action by prohibiting the use of confessions obtained by torture, regardless of

---

6 A. Tieler Giles in “Nation Building”, Advocate, Fall 2004/Winter 2005, p.2
contemporaneous corroboration by other information; (2) that persons arrested for violation of the criminal law should be given a standard advice of rights based on internationally accepted standards; (3) that arrested persons should be entitled to appointed counsel during the investigative stage, not merely at the trial stage; (4) that all persons arrested in criminal cases should have the right to remain silent and should be informed of that right at each stage of the criminal process. Ambassador Bremer immediately instituted these safeguards.

Conducting the Assessment
Following the presentation of the emergency recommendations to the Coalition Provisional Authority, the assessment team members dispersed to Iraq’s four major population centers: Baghdad (Central Region); Hillah (South Central); Basrah (Southern Region) and Mosul (Northern Region). The principal purpose of their mission was to assess the state of the Iraqi judicial system. From late May through late June 2003, members of the team spent hours traveling and interviewing judicial system employees in courthouses throughout their assigned regions.

The temperature in Iraq in mid-day hovered between 120 to 130 degrees. Team members were weighted down by the required Kevlar helmets, flak jackets or bulletproof vests. Team members also carried such items as a satellite phones, GPS devices, gas mask, kits with two syringes for auto-injection of atropine – an antidote for nerve gas – since it was believed at that time that weapons of mass destruction were present in Iraq.7 A few of the team members were armed, having qualified with 9mm pistols by an instructor from the now-infamous Blackwater USA security company. The heat made their camelback water containers a necessity. The teams rode in white four-wheel drive vehicles and were accompanied by American troops – an armored Humvee leading each convoy as well as another bringing up the rear. When a convoy arrived at a courthouse, spectators always gathered.

As the courthouse visits progressed throughout the four regions, a central theme emerged---very few team members ever actually observed a session of court.8 Judges in every jurisdiction would show up for work every day in dark business suits, dress shirts, shoes and ties. Rather than holding court, the judges spent their days in their offices talking to citizens and each other. The complaint most frequently heard was that “Baghdad is silent” – the implication being that in order for the justice system to resume operations at full steam, there must be a proclamation from the Ministry of Justice on subjects ranging from what laws to enforce to the continued service of judges in occupied Iraq. Hussein’s regime had achieved its desired objective – it so effectively minimized the judiciary’s independence that judicial initiative was largely non-existent, even after the regime was defeated.

The former Director General of the Administrative Office, a branch of the Iraqi Ministry of Justice offered an explanation for the lack of initiative: for many years the judges and their staffs had become accustomed to expect direction from the Minister of Justice. It simply was not the custom of the Iraqi judicial system employees to work unless everything was fixed and fully functional.9

Others feel that the judges’ lack of proactivity may be attributed to the lack of clear direction from the Coalition. It should be noted though that not all Iraqi judges lacked initiative. Some of the judges and their staffs acted heroically to protect their courthouses, and court records. Some took files home when the looting began to protect the integrity of the records, and others manned 24-hour watches around courthouses to ward off looters. In other instances, judges and staffs demonstrated a great deal of courage by showing up for work under very dangerous circumstances.

Findings varied by region and courthouse. In some regions, the courthouses were in much better shape than others. In the areas outside Baghdad, and particularly in the north around Mosul as well as in the south around Basrah, the courthouses were in much better shape. Everywhere though, the judges and court staffs were uniform in their requests for better security. They frequently asked if the court staff could be provided with surplus weapons confiscated by Coalition forces.

Once Hussein’s government collapsed, so did the economic aspect of the Iraqi legal system: judges and court employees no longer received a salary, and lawyers were not receiving any compensation for court-appointed work. It was obvious to the assessment team that something would have to be done to provide economic relief for those in the justice system. In early June, the Coalition provided small salary payments to judges and court personnel, and the American judge advising the Ministry of Justice devised a system to compensate Iraqi attorneys who were providing assistance to citizens seeking to find out about their relatives that had mysteriously disappeared during Saddam’s regime. The court

---

8 Edwards interview of Judge Orlofsky.
9 Luther D. Thomas’ interview of Ghazi Ibreheim Al Janpy, Baghdad, June 2003.
administrator on the assessment team was assigned administer the fund to provide attorney compensation. Working closely with the new top leaders of the Iraqi bar, he reviewed payment applications and disbursed over $80,000 to lawyers over a three-week period.

Despite the corruption and lack of an independent judiciary, the team found some bright spots. The team assigned to survey courts in Basrah and southern Iraq visited the College of Law at Basrah University. The law school's building was completely gutted by fire and looting damage. Furniture was destroyed or removed, windows were broken, and garbage and documents were strewn throughout the facility. The initiative found lacking in the court system employees was readily present in Iraq's law schools: nearly all of students and their professors were continuing their coursework in makeshift classrooms located in other buildings.

Southern team members visited one particular alternate site and spoke with several classes of law students there. The students were fearful for their own safety but said that they wanted to be able to complete their education. The students also raised questions about the ability to remove all references to the Ba'ath Party from their new curriculum. These forward-thinking students asked the assessment team if they could recommend to the Coalition Provisional Authority that funds be provided to renovate their damaged law school. At a subsequent meeting, the students also asked for assistance in getting access to books or resources on the laws of America and other countries outside Iraq. The assessment team members were struck by the initiative and optimism of Iraq's future lawyers.

One of the team, a U.S. circuit court of appeals judge that interviewed judges on Iraq's Supreme Court, came back with a fairly favorable report. The judge said that given the control that the Ba'athists had over nearly all of the rest of the judiciary, he was quite surprised that only three or four of the twenty-one judges of the Supreme Court were Ba'athists.\(^\text{10}\) This was confirmed by subsequent discussions with their colleagues and with lawyers.

The work of the team could not have been accomplished without the assistance of many others such as the American soldiers who accompanied them on their rounds and kept them safe. Only two team members spoke any Arabic, and few judges or court employees spoke English. There were several interpreters employed by the Ministry of Justice who accompanied the teams to the courthouses and facilitated their communications. Lasting friendships between translators and team members continued after the team returned to the United States. A translator whose life was threatened eventually came to the United States to work in the law firm where a team member is a partner.\(^\text{11}\) The court administrator and his translator would speak with each other by telephone every month for the next year and a half while the translator had a new job: assisting the American advisors for the prosecution of Saddam Hussein. In January 2005, he was assassinated as he left his home to go to work at the American Embassy.\(^\text{12}\) A few months after the team left, their Baghdad hotel was hit by a suicide bomber. Several Iraqi security guards were killed. Iraq was becoming much more dangerous.

The Team's Recommendations

At the conclusion of their work, team members made several recommendations. These were sent to the United States Department of Justice, the United States Department of Defense, and the Coalition Provisional Authority:

- The Coalition should place lawyers in each of the four geographic regions to encourage judicial reform, monitor the court system, coordinate with local military units, and facilitate communication with the Iraqi Ministry of Justice in Baghdad.

- The Coalition should establish a process to ensure that uniform decisions were made concerning the removal of corrupt judicial officials, including the establishment of regional commissions to investigate and remove judges tainted by corruption, with a final central review process.

- The Coalition should establish a process for vetting prospective candidates for judges and prosecutors, and the regional advisor should have a substantial role in the selection of new judges and prosecutors.

---


The requirement that a judge or prosecutor attend the two-year course at the judicial institute should be
suspended in light of the need to replace those removed from office.

All prosecutors and judges, both those in place and newly appointed, should be required to attend a training
course that provides instruction on the internationally recognized standards of human rights, judicial and
prosecutorial ethics.

The Coalition authority should undertake efforts to establish and fund a system to both fairly appoint and fairly
compensate attorneys to represent indigent persons arrested for either felonies or misdemeanors.

A funding and construction plan should be systematically developed to reconstruct the looted and destroyed
judicial infrastructure. In addition, reconstruction and court administration experts should be brought in so that
judges and lawyers can devote their efforts to their own professions.

Immediate action should be taken to provide funding and weapons for security of all court and justice
buildings.

The Coalition should raise the salaries of prosecutors commensurate with the judicial system in order to
discourage corruption.

The Coalition should immediately issue a decree lowering fees in order to allow fair access to the courts for
the resolution of civil and criminal law issues.

An administrative claims procedure should be immediately established to resolve the property claim issue
because such claims are not suitable for adjudication in civil courts, and those courts do not have the
resources to hear such claims.

The judiciary should be organized in a manner that facilitates both de facto and de jure judicial independence
from the other government organs, thus some of the powers of the investigating judge should be given to the
prosecutor.

The prosecutorial function needs to be independent from the judiciary and be empowered to direct criminal
investigations and prosecutions. The group did not recommend that the investigating judge system be
eliminated but craft it to resemble the current practice in the civil law countries on which the system was
originally based.

Finally, the Coalition should offer advice on those matters during the constitutional and government formation
process with the understanding that the final decision on these matters is one ultimately for the Iraqi people.

Conclusion

By early July, the team had completed its work. Three of the federal prosecutors remained in Iraq. They had been tapped
to serve in the regional advisor positions that had been recommended. By twos and threes, the judges, prosecutors and
defenders started heading home. Appropriately, on the Fourth of July, the last two to depart, the court administrator and
the team’s only female, an Iraqi-American defense attorney, flew out of Baghdad on a U.S. Air Force C-130 with American
soldiers heading home. The Journey Into the Cradle of Civilization was over.

While the judicial assessment team’s mission was completed by mid-summer 2003, the work they began that spring
continues today. In February 2008, U.S. Attorney General Michael B. Mukasey, a retired federal judge, made his first
official visit to Baghdad. Judge Mukasey met with Mehad al Mahmoud, the Chief Justice of Iraq, commending him and
other members of Iraq’s judiciary for their bravery and devotion in carrying out their duties under the most difficult of
circumstances. The Attorney General also commended the more than 200 U.S. Justice Department personnel working in-
country to rebuild Iraq’s legal and law enforcement structure. Judge Mukasey stated that he was most impressed and
couraged by what he had seen and heard about the rebuilding of the Iraqi justice system.
Assessing The Courts In Russia: Parameters Of Progress Under Putin
By Peter H. Solomon, Jr., University of Toronto

Introduction
The Soviet legacy included courts that were dependent and weak, and whose reform had only just begun. The Yeltsin era witnessed considerable progress in making judges more independent and powerful, but the efforts were seriously constrained by budgetary shortcomings and paralysis in the legislative approval of needed procedural changes. As we shall see, the Putin administration overcame both of these obstacles and at the same time began addressing the thorny question of how to make courts and judges accountable without undue harm to their independence. It also started to address the scepticism about the courts among a significant part of the public, through efforts to improve media coverage, make information about courts more available, and make courts user friendly. While praiseworthy and bound to improve the reality and the perception of the administration of justice overall, these initiatives did not end attempts to exert influence on judges and case outcomes by powerful people (in the public and private sectors) or the mechanisms that facilitated their efforts.

This essay begins by identifying criteria for assessing the quality of the administration of justice in any country, including in the post-soviet world and suggesting specific markers (usually qualitative) connected to each of the criteria developed above. Then, the essay provides an account of relevant policy initiatives in judicial reform undertaken first under Yeltsin and then in the Putin years. The essay goes to provide an assessment of the state of the courts in the Russian federation in 2007 in the light of the criteria and markers supplied in the first section. It concludes with a look to the future, and the identification of crucial markers of change for the post-Putin era.

Criteria of Assessment and Markers
The purpose of courts is to provide to members of the public the opportunity to obtain the impartial resolution of disputes (mainly through adjudication, but sometimes through mediation) in a timely manner. Courts must act fairly and expeditiously, and the design of judicial systems should contribute to these ends.

I propose seven criteria for assessing a court system, some of which break down into a number of components, each of which can serve as markers. They are: the independence of judges and courts; procedural law aimed at ensuring equality among the parties; the power of the courts; the system of judicial accountability; accessibility of the courts; efficiency of performance (and the factors that encourage it); and public attitudes toward the courts.

By judicial independence I mean structural arrangements that improve the chances of impartial outcomes by reducing or eliminating potential lines of dependence of judges, both on external sources and on others within the judicial system. Three basic markers of an independent judiciary (necessary, but not necessarily sufficient to produce impartiality) are: (1) a system of tenure that reduces a judge’s potential fear of reprisal for decisions (such as tenure to the age of retirement with dismissal only for serious cause at the hands of one’s peers) and minimizes the impact of any disciplinary proceedings; (2) financing of the courts sufficient that judges receive good salaries, have good staff support, and hold sway in buildings that enhance rather than detract from their authority; and (3) a reasonable degree of control by the judiciary over the provision of administrative support to the courts. In judicial systems of the civil law type, where judges pursue careers in the courts, biases are commonly introduced through (4) systems of the evaluation of their performance (often involving higher courts) and through (5) the exercise of power by the chairs (presidents) of courts. In the post-Soviet world chairs of courts are especially powerful, often controlling discretionary perks and benefits for their judges, and in a position to help their judges get promotions or hurt them through disciplinary initiatives including recommending their

1 For a more intricate set of indicators of progress in judicial reform see the CEELI “Judicial Reform Index”, which includes 30 different markers falling into six groups: quality, education, diversity; judicial powers; financial resources; structural safeguards, accessibility and transparency; and efficiency. Teams of assessors have applied these tools of assessment to the courts of 18 countries (mainly post-communist), including Ukraine (twice), but not Russia to produce standardized JRI assessment reports. The assessment process includes a battery of interviews with participants in the judicial process, as well as legal analysis. See www.abanet.org/ceeli/. In her new book Linn Hammergren provides a thoughtful analysis of the varieties of judicial reform activities and their effects in reaching particular goals. See Linn Hammergren, Envisioning Reform: Improving judicial Performance in Latin America (University Park, Pa.: Pennsylvania State Press, 2007).
dismissal. At the same time, chairs represent a conduit for requests from the outside regarding particular cases, and they often control the assignment of at least important or hard cases.²

At least in criminal cases Soviet procedural law introduced a strong prosecutorial bias, which was reinforced by informal practices. In both the pre-trial and trial phases, the sides were from equal (a consequence of the distorted Soviet form of neoinquisitorialism), and already in the 1991 Conception of Judicial Reform, reform minded jurists pushed for a more adversarial system. The extent to which the practice of criminal justice (as opposed to the law) is truly adversarial and defence has rights comparable to the prosecution represents another criterion of fairness. At the same time, the discouragement of acquittals (a key informal practice dating from the late 1940s) would also mark a significant improvement.³

The empowerment of courts and judges represents a mark of their importance in government and society. In my lexicon, judicial power refers to scope of jurisdiction (does it include sensitive matters such constitutional interpretation, administrative justice (complaints against government actions), and high profile commercial disputes?), to the degree of discretion (including right to interpret laws), and to the authority of judges, as reflected in the extent to which their decisions are implemented.⁴

The more power judges exercise, the more other actors seek to make them accountable for their actions, but most forms of accountability come only at the price of compromises with judicial independence. This is true of judicial elections (as used in many states of the USA) and of the systems of evaluating judges found in countries of Western Europe. Yet, any attempts to reduce corruption in the administration of justice involve increased accountability. To ensure that measures of accountability do more good than harm to fair adjudication calls for striking careful balances. Another kind of accountability can be provided by the publication or posting on websites of court decisions, a new practice in the post-Soviet world for all but the highest courts.

To perform their social functions, courts must also be accessible to most of the population and for more than just defence against a criminal charge. In most Western countries courts are too expensive for ordinary citizens, and legal aid programs limited in their coverage. One marker of accessibility is the nature of legal aid and public defender systems. Another is the extent to which the courts are themselves user friendly institutions with an ethic of service. Signs of this include: good buildings with adequate waiting areas and washrooms for the public, places to pay court fees, access to photocopiers, good signage and easy access to information about filing cases, convenient hours of access in the registries, and even electronic kiosks. Information about court activity may also be provided on court websites.

The efficiency of courts also matters to their users, who react strongly to unreasonable delays. The requirements of procedural law help keep most cases under control, but increases in caseload can lead to temporary problems (especially in the arbitrazh courts). The raw data on length of cases and backlogs are useful for inter-court comparisons within Russia, but, as we shall see, do not suggest any systemic problems, with the addition of justices of the peace. Still, the efficiency of courts and the quality of service they provide the public is affected by such markers as the nature and quality of staff and the judge-centered system of case management, as well as requirements of procedural law. The drastic underpayment of court staff, including the new post of court administrator, weakens the operations of the courts by encouraging turnover.

Finally, while the public's assessment of the courts reflects a negative view of government in general, as well as gossip about the courts, public opinion data can serve as a crude way of measuring change. In fact, the current Russian government plan for the improvement of the courts has made annual improvements in public attitudes into a metric for measuring the success of the Plan! (see Appendix 2 “Tselevye indicatory i pokazateli”).

Courts and their Reform under Yeltsin
In the nine years of Boris Yeltsin's presidency, starting before the USSR broke apart, Russia embarked on systematic reform of the courts and judiciary that involved simultaneously empowering the courts and establishing many of the conditions associated with judicial independence. During the window of opportunity for radical change, 1990-1993, courts


of one kind or another assumed jurisdiction over constitutional, administrative, and commercial disputes. At the same time, judges on most courts gained life appointments (after a probationary stage) with release only for cause and after review by their peers on the Judicial Qualification Commissions (bodies established already from 1988). Later in the decade the administration of the courts moved out of the executive branch into a Judicial Department under the Supreme Court, and a major expansion of the court capacity was authorized through the creation of Justices of the Peace, themselves creatures of the subjects of the Federation. These later achievements resulted from the political efforts of the judicial community, realized through the Council of Judges and periodic Congresses of judges.

The progress of reform was held back, however, by the drastic shortage of funds for the courts and the failure of jurists and the legislature to agree on new codes of criminal and civil procedure. Before and especially during the financial crisis, courts overall received miserly budgets, and lost parts of those through sequestration. Some courts had no money left after paying salaries, and in the mid and late 1990s it was common for courts on the federal budget to receive significant supplementary funding from local governments and private firms, despite the troubling implications for judicial independence. Equally important, the courts remained shabby places, as repairs were not undertaken and little automation attempted. Caseloads rose, but neither new judges nor extra staff were recruited. The prestige of judges remained low, and most new judges came from work in law enforcement or as court secretaries. Hardly any graduates of full time day law faculties became judges. At the same time, the authority of courts was limited, as revealed by the problems securing implementation of many decisions of both the Constitutional Court’s and especially the arbitrazh courts’s decisions in disputes among private firms. Officials sometimes ignored decisions of the former, and the loser firms in debt collection cases often succeeded in hiding assets from the bailiffs, leading the victors to turn to private enforcement. Moreover, the laws themselves were often vague and contradictory.

By the end of the Yeltsin years the courts had gained key elements of independence and power (tenure and self-rule: new jurisdiction), but lacked others (financial security; authority to secure implementation). At the same time, severe under-funding and the delays in procedural reform held back progress in making the courts fair, efficient, and accessible. This state of affairs was reflected in low public appraisal of the courts and concerns about suspected corruption.5

Judicial Reform under Putin

Vladimir Putin’s presidency has done much to improve the courts and advance judicial reform in Russia, compensating for the most serious omissions of the Yeltsin years. While Putin’s government had far more resources to put into the courts than did Yeltsin’s (because of better tax collection and oil revenues), the decision to so do was largely that of the President, who was committed to improving law and the courts as mechanisms of governance and economic growth. Already in the first years, the new administration promoted hierarchy of laws and sought to reduce inconsistencies in the laws of different levels of government, this as part of the plan to counteract slippage of power from the federal centre. Further, the Putin government succeeded in getting the legal community and the legislature alike to reach compromises and approve new procedural codes, which went into effect in 2002 (criminal) and 2003 (civil). While imperfect, they stand to have a long-term positive impact on fairness of court decisions, if only because of the new requirements for adversarialism. The most dramatic and significant contribution of the Putin government to judicial reform lay in the dramatic increase in funding of the courts, a process initiated in the Plan for the Improvement of the Courts, 2002-2006 (more than 44 billion rubles), and continued in the analogous Plan “Development of the Court System for 2007-2011”.6 As we shall see, the new spending did much to improve the courts according to the criteria and markers outlined above. At the same time, the regime struggled with the accountability of judges, trying to find ways of discouraging improper conduct without excessive threats to judicial independence.

The new money provided in the first Plan supported inter alia: significant raises in the salaries of judges (but sadly not also of court staff); partial support for the establishment of the planned network of justices of the peace, who quickly took over a large share of ordinary cases (30% criminal; 65% civil; all administrative violations), leaving the district courts with reduced loads; the introduction of jury trials as an option in all regional level courts, except Chechnya (a costly venture); significant expansion in the staff of courts of general jurisdiction, with the establishment of the position of clerk or judicial assistant; the repair of many court buildings; the provision of more bailiffs to enhance court security; and steps toward the computerization of the courts.

The second, or current Plan, continues elements of the first plan (improvement of court buildings; computerization), but adds to them a battery of measures to make courts more open and transparent and raise public trust in the courts. These

---

5 On Yeltsin era judicial reform see Peter H. Solomon, Jr., and Todd S. Foglesong, Courts and Transition in Russia: The Challenge of Judicial Reform (Boulder: Westview, 2000).
6 The Plan is available on the website of the High Arbitrazh Court: www.arbitr.ru under the heading “Federal’nye tselevye programmy”.

International Journal For Court Administration | October 2008
include the development of court websites and databanks, which are to include the written decisions in most cases as well as information about the courts and their work; the diffusion of the new post of press-secretary of the court (press secretaries are now found even in some district courts); the development of specialized juvenile panels; and experiments with psychological services to help judges. The Plan includes in an appendix a set of indicators of success (metrics) that feature annual increases in the share of the public trusting the courts, along with a decline in the public’s experiencing rudeness on the part of court personnel.

The repeated initiation of new measures of accountability for judges—spurred in large part by the impulse to combat the appearance (or reality) of corruption—has come mainly from outside the court system, especially from the Ministry of Economic Development and Trade (MERT) and specialists associated with it, and recently from the High Arbitrazh Court as well. Most the Ministry’s proposals have been controversial, arousing opposition from the judicial community, in part because its power and prerogatives were threatened. Thus, in 2002 the threat to life tenure of judges was countered, but the membership of the Judicial Qualification Commissions that decide on judges’ firing for cause was changed, so that instead of all judges, one third of the members would be jurists form outside the courts, and a presidential representative would also be included. In 2004 the head of the Federation Council Mironov proposed reducing the share of judges to half, but this suggestion was rebuffed. Also in 2002 judges lost their strong protections against the launching of criminal prosecutions against them and disciplinary measures short of firing were revived. After a fresh wave of finger pointing about corruption in 2005, the new head of the High Arbitrazh Count Anton Ivanov urged that judges be forced to declare all sources of income and assets (an idea that may well be realized—see the relevant draft law on the Court’s website). Other proposed accountability measures include enforceable conflict of interest rules for lawyers and judges and having judges keep diaries of meetings with members of the public outside of the trial setting.7

The State of the Courts in 2007
What was the impact of judicial reform activity of the Putin era? To what extent were the various criteria outlined at the start of this paper realized? The answer is: to a considerable degree, but not entirely, and as usual the devil is in the details.

The increases in salaries of judges (the base is now $1,000 a month, a reasonably high salary in most Russian cities) and the improved funding of court operations—along with the life tenure and administration of the courts by the Judicial Department means that all of the standard formal elements of judicial independence are in place. But informal practices still facilitate the occasional intervention of powerful persons in cases that matter to them. Russia remains a world based upon exchange relationships, and even with better financial support most chairs of courts need good relations with local officials and notables. In turn, those chairs remain extraordinarily powerful figures who bear legal responsibility for the management of their courts and who control the careers of their judges. The chair’s personal assessment of each judge is crucial to potential promotion, and should a judge fall from grace, the chair has many ways to punish her/him—within the court and beyond. In practice, chairs easily find pretexts to initiate firing for cause, and the JQCs tend to listen to the chairs, even when they are not members. Often, the chair serves as conduit for outside requests, and with the power of case assignment can ensure that a cooperative or mature judge handles the case. Chairs now serve for two consecutive six year terms (once the term was unlimited), and are appointed by the President after a lengthy review process.8 The attitudes of Chairs also affect the extent of corruption in a particular court, along with the norms of local culture.9

While the new criminal procedure code calls for adversarial trials and increases somewhat the legal resources of the defence during the pre-trial phase, an accusatorial bias still colours the administration of criminal justice. The discouragement of acquittals remains in place and overall judges sitting alone give slight more than 1% acquittals (up from .5%), despite the loss of the main alternative “return to supplementary investigation” and despite the fact that juries acquit at a rate of 15-20%. Judges still face other quantitative indicators of performance like “stability of sentences”, which in turn promote conformist behaviour in sentencing. The Criminal Procedure Code of 2001 put into place a modest version of plea bargaining (based on the Italian model), whereby for lesser offences (five year maximum) the accused could admit

---


9 Note that payments to judges often constitute service fees more than bribes and often do not affect the outcome of cases. Both sides may pay; the real winner may be “taxed”; or the decision be reversed by a higher court.
guilt and wave the examination of evidence at trial in exchange for a sentence in the bottom two thirds of the legal range. In July 2003 the simplified procedure was extended to serious crimes (with ten year maximums), although in 2006 the Supreme proposed eliminating this extension. This “shortened procedure” was used in 2006 in 37.5% of cases at district courts and 47% by justices of the peace. It is used especially in cases of theft, narcotics, weapons possession, misappropriation, and ecological crimes.

Despite threats (including an attempt to deprive the Constitutional Court of its power to declare laws null and void), courts in Russia have the full panoply of politically sensitive jurisdiction. Administrative justice has been the jewel in the crown, as all sorts of courts, including military tribunals and arbitrazh courts, have satisfied citizen complaints against officials at well above the fifty percent level. Even complaints against the legality of normative acts of ministries come out in favour of the complainant (and against the government) around thirty percent of the time. Most of the complaints have involved social benefits or the conduct of police; there is no separate data on complaints of a politically sensitive nature. The Supreme Court has pushed for the establishment of a separate set of administrative courts under its aegis, but so far resistance from the High Arbitrazh Court and the State Legal Administration of the Presidency has stymied the initiative.

New appointments have made the Constitutional Court less daring then before, but it still plays a positive role in cases relating to federalism and human rights. The decision to move the Court to St. Petersburg struck many observers as an attempt to marginalize the body, as well as start to make St. Petersburg a second capital. Judges saw the readiness of the other branches to move a court against its will as a sign of political condescension toward the judiciary.

Implementation of court decisions through formal procedures has improved somewhat in recent years, as the official numbers show, but far more parties to cases fail to comply with court decisions directly than should be the case, and the use of extra judicial implementation services is still commonplace, though perhaps also on the decline.

The impact of the new accountability measures is hard to assess. I have seen no systematic studies of the conduct of the Judicial Qualification Commissions before and after their change in composition. The constant chatter about judicial corruption in 2005-2006 and threats of various reactions likely put some judges on the defensive. The prospect of the posting of decisions on websites aroused opposition among many judges, who disliked the need to produce documents of a standard that their colleagues might read and perhaps feared that the occasional improper decision would be most noticeable.

Meeting the challenge of making courts in Russia truly accessible is only in its early stages. There are some examples of courts that are user friendly (including model courts developed under Canadian and US projects), but overall this is not the rule yet. Moreover, the system of legal aid, which was among the world’s best in Soviet times, has declined. Eligibility for low income persons is limited to criminal cases and a small group of civil cases; somewhat broader coverage is available to targeted social groups like veterans and the disabled. No one gets legal aid to pursue complaints against mistreatment by government officials. However, it is still relatively easy to go to court without a lawyer. There is still a tradition of courts providing counsel to persons wishing to file cases, although more and more judicial assistants and consultants are replacing judges in providing the advice. Moreover, the justice of the peace courts were designed to be

---

11 2006 data on the work of regional and district courts and the JPs is on the website of the Judicial Department: www.cdep.ru, then hit “statistika”.
14 Solomon, “Threats of Judicial Counterreform.”
simple and accessible. Still, the designers of the new Plan for the Development of the Court System were correct to privilege accessibility, especially if they seek to improve public confidence in the courts.

The efficiency of courts matters greatly to their users everywhere. Even before the Putin era initiatives of expanding the number of judges, adding staff, and computerization, courts in Russia did much better on most parameters than their counterparts in the West, at least for civil cases. The situation now is even better. The legal time frame, for ordinary civil cases of three months, was met most of the time (94% of cases in 2006), although there was variation from court to court. Arbitrazh courts also met the times requirements in almost 95% of cases. In criminal cases the record was even better (in 2006 97.1% overall), and the violations were usually not to fault of judges but stemmed from the need to postpone trials when victims or witnesses did not appear. The average time for a criminal case between the arrival of the file at court and disposition stood at 2 months in the district courts and JPs (2.6 months in regional courts); for a civil case 2.7 months in district court, 1.2 months by JPs, and 2.2 months in regional courts. (I do not have comparable data for the arbitrazh courts. The average caseload for their judges doubled between 1992 and 2006, but many of these represented initiatives of the tax authorities, either to collect fines or avoid returning overpayments, and legal changes from 2005 produced a major drop in these cases in 2006). Still, what made some cases long was not the trial phase, but what came before and after. Sometimes, investigators did not conclude their work within the required six months, and usually they could get extensions. Then, the post trial appeal, whether cassation or supervisory in nature, added to the time line. Cassation and supervisory reviews in criminal cases could lead to new trials sometimes preceded by new investigations. The bottom line, though, was that the bulk of cases was processed more quickly in Russia than in Western countries, and only a small share of cases became victim of overly complicated procedural norms.

The changes in the Putin years ensured that the courts could cope with a steady increase in the number of cases presented, and improve their overall rate of performance. In some courts (especially district ones), judges reported getting off the conveyor belt, having time to do research about legal issues presented in cases, and above all to “think”. This was often not the case for justices of the peace, who faced huge caseloads, or for judges on some basic level arbitrazh courts (at the regional level), who faced an onslaught of petty cases involving fines for late payment of taxes. Rumour has it that sometimes arbitrazh court judges received payments to speed up the processing of particular cases and give them priority, but few courts had serious backlogs.

One would not expect that public attitudes toward the courts would be especially good, given the overall quality of governance in the RF and cynicism about other government agencies and the fact that most courts were not yet user friendly. However, the latest survey conducted in early June 2007 by the Russian Academy of State Service found that 26% trusted the courts, as opposed to 38% who did not. This finding was better than typical public opinion reports from even five years before, and considerably better than comparable data from a few years ago for Spain and Italy. Moreover, such national level data likely concealed regional variation within the Russian Federation. A new survey conducted on the website of the Arbitrazh Court of St. Petersburg and Leningrad region found that 60% of the respondents trusted arbitrazh courts. 50% expressed confidence in the decisions of all the courts of Russia.

It is unclear to what extent respondents to surveys rely upon gossip or an expectation that they should be critical of the courts. What is clear is that when members of the public have legal problems, they put aside their doubts and turn to the courts in droves. The number of civil cases heard in 2006 was more than 7.5 million, compared to 3.04 million in 1996 and 1.65 million in 1990.

Markers for the Future
Suppose one is concerned about the future of courts and judges in the Russian Federation. What should one look for? What potential changes would auger well, even herald the arrival of full-fledged independent and trustworthy courts? Here are a few candidates, which, taken together, would make a difference.

1. A decision to remake chairs of courts and their power through changes in their selection and tenure (short terms, elected by their peers). To become primus inter pares and rotate, rather than long term directors or bosses.

18 Data in this paragraph come from the websites of the Judicial Department RF and the High Arbitrazh Court (see notes 6 and 11).
2. Improvement of the selection, promotion, disciplining, and firing of judges through either a reform of the procedures used by Judicial Qualifying Commissions, or the creation of a new disciplinary body at a different level of the administrative hierarchy.

3. The establishment of a special training program for judges (minimum of six months) and inclusion in its curriculum of training in psychology, in international human rights norms, in ethics, and in judgment writing.

4. N.B. These first three suggestions appear in a draft law on judicial reform produced by a group attached to the Ministry of Economic Development and Trade in the fall of 2006, which was rejected vigorously by the leaders of the judiciary and led to the appointment of Viktor Ivanov of the presidential administration as political curator for judicial reform matters.

5. Improvements in the rates of implementation of civil and commercial decisions and in observance of decisions without the use of compulsory implementation. This would indicate enhanced judicial authority. Likewise, an increase in the implementation of decisions of the Constitutional Court, on which the Court keeps its own data.

6. A root and branch change in the system of evaluating the work of judges, including the abandonment of most statistical indicators of performance, and the use of qualitative indicators relating to the quality of decisions and the writing of judgements. The abandonment of the concept of 'judicial error'.

7. Significant improvements, including investment, in the system of legal aid.

8. A change in the background of newly appointed judges: an increase in both graduates of full time day law faculties and mid career entries by former advocates and lawyers, and a decline in former policemen, procurators, and court secretaries.

9. Improvements in the treatment of the public at courts, and survey data showing public recognition of the changes.


While all of these changes would either reflect improvements or themselves improve the administration of justice in the Russian Federation, they would not by themselves produce full-fledged legal order, such as rule of law. One would need in addition a shift in the attitudes of public officials, if not also the public itself, toward law, including respect for law as a good in itself rather than simply a means of pursuing one's ends. An instrumental approach to law dominated Soviet culture, but law served as an instrument mainly of the ruling party. In post-Soviet Russia law has become an instrument of a variety of powerful individuals and groups, but an instrumental approach to law still predominates.

There is a view that strong legal institutions, especially those oriented toward protecting individual rights, appear only in democratic contexts, but there are also indications that some forms of political competition have dysfunctional effects on courts.

Clearly, the emergence of truly independent and effective courts requires changes in the broader culture and in the informal practices that connect to the work of the courts and help to shape its impact and meaning. But the accomplishments of the Yeltsin and Putin years go a long way toward laying the groundwork for such courts.

---


The Treatment of Citizens’ Complaints in the Justice Field: Is an Ombudsman Necessary?¹
Hélène Pauliat, professor of public law and dean of the faculty of law and economic sciences of Limoges University, France.

For some years, France has searched for ways to control abuses in the judicial system. In the “Affaire d’Outreau,” indictment, detention pending trial and conviction was delivered to innocent men and women, just because of witness evidence, which had not been verified by the investigating judge; the resulting public criticism made the French parliament reorganize the judicial. This case intensified the crisis of confidence (which already existed) French citizens in the justice system. The Minister of Justice has not played an important role in curbing abuses, but the Superior Council of the Magistrates (CSM) has dealt with disciplinary prosecutions. Thus, the question remains whether it is possible to create a single institution to handle citizen complaints regarding the malfunctioning of judicial institutions, and various issues arise. Should the Mediator (the institution for complaints against executive institutions of the French state, which is the French equivalent of an Ombudsman) or a special Ombudsman for justice organizations, including courts handle these complaints? Should the CSM be given wider powers? France attempted to address these issues through a law on the responsibility of magistrates. However, this effort was a failure because the text was imprecise (so that the Conseil Constitutionnel censored some clauses) and elaborated without consultation.

The delivery of justice by the courts and the public prosecution service, as public services, must relate to the citizenry; but, as a constitutional authority, the delivery of justice cannot and must not be considered the equivalent of other public utilities. Even though quality issues are always present with this sovereign activity, the methods of assessment are open to discussion. The citizens, who appeal more and more often to the courts, are preoccupied with quality of justice issues, but (according to several surveys or opinion polls)², are distrustful of the judiciary. Citizens worry about the slowness of the justice process, the complexity of its language, the excessive costs of judicial proceedings, the inaccessible or distant attitude of its members, the lack of information available on its, the weakness of communication, unfair functioning, and the absence of citizens as participants to hearing cases … The demand for results and the desire for information raise questions regarding the provision are certainly the translation of the questioning of the role and the missions of judicial services in public opinion. As some researchers have suggested that:

“Complaints by citizens on the functioning of the courts are direct indications of the way society considers the judicial services. Every complaint can be considered as a source of information about the quality of the service. It is thus essential that (the treatment of) these complaints be treated with all attention, if we want these signals to be useful. Denying these signals can turn out to be a great error in the process of reduction of the gap between the citizen and the judicial services.

It therefore is important to think about how to restore public trust in the justice system, and the possible role of an Ombudsman in helping achieve that objective. Complaints concerning traditional public utilities (electricity, gas, water)³, are often presented as consumers’ complaints, expressing dissatisfaction with a specific service (electricity, gas, water), or as users who are dissatisfied with the result obtained (hospitals), or as customers criticizing the non compliance with timetables (railway transport). Public administration also suffers from critics and protests: opening hours, delays, incapacity of the civil servants … But the judicial services appear as the only ones looking for quality improvement while protecting judicial independence. To criticize public administration is common; to modify its functioning only implies a re of the service, in order to restructure it. To enable the filing of complaints against justice implies a different conception of the service itself. Here; we cannot be content with just a re of these services, because judges are constitutionally independent. Simple solutions are not possible and have to be made in consultation with all the actors of the institutions; many institutions are then in demand. The administration of justice is directly linked to the functioning of justice; it is the reason why the complaints of the citizens in this domain must not be treated in the same way as complaints against ordinary public services are.

¹ This contribution was published in French in Ethique publique, Les gardiens de l’éthique, 2007, vol. 9, n° 2, pp. 83-96.
³ Public utilities in France have traditionally been a service organized by the state for every citizen living in France, throughout its territory. It may be conceived of as a typical operation of the revolutionary equality principle.
A comparative analysis indicates that different European countries have developed different mechanisms for dealing with citizen complaints. The European Charter on the status of judges, non-binding, refers to citizen complaints in a chapter pertaining to the responsibility of magistrates. The Charter vests the individual states with responsibility for organizing and conducting complaint proceedings. The Charter thus assumes that citizens will be able to file complaints, but does not mandate a particular type of institution for handling these complaints. However, the EU does provide some guidance to individual states. A European Commission report on the efficiency of the justice summarizes the situation in the various member states. That report indicates that 22 countries have compensation systems for excessive delays, 44 countries or entities have compensation systems for illegal detentions, and 43 countries have compensation systems for illegal condemnations. However, the variety of approach between the various states suggests that there might be a role for an Ombudsman who could receive and resolve citizen.
I - The Necessity for Creating Ombudsman to Handle Citizen Complaints

When we say that an Ombudsman can productively handle citizen, it is first necessary to define the term 'complaint'. In certain types of cases, the use of an Ombudsman will not be advisable. In other cases, the use of an Ombudsman might be not only desirable, but imperative.

A - A decisive qualification of the complaint.

A Belgian research team has attempted to develop a complaints matrix that would allow the system to weed out protests that can not really be regarded as "complaints," and to suggest how different types of complaints should be handled. The matrix distinguishes between issues related to the contents of a judicial decision, the policies and procedures used to create that decision, or the general functioning of the judicial system. The Matrix allows us to create a framework for deciding which types of issues should be handled by Ombudsman, and which should not.

A citizen complaint regarding the contents of a judicial decision should not be regarded as a complaint of the citizen against the judicial order or against the functioning of the judicial public service. This type of complaint should be handled by higher judicial bodies, and through reversal. The Canadian system provides interesting insights. Website of the Canadian council for the judiciary includes, on its homepage, a link which explains the various types of complaints that citizens might make. However, the webpage explains to citizens that complaints cannot focus on the content of a judicial decision. The contents of judicial decisions can only be challenged through the appellate process. Here interference of the ombudsman with the judicial domain is possible. This means an ombudsman dealing with complaints against a court organization or a judge, may come to assess judicial decisions concerning the hearing, management and the content of a case, which belong to the exclusive domain of the judge and eventually of an appellate court.

There is uncertainty regarding how to handle citizen complaints regarding excessive delays. If complaints regarding delays are regarded as part of the judicial decision, then they should be handled through the appellate process. On the other hand, if complaints regarding delays are regarded as related to the functioning of the public service of justice, then they might be appropriate for handling by a mediator or an Ombudsman. Within the EU member states, these issues are regarded differently in different states. For example, France provides remedies for excessive judicial delays through its administrative courts, as Portugal, and Italy (thanks to the Pinto law) do. Other countries have adopted different approaches. For example, the Court of Appeal of Belgium adopted a specific responsibility of the lawmaking State, which gave rise to debate. Slovenia created a compensation fund, and Poland allows parties to seek compensation from. In Poland, Ombudsman position has been formalized through legislation. Complainants can, in some cases, refer the case to the Public prosecutor's department (Denmark) or to the Minister of Justice (Spain, Sweden) for further action.

13 The European Council had drawn very early the attention of member states on the working of excessive caseloads of the courts; see Recommendation R(86) 12 of September 16th, 1986 of the Committee of the Ministers in member states relative to certain measures for preventing and reducing the working excess load of courts. This text does not speak the institution of Ombudsman.
15 There are administrative courts, art. 4, nr 1, g) of the Law 107-D/2003 of December 31st.
16 Law N 89 of March 24th, 2001; in their third annual report on the excessive duration of the judicial procedures in Italy for 2003 (CM/inf/DH (on 2004) 23 revised on September 24th, 2004), the delegates of the Ministers insisted on the fact that the Pinto Law had not settled all the difficulties, on the contrary, because the law doesn’t accelerate pending procedures but risks to overload even more courts. See also Resolution ResDH(2005) 114.
17 Court of Appeal of Belgium, June 30th, 2006, Belgian State c./ Mrs Ferrara Jung (N.C.02.0570.F): "by declaring the claimant responsible to the defendant consisting of the fault of having omitted legislation to give to the judiciary the necessary means to allow her to (effectively insure justice, notably in respect of article 6.1 of the ECHR, the judgement does not underestimate the general principle of the right and it does not violate the capacities that aims at the means in this branch". The ruling of the Court of Appeal had indeed indicated that "It results from these motives that the Belgian State commits a fault which invokes its responsibility towards its national when it omits to take legislative measures susceptible to insure respect of the prescriptions of the article 6.1 of ECHR and, in particular, when this deficiency has the effect of depriving the judiciary - and in the case in point the Brussels jurisdictions - of sufficient means to allow them to treat the causes of the reasonable delay (from 6 to 8 months) ".
18 R. Pelc, « Quels sont les attentes et les besoins des usagers de la justice : l’expérience de l’Ombudsman polonais », article available on the website of the European Commission for the efficiency of the justice (CEPEJ, organ of the European Council). R. Pelc underlined the numerous mails sent by Ombudsman to Minister of Justice to alert him on the excessive duration of the procedures, on the slowness or the inactivity of certain jurisdictions and on the absence of a legal solution offered to the citizens, in spite of the very numerous convictions of Poland by the European Court of Human Rights.
The Committee of Ministers of the Council of Europe regularly draws the attention of member States to the necessity of creating mechanisms for providing financial compensation to citizens harmed by excessive delays. As a result, most member States have mechanisms for providing damages for excessive delays attributable to problems in judicial procedure or judgment, as emphasized by the jurisprudence of the European Court of Human Rights. Under these approaches, these types of complaints would not be appropriate for handling by an Ombudsman. At most, an Ombudsman could alert the proper authorities to a problem and play an indirect role in the case.

A rational system will also create special procedures for dealing with complaints relating to specific instances of misconduct by magistrates requiring disciplinary proceedings. Within France, disciplinary actions are handled by superior council of the judiciary, the Council for the Judiciary. Some States, by contrast, place some power over these issues in an Ombudsman. For example, Spain has an individual referred to as the Defender of the People, as does Finland and Sweden. In England and Wales, since 2006, a secretariat of complaints, under the joint responsibility of the Lord Chancellor (Minister of justice) and the Lord Chief of Justice (representing the judicial authority towards government and Parliament), is authorized to hear complaints. English citizens can send their complaints to England’s Ombudsman who can pass them on to the Secretariat. Denmark has also proposed a formalized mechanism, based on its Code, which allows aggrieved citizens to submit the case directly to a disciplinary court of magistrates. The most perfect system is probably the Canadian: every citizen can refer a complaint regarding the behaviour of a federal judge to the Canadian council for the judiciary. This mechanism was strengthened by the fact that this council elaborated ethical principles which every judge must respect.

The French system is currently undergoing a complete transformation. Recently a proposal was made for allowing complaints to be filed with the Mediator, who could have referred some cases to the CSM. After the Outreau case, the Minister of Justice suggested several reforms, among which the one adopted by Parliament. Another proposal was to modify regulation of December 22nd, 1958, on the status of the judiciary, which contained the following provision: "every physical or moral person who thinks, on the occasion of a case concerning her, that the behaviour of a magistrate may constitute a disciplinary fault, can directly refer a complaint to the Mediator of the Republic"; the Mediator would be able to seek information from the heads of Courts. Even if the Mediator were not allowed to render an assessment of the propriety of a magistrate's conduct, he might refer the complaint to the Garde des Sceaux so that he refers to the Council for the Judiciary, if he considered that the facts should receive a disciplinary qualification, and if this complaint had not been referred to a court of the CSM by the chief of the court.

The legal definition of disciplinary fault has been an area beset by problems. The Council of State has suggested this qualification creates a risk of confusion between the role of appellate judges and disciplinary judges:

"The appreciation of the behavior of the magistrate is inseparable from the appreciation of the legitimacy of the initiated appeals, in the same affair, before the judge of appeal or cassation" (advisory opinion on this bill).

---

19 See the temporary resolution CM / RESDH 2007) 74 concerning excessive durations of procedures in front of the Greek administrative jurisdictions and the lack of actual appeals.
20 Among others, CEDH, in October 26th, 2000, Kudla c. / Poland, RFDA, 2003, p. 85.
21 It is necessary to be careful with the definition of Ombudsman, because their powers and legal status vary from country to country.
22 The Defender of the People or Mediator is foreseen in the article 54 of the Spanish Constitution; his status was clarified by an organic law of May 7th, 1981, modified. The article 13 explains that "When the Mediator receives complaints concerning the functioning of the administration of justice, he has to send them to the Prosecution so that this one may analyse if they are grounded and may take the relevant measures according to the law, or to pass them on to the General Council for the judiciary, according to the kind of complaint about which it is a question ".
23 The complaint against a judge must be deposited to the Minister or to the parliamentary mediator.
24 This specific mechanism of complaints exists for some time already. Based on a protocol concluded in April 2003 between the representatives of the profession and the Lord Chancellor; citizens can complain about the behaviour of a magistrate with the Lord Chancellor; these complaints are heard by a specialized administrative unit in charge of their instruction and with the competences to decide on the consequences for the magistrates (see Le régime disciplinaire des magistrats du siège, Documents de législation comparée du Sénat, n° LC 131, January, 2004, p. 9).
26 Organic law N 2007-287 of March 5th, 2007 on the recruitment, the training and the responsibility of the magistrates.
It is difficult to create a clear distinction between the various types of judicial errors (referred to in France as “faults”) which create malfunctions in the judicial system. For the Constitutional Council, a fault is “any neglect by a magistrate in his duties, in the honour, in the delicacy or in the dignity”; but there is also a violation of duties defined as “the grave and deliberate violation of a magistrate by a rule of procedure giving an essential guarantee of the rights of the parties made within a case closed by a final judicial decision”. According to the constitutional court, a grave and deliberate violation of a rule of procedure (e.g. a fault) must be stated by a final decision of a court. Intervention by an ombudsman runs the risk of undermining separation of powers principles as well as judicial independence. Furthermore, the bill increased the risk of political influence on magistrates. Indeed, it would give a disciplinary council the possibility of inflicting a disciplinary sanction to a magistrate because of crass appreciation mistakes. And this might lead the disciplinary authority to appreciate the legality of a judicial decision. Now, if the composition of this authority belongs to the executive power, the system is locked; if we allow the complainants to bring disciplinary pursuits against magistrates themselves, via the Ministry of Justice, this one, political person, becomes the mainspring of the system.

There is thus a principle: the Mediator as an independent authority cannot give a direct or indirect “judgement” on judicial acts. A French citizen can not refer a complaint directly to the Council for the Judiciary, which has the task “to transparently elaborate the ethical obligations of the magistrates”. Citizens also cannot refer their complaints to the chiefs of courts, and they cannot submit negative answers of these chiefs to an adequate authority, such as the CSM. The disciplinary regime thus is very specific in each State, and doesn’t necessarily provide for citizen complaints.

B-Specificity of the complaint
The complaint to be treated concerns the daily administrative functioning of the judicial system, but neither its procedures, nor its judicial decisions; rather the organizational process which leads to the taking of the judicial decision; the usual demand of information is excluded, because it is not considered a complaint as defined above. Such an approach supposes however that these processes are clearly defined in a document as a subject to the law charter, integrating the predictable delay of the processing of the case, the dates of meeting between magistrates, lawyers and citizen, the modalities of reception, information, frame and supply of information to the users … The distinction must be clearly established between the strictly ethical obligations (their misunderstanding can expose judges and court clerks to disciplinary prosecution before the competent authority), and the general obligations inherent to any public service. But the definition of the complaint should neither be too restrictive. If the research conducted in Belgium included a broad definition of the term “complaint” (the complaint was defined as “any demonstration of dissatisfaction of a citizen towards the functioning of the judicial order”), some elements, given by the superior council of the justice of Belgium, have general application. For example, the definition provides that:

"There is complaint on the functioning of the judicial order when it denounces a situation where the service given to the citizens is not in accordance with what they can legally expect from a good functioning of the judicial order".

The complaint could thus be likened to a complaint on organizational malfunctioning, but this approach is not entirely satisfactory in situations where a judge could be subject to disciplinary liability. As the Belgian superior council of justice stated, the malfunctioning can include bad habits or bad practices within a court, but also the unexpected effects of legislation, contradictory instructions, and defective management of the cases of the citizens …

28 F. Bottini, op. cit., p. 2209.
29 The debates in commission before the vote on this law underline the questioning of the members of parliament on the subject as well as those of the Garde des Sceaux: "Some people wonder about the possibility of allowing the Mediateur to directly address the CSM when he considers that a disciplinary fault is characterized. This proposition however raises difficulties. From the point of view of the principles, it presents certain constitutional risk. To entrust to the Mediateur of the Republic the power to engage disciplinary prosecution against a magistrate could be considered as striking a blow at the independence of the judicial authority: this extension of the referral to a court of the CSM in an authority, even independent, indeed risks to increase the number of contestations of the decisions of justice next to the ways of appeal legally foreseen for that purpose. It is advisable to avoid multiplying authorities to seize the disciplinary organ, so that the disciplinary procedure is not used to undermine the magistrates in their judicial activity. It also means that the Mediateur would be entrusted with a rival power, even superior to the Garde des Sceaux, because he could surpass the Minister of justice to seize the CSM ".
30 Organic law N° 2007-287 of March 5th, 2007 relative to the recruitment, the training and the responsibility of the magistrates, art. 18.
31 Opinion on two private bills concerning the procedure of the complaints relative to the judicial order, approved by the general assembly on February 22nd, 2006.
A similar system has been implemented in Luxemburg. In an opinion on the bill to install a Superior Council for Justice the Mediator advised in favour of it. In his view, taking specific aspects of the judicial structure in Luxemburg into account, particularly the relationship between magistrates and lawyers, the Mediator suggested that he should not be the sole instance to receive complaints regarding dysfunction in the judiciary. He admitted citizens do have the right to complain about organizational dysfunctions, but actually, these complaints can be heard by the courts, the executive, the legislature, and the Mediator... Only an external authority, which is able to decide how to channel citizen complaints, can ensure that complaints are appropriately handled. The Mediator thus proposed that individual complaints be filed with the Superior Council of Justice by any individual or by a lawyer registered at the Luxembourg bar. If the Superior Council finds the complaint justified, it can make a recommendation for an eventual disciplinary action directly to the concerned authorities, to the Minister of Justice or to the complainant.

A complaint in the Luxemburg system can refer to the judicial, or management, or the general functioning of the judicial system. When a qualifying complaint is received, it must be considered by a competent authority that has the power to receive and process it, and to consider the consequences of the malfunction in question. The competent authority should have the power, not only to hear the complaint, but also to ensure follow-up and appropriate resolution. It must also consider how the system can prevent repetition of such dysfunctions. However, the latter task is really the function of an Ombudsman (in a general sense).

If clear complaint resolution processes can be established – for dealing with (referring to ordinary judicial processes) can be defined regarding the recording of cases, follow-ups on delays, administration of hearings, of dates of deliberation, citizen complaints can help produce an interactive dialogue between the courts and the reviewing authority. As a result, judicial dysfunctions can be identified and addressed earlier, and can lead to an improvement in judicial processes and the avoidance of similar future dysfunctions. As a result, the complaint process can help facilitate improvements to judicial administration and ultimately produce a higher level of public satisfaction in the system. However, the complaint process must be connected to the mechanisms related to the recruitment and training of heads of courts.

II- The Ombudsman's Role and Function

The position of Ombudsman thus offers a potentially beneficial method for receiving and dealing with certain types of citizen complaints against magistrates, and other judicial staff. But it is necessary for the Ombudsman to be able to know which institution is best suited to receive and resolve the complaint, and therefore it is necessary that the competencies or jurisdictions of the various institutions be clearly defined. There are different possibilities; France currently is experimenting with several ways of handling these issues.

A- The institution authorized to hear the complaint: a variety of solutions.

There are several modalities for handling citizen complaints, including internal (to the judicial body involved in the complaint) or external, national and local.

When a citizen files a complaint, he must have clear access to a specific procedure, and must know what he can criticize and to whom to submit the complaint. If the citizen simply wants to obtain general information on his complaint, he must know which department or official to contact. Research in various European countries reveals that many complaints can be resolved at any early stage if the complainant receives (relatively simple) information. It is the absence of a prompt response that leads to citizen criticisms, as well as to a loss of confidence in the judicial system. Within each court, there should be a department responsible for answering ordinary citizen questions (where is my file? How long will the procedure take?). This managerial mission actually leads to the organizational fulfilment of functions that otherwise would be left to an Ombudsman.

A complaint, as distinguished from a mere informational inquiry, may concern a more complex issue, related to the systemic functioning of the court. For these complaints, it might be useful to establish a complaints department within the jurisdiction or within the judicial district, a service shared by the head office and the public prosecutor's department, which would have the function of "complaints manager". This complaints manager cannot perform the function of an Ombudsman, because he would be a member of the judiciary and a magistrate. As a result, the complaint manager's rule must be internal to the institution: to collect all complaints and make sure that they are answered. If need be, the

32 Recommendation relative to the institution of a superior council of the justice, of March 22nd, 2006.
33 See the aforesaid Recommendation of the Mediator of the Grand Duché of Luxemburg.
34 See the research led in Belgium, aforesaid, p. 34
35 All the definitions of Ombudsman underline clearly the external character of the institution.
complaint’s manager can contact the head of court to obtain information, or transmit to the chief to allow him/her to obtain further information from the magistrate. This system has the advantage of charging one person with giving an answer and avoids the risk of omissions and gaps that can occur when more than one institution is involved. The complaint manager, as magistrate, should be appointed by the head of courts, according to his specific qualities (capacities in communication, conflict management, flexibility in handling different situations), and maybe he can be released from his other duties during the time of his appointment.

The complaint process has the potential to improve the quality of the judicial process, and to make the system more attentive to quality issues. The internal processing of complaints has an evident advantage for the citizen who has a single interlocutor, from whom he justly expects an answer; the appointed magistrate himself manages the internal processes; and this will enhance the diligence of complaint processing. This proximity allows him to be informed regularly by the responsible persons of their assessment of the complaint and therefore the administrator of the complaints is invested with a heavy responsibility. The internal processing will have an immediate effect on the local judicial institution, because the knowledge, the follow-up and the treatment of the complaints allows him to react at once, to modify internal processes so as to avoid later dysfunctions by focusing on principles of good administration of justice. Finally, such a system may lead to a more positive public leads to a general conception of the justice system. In addition, if the complaint is handled by the court itself, the net effect may be an improvement in the court’s processes, procedures, decision making and its sense of responsibility. Of course, the difficulty with an internal approach is that the system loses the perspective of an outsider like the Ombudsman.

An internal system does not preclude the handling of complaints at national level. And, of course, even a national system must interact with local systems. However, a national system helps the judiciary take a larger view regarding the scope of complaints (e.g., the answers given, the timeframes within which they were given, modifications brought to the judicial functioning), and this may help to preserve the general coherence of the judicial system and avoid contradictory answers. The national complaints could be handled by a superior council of the judiciary, or a superior council within the ministry of justice, or could be a specific commission within or outside of these institutions. Although this national authority might play the role of an Ombudsman, it does so independently from judicial structure and from Parliament. If created, the Ombudsman’s powers should be clarified by Statute Act, notably the power of recommendation and the follow-up of these recommendations (followed by the answers of the Minister), the obligation to provide Parliament with information by an annual report. His intervention would allow an evaluation of the complaint as well as an evaluation of how the complaint was handled on the local level. He could ask for information, resume an inquiry, etc. … If this mechanism were adopted, the competent authority deals with the complaint in the second reading (not sure what this means). This second exam will appear then as a control of the processing and assessment of the complaint at the first level. The risk is that the magistrates would prefer that the second examination be conducted by a judicial official rather than by an external authority. It might perhaps be desirable to create a second level complaints authority to act, as a regulator or manager of judicial quality36: he would centralize the complaints dealt with at the first level, examine them for admissibility at the second level, verify the possibility of a second reading, and report his assessments to an administrator of complaints at of the first level. He would then serve in the role of judicial manager rather than a decision-maker.

Whatever model is chosen, it is important to educate the general public and those working in the field regarding the availability of mechanisms and processes. It is also important that all processes be transparent37. An annual report should provide a summary of the complaints, the timeframes required to resolve them, describe how the complaint was resolved, and offer observations for future improvements to the system.

As France questions the quality of its justice system, it may do well to consider the possibility of creating an Ombudsman. This step can be adopted compatibly with France’s judicial culture, its institutional system and in particular with its concept of the Council for the Judiciary.

B-The establishment of transparent processes: the French efforts

If we try to apply the principles described above to the French judicial system, we see a need to develop clear mechanisms and institutions for dealing with complaints. At present, the system is best by a multiplicity of institutions able to intervene as well as by the absence of clear texts and a weak, Council for the Judiciary.

---

36 We know that this notion is not without risk; see A. Vauchez, L. Willemez, La justice face à ses réformateurs, PUF, coll. Droit et Justice, 2007, p. 98.
In 1999, the Chancellery created a national commission for examining citizen’s complaints\(^{38}\). Its composition was designed to reflect the specificity and the variety of its mission (a magistrate exempted from the hierarchy of the Court of Appeal, two qualified personalities not magistrates, one appointed by the Mediator of the Republic, the other appointed collectively by the presidents of the National Assembly and of the Senate). This commission had the power to refer complaints on behalf of those prejudiced by a dysfunction in the justice system or against a magistrate who engaged in conduct that was subject to disciplinary action. It also had the power to demand information from the chief justices, to classify a dismissal, or to pass it on to the Minister of Justice or the appropriate chief justice. The Chancellery was required follow-up with the complainant and to file an annual report. The project failed because of the lack of authority given to the Chancellery, as well as because of the ambiguous nature of its relationship means given to this authority, its ambiguous relation with the Judiciary Council and the Inspection of judicial services. In addition, it failed because of the lack of a mechanism for ensuring receipt, processing and assessment of complaints in various courts of appeal (The Court of Appeal of Versailles, for example\(^{39}\)). At present, different authorities consider themselves competent to handle complaints, but there is no legal requirement that they publish a general annual report describing the complaints and outcomes.

Among the institutions which intervene, we can note:

- The “houses of law and justice.” Their existence goes back to a law of December 18th, 1998\(^{40}\), they intervene outside of the courts, but their role could be better defined. We know, for example, that the satisfaction rates of those involved with these processes is high and rebounds to the credit of the entire judicial institution. Institutions similar to the houses of law and justice exist in Belgium, but they play a somewhat different role\(^{41}\). The competence to deal with demands for information or with certain complaints could be returned to them.

- The Mediator of the Republic. The Mediator dates back to 1973 as an independent authority. He examines disputes between any a natural or corporate body may have and the justice system, but without intervening in the process. Nevertheless he understands the administrative tasks exercised by the courts and the types of dysfunctions that can arise in the system. The justice domain represents only a small part of his activity (approximately 5%\(^{42}\)); he can however deal with complaints for which he may have to interrogate the concerned service, possibly the inspector of the judicial services, or the chief of a court through a ministerial correspondent.

- The Director of Judicial Services. The Director of judicial services is responsible for complaints concerning malfunctions in the justice system, and to demand changes. The division for the judiciary of this Direction (Office of magistrates’ general cases) deals with complaints that directly concern a magistrate.

---

\(^{38}\) On this question, V.R. Errera, Colloquium of the Court of Appeal, on 2003. The Garde des Sceaux, Elisabeth Guigou, had suggested establishing an authority of filtering to allow the citizens to engage the civil responsibility of the magistrates (JO, debates, AN, the session of January 15th, 1998, p. 8).

\(^{39}\) V. V. Lamanda, « Les plaintes des justiciables à la première présidence de la Cour d’appel de Versailles », BICC, 15 juillet 2000. This report clarifies that all the complaints of the citizens received by the first presidency are the object of a record and of a particular follow-up. Starting in 1997 in 1999, 350 requests from 301 different persons were listed, what makes an average of about 120 complaints a year. 16 % were issued by lawyers, the rest by citizens. The report shows that the complaints were passed on by the Chancellery, the others were received directly by the Court, the others, sometimes the same complaints, were received by the presidents of the jurisdictions of the first degree. The study of the object of the complaints is interesting: If we hold only the coherent complaints (thus by removing those who result manifestly from lunatics), some did not question a judicial service, 55 % concerned the functioning of a jurisdiction. On the complaints which could turn out to be lawful (126 on the whole), 76 were about delays of deliberation, 34 on delays of procedure, 10 on a dysfunction of the Clerk’s Office, 3 in the relational behaviour of magistrates, 3 on a procedural dysfunction. Involving results of the complaint and its consequences, the report indicated that the complaint at first was the object of an acknowledgment of receipt; it was then communicated to the head of the jurisdiction concerned if it was justified, with a demand of an elaborate report for the definite delay; the complaint could then be classified, or if it was grounded, the head of jurisdiction was invited to take the necessary measures to stop the dysfunction. If the complaint concerned the behaviour of a particular magistrate, this can be taken into account in his evaluation. A magistrate can be also removed from a promotion table, be the object of a warning, or of disciplinary prosecution.

\(^{40}\) Law n 98-1163, December 18th 1998, relative to the access to the right and to the amicable resolution of the conflicts; decree N 2001-1009 of October 29th, 2001, modifying the Code of the judicial and concerning the houses of justice and the right; circular of November 24th, 2004, relative to the houses of law and justice and to the antennae of justice.

\(^{41}\) It is about Houses of the Justice, while, paradoxically in France, they appear rather as Houses of law and additionally as houses of the justice. V.M. Lebois and P. Robin, "The dysfunctions of justice more than 5 years after the White March", a day of study of May 16th, 2002 in Brussels, See Review of the Law Faculty of Liège, on 2002, p. 523.

\(^{42}\) See Rapport de Médiateur de la République pour 1999 ; v. also C. Coste, « Plaintes des justiciables et fautes disciplinaires des magistrats », BICC, 15 juillet 2000.
- Inspectorate of Judicial Services. The inspectorate of the judicial services carries out a permanent mission of inspection of the various judicial systems, and this competence allows the general inspector to be aware of dysfunctions in the system. The general inspector is the correspondent of the Mediator, but the institution is connected to the Garde des Sceaux\footnote{This is the French special name of the Minister of Justice.}, the Minister of justice and not to an independent authority, such as the Judiciary Council.

- The Council of the Judiciary. The Council is the disciplinary authority of the magistrates; but its powers differ in relation to magistrates, chief justices and public prosecutors. But it can deal with behaviour of magistrates certain citizens complain about…

It is thus indispensable for France to develop an integrated system for handling complaints. At the moment, only the Lord Chancellor and the chiefs of court can refer a disciplinary case to the Judiciary Council\footnote{The heads of jurisdiction have this possibility since the organic law N 2001-539 of June 25th, 2001; F. Bottini underlines however that the common private individuals can indirectly activate a disciplinary procedure by seizing a complaint the leaders of yard or the Garde des Sceaux. If these complaints seem lawful, the leaders of yard have as a rule the obligation to educate them (op. cit., p. on 2216).}. In the large majority of cases, the referral is based on a report of the inspection service and is followed by an act of referral drafted by the directory of the judicial services assessing the ethical concerns and the disciplinary faults\footnote{See J.-P. Jean et D. Ludet, « Discipline des magistrats, plainte des justiciables et prérogatives du médiateur de la République »}.

There are two main solutions: each one can be published and explained inside the houses of law and justice. First, the Judiciary Council can be placed in the centre of the system. The complaints are filed at the first level; so the citizens or the dissatisfied citizens can complain in the concerned jurisdiction, about a dysfunction or about a criticism concerning a service, a magistrate or a co-worker of justice, a court registrar, a lawyer … This complaint can be examined according by a Judiciary Council staff but the local administrator of complaints must still sort and allocate the complaints. The registered complaint is then passed on to the CSM. The CSM can take any of several actions either to take direct cognizance of a complaint regarding behaviour of a magistrate, or to ask for a preliminary inquiry by the Inspector of Judicial Services. When the complaint concerns a magistrate, the Judiciary Council can inform the chief of courts, by asking them to find a solution and by insuring follow-up regarding the complaint. Alternatively, if the dysfunction concerns a co-worker of justice, the head of the affected organizational unit can be informed. The function of the Ombudsman envisaged would help improve communication between a number of institutions, including the superior council and professional bodies (bailiffs, notaries…). Creation of the Ombudsman position would provide another way to deal with judicial dysfunctions with overwhelming the system; such a construction succeeds to treat general a dysfunction of the public utility in a general way, without overwhelming a magistrate or a service; a dysfunction can be indeed connected to several factors (working excess load of a lawyer, bad of a hearing, absence of a clerk of the court).

The Judiciary Council proposal would include several important reforms to turn the CSM into a real superior judiciary council: to put the Inspection of the judicial services either under its authority or under that of Minister of justice; and that this "new" council receives the power to define the internal processes indispensable to the jurisdictions. At the moment, by law, the CSM only has the power to establish the ethical principles for magistrates and judicial personnel. It would be desirable for the CSM to handle the registration and recording of complaints, the follow-up are defined by him and that it makes a synthesis of the whole and of the recommendations in terms of management of the jurisdictions, the means, the efficiency, as aspects of processing, procedure and ethics sometimes are connected. The CSM should also have the power to deal generally with complaints regarding the entire judicial system as a very different way from other traditional public services, which is in connection with all the occupations of justice, and to remove all competences in the justice field from the Mediateur. This renewed council for the judiciary for the greater part would really have a role of Ombudsman. No doubt it would be useful to centralize within it all the domains which would allow insuring the coherence of the system\footnote{So it would be necessary to think about the competence of the Commission for access to the administrative documents (CADA), for example; she often pronounces on the possibility or not to communicate documents in relation with justice. Should this competence be reserved for the renewed Council for the judiciary, or on the contrary, in a new system, would it be preferable to generalize this approach?}.

The second possibility is for the Mediator to become the linchpin of the system. His participation could be structured through existing modalities or could be broadened and enhanced. Regardless, he would be required to determine how to handle complaints, and who to refer them to, and correspond with the interested parties. As a result, he might handle a complaint differently depending on whether it concerns a magistrate (CSM), another professional (e.g., a bailiff, for
example), or a dysfunction in a jurisdiction (chief of court). With regard to the Mediator, the difficulty in this domain is that a dysfunction is only very rarely due to a unique cause, and this can cause problems for the Mediator because he has to know all the elements of the case. Furthermore, the Mediator is unable to provide a binding solution, but can only propose a solution. The distinction between dysfunction (competence of the Mediator), error of process (competence of the jurisdiction and its complaint administrator), error of procedure (traditional ways of appeal) and difficulty connected to a misunderstanding of ethical principles47 (CSM) is attractive in theory but difficult to apply in practice. At the CSM, a system could be developed for dealing with these different types of complaints.

Citizen complaints regarding the judicial process are likely to become more and more numerous, as demands on the quality of judicial management and processing of the complaints are inseparable. Reflection and further research are indispensable to develop a coherent and legitimate system, and transparency is an essential element. The proposed solutions show however that an accumulation of structures will resolve nothing. It would be better to reform existing institutions, no doubt particularly the Superior Council of the Judiciary. The ambition of the French justice system should be to give to this institution the competences and a scope of intervention as high as the expectations of the citizens.

---

47 It is not a good idea to multiply institutions; the CSM should simply appreciate the behaviour of a magistrate which may be considered as a subject of disciplinary proceedings; for other elements, it would be connected with a dysfunction. We know that the Canadian council for the judiciary has a system of particularly elaborated processing of the complaints which can lead to the revocation of a judge: the complaint is deposited in writing, a committee on the behaviour of the judges examines it, asks the concerned judge for information, has the possibility to seize a lower committee to obtain a supplementary inquiry; a committee of inquiry can be created, an advisory report is then passed on to the Council, and the procedure ends by sending a recommendation to the Minister.
The Swiss Federal Supreme Court: A Constitutional Assessment of Control and Management Mechanisms
By Andreas Lienhard

Introduction
Even the highest courts are under pressure to perform effectively and efficiently. In some instances, the pressure comes from supervisory and elected authorities, such as parliaments, which demand information regarding judicial output. In Switzerland, a decision has been made by the Parliament to apply “steering instruments”, which were introduced as part of general administrative reforms. These procedures also include mechanisms for “controlling” judicial activity. In this article, we examine reforms relating to the Swiss Federal Supreme Court, and the compatibility of those reforms with separation of powers principles.

General Overview of the Swiss Judicial System
In keeping with its political system, the Swiss judicial system is shaped by federalism. In the 26 cantons, there are generally several lower district courts, as well as a single supreme court or cantonal court that has jurisdiction over civil and criminal matters. Each canton also has a cantonal administrative court that also has jurisdiction over tribunals of lower instance which are often, though not exclusively, bodies within the relevant government authorities. For civil and criminal cases, the current cantonal procedural codes are in the process of being harmonized throughout Switzerland.

The administration of justice is governed by the procedural law of each canton. At federal level, the Federal Criminal Court, as court of first instance, decides criminal cases that fall within federal jurisdiction (e.g. offences involving explosives, organized crime). In such cases, the proceedings are governed by the Federal Criminal Justice Act. There is also a Federal Administrative Court, which hears appeals on rulings by federal administrative authorities, and these appeals are governed by the Administrative Procedure Act.

The decisions of the highest cantonal judicial authorities, as well as those of the Federal Criminal Court and the Federal Administrative Court, are appealable to Federal Supreme Court. The proceedings are largely governed by the Federal Supreme Court Act.

Status and Duties of the Swiss Federal Supreme Court
The Swiss Federal Supreme Court is the supreme judicial authority of the Swiss Confederation (Art. 1 para. 1 Federal Supreme Court Act [SCA]). The Court has 35 – 45 regular federal judges (Art. 1 para. 3 SCA), as well as part-time federal judges,
whose number may not exceed two-thirds of the number of regular judges (Art. 1 para. 4 SCA). The Parliament\textsuperscript{12} establishes the number of judges by ordinance (Art. 1 para. 5 SCA).

Although the Federal Supreme Court functions independently, and is constrained only by the law (Art. 2, para. 1, SCA), the Parliament\textsuperscript{13} oversees the Court’s finances and organizational functioning. In particular, the Parliament is responsible for approving the Federal Supreme Court’s budget, accounts, and annual report (Art. 3 SCA), and appoints the judges (Art. 5 para. 1 SCA) to their six year terms (Art. 9 para. 1 SCA)\textsuperscript{14}. The Federal Supreme Court is responsible for administering itself in that it organizes its own structure, appoints its own personnel, and maintains its own accounts (Art. 25 SCA).

The duties of the Federal Supreme Court are described in the Federal Supreme Court Act as follows:\textsuperscript{15}:

The Federal Supreme Court is the regular appeal court in civil cases (Art. 72 ff. SCA), in criminal cases (Art. 78 ff. SCA), and in cases governed by public law (Art. 82 ff. SCA). The Court has the power to hear cases alleging violations of federal law, international law, cantonal constitutional law, cantonal ordinances governing political voting rights, elections and votes, as well as inter-cantonal law (Art. 95 SCA). In exceptional circumstances, where none of these grounds for appeal exist, (e.g. in the areas of internal and external security), decisions of the highest cantonal court of appeal on violations of constitutional rights may still be contested before the Federal Supreme Court by means of a subsidiary constitutional appeal (Art. 113 ff. SCA). Within its exclusive jurisdiction are cases involving issues relating to conflicts of competence between federal and cantonal authorities, civil law and public law disputes between the Federal Government and the cantons (as well as between cantons), and liability claims relating to the official activities of federal government ministers and federal judges (Art. 120 SCA). Finally, the Federal Supreme Court is responsible for revising, explaining, and rectifying its decisions (Art. 121 ff. SCA).

Legal and Conceptual Principles for Controlling Court Management

Based on the Federal Supreme Court Act, the Parliament issued the Ordinance on Judges of the Federal Supreme Court on June 23, 2006\textsuperscript{16} which established the following:

Art. 2 Controlling and Reporting
1. The Federal Supreme Court shall establish a controlling procedure that shall serve as the basis for Parliamentary oversight, as well as for determining the number of judges.
2. It shall comment in its Annual Report on its caseload statistics and in general terms on the results of the controlling procedure.

The Federal Supreme Court, together with the Swiss Parliament’s Audit Commissions, subsequently issued a report on implementing this Ordinance: Concept for Controlling at the Federal Supreme Court for the attention of the Audit Commissions, 5 March 2007 (see below).

Constitutional Principles for Controlling Court Management

The implementation of court management systems might seem inappropriate in a constitutional system that is based on separation of powers principles. Indeed, in order to preserve the essence of those principles, the management structure should adhere to the following constitutional principles:\textsuperscript{17}:

- Parliament oversees the Federal Courts (Art. 169, para. 1 Federal Constitution)\textsuperscript{18}: While it is constitutionally permissible for Parliament to oversee court management, it is inappropriate for the Parliament to exercise control over the content of judicial decisions.\textsuperscript{19}

\textsuperscript{12} The Swiss Parliament consists of two chambers: National Council and Council of States.
\textsuperscript{14} Elections are prepared by the Court Commission of the Parliament (Art. 40a Parliament Act).
\textsuperscript{15} See also www.bger.ch/de/index/federal/federal-inherit-template/federal-rechtspflege.htm.
\textsuperscript{16} SR 173.110.1.
\textsuperscript{18} See also Art. 3 SCA.
\textsuperscript{19} Art. 26 Parliament Act.
• **Parliament is responsible for appointing the judges (Art. 168 para. 1 Federal Constitution)**: In order to determine the required number of judges, the Parliament and the preparatory Court Commission rely on information regarding the Federal Supreme Court’s workload. The Parliament and Commission also rely on performance profile information in appointing judges.

• **Judicial independence (Art. 30, 191c Federal Constitution)**: In the present context, the constitutional principle of judicial independence forbids Parliament from exercising any direct or indirect influence over judicial decision-making. In addition, the principle prohibits the Parliament from reviewing judgments other than appeal decisions.

• **The Federal Supreme Court’s Right of Self-Administration (Art. 188 para. 3 Federal Constitution)**: The right of self administration, an essential component of judicial independence, is simultaneously a right and an obligation of the Federal Supreme Court.

• **Economical use of resources (Art. 126 para. 1 Federal Constitution)**: Both the administration and the courts are obliged to make efficient use of the funds at their disposal.


In certain cases, these various constitutional principles conflict with one another. A conflict exists in particular between judicial independence and the right of self-administration, on one hand, and the oversight and (re-)appointment powers of the Parliament. Apparently, there is also tension between guaranteeing the exercise of judicial functions and the economical use of resources. Despite the formal equality of the respective constitutional provisions, the guarantee of adjudication and the independence of the courts, which is absolutely essential for this, must be awarded special significance.

**Consequences of Management Control**

The obligation to guarantee the **management structures and instruments** required for administering justice is derived from the right of the Federal Supreme Court to administer itself. This includes primarily the provision and maintenance of a system that plans the activities of the Court and allocates the necessary resources. Such a system must be capable of periodically determining the differences between planned and actual values, in order to be able to make any adjustments that are required. Accordingly, control mechanisms are needed as a management support instrument to enable the achievement of targets.

With regard to the organization of control mechanisms in the courts, two key questions arise: the question of what is made subject to the control mechanisms and the question of the addressees of those mechanisms. With regard to the subject matter of control mechanisms, it must in particular be clarified whether, in addition to average case numbers and the average duration of proceedings, it should also include judicial performance or the time expended by individual judges. In order to be able to ensure a fair workload balances within the court, such indicators or person-specific case statistics appear to be essential. This does not mean, however, that such information must also be provided to the supervisory authorities, since the supervisory function must primarily be focused on ensuring that the court functions as a whole and that there are not, as a rule, delays in proceedings or obvious inefficiencies. For this purpose, general statistical data on the management of the caseload and the resources utilized for this are sufficient. A different issue arises with regard to the (re-)appointment power of Parliament: in this connection, more specific information on the performance of judges standing for re-appointment is necessary if re-appointment is not to become automatic. Even here, however, the information can generally be limited to a basic assessment by court management without disclosure of a particular judge’s performance details. Only if a judge has an accumulation of objectively inexplicable deficiencies over a longer period of time are the (re-)appointment authorities or the responsible commission entitled to receive more detailed information.

These considerations lead to the following basic requirements for court controlling:

---

20 See also Art. 1 para. 5, and Art. 5 SCA.
21 The Audit Commissions and the Financial Delegation inform the Court Commission of any issues that seriously call into question the professional or personal qualification of judges (Art. 40a Parliament Act).
22 See also Art. 2 SCA.
23 See also Arts. 13 and 25 SCA.
• Management control is an indispensable consequence of the Court’s right to self-administration and a necessary prerequisite for an efficient judiciary.
• Management control must also record the performance of judges.
• The information prepared as part of management control is made available primarily to the courts themselves or to the court management for use in fulfilling their managerial roles.
• The data from management control must also be provided in summarized form to the supervisory or (re-)appointment authorities, whereby this must be limited to the responsible commissions.
• The information from management control is provided in an even more summarized form in the Annual Report, and thus also to the public.

From this one can draw the following general conclusions: the information generated by controlling activities differs depending on the body to which it is addressed; as we move from court management to the commissions, Parliament, and the public, less information is provided at each level. The establishment of court control mechanisms in itself fosters trust, without the necessity to provide full access to its organization and findings to the supervisory or (re-)appointment authorities. It would therefore also be worth considering the possibility of allowing the courts to have their own self-administration certified — and thus permit the professional certification of their controlling functions.

Implementation of the Federal Supreme Court’s Management Control Mechanisms
With regard to reporting, the Concept for Controlling at the Federal Supreme Court differentiates between three different levels:

• public data in the Annual Report
• special data for the commissions
• internal controls

Level 1: Data available to the public includes information on the duration of proceedings, settlement rates, trends in caseload by division, and also data on administrative matters, such as human resources, finances, or information technology. Using the statistics section of the Annual Report, supervisory authorities can obtain an overview of the business activities of the Federal Supreme Court, and the public can perform its oversight function.

Level 2: Supplementing this, the Audit Commissions and the Court Commission collect data on the number of pending cases and the caseload by legal field, as well as additional information on the length and duration of proceedings by division and legal field. The data also includes information regarding average case costs, as well as the ratio of time on adjudication and court management or administration, and average case numbers and processing times. For judges, in particular, the data includes information regarding the average time required to draft an opinion and average case numbers for the presiding judge and when participating, though not as presiding judge (by division and entire court). Reported only to the Court Commission, however, are significant deficiencies that could call into question whether a particular judge should be reappointed. These various statistics and reports provide the basis for a more-detailed understanding of court operations and a foundation for the re-appointment process.

Level 3: Finally, the Court uses internal management tools in order to further efficient case flow management. Using an information technology-based statistical program, the court management and divisional presidents can access various types of management information (e.g. case allocation, the number of pending cases, the status of the proceedings, the duration of the proceedings, the load according to language, the load profile of the court clerks, and the number of settled dossiers of individual judges). As part of the Court’s internal control processes, the performance of court clerks (based on quantitative performance goals) and judges are periodically discussed (self-controlling mechanisms).

Preliminary Assessment
First, the creation of the Concept for Controlling at the Federal Supreme Court itself must be highlighted. There is a constructive relationship between the Federal Supreme Court and the Parliament on sensitive issues such as oversight of the Supreme Court, which is handled through the framework of a joint working group. This is therefore an example of a cooperative handling of separation of powers issues between the legislature and the judiciary.

24 The concept is reproduced for your information at the rear of this article.
These new approaches to the management and control of the Federal Supreme Court exhibit a high degree of maturity with regard to self-administration, as well with regard to Parliamentary supervisory and (re-)appointment functions. The finely tuned system attempts to take account, as far as possible, of the tense relationship that sometimes exists between the constitutional imperative of separation of powers and the need for parliamentary oversight.

It seems appropriate to withhold information from the Court Commission regarding the number of dossiers processed by individual judges and the time expended on each case\textsuperscript{25}, even if this information provides indicators that may be relevant to Parliament’s (re-)appointment function or its task of determining the number of judges that should sit on the Court. It should be noted that the decisions of the Federal Supreme Court (including the names of those on the bench) are published on the internet anyway. With this information it is relatively easy to calculate the number of cases dealt with by each judge.

What is now a rather well-balanced model for organizing oversight of the Federal Supreme Court might also provide a model for oversight of the cantonal supreme courts. In various cantons, efforts are being made to optimize court organization, with particular emphasis on judicial management and it’s positioning within the system of separated powers. Furthermore, this concept may well be of interest in exercising oversight over the Federal Criminal Court and the Federal Administrative Court, both of which are subject to the managerial supervision of the Federal Supreme Court\textsuperscript{26}. The Swiss oversight approach has the potential for exerting important international influence.

For this reason, the initial experiences with the new oversight concepts at the Federal Supreme Court are eagerly awaited. This, however, may take a while, since the more refined statistical data will not be available until fiscal year 2008.

\section*{Federal Supreme Court Administrative Commission}

\section*{Concept for Controlling at the Federal Supreme Court for the attention of the Audit Commissions}

5 March 2007

\subsection*{1. Public Data in the Annual Report}

\textbf{1.1. Purpose:} The publicly accessible data of the Federal Supreme Court provides the supervisory authorities with the basic data for assessing the business activities of the Federal Supreme Court. This data also provides the basic data on the judicial system to interested members of the public and to the academic community.


\textbf{11.3. Organization:}

a) General Public Statistics Section (see APPENDIX 2 for detailed information);

\begin{itemize}
  \item 1) Number and type of cases (Statistics I.1)
  \item 2) Duration of settled cases and cases carried forward (Statistics I.2)
  \item 3) Settlement rates: (Statistics I.3)
  \item 4) Type of settlement: by correspondence, sessions, listing persons in attendance (Statistics I.4)
  \item 5) Assessment of the caseload: cases carried forward from the previous year, new cases, settlements, cases carried forward to the following year (Statistics II)
  \item 6) Tabular overviews: Disputes according to language, type of settlement, ratio of new cases to settlements, cases carried forward (Statistics III)
  \item 7) Number and type of cases by Division (Statistics IV. 1)
  \item 8) Trends in cases by Division in a five-year overview (Statistics IV.2)
  \item 9) Number and type of cases according to legal field (Statistics V)
\end{itemize}

\textsuperscript{25} As was provided according to the report of the Commission for Legal Questions of the Council of States dated 21 February 2006, and the corresponding draft ordinance.

\textsuperscript{26} Art. 1 para. 2, SCA.
b) Adjustment for the combined court: consolidation of statistics for the Federal Supreme Court and those of the Federal Insurance Court.

c) Uniform structure of the statistics of the federal courts of first instance and the Federal Supreme Court, in order to make them more comprehensible and comparable

d) Information on the administration of the judiciary relating to human resources, finances, projects, information technology, buildings, services, and provision of information

e) Summary report on oversight activities relating to the courts of first instance

f) General report on controlling in accordance with Art. 2 para. 2, of the Ordinance of 23 June 2006 on Judges at the Federal Supreme Court.

2. Special Controlling Data for the Audit Commissions

2.1. Purpose: The special controlling data provide the parliamentary oversight authorities with a detailed view of the work load, court operations and oversight activities, as well as the information required for re-appointment that is forwarded to the Court Commission. This data should specifically mention problems and weaknesses related to the Federal Supreme Court.

2.2. Means: Additional statistics and reports to the parliamentary commissions

2.3. Organisation: Statistics and reports relating to divisions, judges, court clerks (mid-level), and the administration of the courts.

2.4. Divisional Level

a) General statistics section:

1) Statistics section of the Annual Report (see 1/3/a and APPENDIX 2)

2) Table on trends in pending cases (four-Year overview by Division)

3) Detailed Statistics V on the type of settled cases according to legal field

4) Statistics on connected cases (from 2007 – serial cases and parallel subsidiary constitutional appeals recorded separately)

5) Statistics on standard appeals with constitutional reprimands

6) Duration of the cases including information as specified in the Annual Report (one month, three months, six months, one year, two years, more than two years), as well as the longest and average duration of proceedings - for the Audit Commissions

7) Additional breakdown by division

8) Additional breakdown by legal field (main raster numbers)

b) Additional Indicators:

1) Settlement coefficients by division and for the entire court

2) Average case cost by division and for the entire court (based on staff costs, net adjudication operations, and gross operations including proportionate allocation of infrastructure costs)

3) Ratio of time expended on adjudication to that needed for administration and court management (central reporting based on the function of staff members)

4) Frequency of appeal and consistency of judgment by canton and legal field (general)

c) Report on the Creation of Judicial Panels:

Based on the statistics in accordance with Art. 42 of the Regulation of the Federal Supreme Court.

2.5. Judicial Level

a) Report on significant deficiencies in judges that are possibly relevant for reselection (Art. 40a para. 6 Parliament Act).

b) Additional statistical information:

1) Average time taken to prepare opinion on case

2) Average number of cases as presiding judge by division and for the entire court

3) Average participation, without being presiding judge, by division and for the entire court, as well as breakdown into three-person and five-person panels (basic judgments)

---

27 The Federal Supreme Court deals directly with the Audit Commissions. The Audit Commissions then forward the data and reports to the Court Commission, which needs the information for its work. The Audit Commissions regulate this collaboration directly with the Court Commission.
2.6. Court Clerk Level
a) General report on the status
b) Additional statistical information for the Audit Commissions:
   1) Average number of cases
   2) Average processing time for the assigned judgment, as well as for the drafting following the decision

2.7. General Judicial Administrative Level
Information in the Annual Report on human resources, finances, projects, information technology, buildings, services, and provision of information
If necessary, special report on the problems and status of resources sent to the Audit Commissions

2.8. Oversight over the Courts of First Instance
General report on oversight (Annual Report of the courts of first instance, budget, accounts, and staffing trends)
Report on special controlling areas and special occurrences

3. Internal Controlling
For the sake of completeness, it will be demonstrated to the Audit Commissions that, in addition to public statistics and certain statistics for the oversight authorities, the Federal Supreme Court has an effective internal controlling mechanism and efficient internal management tools. In this regard, reference is made to APPENDIX 3.

4. Implementation
This concept cannot be implemented without the required information in a suitable form. The statistics must to some degree be completely re-structured. This entails a medium-size information technology project. The required groundwork should be completed by the end of 2007.

Lausanne, 20 December 2006
<table>
<thead>
<tr>
<th>Type of Proceedings</th>
<th>Caption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regular proceedings (i.e. all but the following two): Three-man panel in terms of Art. 109 of the Federal Supreme Court Act (SCA) Simplified proceedings according to Art. 32, Para. 2., and Art. 108 of the SCA</td>
<td></td>
</tr>
<tr>
<td>Connected Cases</td>
<td>Serial cases with the same subject of appeal (different appellants) Standard appeal with a subsidiary constitutional appeal (in the same petition)</td>
</tr>
<tr>
<td>Parallel Subsidiary Constitutional Appeals</td>
<td>Regular appeal and constitutional appeal submitted in the same appeal petition and dealt with in the same proceedings (Art. 119 of the SCA – a case of a connected appeal)</td>
</tr>
<tr>
<td>Case</td>
<td>An entire dossier, from submission to archiving</td>
</tr>
<tr>
<td>Duration of Proceedings</td>
<td>Duration of Proceedings = from the lis pendens in the Federal Supreme Court to the date of judgment Duration of Drafting = from the date of judgment to the completion date of the drafted judgment</td>
</tr>
<tr>
<td>Time taken to prepare opinion</td>
<td>Period of time from the assignment of the case to the presiding judge or the instructing judge to the delivery of the opinion to the presidents (if necessary, including all instructional measures)</td>
</tr>
</tbody>
</table>
APPENDIX 2

Public Statistical Data according to Annual Report

- Number and type of activities with new cases, cases carried forward, and outcomes of proceedings, organised according to the nature of the dispute (Statistic I.1)
- Duration of the settled and carried-forward proceedings, specifying the longest and average duration, classified according to the duration of proceedings and drafting, organised according to the nature of the dispute (Statistic I.2)
- Settlement rates: Rate 1 = Settlement of new cases, 2 = Settlement of cases carried forward from the previous year, 3 = Ratio of settled cases to new cases (Statistic I.3)
- Type of settlement: by correspondence, sessions listing attendees, simplified proceedings, proceedings with single judges, organised according to the nature of the dispute (Statistic I.4)
- Assessment of caseload: cases carried forward from the previous year, new cases, settlements, cases carried forward to the following year, everything compared to the previous year, organised according to type of proceedings (Statistic II)
- Tabular overviews: disputes according to language, type of settlement, and ratio of the new cases, settlements, and cases carried forward, partially shown in different formats (Statistic III)
- Number and type of proceedings by division: cases carried forward from the previous year, new cases, settlements, cases carried forward to the following year, organised according to legal remedy (Statistic IV.1)
- Trends in cases by division in a five-year overview (Statistic IV.2)
- Constitutional and administrative law broken down by subject and legal remedy (Statistic V.1)
- Civil law broken down by subject and legal remedy (Statistic V.2)
- Debt collection and bankruptcy law (Statistic V.3)
- Criminal law broken down by subject and legal remedy (Statistic V.4)

APPENDIX 3

Internal Controlling

1. Purpose: Internal Controlling provides the Administrative Commission and the division presidents with an overview of the caseload, the bottlenecks, and the resource requirements at any given time. The internal statistics should enable the Administrative Commission to exercise efficient court management and also create good preconditions for effective divisional case management.

2. Resources: Internal statistics by division, judge, and court clerk.

3. Organisation: The basics required for higher level management are made centrally available and distributed; the divisions can supplement the basis for their management.

3.1. Divisional Level

These statistics should be compiled as follows:
- Monthly for the division presidents;
- Quarterly for the Administrative Commission;
- Quarterly, broken down by respective division for regular judges.
  1. Statistics on the creation of judicial panels
  2. Statistics on settled cases
  3. Statistics on public sessions
  4. Statistics on pending cases
  5. Statistics on new cases
  6. Statistics on the duration of proceedings according to days and months
  7. Statistics on the time taken to draft judgments according to days and months
  8. Statistics on connected cases

3.2. Bi-annual Statistics

These statistics should be compiled for:
- The division presidents;
- The Administrative Commission.
  1. Language statistics of the new cases
3.3. Annual Statistics
These statistics should be compiled for:
   a. The division presidents;
   b. The Administrative Commission.
      1. Overview of cases pending for more than 2 years along with a report from the divisions
      2. Overall graphic from Financial Services on the trends in cases and resources at the Federal Supreme Court (since 2000)
      3. Graphic on the trends in new cases and settlements in the divisions (10-year comparison with current data on resources)

3.4. Judges
These statistics should be compiled as follows:
   a. Monthly for the division presidents;
   b. Quarterly for the Administrative Commission;
   c. Quarterly, broken down by respective divisions and judges.
      1. Statistics on opinions
      2. Statistics on the calculated work days and opinions of the part-time judges
      3. Number of settled cases in which a judge participated without being a presiding judge
      4. The cases assigned to the judges along with the information on the Court Clerks

3.5. Court Clerks
These statistics should be collected as follows:
   a. Monthly for the division presidents;
   b. Quarterly for the Administrative Commission;
   c. Quarterly, broken down by respective division for the Court Clerks and the regular judges.
      1. Overall assignment and settlement statistics, broken down by division and language
      2. Statistics on the drafts assigned to any one Court Clerk

3.6. Internal Divisional Statistics
These lists should be compiled as follows:
   a. Once each month, centrally printed and made available to the divisions;
   b. At any given time, accessible by the divisions.
      1. New, unassigned cases
      2. Listed cases
      3. Pending cases with motions (including suspended cases)
      4. Cases that are decided but where the judgment has not been drafted
      5. Special Statistics: Black list with all cases that have not been drafted within 3 months
      6. Drafted, but not dispatched cases
      7. Assigned cases
      8. Cases in circulation following delivery of the opinion
      9. Settled cases
Materials/Reports


Bibliography

AESCHLIMANN ARTHUR, Das Bundesgericht und die Politik, "Der Bund" of December 30, 2006
BACHMANN PETER, Controlling für die öffentliche Verwaltung, Wiesbaden 2004
BERENS WOLFGANG/HOFFJAN ANDREAS, Controlling in der öffentlichen Verwaltung, Grundlagen, Fallstudien, Lösungen, Stuttgart 2004
DEUTSCHER RICHTERBUND, Qualität in der Justiz, Ruling of the Federal Committee of Representatives of the German Judges Association dated 11/15/2002, Kiel
FABRI MARCO/JEAN JEAN-PAUL/LANGBOEK PHILIP/PAULIAT HÉLÈNE/RIVERO-CABOUAT NOËLLE, L’administration de la Justice en Europe et l’évaluation de sa qualité, Paris 2005
FELBER MARKUS
Team-Führer wider Willen, Die Wirklichkeit hat das traditionelle Bild vom Richter überholt, www.fel.ch
Wenn der Computer "manipuliert", Bundesverwaltungsgericht lässt Richterbank elektronisch besetzen, NZZ of April 11, 2007
KIENER REGINA
Richterliche Unabhängigkeit, Verfassungsrechtliche Anforderungen an Richter und Gerichte, Bern 2001
KLOPPER RAVER, Vom Richter zum Justizmanager, NZZ of June 20, 2005
LIENHARD ANDREAS
Knappe Ressourcen auch am Bundesgericht, Richter zwischen Effizienzdruck und Rechtsstaatlichkeit, NZZ of August 17, 2005
Modernes Management in der Justiz, unipress June 2003, pp. 31 ff.


Staats- und verwaltungsrechtliche Grundlagen für das New Public Management in der Schweiz – Analyse, Anforderungen, Impulse, Bern 2005


MAIER PATRICK, New Public Management in der Justiz, Bern/Stuttgart/Vienna 1999


MÜLLER JÖRG PAUL, Richterliche Unabhängigkeit steht zur Debatte, Vor der Beratung im Nationalrat über Richterzahl und Controlling, NZZ of May 26, 2006

MÜLLER ULRICH, Controlling aus verwaltungswissenschaftlicher Perspektive, Ein Beitrag zur Verwaltungsreform, Wiesbaden 2004

NAI GUISEP

Die Justiz und das Sparen, NZZ of July 22, 2005

RASELLI NICCOLÒ, Richterlicher Unabhängigkeit unter Druck, Die Gefahren des geltenden Wahlsystems, NZZ of March 23, 2006


SCHOCH ZELLER CLAUDIA, Der letzte Elfenbeinturm wankt, NZZ of May 20/21, 2006


SCHWEIZER ROLF, Gewaltenteilung, Allgemeine Grundlagen und schweizerische Ausgestaltung, Bern 1994

Gewaltenteilung, Allgemeine Grundlagen und schweizerische Ausgestaltung, Bern 1994

SEILER HANSJÖRG/VON WERDT NICOLAS/GÜNGERING ANDREAS, Bundesgerichtsgesetz (BGG), Bern 2007

SPÜHLER KARL/DOLGE ANNETTE/VOCK DOMINIK (ed.), Kurzkommentar zum Bundesgerichtsgesetz, Zurich/St. Gallen 2006


TCHANENNIER PIERRE (ed.), Neue Bundesverwaltung, Auswirkungen der Totalrevision auf den kantonalen und eidgenössischen Rechtsschutz, Bern 2007

TSCHENTSCHER AXEL, Demokratische Legitimation der dritten Gewalt, Tübingen 2006


WIPFLI HANS, Justizmanagement am Beispiel eines Steuergerichts – Struktur, Organisation und Führung, KPM Book Series, No. 13, Bern 2006
WIRTHLIN MARTIN, Vom massgeblichen (Bundes-)Richterbild, Jusletter of June 19, 2006
WITTRECK FABIAN, Die Verwaltung der Dritten Gewalt, Tübingen 2006
ZIMMERLI ULRICH
"Beaufsichtigte" Justiz, Parlament – Parlament – Parlamento 2002/3 3
Direkter Zugang zum Parlament, Bundesrat Blocher ist nicht Vormund des Bundesgerichts, NZZ of August 13/14, 2005
Management of the Courts: the Irish Experience
By P.J. Fitzpatrick, Chief Executive Officer, Irish Courts’ Service

Background
The management and administration of the courts in Ireland had remained essentially unchanged since the Courts of Justice Act of 1924, which provided for the courts system of the new State shortly after independence. The 1924 regime left a vacuum, failing to address the need for an independent administrative structure for the Courts. There was, for example, no Department such as the Lord Chancellor’s Department. Under the Act, the Department of Justice managed the Courts and their funding apart from judicial salaries. Those arrangements followed what is often loosely referred to as the “Ministry of Justice” model. Responsibility for the provision of budgetary, staffing and other resources, and the management of those resources, rested with the Department of Justice, Equality and Law Reform, as it is now known, through its Courts Division. As distinct from the allocation of business before the courts, the Judiciary – although it might be consulted and make representations – had little input into the allocation of resources or the way in which they were deployed.

The extent of the Minister for Justice’s remit - and limits of the Judiciary’s – in this regard is best summed up by the provisions which governed the management of the various offices of the High Court and staffing arrangements for the Superior Courts generally. Senior management in the courts was “subject to the general direction of the Minister in regard to all matters of general administration” and answered to the senior Judiciary (the Chief Justice in the case of the Supreme Court and the President of the High Court in the case of that court) on matters relating to the conduct of the business of the court required by law to be transacted before a judge. The Minister for Justice, with the sanction of the Minister for Finance and after consultation with the Chief Justice and the President of the High Court in relation to the offices of the Supreme Court and High Court respectively, determined how many and what categories of court officers and ancillary staff would be deployed in the offices concerned and, after similar consultation, how they were deployed.

Concern about deficiencies in the system grew over the next 70 years and by the mid-1990s had spawned proposals for new machinery to administer the courts that were considered by successive governments. The Working Group on a Courts Commission, chaired by The Hon. Mrs Justice Denham, Judge of the Supreme Court, was established by the Minister for Justice in October 1995 to:

1. review:
   a) the operation of the Courts System, having regard to the level and quality of service provided to the public, staffing, information technology, etc;
   b) the financing of the Courts system, including the current relationship between the Courts, the Department of Justice and the Oireachtas (legislature) in this regard; and
   c) any such aspect of the operation of the Courts system which the Group considers appropriate; and

2. in the light of the foregoing review, to consider establishing a “Commission on the Management of the Courts as an independent and permanent body which financial and management autonomy...” and,

3. to report its recommendations to the Minister.

In the first report, published in 1996, the Working Group recommended that priority be given to the establishment, under statute, of an independent and permanent body to manage a unified court system. The body would be supervised by a Board chaired by the Chief Justice or the Chief Justice’s nominee. It would be composed, "in light of the constitutional parameters involved", of a majority of judges of the various jurisdictions and include, as well, representatives of the...
Department of Justice, each branch of the legal profession, court staff, court users, business, and the trade unions. Day-to-day operational responsibility would lie with a Chief Executive who would, in the financial and administrative management of the Courts Service, be accountable to the Oireachtas (Legislature). These recommendations led to the enactment of the Courts Service Act, 1998 in April of that year and the establishment of the Courts Service, initially under transitional arrangements, and in November 1999 as a permanent agency. The courts administration model in Ireland was thus recast as an “independent agency” model.

Judges, understandably, were concerned about the separation of powers and the independence of the judiciary. After lengthy and careful consideration, the Working Group recommended that Judges work alongside others on matters relating to the administration and management of the Courts.

**The Courts Service**

**Functions**
The statutory mandate given to the Courts Service emphasizes the roles of that organization as court manager and service provider. Under section 5 of the Courts Service Act, 1998, the functions of the Service are to:

a) Manage the courts,
b) Provide support services for the judges,
c) Provide information on the courts system to the public,
d) Provide, manage and maintain court buildings, and
e) Provide facilities for users of the courts.

Powers ancillary to Courts Service’s functions include:

a) Acquire, hold and dispose of land,
b) Enter into contracts,
c) Make proposals to the minister in relation to – reform and development, the distribution of jurisdiction and business among the courts and matters of procedure, and
d) Designate court venues.

The Courts Service is a body corporate with perpetual succession and power to sue or be sued. The Service is subject to the legislation and independent in the performance of its functions. The Board may establish such committees as it considers fit to advise it, but it must notify the Justice Minister of such committees, their functions, and their membership.7

A leading commentary on the administration of justice in Ireland has described this development as:

“a fundamental shift in the “philosophy” of the courts system, requiring it to take account of the concepts of quality, service and competitiveness more associated heretofore with the private sector...there can be no doubt of move from “court system” to “court service”.8

Under the provisions of the new Act, functions previously exercised by the Minister in court management and administrations were transferred to the Courts Service9. The Department of Justice, Equality and Law Reform retained responsibility for securing the annual vote of funds from the Oireachtas. Some staff from the Department’s Courts Division was transferred to the Service. The Department now oversees the vote and manages its relationship with the Judiciary and the Courts Service through a slimmed down Courts Policy Division.

**Functions of the Board**
The Board considers and determines policy (operational policy for the Service) in relation to the Service, and oversees its implementation by the Chief Executive Officer.10

**Membership of the Board**
Reflecting the Working Group’s recommendations, the Board consists of

- the Chief Justice for the time being or a judge of the Supreme Court nominated by the Chief Justice, as

---

7 Section 15, Courts Service Act, 1998.
9 Section 29, Courts Service Act, 1998.
10 Section 13(1), Courts Service Act, 1998.
Chairperson,
- the Presidents of the High, Circuit, and District Courts,
- a judge nominated by the Chief Justice in “respect of his or her experience or expertise in a specific area of court business,”
- a judge from each of the courts aforementioned other than the court president, elected by the ordinary judges of the courts concerned,
- the Chief Executive,
- a practicing barrister nominated by the Bar Council,
- a practicing solicitor nominated by the Law Society,
- a member of the staff of the Courts Service,
- an officer of the Minister for Justice, Equality and Law Reform nominated by the Minister,
- a person nominated by the Minister to represent “consumers of the services provided by the courts,”
- a person nominated by the Irish Congress of Trade Unions, and
- a person who, in the Minister’s opinion, “has relevant knowledge and experience in commerce, finance or administration and who is nominated by the Minister after consultation with such bodies as the Minister considers are representative of such interests in the State.”

Members of the Judiciary have 9 of the 17 places on the Board. It should be emphasized, however, that the Judiciary has never found it necessary to rely on its majority; matters of policy are determined by the Board largely by consensus and in a spirit of collaboration.

**Term of Office of Members**
The term of office for Board Members generally is three years. The Chief Justice, the President of each Court, and the Chief Executive Officer are Ex officio members of the Board.

**Meetings of the Board**
The Board meets as often as it considers necessary, but must not meet less than once in every period of three months.\(^\text{11}\)

**Functions of the Chief Executive Officer**
The Chief Executive manages and controls generally the staff, administration and business of the Service and such other functions as may be conferred on him or her by or under the Act or by the Board. The Chief Executive is responsible to the Board for the performance of his or her functions and the implementation of the Board’s policies. The Chief Executive provides to the Board such financial and other information in relation to the performance of his or her functions as the Board may from time to time require.\(^\text{12}\)

The Chief Executive is the accounting officer for the appropriation accounts of the Service and appears before Oireachtas (Legislative) Committees including the Public Accounts Committee.\(^\text{13}\)

**Accountability**
The Board must prepare and submit to the Minister an Annual Report each year which provides information on the performance of its functions. The Board must also supply to the Minister any information the Minister requests relating to its functions. The Board is accountable to the public through the publication of its annual report.\(^\text{14}\)

In overseeing expenditure of resources allocated, the Courts Service Board is required to consider:
- the resources available and the need to secure “the most beneficial, effective and efficient use of such resources,” and
- any policy or objective of the Government or a Minister of the Government insofar as it may affect or relate to the functions of the Courts Service.\(^\text{15}\)

Every three years the Board must prepare and submit to the Minister for approval a three-year strategic plan. When approved, with or without amendments, the Minister must present the plan to both houses of the Oireachtas. Strategic plans shall:

---

\(^{11}\) Section 14, Courts Service Act, 1998.

\(^{12}\) Section 20, Courts Service Act, 1998.

\(^{13}\) Sections 19 & 20, Courts Service Act, 1998.

\(^{14}\) Section 8, Courts Service Act, 1998.

\(^{15}\) Section 13(2), Courts Service Act, 1998.
a) Comprise the key objectives, outputs and related strategies (including use of resources) of the Service,

b) Be prepared in accordance with any directions issued by the Minister,

c) Have regard to the need to ensure the most beneficial, effective and efficient use of the resources of the Service, and

d) Have regard to the Government policy on bilingualism and, in particular, to the need to ensure that an adequate number of staff is competent in the Irish language so as to be able to provide service through Irish as well as English.16

Role of the Minister for Justice, Equality & Law Reform
The Minister for Justice, Equality and Law Reform is politically accountable for the Service. Funding is negotiated through the Department of Justice, Equality and Law Reform. The Service has its budget appropriated directly by Dáil Éireann.

The Courts Service and the Judiciary
The 1998 Act contains provisions designed to ensure that the new arrangements do not permit either the Executive or the Legislature to encroach on matters that are appropriately the preserve of the judicial function. Section 9 provides that:

“No function conferred on or power vested in the Service, the Board or the Chief Executive, under this Act shall be exercised so as to interfere with the conduct of that part of the business of the courts required by law to be transacted by or before one or more judges or to impugn the independence of:

a) A judge in the performance of his or her judicial functions, or

b) A person other than a judge in the performance of limited functions of a judicial nature conferred on that person by law.”

Although the Chief Executive Officer may be called upon by a committee of the Oireachtas to “give account for the general administration” of the Courts Service, that obligation is qualified in that the CEO cannot be requested to give account for any matter relating to:

a) The exercise by a judge of his or her judicial functions, or

b) The exercise by a person other than a judge of limited jurisdiction of a judicial nature, including a matter which is, has been, or may at a future time be the subject of proceedings before a court in the State. Where the CEO is of the opinion that a matter falls within these categories, he or she must inform the committee giving reasons and, should the committee not withdraw the request, the CEO or the committee chairperson may apply to the High Court for a ruling on whether the matter is excluded from inquiry. If the High Court does so determine, the Committee must withdraw the request. If the High Court determines that it is not a matter falling within the area of judicial functions, the CEO must appear before the committee to account for it.17

Funding and Staffing
The Bulk of funding for the Service is provided by the State. The Service currently employs 1100 staff; positions in the Service are approved by the Minister with the consent of the Minister of Finance.18 The Service manages funds in a trustee capacity totaling €1.062bn.

Judicial Support
A Judicial Support Unit within the Courts Service provides a “one-stop shop” in delivering on the agency’s mandate to provide support services for judges. The Courts Service also provides staffing and support to bodies such as the Judicial Appointments Advisory Board, the Judicial Studies Institute and the three Courts Rules Committees, all of which are independent of the Courts Service. A support unit for these three committees provides administrative, secretarial, and drafting services for all three committees. The committees function independently of the Service.

Obtaining and allocating resources
In common with other jurisdictions, the courts are largely dependent for funding and other resourcing on the other branches of Government. Although judicial salaries are met from the Central Fund, the bulk of the Courts Service's

---

16 Section 7, Courts Service Act, 1998.
17 Section 21, Courts Service Act, 1998.
funding is secured by means of the annual vote of funds by the Oireacht, as noted earlier.

By contrast with the position in England and Wales, the courts in Ireland are not required to recover the full economic cost of their operations from the revenue generated by court fees; nor indeed could they be, given the constitutionally guaranteed right of access to the courts.

Judges actively participate in the decisions on resource allocation through their membership on the Board and through membership of committees and project boards. These include the Finance, Audit, Investment (the latter of which oversees investment policy in relation to the €1 billion in funds of beneficiaries managed by the courts), and Family Law Committees. In addition, judges serve on Buildings Committees and project boards such as those established for the new Criminal Courts Complex and ICT projects.

**Reform**

The 1998 Act gave to the Courts Service an advisory role not previously enjoyed by the court administration. The Service is empowered to "make proposals to the Minister in relation to the distribution of jurisdiction and business among the courts and matters of procedure". The Service prepares proposals for amendments to primary legislation and court rules to modernize and reform court procedure. It provides a vehicle through which the Judiciary has input into court reform without encroaching on the boundary between competencies of the Judiciary and the Executive.

**Conclusion**

The Irish courts governance model combines a strong combination of judicial and non-judicial involvement in the setting of policy on the management and administration of the courts. The effective resourcing of the courts depends heavily on a successful partnership with the Executive (The Department of Justice, Equality and Law Reform). The partnership, as it has evolved in Ireland since 1998, has, it is fair to say, worked very well.

---

19 Section 6(F), Courts Service Act, 1998.
Appendix 1

Courts Service Management Structure

- Courts Service Board
  - Finance Committee
  - Audit Committee
  - Buildings Committee
  - Family Law Committee
  - Director of Corporate Services
  - Director of Finance
  - Director of Reform and development
  - Director of Operations Supreme and High Courts
  - Special issues Committees
  - Special issues Committees
  - Director of Information and Communications Technology
  - Director of Human Resources
  - Director of Operations Circuit and District Courts
  - Chief Executive Officer
Book Review of:
By Gar Yein Ng


By Gar Yein Ng

The authors of this book set out to “elevate awareness of courts as organizations” [p.146]. Even though it may seem fairly obvious to many readers that courts are “organizations,” courts have been neglected in research compared to the legislature and executives of many democratic countries. This research gap may be attributable to two myths. First, while the legitimacy of legislatures and executives is based on democratic principles, many view courts as institutions of justice and liberty and therefore not subject to the same rules of political accountability. Second, the gap may result from the fact that courts are seen as conservative, difficult to change, and therefore not really worth the bother. This book debunks both myths.

The authors undertake this effort with very little reference to a legal framework. While such an approach is rare in research concerning the courts, it can be very effective in assisting the reader to realize that courts are organizations rather than simply institutions of justice. The authors do help ensure that the reader does not forget the role of the courts. Nonetheless, the authors start the book by referring to law as the basis for such research. There is a recognition that courts must administer justice effectively in order to maintain judicial independence and separation of powers. Whilst the arguments put forward here are overly simplified, and the connection between organizational autonomy and judicial independence could be more clearly outlined, the options are clear to the judges and the courts: start managing courts efficiently or lose the autonomy to manage themselves and their courts, thereby putting judicial independence and separation of powers at risk.

This book establishes a method for measuring the culture of courts, in particular, the way in which things are done, and whether the way in which things are done affect the performance of the courts. A set of tools and vocabulary is created to assess the culture of the courts and to create tools for change management. This they do in six parts.

The first part of the book sets out a theoretical framework for measuring the culture of courts. The authors describe in great detail the methodology used in the research, including the number of courts involved, and they highlight the similarities and differences that justify their choices. A theoretical framework is applied to the courts based on research into cultural typologies in the private sector. The authors map out previous research which suggests that organizational norms, values and relationships matter more than the organization’s goals and performance. From this structure, the authors create cultural typologies that focus on a scale of sociability or solidarity: hierarchical, networked, community or autonomous cultures.

The second part of the research examines five courts’ working areas within the cultural framework created in the first part. The working areas include such topics as case management styles, judge-staff relations, change management, leadership, and internal organisation. Each court involved in the study was asked to fill in questionnaires on how the handled issues related to the various working areas. From the data, the authors created graphic displays of the results. For those readers not used to reading and interpreting statistical data, these graphic displays are very revealing. For those readers who prefer to read and interpret statistical data for themselves, there is a wealth of data available in the text itself and in the appendices.

For the fourth part of the research, the researchers deepen the data from the original questionnaires by taking interviews with judges and court managers. The authors use the results of the questionnaires to elaborate on the culture types by describing in more detail how things are done in the five working areas. They then suggest that certain cultural archetypes have easily identifiable features and characteristics that impact the way work gets done. However, the research also reveals that no one culture type dominates the five working areas.

For the fifth part of the research examines whether judicial culture affects the performance of courts. The authors rely upon the Trial Court Performance Standards (TCPS) created by the National Center for State Courts. Relying on data from the TCPS, the authors hypothesize that judicial culture does affect judicial performance in terms of timeliness. They also look
at whether access to justice, fairness and managerial effectiveness are affected by court culture. To do this, they interview attorneys on the theory that they are in the best position to assess whether judicial culture affects performance.

The last part of the research examines how courts might respond to the research. For this, court officials were asked to fill out yet more questionnaires. The authors hypothesize that courts wish to change their culture (contrary to the popular myth of conservatism), and that the preferences will vary across the five work areas. In the book, when the researchers were analysing the data, they found out that the courts actually wanted to do things in a similar way (i.e., to have a similar cultural kite), but found that because of the way change takes place, or other policy considerations, that they couldn’t get to that position.

The book concludes by summarizing the main conclusions from the research. They do not offer a single solution to court problems, and indeed suggest that there may be no one solution given the differing nature of each court organisation. They draw attention to the fact that courts, like all other public organisations, have multiple and often competing goals. The authors go on to offer suggestions for improvement based on the cultural assessment and measurement instrument.

For such a thin volume, there is a concentrated amount of information. Every step of research is clearly outlined, and it is easy for the reader to get lost in the detail. Given the newness of the language, and the creation of new evaluative tools it is not easy to grasp the vocabulary immediately, and one may have to struggle to get used to it, while being fully aware of the implications of the results. The book has a very easy structure, and the language is easy to follow although it can be technical and intense. Even though the book is directed at students of policy making and public administration, students of political science and law will be amazed by some of the results. The authors suggest that even they are surprised by the results of their own research. The book may lead to different approaches to and may also lead to a change in the way in which lawyers and courts interact in the future.

In this field of judicial and court administration, there has never been research like this conducted so successfully. The authors describe courts as organisations rather than as simply institutions of justice within the separation of powers. In addition, the book paves the way for further research to be done in this field and opens the door for more ideas on how to improve court administration.